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MISSISSIPPI IN THE SIXTIES AND OTHER EXPERIENCES: THE CONTEMPORARY MEMOIR OF A JUSTICE DEPARTMENT CIVIL RIGHTS LAWYER

2012 PREFACE

My name is Frank E. Schwelb, and I am a Senior Judge of the District of Columbia Court of Appeals. From 1962 to 1979, I served as an attorney with the Civil Rights Division of the Department of Justice, initially as a trial lawyer assigned primarily to voting discrimination cases in the State of Mississippi, and subsequently, beginning in 1969, as the first Chief of the Division's Housing Section, charged with nationwide enforcement of the Fair Housing Act of 1968.

The memoir to which this is the 2012 Preface was started in the late 1960s and completed in the very early 1970s. I had intended to polish the manuscript and to try to make it more suitable for publication at that time, but my work as the Chief of the Housing Section, and later as a judge of the Superior Court and, since 1988, of the Court of Appeals, left me little time. Moreover, my memory of details faded, and I also thought that the reading public's interest in the primary subject (voting discrimination in Mississippi) had somewhat waned. In any event, the manuscript lay untouched on a shelf in my closet for several decades until a young friend, Michael R. Gould, to whom I am most grateful, offered to put it into a form in which it could be published on the Internet. This memoir resulted.

I need to add that over the years and several moves, some pages of footnotes have disappeared and I have no way of recovering them. Also, I have made no attempt to change either the content or the style of what I wrote some forty years ago. For example, the use of the word "Negro" (as distinguished from "African-American" or "black") was more or less universal then, and it appears throughout the memoir. In addition, the use of offensive epithets by bigots, quoted in several chapters, was (and remains) central to the racial prejudice and oppression that I was trying to describe, and to leave out the epithets or to replace them with euphemisms would be to sugar-coat the truth. Further, although black citizens have by no means been the only victims of discrimination in this country, the Civil Rights Division's focus at the time was on the racial caste system in the south and on the discriminatory practices that were designed to perpetuate it. Reading the memoir four decades after I wrote it, I am struck by the virtual absence, in most of the chapters, of any discussion of problems faced by other minorities, including Latinos, Asian Americans, and American Indians. Further, as was the unfortunate practice when the memoir was written, words like “he” and “man” are used routinely, almost as if women did not exist, and sex discrimination is barely mentioned. No reasonable person would write in this way today, and I certainly would not. I am pleased to be able to report, however, that during the 1970s, after the events described in this memoir, we substantially broadened the scope of our

enforcement of the civil rights laws to include successful litigation of many cases involving discrimination based on sex or national origin.

A brief note regarding my background and on how this memoir came to be written. I was born in Prague, in the former Czechoslovakia, on June 24, 1932. My father, Dr. Egon Schwelb, was an attorney whose practice included many cases of a "civil liberties" nature. Specifically, he represented anti-Nazi refugees from Adolf Hitler's regime in Germany. My parents were also of Jewish origin. Egon Schwelb was obviously on a list of those to be detained by the Nazis as soon as Czechoslovakia was occupied. On March 15, 1939, German forces marched into Prague. Although I was only six years old, I remember the invaders goose-stepping along the streets of my homeland's beautiful capital city. A few days later, my dad was arrested by the Gestapo, and he was detained for two months at the Pankrac prison. For reasons which, to this day, are not quite clear to me, he was released in May 1939, and our family left for Britain, arriving there on August 13, 1939, less than three weeks before the outbreak of World War II. Those of our relatives who were not able to leave, including my mother's younger sister, perished in the gas chambers of Auschwitz.

My parents and I spent the war years in Britain, where my father served on the Legal Council of the Czechoslovak government-in-exile. In 1947, he was appointed Deputy Director of the Human Rights Division of the United Nations (he later became known in the international human rights community as "Mr. Human Rights") and our family moved to the United States. I was sent to attend Williston Academy in Easthampton, Massachusetts, where I started in the late fall of 1947 as a student in the eleventh grade.

When I came to Williston, there were three black students at the school. One, Malaku Bayen, was the nephew of the Emperor of Ethiopia, Haile Selassie. A second, Clarence Simpson, was the son of a high Liberian official. The third, Byron Milton, was an American boy from Michigan. One day I was in a French class taught by Mr. B, a much-loved teacher who had been at Williston for many years. Byron Milton was not a member of the class, but he walked into the classroom by mistake. Noting his error, Byron excused himself and left. Then, to my astonishment, Mr. B. commented roughly as follows: "A dark cloud has hovered over us but thankfully it has passed away!" To say that I was astonished is to understate. I had only been in this country for a few weeks, but I had the naive notion that there was a place called "the South" where there had been slavery and where there was still segregation and discrimination, but that "the North" had won

the Civil War and ended slavery so that everyone would be equal, and that there was no discrimination in the North (or at least that such discrimination was rare).

Some weeks or months later, Dr. Ralph Bunche, one of the first black American diplomats, and later the winner of the Nobel Peace Prize, was sent to what was then Palestine to mediate between Jews and Arabs. A Jewish student, R., said to me: "That was the worst thing they could have done!" I asked what was, and he responded, "To send a 'nigger' to mediate over there!" He made this remark less than three years after the conclusion of World War II, during which the Holocaust resulted in the annihilation of six million Jews. It was incomprehensible to me that any Northern boy, and especially a Jewish boy, could talk (or think) like that.

I did not mention these Williston incidents in the manuscript that I wrote in the 60s and 70s. I was focused then on discrimination in Mississippi, not at Williston. But on graduation from Williston, I moved on to Yale University, where I joined the NAACP. I also served for two years in the U.S. Army, mostly in the South, and I saw segregation first-hand. At Fort Polk, Louisiana, the Army decreed that "colored" sections of nearby Leesville were "off limits" to white soldiers. I also seem to recall that the Army occasionally sponsored separate dances (with local young women) for white and “colored” enlisted men.

I graduated from Harvard Law School in 1958, and I went to work for a New York law firm, but I also did volunteer work assisting civil rights lawyers to write briefs in the so-called "sit-in demonstration" cases, and in 1961 I wrote my first published article about the law relating to sit-ins. In 1962, inspired by President John F. Kennedy, who remains one of my heroes, I joined the Civil Rights Division, and the manuscript of which this 2012 Preface is now a part tells of my experiences during the first half of my career at the Division. Looking back on my life, I am now convinced that the unkind and prejudiced words spoken at Williston by Mr. B. and by my schoolmate R. helped to motivate me to join the legal fight against discrimination and injustice by becoming a civil rights lawyer. That career has been followed by (so far) more than thirty-two extraordinarily rewarding years as a judge, during which I have had the opportunity to contribute to justice in a different capacity.

I hope that during the course of my professional life, I have helped to make equal opportunity a reality for people to whom it would otherwise have been denied. I have the greatest admiration for the colleagues with whom I worked in Mississippi and elsewhere to combat discrimination by enforcing the law. I also

continue to marvel at the heroism of those black citizens of Mississippi who risked their lives and well-being, and who endured prejudice and cruelty to an extent that a reader today will find hard to believe, but who still continued to battle for justice until, in substantial measure, and at great sacrifice, they achieved it. But even today, there remains a long way to go.

I did not yet know my wife Taffy when I wrote this manuscript, but I will be forever grateful for her love and for her encouragement, as I have endeavored to promote equal justice under law in my capacity as a judge. Finally, I wish to devote this memoir to the memory of my late dad, Dr. Egon Schwelb, "Mr. Human Rights". If it is true that the acorn never falls far from the tree, then I had the extraordinary advantage of being the offspring of a truly magnificent oak. Anything that I may have achieved I owe to him. Rest in peace, "Popski"!

Introduction

On December 18, 1970, the Permanent Subcommittee on Investigations of the U. S. Senate denounced the multi-billion dollar program to build F-111 fighter-bombers as a "fiscal blunder of the worst magnitude." Five hundred planes had cost 7.8 billion dollars, at a cost of 15.6 million dollars a plane. Fewer than 100 of the aircraft, according to the Senate Committee, came even reasonably close to performing as intended, and the program as a whole, with its delays and disappointments, had an "adverse impact on our defense posture." The Committee referred to it as a fiasco.

The Civil Rights Division of the U. S. Department of Justice is the principal enforcement agency for the numerous federal civil rights statutes now on the books. These laws prohibit racial discrimination in voting, public education, employment, housing, and public accommodations and facilities, and make it a crime to willfully deny a person his constitutional rights. For the fiscal year 1970-71, the Nixon Administration succeeded in obtaining an appropriation of a little over 4.3 million dollars for the Civil Rights Division – a large increase over the less than 3 million dollars which was appropriated when President Johnson was in office. The Division's budget is now about one-quarter of the cost of a single airplane in the ill-fated F-111 program.

If the United States government had purchased one less F-111 and used the saving for civil rights enforcement, it could have more than quadrupled the Civil Rights Division's budget. There could have been 600 attorneys during the 1970-71 fiscal year instead of 150. More racial discrimination would have been discovered, and the United States would have brought many more lawsuits and secured far more voluntary compliance with the law. Experience has shown that where potential lawbreakers are certain that the laws will be enforced, they are disinclined to risk apprehension, and the necessity for lawsuits is significantly reduced.

In view of the Division's limited budgetary resources, the enforcement of the civil rights laws by the Justice Department has had to be selective. A local district attorney is expected to, and ordinarily will, prosecute every murder, robbery, rape or other crime which occurs in his jurisdiction. With only twenty-one attorneys assigned to the enforcement of the federal fair housing laws in the entire country, this kind of total law enforcement by the Civil Rights Division is obviously impossible, and Congress has apparently never contemplated it. Much of the

implementation of the civil rights laws has been left to lawsuits brought by private individuals through their own attorneys, and the NAACP's Legal Defense and Educational Fund, in particular, has contributed much to making equal treatment under the law a reality in America.

Nevertheless, it has been the function of the Civil Rights Division, as the government's principal legal arm in the area of civil rights, to set the tone of enforcement. Consequently, the influence of the small group of young lawyers in the Division, many of them just out of law school, has been far greater than their number would ordinarily warrant. After a decade among them, I believe that they have made an impact, and that America would be a different, less exciting, and less just country if our Division did not exist. I think that the political landscape of the deep South has been materially altered, largely as a result of the efforts of this relatively small group of lawyers, and that other sections of the country are now feeling its influence to a constantly expanding degree. It is a healthy thing, in a rich land like America, to have a branch of the government operating essentially as an Ombudsman, with its lawyers appearing in court, not, as Marx predicted, to help the dominant class to oppress the poor and the unrepresented, but rather to assist the victims of discrimination and oppression to secure the rights which the state or local governments, or influential entrepreneurs and members of the establishment, have long denied them.

The approach of the Civil Rights Division to the problems of racial discrimination has been to explore the facts, in depth, and to bring them, objectively but forcefully, to the attention of the courts and of the country. Where racial problems are concerned, evidence is of the essence. Facts are far more persuasive than the inflamed rhetoric which often accompanies so emotionally charged a topic as race relations.

In general, the Civil Rights Division has been able to show, in case after case, and with cold, hard, incontestable evidence, that those bent on perpetuating racial segregation and discrimination go far to achieve their ends. I think that the incidents related in this book demonstrate not only that adversaries of equal opportunity will lie, cheat, and even murder for their cause, but also that the segregationist ideology often so destroys their sense of proportion that the ridiculous becomes commonplace.

When proof of fraudulent, cruel or foolish discriminatory conduct is made within the four walls of a courtroom, there is no escape under the law or under simple justice. The courts of this country have, by and large, responded to such

evidence by fashioning remedies that will work. When it has been necessary, Congress has passed new laws to do what has to be done, filibuster or no filibuster. Moreover, the scope of the remedy has consistently been directly proportional to the degree of the wrong.

During the past ten years, as a lawyer with the Civil Rights Division of the Department of Justice, I have been privileged to participate in and observe the clash between racially discriminatory institutions and practices on the one side and the United States government, enforcing laws designed to assure equal opportunity, on the other. There have been frustrations and disappointments, but the experience has persuaded me that, by and large, exposure of racial injustice in a court of law contributes measurably to its end. In this book, I have attempted to relate, principally by reference to first-hand experience, how the right to vote was secured for the black man by proof of the irrationality and fraud which were used to disfranchise him. I have also tried to show that techniques employed to right that legal and moral wrong have been and can be applied to the national rather than sectional problems of discrimination which will characterize the 1970s. What has worked to enfranchise the blacks, to punish the killers of Negroes and civil rights workers, and to eliminate at least formal dual school systems based on race, can accomplish much, if adequate resources are provided, to deal with the highly complex problems of discrimination in employment, housing, and urban schools which will be the principal battlegrounds in the decades to come.

One caveat is in order. In this book, so far as possible, I have related events as they have happened in my own experience, and I have allowed the facts to speak for themselves. Much of what is contained in this book occurred during the course of lawsuits in which I represented the government. Complete objectivity is probably impossible for a lawyer when he is telling of a case in which he was counsel for one of the parties. I am sure that my adversary in each of the court battles would tell the tale quite differently, and I can only hope that he does not write a competing memoir.

Finally, I wish to make it clear that any views expressed herein are mine alone, and not those of the present [Nixon] Administration or of any other.

CHAPTER 1
A DIVISION WITH SOUL

When John F. Kennedy was elected President in November 1960, many young men and women who had previously had no disposition to work for the government, or to accept the odious labels and comparatively lower pay traditionally bestowed upon “federal bureaucrats," began to flock to Washington. The new President said in his Inaugural Address that the torch had been passed to a new generation of Americans, and the speaker's appearance, demeanor and style appeared to confirm the truth of his words. A restlessness overtook many young people from all parts of the country and of diverse backgrounds and training, for they wanted to be a part of the new adventure and to "get in on the action.”

The election of President Kennedy coincided with a new momentum in the movement to secure for Negroes the actual enjoyment of the rights that had been guaranteed them as American citizens by the post-Civil War Amendments almost a hundred years earlier. In 1960 Negro protests, expressed by direct action rather than by petitions to legislative bodies or to courts, impressed themselves upon the national consciousness. The sit-in demonstrations which began in early 1960 at a lunch counter in Greensboro, North Carolina spread swiftly throughout all but the most recalcitrant areas of the South. Even before the sit-ins, major developments affecting civil rights had brought that issue to center stage. In 1954, the Supreme Court had outlawed public school segregation. In 1956, the Montgomery, Alabama bus boycott made a previously unknown young black minister, Dr. Martin Luther King, a national figure. In 1957, President Eisenhower had dispatched federal troops to Little Rock, Arkansas to enforce court-ordered school desegregation. The sit-ins, however, represented a new and more dramatic turn in the struggle against segregation. The Negroes, or many of them, had become activists, and a new President had been elected who envisaged his role as placing him in the thick of the fray. It was an inviting time for those who believed that there were wrongs to be set right to enlist in the activism which was burgeoning around them.

In the early 1960s much of the “practical” action in civil rights revolved around the attempt to make the Negro’s right to vote a reality, and the agency charged with achieving this goal was the Civil Rights Division of the Department of Justice. While Negro protests went far beyond denial of the franchise, most civil rights leaders agreed that this was the most fundamental right of all rights, and that little progress could be made while its denial remained widespread. It was said to be the view of the Kennedy Administration that the right to vote was the

one upon which all others depended, and that if its free exercise was secured, other rights would follow. After almost a century of federal non-involvement, government lawyers were in the states of the Deep South collecting evidence and instituting lawsuits to try to enfranchise voteless Negroes. It was a belated effort to redeem a pledge which was nearly a hundred years old.

Racial discrimination in voting had been unlawful since the ratification of the Fifteenth Amendment shortly after the Civil War. For several decades during and after Reconstruction, Negroes voted with varying degrees of freedom in the several Southern states. In the 1890s and early 1900s however, all of the states of the Old Confederacy revised their Constitutions to adopt various discriminatory measures to disfranchise Negroes, and soon the Negro vote had been eliminated as a factor of any significance in politics.

Since the Constitution prohibited racial discrimination in registration and voting, it was theoretically possible for Negroes to go to court and secure a court order barring local officials from discriminating against them. Such a right was, however, a fantasy in practice. In Mississippi, to take an example, there were only three Negroes who were actively engaged in the practice of law, and there was hardly a white attorney who would, or could, accept a case of this kind. If such a case were brought, state law provided for extensive administrative proceedings which the Negro would have to exhaust before he even got to court. Finally, proof of discrimination by a registrar, even in a small rural county, involved the comparison of thousands of registration applications and other documents in order to determine, for example, if tests of equal difficulty were given to whites and to Negroes, whether assistance was furnished to one race but not to another, and whether grading was racially discriminatory. Such records analysis would take trained Justice Department attorneys and clerical personnel literally thousands of man-hours. As a practical matter, it was impossible for an impoverished Negro to do all of this, and in large areas of the South the right not to be discriminated against in the registration and voting process was imposing on paper but for the average local Negro, the stuff of which dreams are made.

In 1957, Congress enacted the first civil rights legislation since Reconstruction days. The Civil Rights Act of 1957, although comparatively narrow in scope, was nevertheless a historic advance, for it was above all an implementation bill. Congress recognized that Negroes in many Southern states simply could not enforce the rights secured to them by the Fourteenth and Fifteenth Amendments. Accordingly, it was the basic theory of the Act that the United States, acting through the Attorney General and the Department of Justice, should

be authorized to bring suits on behalf of disfranchised Negroes to secure an injunction or other court order to assure them their right to vote, or at least to nondiscriminatory treatment at the registration office. By Title III of the Act, as it was proposed, the Attorney General would also have been authorized to institute school desegregation suits on behalf of aggrieved Negroes, but this title was defeated in the Senate, and was not to become law until Congress enacted a modified version of it as part of the Civil Rights Act of 1964. The provision for suits by the Attorney General to end discrimination in voting did pass, however, and, as part of the 1957 Act, Congress created a Civil Rights Division of the Department of Justice which was assigned the responsibility of enforcing it.

In 1962, I applied for a job with the Civil Rights Division and, after some correspondence, I was invited to come to see Mr. Burke Marshall, then the Assistant Attorney General in charge of the Division and Attorney General Robert F. Kennedy's principal civil rights adviser. Mr. Marshall made a remarkable impression on me. A short and scholarly looking young man of about forty who had previously specialized in antitrust law, he met me coatless and with his shirtsleeves rolled up. "So you're the fellow from Wall Street who wants to work for the Civil Rights Division?", he greeted me somewhat laconically. He was familiar with an article I had written on sit-ins, and he asked questions which were so probing and difficult to answer that I felt intellectually eclipsed. Nevertheless, he was friendly and enthusiastic and began to explain how his Division operated. On the walls of his office were maps of the deep South with different colored pins; some represented counties where discrimination suits against registrars of voters had been instituted; others, counties where investigations were pending; still others, counties where the Department was seeking access to registration and voting records in order to determine if violations of law had occurred. Mr. Marshall explained that the Department did not always wait for complaints and that the attorneys visited Negro leaders and ordinary Negroes, not to solicit litigation, but rather to determine whether local officials were complying with federal law. He explained that his Division always tried to secure voluntary compliance with the law by state and local officials, but that when such compliance could not be obtained, the government went to court. I was struck by the controlled energy and goodwill which radiated from this rather shy man. He was about as matter of fact and down to earth a government official as I could possibly imagine, and everything from the rolled up sleeves to the carefree greeting told me that he would be an exciting boss.

At the conclusion of the interview, Mr. Marshall told me that his First Assistant, Mr. John Doar, was out of town, that Mr. Doar was in active charge of

the trial lawyers, and that I would have to come down and see him before a final decision on my application could be made. A short time later, I visited Washington again and met Mr. Doar. The First Assistant was a striking contrast to Mr. Marshall. Tall, athletic, curly-haired and handsome, Doar, who was then 40 years old, at first conveyed the impression of a very young man just out of college. His appearance was less scholarly than Marshall's, and he could easily have been taken on first impression for an intelligent but not particularly unusual fraternity president. Mr. Doar's tone was, and is, cool and low key. Understatement and underplay are endemic to him. His hallmarks are not colorful rhetoric but extraordinary energy and zest for hard work, and he has a highly developed sense of fairness. Nervous, proud, sensitive, irritable, even mercurial, Doar is no angel, but he has probably done as much to secure for American Negroes their constitutional rights as any other man, black or white, living or dead.

Our conversation was brief and to the point. Doar told me that, on paper, I had the qualifications for the job, but that it was frankly not everyone's cup of tea. Would I really like, he asked, to journey along dusty roads in Alabama or Mississippi or Louisiana taking statements from Negroes who had repeatedly tried to register, and had repeatedly been turned down. I told him that this was just the kind of thing I was anxious to do. Doar then warned me that much of the work involved the examination and analysis of records, and that this could be tedious. Suddenly, he whirled and exclaimed: "But there's romance in the records!" To prove his point, he showed me a blow-up of a Mississippi application for registration. Next to the second signature line, located in a remote place on the form, there was a light but clearly visible check mark. Doar explained that white applicants in Forrest County, including the one whose form we were studying, had all signed this line and had passed the test; many Negroes had been rejected solely for failing to sign it. A series of checkmarks evidently made by the registrar on the forms of the white but not of the Negro applicants told why. In order to make sure that whites would sign the "concealed" signature line and become eligible voters, the registrar had placed a check mark where they were supposed to do so. The proof in the case showed that the forms of virtually all white applicants had such a check mark, but that the black applicants' applications did not. The blacks were then flunked for failure to sign in the right place.

The records, as I was to learn, were full of such "romance," and it was to be part of my job to be a sleuth. I was accepted for the position, and started on October 1, 1962, just as the riot at the University of Mississippi over the admission of the first Negro to cross racial lines in that state since Reconstruction was leaving

two dead and the entire campus a shambles. My assignment was to work on cases in the State of Mississippi.

CHAPTER 2
THE MAGNOLIA STATE

In 1962, Mississippi was, literally, segregated from the cradle to the grave. In rural Leake County, which was the home of the Governor, Ross Barnett, the weekly newspaper, the Carthaginian, featured a "contest" every year for the "First Citizen of the New Year." It was quite an event. As the Carthaginian put it in welcoming the prize winner:

> On thing is for sure. The first white baby born in Leake County after midnight will be given a hearty welcome. Carthage businessmen have contributed a multitude of marvelous gifts that will be presented to the winner of this newspaper's baby derby.

Jackson, the state capital, is less than fifty miles from Carthage, the county seat of Leake County, and our copy of the Carthaginian is flown to Washington by air from the Jackson Airport. At the junction of United States Highway 80 and the access road to Jackson Airport, there was a large white billboard proclaiming the other end of the segregation spectrum:

Visitors Welcome

FLORAL HILLS MEMORIAL
GARDENS, INC.
A Modern Garden Cemetery For
White Only With Perpetual Care

The social system of which the First Citizen contest and the Floral Hills billboard are a product was rigorously enforced by all branches of the state government and was expressed in numerous provisions of the State Constitution and law. There were laws on the books prohibiting integration of schools, hospitals, prisons, insane asylums, parks, waiting rooms, places of amusement, and various other facilities. It was unlawful for an operator of a small motor vehicle for hire to carry Negro and white passengers at the same time, unless the Negro was a servant. It was a crime for a white pupil to attend a school also attended by Negroes, or for a traveller to enter a waiting room or a restroom designated for another race. While "colored" nurses were required to attend "colored" patients at all hospitals maintained by the state, it was also mandatory that they be under the direction of white supervisors.

State and local officials in Mississippi were required by state law to enforce these provisions and to thwart federal attempts to invalidate segregation. Despite the provisions of the United States Constitution assuring freedom of speech, criticism of many segregation laws was a crime. All employees of the State and of every subdivision of the State were commanded by Section 4065.3 of the Mississippi Code "to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court ... and to prohibit by any lawful, peaceful and constitutional means, the … mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this State, by any branch of the federal government." It was a crime to conspire to overthrow the segregation laws of Mississippi, and, Section 2339 of the Mississippi Code provided that:

> Any person, firm or corporation who shall be guilty of printing, publishing or circulating printed, typewritten or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and Negroes shall be guilty of a misdemeanor and subject to ... a fine … or imprisonment … or both fine and imprisonment.

Negroes and whites attended different schools, colleges, and churches, and the caste system was enforced. In 1958, Clennon King, an instructor at all-Negro Alcorn A&M in Lorman, Mississippi, sought admission to the University of Mississippi (Ole Miss) for graduate study; the University refused him and the State had him committed to a mental hospital for psychiatric examination. In 1959, Clyde Kennard, a paratrooper veteran of the Korean War who unsuccessfully attempted to enroll at the University of Southern Mississippi in Hattiesburg was charged first with a liquor violation (later dismissed) and then with being an accessory to chicken theft. He was sentenced to seven years at segregated Parchman Penitentiary for the second offense; the illiterate Negro said to have been the "principal" to the crime, and on whose testimony Kennard was convicted, went unpunished. Kennard developed cancer while confined, and it has been alleged that his death in 1963 resulted from lack of proper treatment at the penitentiary. Similarly, Negroes who sought to attend “white" churches were barred or prosecuted for "disturbing public worship, and "letters to the editor" columns in the Mississippi press frequently featured correspondence from clergymen and others with headlines such as “Says Integration is Not the Plan of God." As Reverend Bob Lynch of McComb’s Central Baptist Church was to tell

the Rotary Club during the “Long Hot Summer" of 1964, "the love referred to in the Bible does not relate to integration."

It was a rarity in 1962 for a Negro to serve on a jury in Mississippi; in rural areas, it was completely unheard of. Under these circumstances, an all-white jury acquitted white defendants in the 1955 murder of Negro teenager Emmett Till, even though one of the defendants subsequently described the killing in a national magazine, and a local all-white grand jury reportedly refused even to read an FBI report which was said to identify the perpetrators of the 1961 lynching of Mack Charles Parker, and no one was ever indicted for this crime. Clyde Kennard, however, received a seven-year sentence as previously described, and, in 1964, Cynthia Washington, an attractive and altogether captivating Negro civil rights worker who is the daughter of Walter Washington, now Mayor of the Nation's Capital, and of prominent educator Bonetta Washington, was initially sentenced as follows by a justice of the peace for alleged traffic offenses said to have been committed while she was leaving a civil rights meeting in Batesville:

Running a stop sign:	90days, $250 fine,
Speeding:	90 days, $250 fine,
Reckless driving:	No imprisonment,
	$100 fine; the sentences to run consecutively.

During her trial, Miss Washington was sentenced to 60 more days for contempt of court, the contempt consisting of asking a question on cross-examination suggested by an out of state lawyer whom the justice of the peace had denied leave to practice in his court. Later, the excessive sentences were set aside, but this did not occur until Northern civil rights volunteer attorneys had filed a federal suit.

A few weeks after this sentence was handed down to Miss Washington and her companions, nine white men who were found guilty in a series of racial bombings in McComb, Mississippi, received suspended sentences because, in the words of the judge, they were "mostly young men, just starting out," came from "good families," and were "unduly provoked and were ill-advised." The “youths" involved in this mistake of judgment were between 30 and 44 years old.

The tone of political life in Mississippi during the early 1960s reflected this atmosphere. The advertisements of many of the candidates for local office were directed to the "white qualified voters” of Leake or Jasper or Neshoba County as the case might be – a practice which promptly disappeared after the Voting Rights Act of 1965 brought the vote to large numbers of Negroes. A Hattiesburg

American editorial in 1963 urging voters to retain the one-party system, and to turn back the first serious Republican gubernatorial challenge in recent times, stated in part:

> The only benefactors [sic] of a two-party system in this state would be the 920,000 Negroes who dwell here. This would please the Kennedys, the left-wing liberals of both parties and the racists.
>
> It is natural and understandable that most Mississippians should view with dismay the growing dictatorship in Washington; that Mississippians should loathe the Kennedys. But who has more reason to despise the Kennedys than Paul Johnson, the Democratic candidate.
>
> In his television debut last Thursday Rubel Phillips, the Republican candidate, came out a poor second in his claim to hate the Kennedys more.

Lieutenant Governor Johnson was widely reported to have said during his 1963 primary campaign that "all that NAACP means to me it is Nigger, Ape, Alligator, Coon, and Possum," and one of his campaign advertisements during his primary contest with former governor J. P. Coleman contained a photograph of a bed in the Governor's Mansion in which, so it was alleged, Senator John F. Kennedy had spent the night during the Coleman administration; the implication was that Coleman was a friend of, or at least soft on, the Kennedys, which Paul Johnson assuredly would not be.

The Mississippi voting laws with which the Civil Rights Division was confronted reflected the existing racial and political atmosphere. The voting requirements in effect in the fall of 1962 had their origin in the Mississippi Constitutional convention of 1890, which met as white supremacy consolidated its foothold following the end of Reconstruction. United States Senator George explained the purpose of that convention as being,

> to devise such measures, consistent with the Constitution of the United States, as will enable us to maintain a home government under the control of the white people of the state.

Judge S. S. Calhoon of Hinds County, who was subsequently elected President of the Convention, expressed the view that,

> If the Negro brings his own reason to bear on his condition, he must see that his future is better assured without the ballot.

Sensible Negroes, in other words, do not want the right to vote, or that at least was Judge Calhoon's view. He, of course, was white.

In order to implement the white political supremacy which was its reason for existence, the Convention passed a resolution to the effect that the Fifteenth Amendment, which prohibits discrimination in voting and enfranchised the Negro, ought to be repealed. Since the Mississippi Convention was powerless to put this "ideal solution" into effect (since it would have changed the United States Constitution), it contrived instead, as one delegate later wrote, to "legislate against the Negro's habits and weaknesses, and, without infringing the provisions of the Constitution of the United States, we provided for perpetual white supremacy in the State of Mississippi." Another delegate later reminisced that there was "scarcely a conceivable scheme having the least tendency to eliminate the Negro vote that was not duly considered by the convention … It is regrettable that all the suggestions … were not recorded; had they been preserved, the record would be a monument to the resourcefulness of the human mind."

In order to take away the Negro's right to vote, the members of the convention tried all kinds of stratagems. Conviction of crimes, for example, thought to be characteristic of Negroes was made a disqualification from voting, while crimes of which whites were more often convicted were not so treated. A poll tax was instituted because it was thought that whites would pay it and Negroes would not.

The single most significant measure in this complex instrument of disfranchisement, however, was the so-called "understanding test." According to Section 244 of the new Constitution, an applicant for registration was required to be able to demonstrate, to the satisfaction of the registrar, that he could either read any section of the State Constitution, or understand it when read to him, or to give a reasonable interpretation of it. In 1890, 76% of Mississippi's whites, but only 11% of its Negroes, were literate, and a requirement of this kind, even if administered impartially, would have disproportionately kept far more Negroes than whites from the polls. It was not intended, however, that the test be given equally to all. One delegate candidly remarked:

> It looks as if it was intended that if a register [sic] wanted the man to vote he would read him such clause as Slavery except as a punishment

> for crime should be forever prohibited. 'Do you understand that?' 'Oh, yes.' But if he did not want him to vote he would read him the interstate clause or the section forbidding the Legislature to pass ex post facto laws and demand a construction.

As the late Senator Bilbo, a violent segregationist who openly advocated intimidation of would-be voters in the black community, ebulliently put it half a century later:

> What keeps 'em from voting is Section 244 of the Constitution of 1890, that Senator George wrote. It says that a man to register must be able to read and explain the Constitution when read to him … And then Senator George wrote a Constitution that damn few white men and no niggers at all can explain.

The 1890 Constitution succeeded in its purpose. In 1890, more than 55% of the eligible voters in Mississippi were black. By 1899, the Negro percentage of the electorate had declined to 10%. In the 1950s and early 1960s no more than 5% of the adult blacks were registered. Even of those, many were not allowed to or did not pay poll tax, and were therefore ineligible to vote under Mississippi law. Of the tiny number remaining, some were turned away at the polls at the all-important primary elections, on the grounds that they did not support the principles of the Mississippi Democratic Party, which included white supremacy. For all, practical purposes, the black vote did not exist.

As if this was not enough, the 1954 Supreme Court decision outlawing compulsory public school segregation was followed by a vehement white supremacist reaction, led by the [White] Citizen's Council. Following that decision, and again after the enactment of the Civil Rights Acts of 1957 and 1960, registration requirements were further stiffened, ostensibly for everybody, but actually only for Negroes. Since more blacks were now literate, the law was changed to require applicants to be able both to read and to understand any section of the Mississippi Constitution, but persons already registered (most whites, but very few blacks) were exempted. Applicants were also required to fill out a letter-perfect application form without any help from the registrar, and any error, no matter how technical, would disqualify them; hence the check marks Mr. Doar had shown me, signaling to white applicants where their signatures should go. Another law was enacted requiring that the names of applicants be published in the local newspaper – a procedure calculated to scare Negroes, most of whom were economically dependent on whites who might read the paper and not like what

they read. Any registered voter was given the right to "challenge" an applicant for registration for lack of "good moral character," and that term was not further defined by the law. Since advocacy of social equality between blacks and whites was a crime under Mississippi law, it presumably showed lack of good moral character too. Moreover, the law provided that if the applicant resisted the legal challenge to his moral character, there would be a full hearing, with subpoenas and witnesses and transcripts and rules of evidence, with the loser paying the costs. The costs might well exceed a black tenant farmer's annual income. It was not the kind of risk many Mississippi Negroes could afford to take.

CHAPTER 3
Romance in the Records

To prepare a voting discrimination case against a county registrar for trial, Civil Rights Division lawyers had to interview hundreds of prospective witnesses and analyze thousands of records. The interviewing was done in the field, for most of the witnesses were accepted and rejected applicants for registration who lived in the county where they sought to vote. The records analysis involved two steps. First, Civil Rights Division lawyers would select, and FBI agents would photograph, applications and other records in the county registrar's office – often tens of thousands of pages of documents. Then, back in Washington, the attorneys would risk eyestrain peering at the endless rolls of film wound into unsightly olive drab microfilm machines. Although the applicable federal statute authorized the Attorney General to inspect voting records upon demand, the registrars usually resisted our right to do so tooth and nail, and the State of Mississippi placed the resources of its Attorney General's office at their disposal. Consequently, there were often two series of negotiations and two lawsuits with respect to each county – preliminary negotiations and litigation for the right to inspect and copy records, and substantive negotiations and litigation to end the discrimination which the records of most Mississippi registrars disclosed once they had been copied and analyzed. It was a long and arduous process.

In January 1962, Attorney General Robert F. Kennedy requested the registrar of Lauderdale County, Mississippi, Preston Coleman, to make the county's registration records available for inspection and copying by our personnel. The registrar declined to do so, and after the United States sued, state attorneys put up vigorous resistance on his behalf. A hearing was held on September 5, 1962, and, shortly thereafter, United States District Judge Harold Cox, no friend of civil rights, nevertheless entered an order requiring the registrar to let us come and inspect and copy. There were further delays before a mutually acceptable date could be agreed upon, but finally, in early December, Bob Owen, the tough and talented leader of our Mississippi unit, advised that I was to go to Mississippi the following day, together with a couple of more experienced attorneys, to help analyze the Lauderdale County records while the FBI was putting them on microfilm. It would be my first trip to where the action was.

Meridian, the county seat of Lauderdale County, has about 50,000 inhabitants and is the second largest city, after Jackson, in the state. Lauderdale is one of Mississippi's most populous counties, and the trip was therefore of some

importance. Moreover, the city and county were represented on the federal judiciary by the late Judge Ben Cameron, who then held the traditional Mississippi seat on the United States Court of Appeals for the Fifth Circuit, the appellate court with jurisdiction over Georgia, Florida, Alabama, Mississippi, Louisiana and Texas. Judge Cameron was an articulate and outspoken segregationist who was so committed to his philosophy that he had taken the unprecedented action of entering four separate stays of the order requiring James Meredith's admission to the University of Mississippi, even though he was not a member of the panel that heard the case. Finally, the stays were set aside by the late Mr. Justice Black of the Supreme Court of the United States, who came from the neighboring State of Alabama, and Meredith was admitted.

A short time before our trip to Meridian, Judge Cameron made a scathing attack, in one of his numerous dissenting opinions, on several of the other members of his court for pushing desegregation too hard. In the course of his opinion, he had taken rather a dim view of Justice Department and FBI personnel coming to county seats to photograph voting records. Referring to the late Justice Robert Jackson of the United States Supreme Court, who, so Judge Cameron believed, would have agreed with his views on states' rights and segregation had he lived, Judge Cameron wrote as follows:

> It is not necessary to conjecture what he would have thought … of the spectacle of the invasion by the bright young men from the North which is taking place in the South today. A kind providence spared him the pain of watching groups of highly trained representatives of the central government, brought from its seat of power in Washington, backing their cameras up to the courthouses in the rural sections of the South, photographing the records of the sovereign States and hailing their elected officials into court to answer the variegated charges made by men who do not understand – the creature turning upon the creator to rend it – and all with the solemn sanction of judges who ought to understand.

With Meridian's most renowned lawyer having expressed himself in these terms, we had no idea what kind of a reception we were going to get from the registrar of Judge Cameron's home town, and it was always possible that Judge Cameron might enter an order prohibiting the inspection altogether. The uncertainty made my maiden voyage even more exciting.

The racial customs of Meridian, Mississippi, which were observable en route from the motel (where breakfast included the inevitable hominy grits) to the registrar's office at the Lauderdale County Courthouse, were consistent with Judge Cameron's philosophy. There were three rest rooms at the modern municipal garage at which we parked our rented car; one for WHITE MEN, one for WHITE WOMEN, and one for "COLORED," evidently of both sexes. As we walked a couple of short blocks to the Lauderdale County Courthouse, another phenomenon brought me up sharp. There were several automobiles on the street with a white man or woman at the wheel and a Negro passenger, ordinarily female, sitting in the rear seat. In Meridian, Mississippi, white people and Negroes, even of the same sex, generally did not ride together in the front seat. On the contrary, the Negro maid sat in the rear. There was little time to consider the sociological implications of this custom, however, or even of the predictable statue of the Confederate soldier in front of the courthouse and the clearly marked "white" and "colored" toilets and drinking fountains inside, for soon we were in the Circuit Clerk's office and face-to-face with an authentic Mississippi Registrar of Voters.

Under Mississippi law, the duties of registrar devolve upon the Clerk of the Circuit Court, which is an elective office. Since the Clerks, like other local officials, are elected during the same year as the Governor of Mississippi (in the year preceding the presidential election), statewide issues often enter into their campaigns, and in the year of Meredith's admission to Ole Miss, there was only one statewide issue – SEGREGATION. Registrars would, to some extent, reflect popular feeling, and it was common knowledge that the Registrar of Walthall County, who had never registered a Negro, had pistol-whipped a civil rights worker who had brought in two elderly Negro applicants to the registration office and then had him arrested for breach of the peace. However, Preston Coleman, the Registrar of Lauderdale County, did not seem to have horns. A tall, quiet and rather courtly gentleman, middle aged or even elderly, Mr. Coleman politely asked us for identification, examined a copy of the federal court order authorizing the inspection, and showed us to a room in the rear where the FBI agents set up their rather unwieldy cameras. He made available the various records he had retained and, without further ado, our inspection was on.

Although I was later to inspect records in about forty of the eighty-two County Court houses in Mississippi, I was then still new to the game, and my colleagues, Gerald Stern and Jim Groh, were in charge. This was apparently quite obvious to the otherwise inscrutable FBI agents. The subsequent FBI report on the photographing which accompanied the microfilm recited somewhat unflatteringly

that "all records photographed were selected by Department Attorneys James Groh and Gerald Stern. Department Attorney Frank E. Schelb (sic) was also present." Even a novice had to do something, however; and my colleagues asked me to analyze the rejected applications, which Mr. Coleman kept in a separate file.

There were about thirty such forms, and my first impression was one of disappointment. While two or three of the rejected applicants were school teachers who had completed their forms creditably, several of the applications were in poor or mediocre handwriting, and a majority of the interpretations of the various sections of the Mississippi Constitution which had been assigned to these applicants were incorrect and unresponsive. Most of the rejected applicants were recognizably Negro – they gave their occupations as maids, porters, and in some cases as teachers at Negro schools – and it appeared that three or four of them had filled out forms which should have been accepted on any reasonable standard. Considered without reference to the treatment of accepted applicants, however, the remainder of the rejected applicants had indeed failed to comply with Mississippi law as written. If there had been nothing with which to compare the rejected Negro applications, one might simply have concluded that the test was quite difficult for persons with limited educational opportunities, and that the grading was rather strict, but these facts standing alone hardly made out a case of the kind of racial oppression of which I had heard so much.

The perspective became quite different, however, when we began to analyze the accepted applications. More than 99% of the white applicants had been accepted, compared with about half the Negroes. The registrar and his deputies had been notified in late January 1962 that the government was seeking access to the county's registration records. Consequently, one suspected that it would be the registration practices before that date – before Mr. Coleman and his deputies had any reason to expect surveillance – that would be most revealing. They were. The accepted white applicants had been given a completely different "test," if indeed, that is what it was, from that directed to the rejected Negroes.

Two of the shortest and simplest sections of the Mississippi Constitution assigned in Lauderdale County read as follows:

> Section 30: There shall be no imprisonment for debt.
>
> Section 123: The Governor shall see that the laws are faithfully executed.

It was obvious that these sections were coming up far more frequently among the accepted white applications than among the Negro forms, and on subsequent study that, in the critical period prior to February 1, 1962, 63% of all white applicants, but only 8.5% of all Negroes, were assigned one of these sections. Later, in pretrial depositions, the registrar and his deputies actually testified under oath that sections of the Constitution were assigned completely by chance, and that if one section came up five hundred times, and another not at all, this was pure coincidence.

What the Negroes were being required to interpret was something else again. In considering the significance of the statistics that follow, the reader should consider that there were seven times as many white applicants as there were Negroes during the period in question. The following statistics reflect the frequency with which some of the more difficult sections were assigned to white and Negro applicants in Lauderdale County:

Section 185. The rolling stock belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale as such.

White	Negro
0	10

Section 198. The legislature shall enact laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare.

White	Negro
2	12

Section 220. The militia shall be exempt from arrest during their attendance on musters, and in going to and returning from the same, except in case of treason, felony or breach of the peace.

White	Negro
2	8

Section 196. No transportation corporation shall issue stocks or bonds except for money, labor done (or in good faith agreed to be done) or money or property actually received; and all fictitious increase of stock or indebtedness shall be void.

White	Negro
0	3

Section 66. No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members-elect of each branch of the legislature, nor by any vote for a sectarian purpose.

White	Negro
0	3

There were several other such sections reserved for Negroes, but the above provisions represent a reasonable sample. There are law students who would have had trouble interpreting some of these sentences, but not half the trouble Negroes with perhaps five years of schooling at Jim Crow institutions had. Surely Senator Bilbo would have smiled, confident that "no niggers at all" could pass this test.

Analysis of the accepted applications promptly revealed that even the easier sections which were assigned to most whites were not given as any serious kind of a test. An examination of the Mississippi application form shows that the heart of the test is contained in Questions 19 and 20**.** Question 19 calls for an interpretation of the assigned section of the Mississippi Constitution; Question 20 requires the applicant to write a statement setting forth his understanding of the duties and obligations of citizenship under a constitutional form of government. It soon became apparent that form after form among the accepted whites contained identical, verbatim answers to these questions; so much so that coincidence was an impossibility and copying an obvious fact.

As soon as I started analyzing accepted applications, I noticed that a majority of the interpretations of Section 30 (there shall be no imprisonment for debt) among the accepted applicants read, precisely, as follows:

No one can be placed in prison for debt.

At first blush, this might not seem particularly significant, for, after all, this is a correct interpretation, and how many different ways could there be to say it? On the same forms, however, there was a similar thread in the answers to the "duties of citizenship" question, and this one was considerably more startling. For no apparent reason, accepted applicant after accepted applicant responded to this question, practically verbatim, as follows:

> I, as a citizen, pledge allegiance to the Constitution
> of the United States and the State of Mississippi.

It was inconceivable that this patriotic but rather unresponsive answer had occurred to all of these applicants independently. Further examination revealed that almost all of the accepted applicants who had written this standard statement of the duties of citizenship also had identical interpretations of Section 30. Our analysis eventually disclosed that these particular standard answers were common not just to a few forms but to well over a hundred accepted white applicants!

Obviously, there was a wide chasm between the formal requirements of the law and the actual practices of the registrar. The State of Mississippi had set up all kinds of imposing voter qualifications, but its agents applied them by allowing white persons (for virtually all the persons with standard answers turned out to be white) simply to copy out in toto someone else's completed form! When the FBI interviewed the white applicants who had standardized answers, several of them frankly admitted that they had been given samples to copy.

Sometimes, it got wryly amusing; the records disclosed that two whites were accepted although they wrote no constitutional interpretation at all, many wrote unresponsive or nonsensical interpretations, and three passed although they wrote answers which were standard interpretations of a section different from the one assigned to them but plain gibberish as responses to their "test". Finally, twelve white persons were registered although their standard and obviously uncomprehending interpretation of "There shall be no imprisonment for debt" was "No one can be placed in prison for death". One white man, perhaps unchivalrously, wrote a slight variation: “No one can be placed in prison for his date.” Romance in the records?

But this was not all. Discrimination in the assignment of sections of the Constitution was no rarity in Mississippi, nor were standard or copied answers by white applicants, nor was discrimination in grading. The deliberate doctoring of records, however, was less common, and yet, almost by accident, we stumbled on a remarkable example of just that during the examination of the Lauderdale forms.

The registration procedure in Lauderdale County was for the registrar or his deputy to assign every accepted applicant a registration number. The numbers were consecutive; if one applicant had number 5001, the next would have 5002, and so on. After an applicant was accepted for registration, his name and number were placed on the Registration Book and also on a separate alphabetical index of

registrations. Ordinarily, each applicant would have the same date on his application form, on the Registration Book, and on the index.

Registrar Coleman kept his accepted applications in sequence according to registration number. As we were going through the forms for February 1, 1962, we noted a curious aberration. Forms 8041 through 8053 were all dated February 1, 1962, and the applicant's name and number were entered on the same day on the Registration Book and on the index to registrations. Number 8054, however, was different. It belonged to Annie Mae Griffin, a maid, whose application was dated May 18, 1961, and whose name and number were entered on the Registration Book and index on January 29, 1962, seven months after she had applied. The dates with respect to the next applicant, Eva Croft, were similarly askew. Further examination revealed that all the identifiable applicants from No. 8054 through 8072, except one, were Negroes, and each had applied months and even years before he or she had been registered. The sequence was as shown in the following table, which is copied from the government's brief to the court:

Name	Race	App. No.	Date of App.	Date on Reg. Bk.	Date on Index
Peacher, Lucinda J.	W	8041	2/1/62	2/1/62	2/1/62
Hanne, Clarence	W	8042	2/1/62	2/1/62	2/1/62
Jennings, William	W	8043	2/1/62	2/1/62	2/1/62
Harper, Billy J.	W	8044	2/1/62	2/1/62	2/1/62
Goodin, Lomax C.	W	8045	2/1/62	2/1/62	2/1/62
Ward, Howard B.	W	8046	2/1/62	2/1/62	2/1/62
Billingsley, Louise	W	8047	2/1/62	2/1/62	2/1/62
Magill, Irma	W	8048	2/1/62	2/1/62	2/1/62
Rutledge, Kay Frances	W	8049	2/1/62	2/1/62	2/1/62
Pierce, William C.	W	8050	2/1/62	2/1/62	2/1/62
McFarland, Edward J.	W	8051	2/1/62	2/1/62	2/1/62
Pettey, Mary	W	8052	2/1/62	2/1/62	2/1/62
Gray, LahomaL.	W	8053	2/1/62	2/1/62	2/1/62
Griffin, Annie Mae	N	8054	5/18/61	1/29/62	1/29/62
Croft, Eva B.	N	8055	3/7/61	1/30/62	1/30/62
Sims, Upiana	Philippine married to a Negro	8056	1/30/61	Eradicated	Eradicated
McMillan, Mae Ella	N	8057	11/2/60	1/31/62	1/31/62
Form missing		8058			

Chess, Dr. Robert H.	N	8059	1/20/61	2/8/62	2/8/62
Bennett, Barbara L.	N	8060	6/12/61	2/12/62	2/12/62
Lee, Ulyssee C.	N	8061	2/2/61	2/15/62	2/15/62
Malone, Lee C.	N	8062	1/25/61	2/15/62	2/15/62
Missing		8063			
Willis, Ruthie Lee	N	8064	Des-troyed	Crossed out	Crossed out
Missing		8065		Out	Out
Clark, Enotre	N	8066	7/17/61	2/16/62	2/16/62
Willis, Lurrie	N	8067	3/7/61	1/31/62	2/16/62
Ware, Sudie Lee	N	8068	8/4/61	8/4/61	2/16/62
King, James	N	8069	2/2/61	2/2/61	2/12/62
Houston, Ollie	W	8070	1/21/60	2/2/62	2/17/62
Butler, Clark	W	8071	3/7/61	2/5/62	2/17/62
Thomas, Easie	N	8072	3/7/61	2/7/62	2/17/62
Dubisson, Eugene	W	8073	2/1/62	2/1/62	2/1/62
Berry, Abner W.	W	8074	2/1/62	2/1/62	2/1/62
Manley, Delia Dee	W	8075	2/1/62	2/1/62	2/1/62
Williams, Edna M.	W	8076	2/1/62	2/1/62	2/1/62

At first we were somewhat puzzled by this sequence – we suspected, as later proved true, that all or most of the applicants with numbers 8054 through 8072 were Negroes, but what did it all mean? A closer look at the applications put us on the right track. It was the custom of Registrar Coleman and his deputies to write

the word "No" in red pencil on the front of most of the rejected application forms. We studied Mrs. Griffin's form, and, sure enough, the word "No" had been written on the top of the page and then carefully erased, but it was still visible to the naked eye. The same was true with Mrs. Croft. With Mrs. Sims**,** the next applicant, there were erasures both in the Registration Book and in the index – this lady turned out to be a Filipino school teacher married to a Negro undertaker, which might have caused some of the confusion as to how she should be treated. An examination of the table reproduced above discloses other peculiarities with respect to the entries and applications for the affected Negroes. It was now apparent that what had happened was that the forms of these Negro applicants had been regarded around the end of January or beginning of February 1962, and that they were then changed, on paper, from rejected to accepted applications. So far as the record was concerned, these Negroes were now registered voters. The timing of this action coincided rather strikingly with the registrar's receipt of a letter in late January 1962, from the Department of Justice advising him that the government was seeking to inspect his registration records. It certainly looked as though someone was trying to cover his tracks!

We interviewed Mrs**.** Griffin and a number of the others. They had indeed applied for registration. They had been told they had failed the test, and that was it. Most became discouraged and never tried again. Nobody had informed Mrs**.** Griffin that she had been accepted and was now a registered voter, and she had no idea that this was so. The other interviewees told the same story, and what had happened became obvious. The belated acceptance of these Negroes' applications had been entirely a paper transaction, apparently designed to make it appear that more Negroes had been registered and fewer rejected than was in fact the case. Not knowing of the reconsideration of their applications, these Negroes would probably not pay poll tax – then a prerequisite for voting though not for registration – and they certainly would not try to vote. Their names would integrate the registration books but would not affect the racial composition of the electorate at all!

Perhaps the most incongruous aspect of the entire matter involved Dr. Robert Chess, a young Negro doctor who would have been the government's opening witness if the case had come to trial. The records showed that Dr. Chess applied in January 1961, that he had been assigned a particularly abstruse section of the Constitution about "the exercise of the right of eminent domain," and that he had been rejected. He reapplied in July 1961, and he was again assigned a highly technical section, but this time he passed. In January 1962, as a part of the apparent cover-up operation described above, his original January 1961, application was regarded and marked accepted, and his name consequently appears

on the list of successful applicants twice, one time for each of these applications. Moreover, an interview with Dr. Chess revealed that the July 1961, form was actually his third and not his second application; he had applied on a still earlier occasion, he had received some other technical section of the Constitution to interpret, and he had been rejected for registration. In a county in which whites who wrote no interpretation, or an absurd interpretation, were routinely registered, a talented young Negro physician was not only twice refused the right to register to vote, but was also used as an unknowing vehicle for making the registrar look as though he was registering a lot of Negroes when he wasn't.

Besides the records, there were the witnesses. Over the next few days, and on later trips on the same case, we interviewed more than 200 Negroes in Lauderdale County who had applied to register to vote, most were rejected at least once. Many of them lived in ramshackle houses on the unpaved streets of the poorer Negro sections of Meridian – chickens would be promenading down a few of the "urban" thoroughfares – and pictures of Jesus Christ and John F. Kennedy stood side by side on the mantlepiece of many a black home.

The Negroes told of hard tests and discouragement. Whites, on the other hand, were registered despite their inability to read, and some acknowledged having copied their interpretations. Since it was apparent from the records and from our interviews that the exacting requirements imposed on Negroes were markedly different from the non-existent standards applied to whites, and that the constitutional interpretation test and the duties of citizenship test were not really used as a prerequisite for voting except for Negroes, we asked Registrar Coleman to discontinue use of these tests and to register all of the Negroes who had been discriminatorily rejected. On the advice of the Mississippi Attorney General's office, Mr. Coleman refused, and the United States brought suit. The case was to come to trial on Monday, June 22, 1964. Shortly before the scheduled trial, however, Mr. Coleman suffered a heart attack, and he never recovered sufficiently to be able to appear in court, so that no trial on the merits was ever held. The late District Judge Sidney Mize, a genial and courtly “old school” segregationist, did order the registration of the fifteen most qualified Negro applicants pending the registrar's illness, but it was not until passage of the Voting Rights Act of 1965 that most Lauderdale County Negroes were able to register.

CHAPTER 4
A Community Called Harmony

More people live in Meridian than in Leake County, a small rural county in the geographical center of Mississippi, but in some ways Meridian is no more representative of the Magnolia State than New York is typical of the United States. With its almost 50,000 inhabitants and modern office buildings, Meridian is a real city, though a small one. To most of the citizens of this primarily agricultural state, and certainly to the Civil Rights Division attorneys who have toiled there, the image engendered by Mississippi is one of cotton fields and dirt roads, of the memorial of the Confederate soldier in front of the courthouse of the small rural county seat, of the little shacks on the unpaved streets of what many whites (and some Negroes) still call "Nigger-town," and of the dry dust in the blazing summer sun.

Leake County is a place which fits this image. It is in many ways a microcosm of the various crosscurrents of the political and social life of Mississippi. Leake is the home county of Ross Barnett, the least reconstructed governor of modern times, who physically barred James Meredith from the University of Mississippi to bring about one of the first of the great confrontations between state and federal power which have shaped the history of the United States during the past decade and a half. Located in Leake County is "Harmony," an all-black community near Freetrade, Mississippi, which is the home of some of the most activist Negro citizens in the entire state. The residents of Harmony are, in large part, members of an active branch of the National Association for the Advancement of Colored People, and it was in Leake County that the first suit to desegregate a rural school system was brought. Reprisals were anticipated, and they came. Shotgun blasts from white nightriders were fired into the homes of a dozen residents of Harmony, and an attempt was made to disbar the Negro attorney who brought the suit. The United States Court of Appeals, in dismissing the proceedings against the lawyer, found the charges so baseless that it rebuked not only the county officials who initiated the reprisal, but also the United States District Judge (Harold Cox) who, while refusing to disbar the attorney, had ordered him to pay court costs.

Segregation has not always been total in Leake County, for local blacks say that there are many among them who are related to some of the more prominent white citizens by blood. White and Negro civil rights workers have been brutalized in the county, but there have been white men who have, quietly, acted justly towards the Negro. The black citizens one remembers are those who have risked all to assert their rights, but there are others, including, for example, the

black thug who, allegedly for white money, severely beat Debbie Lewis' father shortly after she desegregated the white elementary school in Carthage in the fall of 1964. If monolithic solidarity did not exist with respect to either race, however, white opposition to racial segregation was not readily in evidence in December 1962. Negroes were to tell us that individual whites had expressed shock that individual Negroes could not vote, but no public protest on the part of any white Leake Countian against racial discrimination in voting has ever come to our attention. In 1962, few Negroes and no whites openly attacked the status quo.

Some of the hardy Negro residents of Harmony had voted before 1955 but thereafter found themselves mysteriously disfranchised because, as the registrar told them, their "names were not in the book." Indignant, the residents of Harmony had been among the first Mississippi Negroes to complain to the Justice Department about the denial of their right to vote after federal activity began in the state. In addition, and without any organizational prodding, a young Negro college student from the quiet Ofohoma community wrote the following personal letter to Attorney General Robert F. Kennedy:

Ofohoma, Mississippi
April 10, 1962

Attorney General Robert Kennedy
Washington, D. C.

Dear Sir :

Being a Negro and residing here in a typical southern community, I think that I am able to give you first hand information on problems concerning the South as far as literacy tests are concerned.

My father being a prominent and well respected man in his community is very disgusted at the voting procedures in the South. My father has a seventh grade education and he is not well versed on quoting parts of the "Constitution," although I know he knows what it means. Many of the illiterate Whites of this community are not given the literacy test but they are permitted to vote. Negroes are barred from voting because everything is handled by the Whites. Negroes are getting very impatient because they are beginning to feel that the people in authority are not really interested in their welfare.

Mr. Kennedy, being a young man not yet 21 years of age, I am

counting on you. I am sure that the Negroes of the South, especially, will be proud of you. Not only the Negroes, but there are Whites as well who would favor Negroes voting.

In conclusion, I feel that a person is able to form intelligent decisions for the betterment of human society, regardless of required educational standards. I feel that only the people that are interested in what is going on would want to vote anyway.

Will you not answer this letter?

Yours truly,

Ferr Smith

Having limited resources, the Department of Justice operated on the premise that its lawyers, like God, should help those who help themselves. Accordingly, Leake's registrar was one of the first to receive a written demand from the Attorney General that our attorneys and the FBI be permitted to inspect voting records to determine whether racial discrimination in the registration process had occurred. Complex litigation ensued over whether such an inspection should be allowed, even though Congress had clearly intended the Attorney General to have this right as a matter of course, but the government was ultimately successful in securing an order requiring the registrar to let us look. Accordingly, while my colleagues and I were determining how the Mississippi "understanding test" was working in Meridian, Bob Owen arranged for a similar inspection in Leake County. Instead of going home to Washington after ten days in Meridian, I was directed to drive to Carthage, the county seat of Leake County, to help Bob Owen to analyze the records and to interview the complaining Negroes.

Carthage is an hour or so from Meridian, and the drive through the woods and farmland of Neshoba and Leake Counties is typical of the rural character of most of the state. The route goes along Mississippi Highway 19 to Philadelphia (where three civil rights workers were to be murdered some eighteen months later) and Highway 16 from there to Carthage. While both of these state roads are paved, (or, in local parlance, blacktops), many if not most of the county routes which lead into them are reddish brown dirt roads. The wooded, sparsely populated terrain of Leake County does not project an image of affluence, let alone luxury, and it is therefore something of a surprise to notice that the little motel on the eastern side of Carthage is called, of all things, the "Riviera," but then it is perhaps equally incongruous that this dusty little farming town of 3,000 or so inhabitants is named

after a great ancient Mediterranean empire. In December 1962, however, Carthage's greatest pride was not its name or its motel, or even the great non-white general Hannibal who led the troops and elephants of ancient Carthage in war. Beaming down at the traveler from a gigantic billboard at Carthage's main crossroad was a kindly and folksy photograph of Leake County's most famous son, and portrait and billboard welcomed the motorist to Carthage, home of Governor Ross Barnett. In December 1962, two months after the confrontation at Oxford over the admission of James Meredith to the University of Mississippi, the battling governor from the community of Standing Pine was undoubtedly the hero not only of white Leake Countians**,** but of a substantial majority of the white citizens of the entire state.

The Leake County Courthouse is a large, old, and rather rickety looking building in the middle of Carthage's main and only square. It is indistinguishable from many other old rural courthouses all over the South, and, in 1962, racial signs designated its "white" and "colored" toilets and drinking fountains. On the wall of the courthouse corridor was a plaque commemorating the white Leake Countians who had given their lives in one of the world wars. Even in expressing gratitude to the fallen dead, Leake County carefully avoided mixing the races.

Bob Owen and the FBI were already at the Registrar's office when I arrived, and we quickly went to work. We had names of Negroes from Harmony who had complained to the FBI that they had been discriminatorily rejected – Hudsons, Dotsons, McDonalds and Makees. We soon found that, as in Lauderdale County, practically all of the rejected applicants were Negroes. Mr. Collier's practices in Carthage were not significantly different from those we had discovered in Meridian. All of the rejected Negroes were assigned Section 241 of the Constitution to interpret – a breeze of a provision that consisted of a mere 206 words which defined, in legal terms, the technical qualifications for voting in Mississippi. For almost all the whites, Mr. Collier (and his wife, who served as his only deputy) had found a section in the same part of the Constitution – Section 240 consisting of the following nine words, "All elections of the people shall be by ballot." The answers by the whites were as standardized as those we had found the previous week in Meridian – just about every white citizen of Leake County thought that a provision requiring ballots meant that elections ought to be secret, even though Section 240 does not say a word about secrecy. We also found that, while there were some 200 Negroes (of more than 5000 eligible) registered in Leake County, not one had been registered from 1955 through the end of 1961, when Registrar Collier was first advised of federal interest in his records. Finally, of the more than 200 Negroes on the registration books, only a couple of dozen

were listed as eligible voters on the poll books, and since it was the poll books that were sent to the respective precincts on Election Day, persons whose names did not appear on the poll books would not be allowed to vote. Few Negroes were registered, and most of those who were registered were disfranchised by the simple expedient of not placing their names on the appropriate books.

While we were inspecting the applications and registration and poll books, a man with a badge appeared and introduced himself as Deputy Sheriff Peter Crawford. Mr. Crawford walked over to Bob Owen and asked if we were the ones from Washington. When Bob told him that we were, the Deputy Sheriff expressed his philosophy to us, and it came through loud and clear. "You know," he remarked, "you can give a nigger a million dollars, you can put him through Harvard, but he's still nothin' more than a plain ole nigger." I have never known what to say in such situations, but my colleague's instant response was surely as apt as any. "You know," he replied without hesitation, " that's what makes this country so great. You are free to say what you like, and I am free to disagree with you." Mr. Crawford could not think of anything to say, so he said nothing, and departed. Local attorneys Smith and Davidson, who represented the registrar and had been present most of the day, listened to this exchange somewhat uncomfortably, and reassured us afterwards that we ought not to pay any attention to this "no account deputy." I wondered, however, if this advice could have been very reassuring to the Negro citizens whose rights were theoretically under Crawford's protection.

Since Leake is a far smaller county than Lauderdale, the records inspection took little more than a day. Even the cursory analysis of the applications which we were able to make on the spot made it apparent that the standards for whites and Negroes in Leake County were quite different, and that a court suit would be necessary unless the registrar was prepared to make major concessions, even drastic ones. We thought it important to move as fast as possible, and we needed to supplement the information gleaned from the records with interviews with Negro applicants and leaders, who would undoubtedly be able to expand considerably on what we had learned at the registrar's office. Bob Owen must have swallowed hard before letting a wide-eyed novice like me go out to "the rural" alone – negotiating muddy dirt roads had not been my major on Wall Street, I am not exactly mechanical, and I barely knew a tractor from a furrow – but he manfully concealed his nervousness and, after imploring me earnestly not to "screw up," he told me to go to Harmony and "see if we have a case." Bob left and I was on my own.

In the mild and pleasant December weather, I drove through the Leake County countryside towards Freetrade, Mississippi, the general area where I believed the complainants from Harmony community to live. Spying a small Negro woman in working clothes in the yard of a run-down little farmhouse just off the road, I pulled over and asked for directions. The woman was not very articulate, and she gave me instructions which confused rather than enlightened, and I realized I would have to ask someone else. Interested in a random sample of what rural Negroes think and do, I explained who I was – I don't think she understood – and I asked her whether she had ever tried to register to vote. The woman suddenly achieved a kind of eloquence which was quite out of keeping with her minimal Jim Crow education. Her response, in terrified spurts, went something like this:

> VOTE!!! We can't vote. You sure ain't been in Leake County long, have you? My bossman would EAT ME ALIVE if I tried to vote. OOH! (She actually shrieked.) Mah skin is black and I knows mah place. Over there yonder on Mr. _____'s place, the landlord hates colored people – he says he'll shoot them with a shotgun if they even come on his place. VOTE! Why he'd EAT ME ALIVE!

This interview took place on December 14, 1962. More than 70% of Leake County's adult Negroes are now eligible voters, and it is probably accurate to say that all are free to register. I have often wondered if this woman has ever registered. It was a pathetic, almost terrifying introduction to the "rural" of which I had heard so much. Fortunately, as the adventures of that day were to show, this lady's aroused insistence on her own inferiority, i.e., knowing her place, was not representative of the black citizens of Leake County.

In search of further, more concrete directions, I drove up another driveway and met my second random rural Negro, but an entirely different one. Mrs. Wilma McBeth, aged 32, was obviously very poor; the cabin in which she lived with her husband and seven children was primitive, and its facilities were negligible. Her husband worked some cotton land for a white man, and they shared the proceeds “by halves.” Mr. McBeth also occasionally did "public work", as common labor is called in Mississippi; he was paid, his wife said, $3 a day to work from "sun-up to sun-down" in the broiling Mississippi sun. From these earnings, the McBeths had to purchase everything except for their board, such as it was, and they always owed the landlord money.

Mrs. McBeth talked simply and directly. She had never tried to register or to vote because she was afraid and because the white people did not like it. People who owned their own farms, she said, were in a far better position to act independently than those, like herself, who were entirely at the landlord's mercy. The worst problem for most Negroes in Leake County, she said, was trying to make ends meet, and they had to endure much unkindness. Just a few weeks earlier she had been in Carthage and had seen a white man kick an elderly Negro lady down the street. She said that this sort of thing happened often and that Negroes just had to take it; they were not supposed to say anything about it. Some of the white people just don't like the colored, Mrs. McBeth advised, "and treat us bad on purpose." All, of this was related in a kind, matter of fact manner and without observable bitterness. I had no doubt from her demeanor that she was telling the truth; had I doubted it, the "white only" war memorial and the remarks of Deputy Sheriff Crawford would have made a believer out of me.

My next stop, S. O. Williams' store, is the social center of the Harmony Community, and it was a far cry from the woman whose skin was black and who knew her place. The inhabitants of Harmony are by no means wealthy, but they do not live on a white man's plantation. Many own their own homes, and their outlook is full of hope. There are usually a dozen or so people, young and old, sitting on the benches in the store, and whenever something interesting happens, such as the arrival of a Justice Department attorney to investigate complaints, the place fills up with eager and friendly faces as the folks come down to see what's going on. Leake County was segregated, and these people were not even allowed to vote, but they were at least to some degree in control of their own destinies, and it certainly made a difference with respect to their morale. They had tasted a piece of the pie – hardly their fair share, but a piece – and what they wanted was the rest of their share, now.

I explained why I was there, and the bustle became a hubbub as everyone wanted to tell his story at once. Not all of the complaints had to do with voting. Why wasn't daddy getting a social security check? What about the shootings into folks' homes – couldn't the federal government do something? What about the lady who was kicked down the street of Carthage, someone asked, and my belief in Mrs. McBeth's truthfulness was further reinforced. With only three Negroes engaged in the active practice of law in the entire state, and white attorneys reluctant to represent Negroes in any case which might put them at odds with the white establishment, the Harmony Negroes tended to treat anybody with authority to help them in any area as a kind of an ombudsman who was expected to advise them on everything. Our authority was, as a practical matter, restricted to voting

and aggravated police brutality, but even the simple act of giving someone the address of the Social Security Administration to write to evoked enthusiastic appreciation. In 1962, it was a rarity for the Harmony Negroes to meet a white man who called them Mr. or Mrs., and who shook hands with them without feeling self-conscious about it. As the first Justice Department attorney to visit the area, I was assured of a warm welcome, and the friendliness of these people was positively disarming.

I was not there as an ombudsman, however, but as Civil Rights Division attorney, and it was soon necessary to abandon the role of friendly white man and to focus instead on the immediate issue – alleged racial discrimination in the registration process. The folks at S. O. Williams' store directed me some fifty yards up the hill to Olon and Clara Dotson's house, where the members of three of the leading NAACP families were gathered – the Dotsons, the Hudsons, and the McDonalds. These people were the principal black leaders in Leake County and they included two thirds of the fifteen or so rejected Negro applicants whose forms we had seen in the registrar's office in Carthage. In order to reach these illustrious folks, however, I had to climb through a wire fence, and, as a result of some unpremeditated contact between my suit and the wire, my dignity was impaired as my acquaintance with the leadership of Harmony began. Fortunately, my hosts had a sense of humor.

After I had defined my mission as best I could, the citizens of Harmony related the history of Negro voting in Leake County, and it corroborated what the records in Mr. Collier's office had told us but translated it into personal, bold life terms. After World War II, there had been some limited Negro registration, undoubtedly sparked by returning Negro veterans, and most of the members of the group gathered at the Dotson house had voted for a few years in the late 40s and early 50s. No more than 5% of the Negroes in the county had ever been registered, at least since Reconstruction, for what was plausible for a Harmony farmer who owned his own land was not practicable for the impoverished tenant who was completely dependent on the plantation owner's largesse. After the Supreme Court's school desegregation decision in 1954, and the subsequent tightening of Mississippi's voter registration requirements, there had been a total re-registration in the county, but the names of most of the whites had, so these Negroes believed, been automatically transferred to the new books, so that this "re-registration" was in effect a purge of Negroes. In any event, for half a decade, the Negroes of Harmony were never able to establish if they were registered at all, and, if not, what they were supposed to do to become eligible voters once again.

Murrie McDonald, a captivating old farmer in his seventies, told a particularly frustrating story. A veteran of World War I, a community leader, and a long time official in the local NAACP, he had registered during the 1940s under a registrar called Jordan. In the early 1950s, he double-checked his registration with the new registrar, Mr. Horn, who confirmed that he was registered. When McDonald went to the precinct to try to vote, however, the polling official was unable to find his name on the poll book, and McDonald could not cast his ballot. He returned to the registrar's office on several more occasions, but Horn was now unable to find McDonald's name on the book, and the registrar had no suggestions as to how he could get it on. In 1960, Registrar Collier succeeded Horn, and McDonald tried again, twice. On the first occasion Mr. Collier told him that the Board of Supervisors had the books, and on the second occasion, the registrar just could not find the necessary documents. Finally, in August 1961, following the second incident under Collier, Mr. McDonald swore to an affidavit relating his experiences at the registrar's office. It was this affidavit, together with others made by several additional Leake County Negroes and sent to our Division by the late NAACP leader Medgar Evers, that led to the federal investigation which had brought me to Harmony. After all of his troubles, Mr. McDonald did not know on the day I met him - December 14, 1962 - whether or not he was registered. He died shortly after we met, but he lived long enough to become a qualified voter once again.

Under Mississippi law, a person who was registered prior to January 1, 1954 was not required to complete an application form or take the constitutional interpretation test in the event of a complete re-registration. During the summer of 1961, however, some of Mr. McDonald's colleagues, unable to get their names back on the poll books in any other way, decided to start all over again, to do more than the law required, and to fill out applications for registration. It was at this point that Collier assigned them Section 241 - all 206 words of it – and, in her blunt way, Mrs. Winson Hudson, a sturdy leader in the county NAACP, declined to write any interpretation other than "It says what it means and it means what it says." After she and the others had gone through this ordeal (in July 1961), Mr. Collier helpfully informed them that they would have to wait "until the Board met" in April 1962. All of the Negro forms were initially marked rejected; a few were later changed to accepted after Mr. Collier learned that the government wanted to see his records, but the Negroes so "registered" were never told and never voted. It was like Meridian all over again!

The Hudsons and the McDonalds and their friends are proud people. It must have been humiliating for them to have to apply repeatedly for their most

elementary rights to officials who obviously had no intention of giving them their due – to play the game, in other words, in the white man's ballpark. A newer and more strident style of leadership today heaps scorn on the black man who attempts to secure redress of his wrong by working within the legal framework rather than by overthrowing it. The complaint of the people of Harmony was not against the law, however, but against its non-enforcement, and the arrival of a Justice Department attorney appeared to represent, to them, the arrival of an era when the Fifteenth Amendment might be a reality rather than an obscure document in the National Archives. I thought myself fortunate indeed to have met these sturdy, self-reliant and generous people and to have the opportunity to help them to secure their rights. Suddenly, I was staying to dinner, and what a dinner it was! They had just slaughtered a hog, and I must have eaten most of it myself, including that remarkable southern country specialty, “chitlins” or “chitterlings”. If the wire fence had not ripped my suit, my waistline would surely have done so!

By the time I returned to Washington a few days later, Leake County was somehow in my blood – I was soon nicknamed the Leopard of Leake (and, for good measure, the Lion of Lauderdale). We analyzed the records on microfilm, and it appeared certain that we would have to bring a lawsuit against Registrar Collier. It was the Division's policy, however, not to sue until attempts to secure voluntary compliance had proved unsuccessful, and we contacted the registrar and his attorneys to determine what changes they would make in their practices to avoid a suit. We expected little; this was, after all, Governor Barnett's home county, and our position was that the standards required of Negroes in the future could not be higher than those actually applied to whites in the past – practically no standards at all. We were wrong.

The principal attorney for Mr. Collier, J. E. Smith, was a young, able and comparatively progressive man who had done his homework and knew what we could prove in court. He was no militant integrationist, but he was a reasonable man. He recognized that Collier could not continue as he had and that Negroes would have to be allowed to register and to vote sooner or later. Smith was a man with whom one could fruitfully negotiate, and we did. Suddenly, the registrar who had never been able to find the books when Negroes were in his office, and who assigned 9-word sections to whites but 206-word sections to Negroes, was prepared to give everyone simple sections and to grade all applications so leniently that, as a practical matter, everyone who could read and write would be accepted. Every applicant would be graded on the spot and allowed to register if he passed. The names of all eligible Negroes would be placed on the poll books at once; this instantly quadrupled the number of eligible Negro voters. Finally, and perhaps

most importantly, the registrar would furnish Negro leaders a list of registered Negro voters and would advise them with respect to the new relaxed standards that were now being put in effect. If the registrar kept his agreement, we could certainly achieve more by negotiation than by a slow-moving lawsuit which, if prior results were to count for anything, would have to go to the Court of Appeals before relief we thought effective would be granted, if, indeed, it would be granted then. We agreed to the settlement.

I visited Harmony and some other areas and told the folks. Someone murmured something about wondering if you could teach an old dog new tricks, but the people were willing to try; some thought that Mr. Collier with the federal government looking over his shoulder might be a different fellow from the registrar whom they had known before. I do not suppose Mr. Collier liked the whole thing very much, and my first visit to his office after the agreement was reached persuaded me that his implementation was initially a little on the tentative side. Nevertheless, 85% of the Negro applicants were now being registered, and additional negotiations brought the percentage near the 100% mark. Small but growing numbers of Negroes registered, and those who had been registered now voted. Among the first new registrants were Mr. and Mrs. Junior Smith of Ofohoma, whose son, Ferr, had written the letter to Attorney General Kennedy quoted earlier in this chapter. Moreover, the Negroes were now being treated courteously at the courthouse, and, as they told their friends, the numbers of applicants reached the hundreds. A modest beginning, perhaps, but a beginning nevertheless.

A few months after the settlement, I received the following letter in the bold clear handwriting of Mrs. Clara Dotson of the Harmony NAACP, at whose house I had first met the leadership:

> Dear Mr. Schwelb:
>
> Don't think you are forgotten around Harmony. We give you the praise for having as many as we have here voting.
> When a bunch came to me talking about going over in large groups to register, I say the way is already open for (us) and we need not go in crowds. Mr. Schwelb has smoothed the way and it is just in the individual now. They are still going. You don't know how much the people of Harmony think of you. We speaks of you quite often. Your kindness shall never be

obliterated. Thank you so very kindly. All join me in sending thanks with prayers.
Clara

CHAPTER 5

County by County - Negro by Negro

In 1963, civil rights issues reached and remained at center stage. It was a year in which hopes rose, only to be frustrated by tragedy. At the beginning of the year, Governor George Wallace of Alabama stirred listeners to his Inaugural Address with his defiant cry of "Segregation Today! Segregation Tomorrow! Segregation Forever!" and on June 11, he redeemed his pledge to "stand in the schoolhouse door" in a vain and quixotic attempt to exclude two young Negroes from the University of Alabama. On the same evening, America showed a different face as President John F. Kennedy, in a moving televised address to the Nation, told his fellow citizens of the plight of black Americans and of his own determination to right centuries of wrongs:

> We are confronted primarily with a moral issue. It is as old as the scriptures and as clear as the American Constitution.
> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated. If an American because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place. Who among us would then be content with the counsels of patience and delay?
>
> One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression, and this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.

A few hours after the President's speech, Medgar Evers, the courageous young Mississippi field secretary for the NAACP, was shot from behind and murdered by a sniper who lay in ambush under the cover of darkness.

The popular image of the supposedly shuffling, docile, acquiescent Negro was fading. In Birmingham, Alabama, the adults and children who faced Bull Connor's police dogs and fire hoses without violence but without fear in massive

demonstrations for equal rights, kindled the conscience of a nation. In August 1963, in what must have been the greatest single organized protest in American history, more than 200,000 black and white Americans, led by Dr. Martin Luther King, marched to the Lincoln Memorial for jobs and freedom. The President of the United States received their leaders warmly, as did the citizens of the nation's capital, and the event seemed to augur well for the redress of ancient wrongs. A few weeks later, however, four little Negro girls were killed and a fifth blinded when the church in Birmingham, Alabama, at which they were attending Sunday school was destroyed by dynamite; the persons responsible for this crime have never been identified or brought to justice. Finally, on November 22, 1963, the President whom Negroes throughout the country had come to revere more than any other man, black or white, was himself assassinated, with his civil rights proposals facing the certainty of a determined filibuster and, consequently still far from enactment.

While the newspapers headlined demonstrations, assassinations and the oratory of statesmen and politicians, the federal government was attempting on a less publicized front to enfranchise the Negroes of the deep South. The short-term results, in terms of Negroes actually registered, were negligible. The following table shows the approximate percentages of Negroes registered in Mississippi counties where suit was brought, first at the time of suit, then on December 1, 1963, and the rate of increase is hardly staggering.

County	Date of Suit	Percentage of Negroes Registered When Suit was Filed	Percentage of Negroes Registered on Dec. 1, 1963
Clarke	7/6/61	0	1.5
Forrest	7/6/61	0.2 of 1%	1.2
Jefferson Davis	8/3/61	2	3.6
Walthall	8/5/61	0	0.1204 of 1%
Panola	10/26/61	0.014 of 1%	0.36
George	4/13/62	1.2	2.0
Sunflower	1/26/63	0.84 of 1%	about same
Hinds	7/13/63	13	about same

The meagerness of the Civil Rights Division's short-term progress was out of all proportion to the effort required. The average workweek of our little cabal of lawyers assigned to Mississippi was at least 60-65 hours a week, and often reached 90 or more. We worked Saturdays and Sundays and holidays. The analysis of the registration records of even the smallest rural county invariably took several hundreds of hours, and dozens – often hundreds – of persons had to be interviewed before witnesses could be selected so that a case was ready for trial. There were often numerous pretrial hearings, motions, depositions and interrogatories, some the result of delaying tactics by the defendants which would bear little on the merits of the case but would involve hundreds of hours of additional labor for our lawyers and dozens of weeks of delay for the Negroes. There would ultimately follow a trial with a scenario that became familiar in county after county in Mississippi. The United States would introduce photocopies of thousands of registration records which would in turn show that virtually all of the whites, but only a negligible percentage of the Negroes, were registered to vote. Some forty or fifty witnesses would be called to the stand, about half of them Negro, the other half white. The Negroes, who generally included the most distinguished members

of the black community, would testify that they had tried to register on one or more occasions, that they had been assigned technical and difficult sections of the Constitution to interpret, that they had been given no assistance, and that their applications had been rejected; many had encountered numerous other obstacles as well, or had never been given the opportunity to complete a form at all. The whites, who included many persons unable even to write their names, had been registered without difficulty no matter how illiterate or unqualified they may have been. In many instances, the registrar or some vote-seeking local politician had completed a white applicant's application, or the applicant had not been required to fill out a form at all. Those white witnesses who did know how to read and write frequently testified that the registrar had given them a completed form to copy.

Judge Cox commented on a number of occasions that the government had certainly combed the woods for some ignorant folks, but neither he nor Judge Clayton, the other United States District Judge who presided over such trials in Mississippi during 1963, thought at that time that any drastic change was called for in the way things were done. In several of the cases, even where this kind of proof was offered, the court declined to make a finding that there had been any pattern or practice of discrimination at all, and, where the judge did find that discrimination had occurred, he would do very little about it. The relief in those cases in which the court determined that a court order was necessary would usually consist of a direction to the registrar not to discriminate, but this changed little, for the Civil Rights Act and, indeed, the Constitution, had already prohibited discrimination when the wrongs had been done. In a few cases, Judge Cox ordered a few illiterate whites stricken from the registration rolls, but more than 99% of the whites would remain registered no matter how they had got on the books, and the 99% or more of the members of the black community who remained unregistered would still have to pass the "constitutional interpretation" test, have their names published in the newspaper, and overcome all of the various obstacles to registration which the all-white Mississippi legislature had placed in their path. The trial judges steadfastly refused to award us the only kind of relief which could possibly be effective, which would have been to order the registration of Negroes if they possessed the qualifications which had actually been required of whites, rather than those theoretically required by Mississippi law. 1963 was at times a rather discouraging year. The tools which Congress had provided for enfranchising the Negro simply did not work.

The cases tried in 1963, however, were not a waste of time or effort. In addition to their value in educating the country, which was to produce impressive results later, they gave the black citizens of rural Mississippi counties the

opportunity to stand up for their rights in courts of law, supported by the might and majesty of the federal government. Thousands of Mississippi Negroes who had never dreamed that anybody in Washington knew or cared about them came into contact with enthusiastic young men – brief case totin' bureaucrats, Alabama Governor Wallace called them – who came from a Department called Justice, and it began to occur to black citizens that, perhaps, "we shall overcome." In the days of slavery, the Negroes had been schooled in Christianity so that they would accept suffering on earth in anticipation of later joy in Heaven. In 1963, more and more of them directed their attention to securing greater joy on earth and joined what has been called the revolution of rising expectations.

While the cases and trials had much in common, each had its own particular complement of personal drama. Human rights were on the firing line and at least to the participants, the contest was seldom dull. The anecdotes from the trials involving Walthall, George, Greene and Rankin Counties are illustrative of what trying to implement the Fifteenth Amendment was like in Mississippi during 1963 and early 1964.

Walthall County

Walthall County is a dusty little area in southwestern Mississippi; it has the reputation of a Klan stronghold, rural and tough. In 1961, John Hardy, a young Tennessee Negro associated with the Student Non-Violent Coordinating Committee (SNCC, known as SNICK), came to the sleepy little county seat of Tylertown to encourage local Negroes, not a single one of whom was registered, to assert their rights of citizenship and to participate in the political process. This was not something which the white citizens of Walthall County welcomed, and Judge Richard Rives of Alabama, speaking for the United States Court of Appeals for the Fifth Circuit, graphically related what happened next:

> On September 4, Mrs. Edith Simmons Peters, A Negro, Aged 63, owner of an 80 acre farm in Walthall County, having had an eighth-grade education, attended her first registration class. On about the same day, Lucius Wilson, a Negro, Aged 62, owner of a 70 acre farm in Walthall County, also started attendance. By September 6, they thought they were ready to apply and agreed to accompany Hardy to the Registrar's office the next morning. They arrived in Tylertown in Mrs. Peters' pickup truck at about 9:30 on the morning of September 7 and went to the Registrar. John Q. Wood, the defendant, was in an inner office; Mrs. Peters and Wilson went in and Hardy remained just outside the door. When Registrar Wood looked

up, Mrs. Peters told him that they desired to register. Wood then replied that, "I am not registering anyone now. You all have got me in court and I refuse to register anyone else until this court is cleared up." John Hardy heard this from his position outside the door of the office some 5 or 6 feet away and came in. According to the affidavits of the government witnesses, Hardy had given Wood only his name when Wood got up and said, "I want to see you John." He then brushed past Hardy into the main room and from the drawer of a desk took out a revolver. Holding the gun down by his right side he pointed to the door going outside and said, "Do you see that door, John?" Hardy replied, "Yes". Wood told him, "You get out of it." Hardy said OK, and turned to go. Wood followed him, and just as Hardy got to the door, Wood struck him on the back of the head, saying, "Get out of here you damn son-of-a-bitch and don't come back in here."

Mrs. Peters and Wilson rushed on out, held Hardy up, and helped him out of the building. Hardy went first to the newspaper office, where he told the editor what had happened. The editor instructed him to get medical attention.

Meanwhile, Wilson went to get the pickup truck, and Mrs. Peters helped Hardy eventually to a little cafe. Wilson returned and they headed out to the street. When asked what he was going to do, Hardy then told several people that he had better find the sheriff. Going up the street, they met the sheriff and according to the affidavit of Mrs. Peters,

> They met right where I was standing and the sheriff asked, "What happened to you, boy," John told the sheriff what had happened. The sheriff told him he didn't have no business in that courthouse. Wilson walked up at this time. The sheriff then said to John, "If that boy (pointing to Wilson) wants to register he know (sic) how to go down to that courthouse and he don't need you to escort him. You didn't have a bit of business in the world down there. You is from Tennessee, you was in Tennessee and you ought to have stayed there." The sheriff told him to "Come on." John asked "On what charges?" and the sheriff said for disturbing the peace and bringing an uprising among the people." John said, "Will you allow me to tell my side of the story?" The sheriff said, "Don't give me none of your head boy, or I will beat you within an inch of your life." After the sheriff took John, I went home.

The United States brought two suits to enforce the Fifteenth Amendment in Walthall County. The first, which sought an end to intimidation and a prohibition against the prosecution of John Hardy, was dismissed by Judge Cox, but the Court of Appeals promptly reversed that decision, and the prosecution of Hardy was dropped. The other suit, which had been brought a few days before the Hardy incident, sought an injunction against Registrar Wood and the State of Mississippi to restrain them from denying Walthall County Negroes the right to vote on account of race.

The investigation which we made in preparation for the trial of this case disclosed a remarkable state of affairs. At the time suit was started, no Negroes were registered and, as a practical matter, no whites were unregistered; the number of names on the registration rolls exceeded the white adult population. We were able to discover twenty-nine separate attempts by Negroes to register in the previous few years, all of them unsuccessful. There were some 1,100 white applications on file since 1955, and all of the white applicants had been registered. A white person could sign up any time, but for Negroes it was difficult. Three elderly Negroes had gone to the registrar's office in September 1960, but a deputy registrar told them that it was too soon before the Presidential election. They returned in January; this time they were advised that it was no use registering because there was no election coming up.

When this case came to trial in the spring of 1963, we called as witnesses more than a dozen completely illiterate whites, all of whom had been registered by Registrar Wood and his predecessor during a period when applicants were supposed to be able to interpret the Mississippi Constitution. The rejected Negroes, by contrast, included individuals of considerable distinction. Ruby Magee, an unusually intelligent young woman, had been an excellent scholar at the University of Texas and was taking further courses at Radcliffe College in Cambridge, Massachusetts; she was rejected for registration although she wrote what appears to be a letter-perfect interpretation of Section 165 of the Mississippi Constitution, which deals with disqualification of judges by reason of relationship to lawyers by consanguinity or affinity. Mrs. Melverson Dunham, a professor at all-Negro Alcorn A&M College in Lorman, Mississippi, was assigned a section about the exercise of the right of eminent domain and interpreted it imaginatively, if hardly correctly; she was then given an additional examination on a separate sheet of paper which the registrar carefully preserved. The questions on the extra sheet, which might recall a college political science examination, read as follows:

1. What are "Ex Post Facto" Laws and when can one be passed in Mississippi?

2. Define impeachment and who has the sole power in this State.

Mrs. Dunham could not answer these questions to the registrar's satisfaction and remained unregistered, with the ironic but not uncommon result that people who were regarded as competent to teach at separate but supposedly equal educational institutions, including universities, were regarded as insufficiently intelligent to vote for their local sheriff.

Reproduced in the pages that follow this chapter are the rejected applications of Miss Magee and Mrs. Dunham. The third form, that of Alton Ard, a white man who successfully registered, reflects the contrasting treatment accorded whites. Ard, who testified that he was unable to read, made two gallant efforts to copy Section 30 - the shortest and easiest section of the Mississippi Constitution. In each case, he printed some letters correctly and others incorrectly; the B's and S's march backwards. His second such attempt to copy the section was his "interpretation." For his statement of the duties and obligations of citizenship under a constitutional form of government, Mr. Ard printed what appears to be the word:

L o w a d i n g.

He was registered without further fanfare.

The trial of this case was an education to many who witnessed it. Mrs. Dunham literally gasped with disbelief at our parade of illiterate white witnesses, and some of the white Mississippians were taken aback by the existence of an intelligent and articulate Negro like Ruby Magee. Others had never seen a white man say "Mr." to a Negro, as we did as a matter of course; I, for my part, was saddened by the way in which the defense lawyers addressed our Negro witnesses by their first names, even though they did not know them personally, and even though such witnesses as the erect and white-haired Robert Bryant, a retired schoolteacher then well into his eighties, exuded the kind of dignity which ought to have commanded respect from anybody. Fortunately, a Supreme Court decision upsetting the contempt of court conviction of a Negro woman who had refused to answer questions put by an Alabama prosecutor when he called her by her first name subsequently gave us the opportunity to protest such discourtesies to our witnesses in later cases; but in the Walthall County case, we could do little but

squirm internally and keep our attention – and, we hoped, that of Judge Cox – focused on the issue of discrimination.

Judge Cox did react to the case, but not as we had proposed. We had called the illiterate whites as witnesses to show what standards were required of whites; we argued that black witnesses who were as qualified as these witnesses should have been registered too. Judge Cox, however, simply held that the illiterate white applicants who had testified were illegally registered and should be stricken from the rolls; otherwise, the registrar was to continue to give the constitutional interpretation test to everyone. Except for the handful of whites stricken and two Negroes who had registered after suit was brought, all of the whites who had been registered remained on the rolls, and all the Negroes remained disfranchised.

Even so temperate an Order, however, was more than Registrar Wood was able to stomach; he just could not believe that times might be changing. After Judge Cox had ordered him to do so, Wood struck thirteen of the illiterate white witnesses from the registration rolls. One of them, Bud Hightower, promptly reapplied for registration. Mr. Wood registered him again, and Mr. Hightower voted in the August 1963 primary election.

The re-registration did not go unnoticed, however. One of our attorneys, Gerald Stern, went to Tylertown to inspect the records, and spotted Hightower's name on the registration book. Mr. Wood immediately responded by filing an affidavit with the Court denying that he had registered Hightower again. Wood's affidavit suggested, in not too veiled terms, that Stern was a liar. We arranged for the FBI to photograph the page in question, and, as Judge Cox found and the Court of Appeals later concluded, the photo showed that Mr. Wood had tried to conceal what he had done by deleting the line on which Hightower had been registered through the use, as Judge Cox put it, of "some substance like ink eradicator which left its stain" on line 45 of the Registration Book of Darbun Election Precinct. The pertinent page of the Registration Book, including the telltale erasure, is reproduced at the end of this chapter.

Judge Cox was obviously irritated with the Registrar for what bordered on open defiance of his rather lenient order, and he severely reprimanded Wood in his opinion and ordered him to pay the court costs of the action. He also ordered Wood to register one Negro applicant who had been discriminatorily rejected between the time of the trial and of Judge Cox's opinion, but this lady, harassed by threatening telephone calls and afraid for her safety, did not dare to go to the registration office to avail herself of her court decreed right to register. For some

time, conditions changed not at all. Crossed were burned, few Negro applicants braved the adverse reactions of the whites, and a year after the trial there were fewer than ten Negroes registered in the county.

In late 1964, the Court of Appeals reversed Judge Cox's decision and ordered the new Registrar, Stinson – for Wood died while the appeal was pending – to adopt more lenient standards and register all literate Negroes. A hundred or so registered, but there was still no real breakthrough until the Voting Rights Act of 1965 was passed and federal examiners were assigned to Walthall County. Then the doors opened wide. The great majority of Walthall's Negroes are now registered, and they vote freely. In nearby Jefferson County, which was previously at least as "tough" as Walthall, Charles Evers, Negro NAACP leader, is now Mayor of Fayette, the previously unknown little county seat.

George County

George County is a small rural county in the southeastern part of Mississippi; it adjoins Mobile County, Alabama, and many of George County's citizens work in the burgeoning industrial City of Mobile on the Gulf Coast. Of George County's 6,000 or so adult citizens, about 90% are white. Ordinarily, opposition to Negro aspirations tends to be directly proportional to the percentage of Negroes in the population, and one might have expected the climate for Negro voting on George County to be milder than in the black belt counties to the North. Nevertheless, when our voting discrimination suit against Registrar Eldred Green was brought in April, 1962, only one Negro – an employee of a former registrar – had been registered since 1947, and of fifteen Negroes whose names appeared on the registration rolls, only five were still alive.

Charles Grant and his wife, Maybird, both black schoolteachers and college graduates, had been trying to register every year since the early 1950s. Until 1962, they were never even allowed to fill out a form. They were usually told that "arrangements for colored registration" had not yet been made or that the "committee", not otherwise identified, would contact them, or that the books were closed. In January 1962, Registrar Green let them complete application forms, which they did without difficulty. Mr. Green then asked Mr. Grant, as an additional examination, to name all of the county officers of George County, which, remarkably enough, Grant was able to do. Green then required Mr. Grant to name all of the members of the County Democratic Executive Committee, which Mr. Grant acknowledged he did not know. Green told him he could not pass, but that he should go study, and that it was for his own good; whatever he

may privately have thought, Grant expressed his appreciation. A few weeks later the Grants returned, having memorized the names. They were required to fill out new applications, and were then tested on the identities of the Democratic Committee members. After this hurdle was passed, Mr. Green told the Grants that their qualifications would now have to be passed on by the Election Commissioners, but gave no indication of how soon that might be. When he had heard nothing for several weeks, the dogged Mr. Grant appeared on his own initiative at the next meeting of the Election Commissioners. He was now told that he would have to file a statement certifying his desire to register. When he inquired where he could secure such a statement, one of the Commissioners told him to check with an attorney.

Indefatigably, Mr. Grant persevered. Ignoring the Commission's instruction about an attorney, he typed up statements for himself and his wife which certified their quite evident desire to register and brought them to the registrar. Green accepted the statements, but told Grant that the Commission would have to pass on these statements, and that the next meeting would be in October. In order to vote in November 1962, however, the Grants would have to be registered in July, and it was apparent that the prospects for prompt action by George County authorities were less than rosy.

The Grants and several other schoolteachers who had received similar treatment brought the situation to the attention of the Department of Justice, and the United States quickly brought suit. The teachers furnished affidavits, and, upon application by our attorneys, Judge Cox immediately entered a restraining order, in advance of a full hearing on the merits, forbidding Green from asking applicants questions about county officers or members of any committees. Several of the teachers then reapplied and were successfully registered. We also secured access to the George County registration records, and we were able, in advance of the trial on the merits, to compare the experiences of the Negro college graduates who had given us affidavits with what was required of white applicants.

There was indeed a difference. The nonexistence of any requirements for white registration was illustrated as strikingly in George County as anywhere. The most unusual example was the application form of accepted white applicant John C. McMillan, which is reproduced in the pages which follow this chapter, and which Attorney General Robert F. Kennedy used before Congress as an argument for further voting rights legislation. Assigned to interpret "There shall be no imprisonment for debt," Mr. McMillan wrote:

> I think that a Neorger should have 2 years in college be fore voting because he don't understand.

Addressing himself to his understanding of the duties and obligations of citizenship under a constitutional form of government, Mr. McMillan volunteered as follows:

> Under Standing of pepper of Govent ship bessing.

As in other counties, no white person had been rejected prior to federal intervention in the case, and there were dozens of white illiterates on the registration rolls. Many other white persons who could read needed substantial assistance in completing their forms. At the trial, we alternated our Negro witnesses – not all were schoolteachers, but each was more literate than many registered whites and subjected to a much harder test – with more than a dozen white illiterates and another dozen or so whites who received substantial assistance from the registrar in completing their applications. In relation to white standards, the cross-examination at the trial by Mr. Rogers, counsel for the registrar, of one of our white witnesses speaks for itself:

CROSS EXAMINATION

BY MR. ROGERS:

Q. Mr. Dickerson, can you read and write?

A. A little bit.

Q. Can you write your name?

A. Yes sir.

Q. I see here that you were given Section 30 of the Mississippi Constitution to copy and this is where you said your father wrote, is that correct?

A. Yes sir, that he wrote.

Q. All right. One moment please. Mr. Dickerson, I have a Mississippi Code here and section of the code dealing with the Constitution and you were given Section 30 to copy and this is where you said your father actually did that for you. Is that correct?

A. Yes.

Q. And that section is there shall be no imprisonment for debt that's the Section 30 of the Constitution. I will ask you, Mr. Dickerson, if you know what that means, if someone told you that there can be no imprisonment for debt in other words that you cannot be put in jail for prison for debt, you know what that means?

A. No sir.

Q. You know what a debt means?

A. Yes sir.

Q. Now what is a debt?

A. Owing somebody something.

Q. Owing somebody. All right you know what a jail is don't you?

A. Yes sir.

Q. You know what a prison is?

A. Yes sir.

Q. Well, don't what I am asking you the section says that you can't be put in jail for owing anybody?

BY MR. SCHWELB:

Your Honor, is that a question? I object to that.

BY THE COURT:

Let him answer.

BY MR. ROGERS:

Q. Do you understand what I am saying?

A. I don't believe I do.

Q. That you can't be put in jail for owing anybody?

A. I understand that, yes sir.

BY THE COURT:

Ask him what the section means.

BY MR. ROGERS:

Q. What does the section mean to you, Mr. Dickerson, if I read to you there shall be no imprisonment for debt do you know what that means?

A. Yes sir.

Q. All right what does it mean?

A. Oh no sir, no sir.

Q. You do not know?

A. No sir.

BY MR. ROGERS:

That's all if the court please.

(Witness excused.)

At the conclusion of the trial, we asked the court to enter an order requiring the registrar to apply past white standards to Negroes, at least to the extent of allowing all reasonably literate Negroes to register. Judge Cox, however, stated from the bench that he would never order such relief, and, a few weeks after the trial, he entered an order, similar to that in the Walthall County case, which simply required the registrar to strike a few white illiterates from the rolls and apply Mississippi law – constitutional interpretation test and all – impartially in the future. The order had little effect, and, while the Court of Appeals for the Fifth Circuit eventually reversed Judge Cox's decision and sustained our position in all respects, it was not until several years after we had brought our case that the right to vote came to George County's blacks.

Moreover, the intransigence of the registrar was not the only difficulty which George County Negroes had to face when they tried to register to vote. Their jobs were at stake, and in this regard the scenario shifted to neighboring Greene County.

Greene County

One of the Negro schoolteachers from George County who joined Charles Grant in giving affidavits to the Justice Department about Registrar Eldred Green's practices was Mrs. Ernestine Talbert. A tall, and personable young woman whose husband was a prominent Negro community leader in George County, Mrs. Talbert

was a teacher and librarian in the schools of Greene County, immediately to the North of George. She later told me that she knew when she gave us her affidavit what would happen next, and I am sure she did.

Mrs. Talbert furnished her affidavit on April 7, 1962. The government's lawsuit against Mr. Green was instituted six days later. The case was reported in the newspaper, and a white bookkeeper in the office of the Greene County Superintendent of Schools saw Mrs. Talbert's name as being associated with the case. She called Mack Arthur Hayes, the principal of the all-Negro school at which Mrs. Talbert had taught, to inquire if the woman named in the newspaper was the same one who taught at the school. When Hayes told her that Mrs. Talbert was the same person, the bookkeeper brought the matter to the attention of the Superintendent of Education, Evans F. Martin.

On March 21, 1962, Mr. Hayes, who, like most Negro principals in Mississippi, was not a registered voter, had recommended to Superintendent Martin that Mrs. Talbert's teaching contract be routinely renewed, along with those of virtually all of the other current teachers. On April 25, 1962, however, Hayes notified Mrs. Talbert that her contract would not be renewed. He advised her that Mr. Martin told him that non-renewal was "in the best interests of the school." He further acknowledged that he "couldn't swear" that registration activity was why she was fired, but he did not know of other reasons: "I've never gave (sic) any complaints to the superintendent about you – everything that I have given to them was complimentary." Mr. Hayes told Mrs. Talbert that, while her contract would not be renewed, he would recommend her for a position anywhere else.

According to Superintendent Martin, Mrs. Talbert was the only teacher whom he did not recommend for reemployment in 1962-63. He stated that he declined to recommend her for "lack of cooperation" and because "she was involved in litigation which was not conducive to good work from her nor for getting the best from the school nor good for the relations among the teachers. It was a controversial matter." He hired Cleopal Turner, another Negro, to replace Mrs. Talbert; Mrs. Turner was not registered to vote.

The United States brought suit against the Greene County Board of Education on June 16,1962. The complaint alleged in effect that the refusal to renew Mrs. Talbert's contract was an attempt to threaten and coerce Mrs. Talbert and other Negroes for the purpose of interfering with their right to register, in violation of a section of the Civil Rights Act of 1957. John Doar personally tried the case for the government, and substantial resources were committed to its

preparation and presentation. In spite of the chronology described above, Judge Cox found that the government had not proved its case. In findings that appeared to recall the "eerie atmosphere of never-never land," in which another judge had concluded only a short time earlier that James Meredith's race had nothing to do with his exclusion from Ole Miss, Judge Cox found that the prior political activities of "Teacher Talbert" were regarded and treated by "everyone" as a George County matter and of no concern to Greene County. He noted that the Superintendent had testified that "it was not in the best interests of the school" that "Teacher Talbert" be reemployed, and that the government had not shown the contrary. Moreover, the judge concluded, it is a universal rule that it is not within the province of any court to make a contract and then enforce it. Accordingly, the Board could not be required to rehire Mrs. Talbert.

The United States appealed. It is the rule in federal appeals, however, that the findings of fact of the trial judge, who had the opportunity to observe the demeanor of the witnesses, will be sustained unless the appellate court finds them to be "clearly erroneous." This means, in substance, that the burden on the appealing party to set factual findings aside is a very heavy one indeed, and appellate courts will overrule *factual* findings, a distinguished from legal conclusions, only in extreme cases. Our attorneys argued as forcefully as possible that this was such an extreme case. Perhaps some, if not all, of the appellate judges would have ruled in favor of the government and Mrs. Talbert had they been presiding at the trial rather than evaluating an appeal. Be that as it may, the Court of Appeals held that Judge Cox's decision was not "clearly erroneous" and affirmed the District Court's Order. After considerable discussion, it was decided that an attempt to secure review in the Supreme Court would stand little chance of success, and the adverse decision remains in effect today.

The situation reflected by the Talbert case, and the government's apparent impotence in dealing with it, explained why voting by Negro teachers in rural counties was a rarity. It was also something of a tragedy for the Talbert family personally. Mrs. Talbert tried to find a job in other districts within reach of her home, and any fair-minded person who met her would regard her as an asset to any school system. She could not find a job in any of the neighboring counties. She ultimately secured employment with the Mississippi Teachers' Association in Jackson, which helps to run the Negro schools, and she moved there with her son. Except for occasional weekends, Mr. Talbert was separated from his family.

The events relating to Greene County happened in 1962, and I did not meet Mrs. Talbert until late 1963, as I was preparing the George County case for trial.

In spite of her experiences, she responded enthusiastically to the new invitation to testify. She also encouraged a more reluctant teacher – an M. A. from Michigan State who had also been rejected for registration and dismissed from her job, and who had then secured a new position in Meridian, nearly 100 miles away – to testify too. The other lady did not answer her subpoena, but Mrs. Talbert testified, and well.

I have spoken with Mrs. Talbert dozens of times since. I have never heard her say one word that would compromise her dignity or that of her race. I have likewise, incredibly, never seen her show any trace of bitterness against white people, or anything but appreciation to the federal government which had been unable to help her enjoy even the most basic of all rights – the right to vote – without ruinous reprisal. Some people say that Negroes in the South just tell white folks what they want to hear, but I do not think that this is the explanation for Mrs. Talbert 's serenity. This remarkable woman simply does not choose to hate.

Rankin County

Like many other Negroes engaged in registration to vote or related activities, Ms. Talbert suffered economic reprisal for the exercise of her rights. This was perhaps the most common consequence of civil rights involvement, but sometimes the interference was more physical and direct. John Hardy's tribulations in Walthall County are one example; another striking instance occurred in Rankin County, near Jackson. Three young Negroes went to the courthouse in Brandon, Rankin's county seat, on January 31, 1963 to try to register to vote. A fourth, Mitchell Grim, who was already registered, stood near the door of the registrar's office and awaited them. Suddenly, they reported, they were set upon by a man with a badge who appeared to be the sheriff, and by several deputies, the sheriff using a blackjack. Grim was beaten quite badly; the others were run out but not seriously hurt. They did not complete their registration.

When the matter was reported to the Justice Department, the FBI instituted an investigation to determine if the prohibition in the Civil Rights Act against intimidation of persons in the exercise of their right to vote had been violated. The local county newspaper reported that the sheriff's office knew nothing of the charges, and attributed the entire situation to federal harassment; publicly the sheriff, one Jonathan Edwards, said nothing.

We instituted a suit against the sheriff and his agents, to restrain them from further intimidation of persons seeking to register. We also subpoenaed all of

Edwards' deputies to the trial. As they arrived, we asked the four young Negroes to view them and to point out any participants in the incident. All of the Negroes readily recognized Deputy Sheriff J. B. Collum as Edwards' principal confederate in the assault.

At the trial, the three victims and several other Negro witnesses who were present testified to the assault and to the participation of Sheriff Edwards and Deputy Collum. Several white witnesses who had been at the courthouse to pay poll tax denied seeing the incident, but they did place Edwards and Collum at the scene at the pertinent time. There was high drama in the courtroom as one big elderly Negro farmer, describing from the witness chair what he had seen and heard, suddenly clapped his huge hands to imitate the sound of the blackjack landing on the person of the unfortunate Grim. Asked what he did next, the witness told it like it was when he related that he "tiptoed on out." The government's case seemed a strong one, for there was no apparent justification for the officers' conduct at all, and the sheriff and his deputies knew nothing of the Negroes except that they were trying to register to vote. We had no idea, however, what the defendants' version would be or how they would defend. Since the case was heard on an expedited basis, there was no pretrial examination of potential witnesses, as there usually is in such cases, and we were unable to determine in advance whether the beating would be denied altogether or admitted but justified in some way. As it happened, both possibilities were realized to some extent.

Deputy Collum blandly denied having been at the scene at all. At the time of the assault, he said, he was in Jackson escorting a prisoner. Sheriff Edwards, however, while denying assaulting the three applicants, who, he agreed, were behaving in an orderly manner, readily admitted beating Grim. The reason, he said, was that Grim was deliberately blocking the door while the room was crowded. On direct examination, Edwards said Grim made a threatening gesture. On cross-examination, the sheriff asserted that Grim had "swung at me." Grim is a small, light fellow and Sheriff Edwards a big strapping man who was, as Judge Cox found, armed with a blackjack. Consequently, the sheriff's rather casual claim of self-defense is belied by his own description of his conduct:

> I struck (Grim) just as many times and fast as I could.
>
> * * * *
>
> When I slapped him down the first time, the next time I hit him I knocked him down and he fell here and I got in on him, and I don't know how many times I hit him, just as many as I could in the short interval of time I had.
>
> * * * *
>
> I hit him and kept on hitting him . . . and if he hadn't run I would have kept on hitting him.

While Edwards was at least partially candid, his deputy was not. Judge Cox, after making some independent inquiries, found that Collum's supposed alibi was a complete fabrication. "It is perfectly apparent to the court," the judge found," that this deputy falsified such statement without any excuse or justification therefor." Since it was undisputed that neither Edwards nor Collum had ever set eyes on the Negroes before and that all of the victims except Grim were trying to register, and since neither Collum nor Edwards could come up with any alternative reason for assaulting at least Grim's three companions, we contended that the purpose of the assault must have been to deter registration, which was what we had to prove in order to prevail. Collum, especially, knew nothing of the victims except that they were Negroes and that they were attempting to register to vote. Judge Cox, however, held otherwise. He found that Collum, whose testimony he rejected as completely incredible, had been "obviously vexed at the crowded condition of the Registrar's Office and officiously entered the office without justification and vented his feelings on these two Negroes who just happened to be registering at the time." He also found partial justification for Edwards' conduct in Grim's alleged behavior in standing in the way. As in the Talbert case, the judge found that the government had failed in its proof of purpose; moreover, since this was a "single" incident, we had failed to show the probability of recurrence, which is usually required in order to secure a preventive injunction.

Once again, we appealed to the Court of Appeals, and once again that Court, this time by a vote of 2:1, declined to find the trial court's findings "clearly erroneous" and affirmed the dismissal of the Complaint. Interestingly, the deciding vote was cast by visiting Circuit Judge Moore from the Court of Appeals for the Second Circuit in New York, while Judge John R. Brown of Texas wrote a dissenting opinion in which he said that the undisputed facts disclosed "a shocking case of Mississippi officials without legal justification engaging in brutal violence against Negroes." In a passage in which he did not conceal his indignation, Judge Brown went on to say:

> This is no case of isolated momentary violence. The violence arose because of and was directed against Negroes seeking to become voters in a county where the bare statistics reveal the bare discrimination. When the Sheriff and his Deputy in the house of the law -- the Courthouse -- whip Negroes in the exercise of these fundamental rights, the effect is not hard to imagine. Nothing could be more discouraging than the fear that what happened to Grim, Davis and Carr was the fate for others seeking this precious right.

In spite of Judge Brown's forceful dissent, the "single incident" aspect of the case made review by the Supreme Court so improbable that we took the case no further. Once again, expenditure of much of our severely limited manpower and effort earned us, in practical terms, no more than a headline in the Jackson Clarion Ledger announcing that the Sheriff had been "cleared," a conclusion which both Judge Cox and the appellate court majority carefully avoided. Such dubious comfort as we could take from the case was the assurance from the improbably named Jefferson Davis, the father of one of the beaten Negro applicants, that the case had brought the Negro community "more together." I hope he was right.

Sheriffs in Mississippi are not permitted to succeed themselves, but, in 1967, after returning to private life for four years, Jonathan Edwards was once again elected Sheriff of Rankin County, and is serving in that capacity today. Negro voting, however, is now unrestricted.

RUBY MAGEE
REJECTED BLACK APPLICANT
WALTHALL COUNTY

ES 440-14f—Ketchings, Natchez

No. 1

SWORN WRITTEN APPLICATION FOR REGISTRATION

(By reason of the provisions of Section 244 of the Constitution of Mississippi and House Bill No. 95, approved March 24, 1955, the applicant for registration, if not physically disabled, is required to fill in this form in his own handwriting in the presence of the registrar and without assistance or suggestion of any other person or memorandum)

1. Write the date of this application: August 30, 1961
2. What is your full name? Ruby Lee Magee
3. State your age and date of birth: 21 years old. Aug. 13 1940
4. What is your occupation? Student
5. Where is your business carried on? Jackson State college
6. By whom are you employed?
7. Are you a citizen of the United States and an inhabitant of Mississippi? yes
8. For how long have you resided in Mississippi? 21 years
9. Where is your place of residence in the district? Rt. 1, Box 135, Tylertown, Miss.
10. Specify the date when such residence began: Aug. 13 1940
11. State your prior place of residence, if any:
12. Check which oath you desire to take: (1) General ✓ (2) Minister's _____ (3) Minister's Wife _____
    (4) If under 21 years at present, but 21 years by date of general election _____
13. If there is more than one person of your same name in the precinct, by what name do you wish to be called?
14. Have you ever been convicted of any of the following crimes: bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy? NO
15. If your answer to Question 14 is "Yes", name the crime or crimes of which you have been convicted, and the date and place of such conviction or convictions:
16. Are you a minister of the gospel in charge of an organized church, or the wife of such a minister? NO
17. If your answer to Question 16 is "Yes", state the length of your residence in the election district
18. Write and copy in the space below, Section 165 of the Constitution of Mississippi.

(Instruction to Registrar: You will designate the section of the Constitution and point out same to applicant)

No judge of any court shall preside on the trial of any cause, wherein the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties, whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of said respective districts to hold such term or during such disability or disqualification in the place of the judge or judges

19. Write in the space below a reasonable interpretation (the meaning) of the section of the Constitution of Mississippi which you have just copied:

No judge can preside over a trial where any of his relatives (Natural or in-law) are on trial or at any trial wherein he has personal interest except by consent of the judge or parties in trial. Whenever a supreme court judge or any judge of this state is disqualified as for some other reason is unable to conduct a trial and the attorney cannot agree upon another member of the bar to take this place then the governor of the state can appoint someone else to preside but this person must have a knowledge of the laws. They will preside until the regular judge can resume his position.

20. Write in the space below a statement setting forth your understanding of the duties and obligations of citizenship under a constitutional form of government.

Under a constitutional government all citizens have duties and obligations. All citizens must obey the laws, pay taxes including property, sale and poll taxes. All citizens should take an active interest in the activities of the government. They should all take an active part in governmental affairs by voting. Every citizen must be willing and ready to serve his country in time of war and render any other services that are deemed necessary for the proper functioning of the government.

21. Sign and attach hereto the oath of affirmation named in Question 12.

AFFIDAVIT

I do solemnly swear (or affirm) that I am twenty-one years old (or I will be before the next election in this County), and that I will have resided in this State two years, and the 4th Election District of this County one year next preceding the ensuing election, (or I am a Minister of the Gospel in charge of an organized church, (or such minister's wife) and aver two years residence in the State and six months in said Election District) and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the Constitution of this State as a disqualification to be an elector; that I have truly answered all questions propounded to me, so far as they relate to my right to vote and also to my residence before my citizenship in this District; that I will faithfully support the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same. So Help Me God.

Ruby Lee Magee
The applicant will sign his name here.

STATE OF MISSISSIPPI,
COUNTY OF Washington

Sworn to and subscribed before me by the within named Ruby Lee Magee
on this the 30 day of August 1964.

John L. Ford
County Registrar.

165

SWORN WRITTEN APPLICATION FOR REGISTRATION

(By reason of the provisions of Section 244 of the Constitution of Mississippi and House Bill No. 95, approved March 24, 1955, the applicant for registration, if not physically disabled, is required to fill in this form in his own handwriting in the presence of the registrar and without assistance or suggestion of any other person or memorandum)

1. Write the date of this application: January 28th 1956
2. What is your full name? Mrs. Melvin Lucy Wyndham
3. State your age and date of birth: May 6, 1904 age 51
4. What is your occupation? Housewife
5. Where is your business carried on?
6. By whom are you employed?
7. Are you a citizen of the United States and an inhabitant of Mississippi? I am
8. For how long have you resided in Mississippi? all of my ✓
9. Where is your place of residence in the district? West Tyletown
10. Specify the date when such residence began: Aug 15 1955
11. State your prior place of residence, if any: ✓
12. Check which oath you desire to take: (1) General ✓ (2) Minister's ____ (3) Minister's Wife ____
    (4) If under 21 years at present, but 21 years by date of general election ____
13. If there is more than one person of your same name in the precinct, by what name do you wish to be called? ✓
14. Have you every been convicted of any of the following crimes: bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy? I have not
15. If your answer to Question 14 is "Yes", name the crime or crimes of which you have been convicted, and the date and place of such conviction or convictions:
16. Are you a minister of the gospel in charge of an organized church, or the wife of such a minister? I am not
17. If your answer to Question 16 is "Yes", state the length of your residence in the election district
18. Write and copy in the space below, Section 190 of the Constitution of Mississippi.

(Instruction to Registrar: You will designate the section of the Constitution and point out same to applicant)

The eserial of the right of eminent domain shall never be Abridged, or so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use; and the exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or general well-being of the state.

19. Write in the space below a reasonable interpretation (the meaning) of the section of the Constitution of Mississippi which you have just copied:

That the state of mississippi is privileged to use property of the | individual | of the state for as a eminent Domain)

relates to Corporation only

20. Write in the space below a statement setting forth your understanding of the duties and obligations of citizenship under a constitutional form of government.

It is my understanding that a Citizen of of a Constitutional government should (accept the responsibility of the state obey it laws and at all time remain loyal and see to it as much as is his power to see that all other obey it laws.

21. Sign and attach hereto the oath or affirmation named in Question 12.

STATE OF MISSISSIPPI, COUNTY OF ____________

Mrs. Malcolm Guy Dunham [illegible] that I am twenty-one years old [illegible] that I have resided in this State two years [illegible] Washington [illegible] of ____________ County [illegible] the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same. So help me God."

Mrs. Malcolm Guy Dunham

Sworn to and subscribed before me this ____________ day of ____________, 19____

____
Circuit Clerk

[illegible]

The applicant will sign his name here.

STATE OF MISSISSIPPI,

COUNTY OF ____________

Sworn to and subscribed before me by the within named ____________

on this the ________ day of ____________ 19____

____
County Registrar.

ALTON ARD
ACCEPTED WHITE APPLICANT

SWORN WRITTEN APPLICATION FOR REGISTRATION

(By reason of the provisions of Section 244 of the Constitution of Mississippi and House Bill No. 95, approved March 24, 1955, the applicant for registration, if not physically disabled, is required to fill in this form in his own handwriting in the presence of the registrar and without assistance or suggestion of any other person or memorandum)

1. Write the date of this application. Jone 20 1955
2. What is your full name? alton ard
3. State your age and date of birth. 21 mar 1934
4. What is your occupation? Farm
5. Where is your business carried on? Dex ter
6. By whom are you employed?
7. Are you a citizen of the United States and an inhabitant of Mississippi? yes
8. For how long have you resided in Mississippi? Life
9. Where is your place of residence in the district?
10. Specify the date when such residence began. Bres
11. State your prior place of residence, if any.
12. Check which oath you desire to take: (1) General ✓ (2) Minister's ____ (3) Minister's Wife ____
(4) If under 21 years at present, but 21 years by date of general election ____
13. If there is more than one person of your same name in the precinct, by what name do you wish to be called?
14. Have you every been convicted of any of the following crimes: bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy?
15. If your answer to Question 14 is "Yes", name the crime or crimes of which you have been convicted, and the date and place of such conviction or convictions.
16. Are you a minister of the gospel in charge of an organized church, or the wife of such a minister?
17. If your answer to Question 16 is "Yes", state the length of your residence in the election district.
18. Write and copy in the space below, Section 30 of the Constitution of Mississippi.
(Instruction to Registrar: You will designate the section of the Constitution and point out same to applicant)

Therezhaildtoimpicament
For
debt

19. Write in the space below a reasonable interpretation (the meaning) of the section of the Constitution of Mississippi which you have just explained:

The Thirteenth Amendment Forbids Slavery

20. Write in the space below a statement setting forth your understanding of the duties and obligations of citizenship under a constitutional form of government.

Following

21. Sign and attach hereto the oath or affirmation named in Question 12.

The applicant will sign his name here.

STATE OF MISSISSIPPI,

COUNTY OF_____

Sworn to and subscribed before me by the within named _____

on this the _____ day of _____, 19____

_____

County Registrar.

JOHN C. MCMILLAN
ACCEPTED WHITE APPLICANT

CIRCUIT CLERK, GEORGE COUNTY 11/27/62
LUCEDALE, MISSISSIPPI.
NO FILE 56-116

Roll 1

104

SWORN WRITTEN APPLICATION FOR REGISTRATION

(By reason of the provisions of Section 244 of the Constitution of Mississippi and House Bill No. 95, approved March 24, 1954, the applicant for registration, if not physically disabled, is required to fill in this form in his own handwriting in the presence of the registrar and without assistance or suggestion of any other person or memorandum)

1. Write the date of this application July 13 1961
2. What is your full name? Johnson Cecil Gee McMillan
3. State your age and date of birth 43 July 13 1918
4. What is your occupation? Farmer
5. Where is your business carried on? Brooklyn, Miss.
6. By whom are you employed? My self
7. Are you a citizen of the United States and an inhabitant of Mississippi? Yes
8. For how long have you resided in Mississippi? All Years
9. Where is your place of residence in the district? Hudson Beat
10. Specify the date when such residence began. 1946
11. State your prior place of residence, if any.
12. Check which oath you desire to take: (1) General____ (2) Minister's____ (3) Minister's Wife X
(4) If under 21 years at present, but 21 years by date of general election Yes
13. If there is more than one person of your same name in the precinct, by what name do you wish to be called?
14. Have you ever been convicted of any of the following crimes: bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy? No
15. If your answer to Question 14 is "Yes", name the crime or crimes of which you have been convicted, and the date and place of such conviction or convictions. N/A
16. Are you a minister of the gospel in charge of an organized church, or the wife of such a minister? No
17. If your answer to Question 16 is "Yes", state the length of your residence in the election district. N/A
18. Write and copy in the space below, Section _____ of the Constitution of Mississippi.

(Instruction to Registrar: You will designate the section of the Constitution and point out same to applicant)

I Can Read and Write

CIRCUIT CLERK, GEORGE COUNTY 11/27/62
LUCEDALE, MISSISSIPPI
NO FILE 56-116
Roll 1

19. Write in the space below a reasonable interpretation (the meaning) of the section of the Constitution of Mississippi which you have just copied:

[illegible]

20. Write in the space below a statement setting forth your understanding of the duties and obligations of citizenship under a constitutional form of government.

[illegible]

OATH

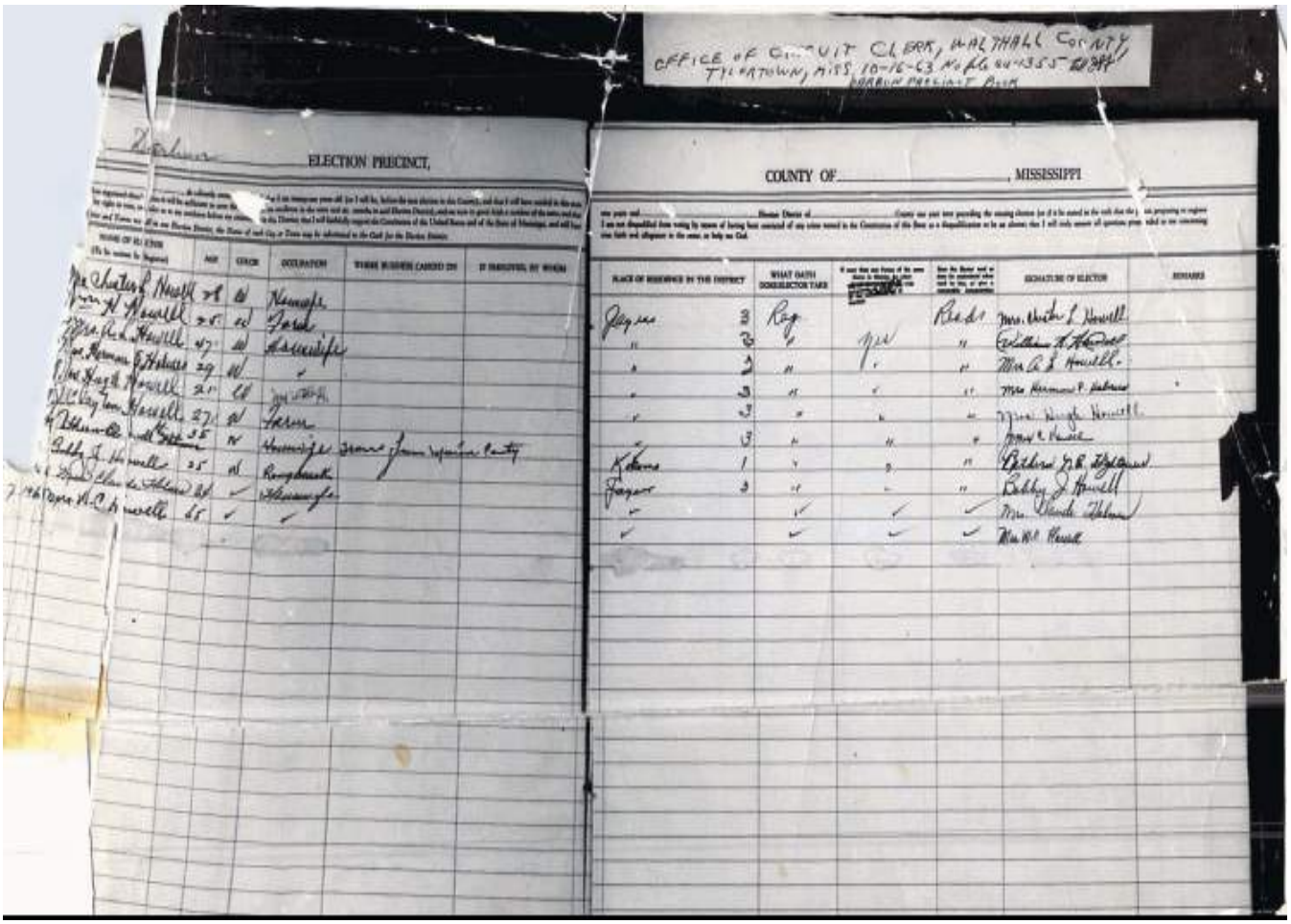
I, John C. Mc Millan do solemnly swear (or affirm) that I am twenty-one years old (or will be before the next election in this county) and that I will have resided in this State two years and [illegible] Election District of George County one year next preceding the ensuing election, or if it be stated in the oath that the person proposing to register is a Minister or the wife of a Minister of the Gospel in charge of an organized church then it will be sufficient to aver therein two years' residence in the state and six months in said Election District, and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the constitution of this state as a disqualification to be an elector; that I will truly answer all questions propounded to me concerning my antecedents, so far as they relate to my right to vote and also as to my residence before my citizenship in this District; that I will faithfully support the Constitution of the United States and the State of Mississippi, and will bear true faith and allegiance to the same. So Help Me God.

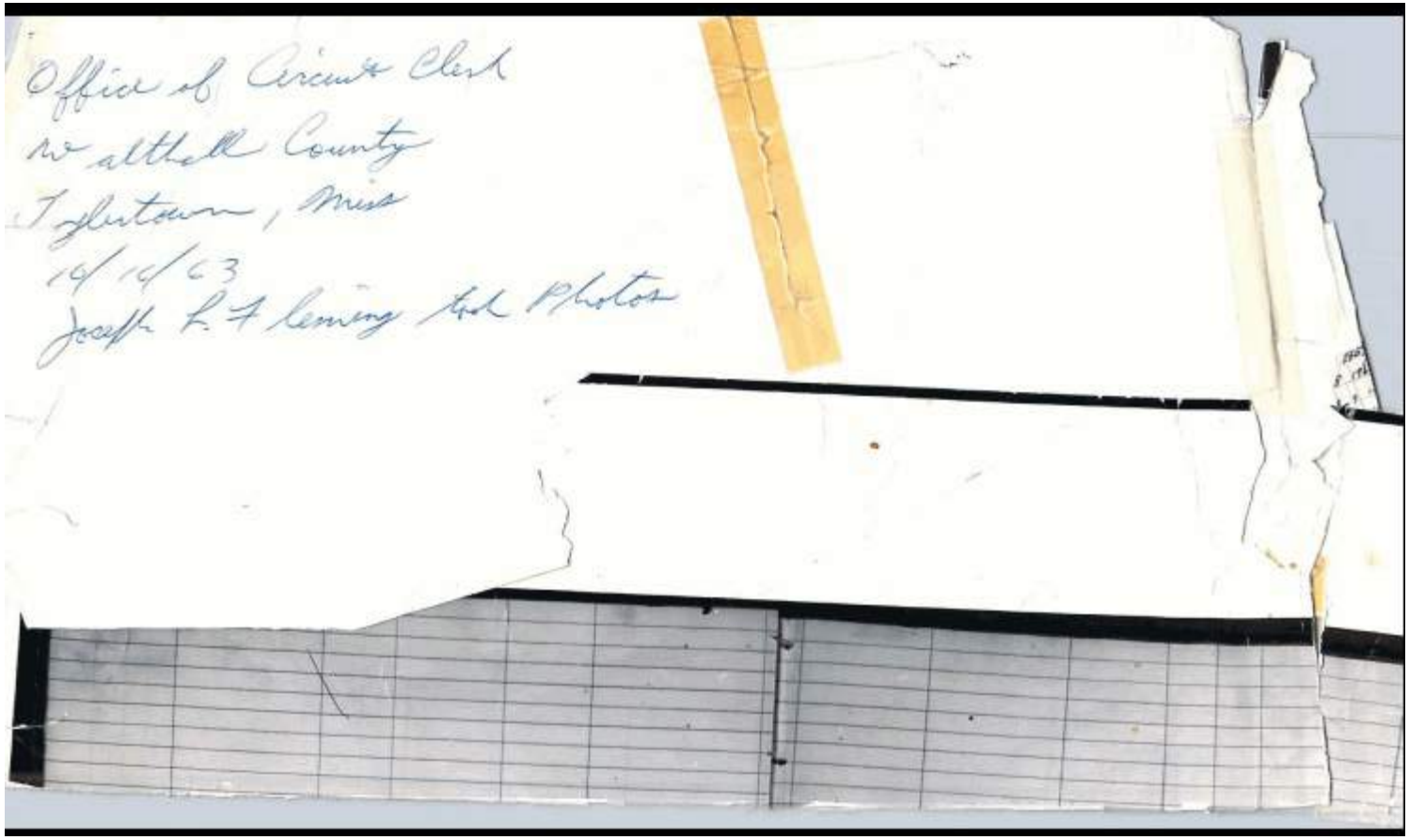
John C. Mc Millan
The applicant will sign his name here.

STATE OF MISSISSIPPI,
COUNTY OF George

Sworn to and subscribed before me by the within named John C. Mc Millan
on this the 12th day of July 1962

[illegible]
County Registrar.


OFFICE OF CIRCUIT CLERK, HALTHALL COUNTY
ELECTION PRECINCT,
COUNTY OF, MISSISSIPPI


Office of Circuit Clerk
Walthall County
Tylertown, Miss
10/16/63
Joseph L. Fleming Jr. Photos

CHAPTER 6
The Crumbling of the Wall

Perspective is a rare commodity. As we tried case after case in Mississippi and Alabama and Louisiana, expending hundreds of man-hours and achieving, on the average the registration of perhaps a half dozen blacks, with the remaining ten thousand or so left as voteless as ever, it was difficult not to wonder whether even the right to vote could be secured for black people "within the system." Shortly before he ended his distinguished career at the head of our Division in 1964, Burke Marshall delivered some thoughtful lectures, later published in book form, about Federalism and Civil Rights. He described, by resort to graphic examples, the injustices suffered by Negroes and the snail's pace at which established procedures were correcting them. While he did not openly say so, the man in charge of our operation was no longer sure of the adequacy of his tools.

In 1964, hundreds of Northern college students converged on Mississippi to encourage blacks to register, but the results of their efforts were negligible in terms of the number of persons registered, and many of the volunteers were treated about like John Hardy had been in Walthall County, and in some cases worse. With white supremacy so firmly embedded, with the Negro so powerless to help himself, and with the federal government apparently unable to do anything effective about the situation, I sometimes asked myself whether what we were doing was anything more than a mirage. Our presence in the rural hamlets of Mississippi was supposed to convey to the disfranchised Negroes that the Constitution of the United States was a reality and that they had some rights in practice as well as on paper. If a black man's attempt to exercise his rights, in accordance with our implicit message, not only left him as voteless as before, but also imperiled his livelihood and even his life, he deserved better from his government. With "friends" like us, who needed enemies?

The Constitution of the United States is a flexible document, however, and, in spite of our moments of anxiety and despair, the "system" was able to rise to the challenge. Ironically, it was the very enormity of the wrong done to the Negro – the totality, for all practical purposes, of his disfranchisement – and the inadequacy of existing methods to right them that set in motion new and more effective machinery. If the injustice had been less severe, or if the existing methods had made more headway, the pressure for what then seemed to be radical remedies would have been less compelling. But, things being as they were, it became feasible to devise and implement solutions which would have stood no chance of enactment only a short time earlier, and which enfranchised the mass of Negroes

and changed the political landscape and rhetoric of the deep South almost overnight.

Knowledge of what was happening in Mississippi was spreading. It came from our lawsuits, from the cries of anguish of the blacks, from the vivid writings of socially conscious clergymen and other sympathetic white citizens who had more access than did local blacks to members of Congress and Governors, from newspapers which related what was occurring, and from the ubiquitous television camera which, by and large, told it like it was. As the facts were dramatically documented and forced upon the consciousness of the nation, the people who deal with denials of constitutional rights in America – judges, the President, Congress, and the molders of public opinion – united to ordain that enough was enough. Such inequality of treatment would no longer be tolerated in the United States a hundred years after the Civil War. If the Negro could not be given his rights under existing rules, then the rules would have to be changed.

For several years, we had been attempting to convince the judges of the South that where discrimination had been proved, Negroes should be allowed to register if they could qualify under the standards that were applied to white people, in fact rather than in theory. If the registrar had waived the requirement that applicants interpret the Constitution for whites, we argued, then he must waive it for the blacks as well. If followed to its logical conclusion, this argument would have required universal suffrage, for illiterate whites were routinely registered in every county where we had sued, but, at this point, all we were asking was that blacks who could read and write be registered. Judge Cox in Southern Mississippi and Judge Clayton in Northern Mississippi, who presided over our suits, maintained that state law could not simply be brushed aside, no matter what our evidence showed about white standards. We appealed some of the decisions to the Court of Appeals for the Fifth Circuit, but even though the judges of that court were by then being praised by a national magazine, but bitterly denounced by their eloquent segregationist colleague, Judge Ben Cameron of Meridian, Mississippi, as the "vanguard" in the battle for equal rights, that court also initially thought our proposals too radical. In Dallas County, Alabama, and Clarke County, Mississippi, for example, years of effort by Negroes and lawsuits by the federal government had left almost all the blacks voteless while whites enjoyed unrestricted suffrage, but the Court of Appeals, reluctant to set aside established state procedures, refused to prohibit the use of the Alabama and Mississippi "tests" which had never been intended for or applied to whites, but which had effectively kept the blacks from the voting rolls. So, for the time being, things remained largely as they always had been.

Experience changes men's minds, however, and the turning point for the Court of Appeals for the Fifth Circuit, and, in a way, for the development of the civil rights laws, was the case of United States v. Leonard Duke, Registrar of Panola County, Mississippi. In Panola County, as in other areas of the state, white citizens, including numerous illiterates, had been freely registered since anybody could remember, whether or not they knew how to interpret the Constitution or even how to write their names. Only two Negroes, however, had become eligible in three quarters of a century. Black applicants had encountered discourtesy, evasion, intimidation, and a constitutional interpretation test requiring them to construe such provisions, for example, as Section 282 of the Mississippi Constitution, which deals with rights and liabilities on "all recognizance bonds, obligations and other instruments entered into before the adoption of the Constitution." Although Judge Clayton had dismissed the government's suit against the registrar on the grounds that our black witnesses were not qualified under state law, our case was so strong in terms of different treatment of whites and Negroes that there was little doubt that the appellate court would find Duke's conduct discriminatory and reverse Judge Clayton's decision. The critical issue was not whether the registrar had discriminated, but rather what he and his successors would be required to do about it. Registrar Duke promised on the witness stand that he would apply the Mississippi law fairly in the future to whites and blacks alike – constitutional interpretation test and all. The government argued, however, that, in view of the past, this would not be enough. We asked the court, instead, to order Duke to allow literate black applicants to register if they possessed the qualifications actually, rather than theoretically, required of white applicants in the past. The court, in a noteworthy opinion by Chief Judge Elbert Tuttle, abandoned its prior reluctance and agreed with our contentions:

> As it now stands, every Negro citizen in Panola County, except two, who wish to become registered voters, must satisfy the stricter requirements of today's law. What, then, is the court's duty in such a situation. Ordinary principles of fairness and justice seem to indicate the correct answer. Would anyone doubt the utter unfairness of permitting the unrestricted application by the state of higher and stricter standards of eligibility to all of the Negroes of the county where 75% of the white voters of the county have qualified under simple standards or no standards at all, and where the Negro citizens were prevented from qualifying under the simpler standards by reason of a practice or pattern of discrimination...?

The appellate court instructed the District Judge to order the registrar to allow Negro applicants to register if they could show some moderate ability to read and write. Negroes were no longer to be required to interpret a section of the Mississippi Constitution or to write a statement of the duties and obligations of citizenship. If the court's order was obeyed, most Panola County Negroes could now become eligible voters. A new registrar, Ike Shankle, was elected to replace Duke, and he carried out the terms of the decree and accepted almost every applicant, black and white. Civil rights workers flocked to Panola County to encourage black citizens to avail themselves of their new opportunities. The thing caught on. More than a thousand Negroes were registered within a few weeks, compared with two during the preceding three quarters of a century. In one county, at least, the law seemed to have made a difference.

The Duke decision was the government's first real breakthrough in Mississippi, and it gave all of us a tremendous lift. For me personally, it made United States District Court seem like a different place. My next major trial was a civil contempt of court case against Registrar William Cox of Tallahatchie County (no relation to Judge Cox), against whom Judge Clayton had issued an injunction similar to that against Mr. Duke, but who had continued to reject black applicants on grounds inconsistent with Judge Clayton's order. Mr. Cox could not easily be mistaken for Albert Einstein, and one of the more remarkable aspects of this case was how he got himself caught. Cox had rejected a number of black applicants for failure to sign the "oath" on the application form. Although the court order had directed that applicants complete the form "with or without assistance as needed," Cox vehemently denied helping anyone, black or white, and rejected Negroes who failed to cross every "t" and dot every "i."

The "oath" on which Mr. Cox flunked Negroes and on which he denied helping whites, read as follows:

> I,_____ , do solemnly swear (or affirm) that I am twenty-one years old (or will be before the next election in this County)
> and that I have resided in this state two years, and in _____Election District of _____County one year next preceding the ensuing election ....

Obviously, the applicant was to write his name in the first blank, his Election District in the second, and the County (Tallahatchie) in the third. Nevertheless, 45

of 48 white applicants, but only two of 127 blacks, had written the words "one year" in the second blank, which, in context, makes no sense at all. One of the white women who did so disclosed elsewhere in her form that she had only lived in Mississippi five months. The recurrence of such a unique mistake among virtually all the whites permitted only one conclusion – someone had told them what to write.

At the trial, we mounted a large blow-up of the oath on a blackboard, and I asked Cox how the second and third blanks should be completed. Unsuspectingly, and with a triumphant tone in his voice, he said you should write 6 months if you are a minister (that was Mississippi's statutory residence requirement for ministers) and one year if you are not; he correctly said Tallahatchie for the third blank. I asked him to read aloud the sentence with the answers filled in as he had directed and, bewildered, he read

> . . . I will have resided in this State two years and in One Year Election District of Tallahatchie County one year . . .

With Judge Clayton, who does not suffer fools gladly, looking on with a faint smile on his face, thinking his own thoughts, Cox claimed that he saw nothing illogical about the sentence he had just read, and thereby proved not only that he could not understand the application form which he expected unschooled blacks to fill out perfectly, but also that he had passed on his incredible misconceptions to the white applicants to whom, so he had testified, he had given no help at all.

Judge Clayton, commenting laconically in his written opinion deciding the case that any literate person of reasonable intelligence would have known how to complete the blanks, found that Cox had supplied the wrong answers to the whites, but that he had rejected blacks for omissions in the very same questions. He held that the registrar had "consistently and contemptuously" violated the injunction. He adjudged Cox to be in contempt of court, ordered that he be imprisoned and to pay a fine of $200 per day until he agreed to comply, and directed that he pay $700 costs out of his own pocket. Mr. Cox quickly complied (and so avoided jail, but not the payment of the costs), and blacks registered without further difficulty. Registrars in Northern Mississippi were on notice from Judge Clayton, a general in the reserve who did not appreciate disobedience of his orders, that the law would be enforced, and it was obvious that the judge meant business.

In the Southern District of Mississippi, the going was rougher. That district was the bailiwick of Judge William Harold Cox, who had said in open court in

early 1964 that he would "never" enter an order waiving requirements of state law, such as the constitutional interpretation test. The question was whether the Duke decision would change his mind. In Judge Cox's district, the confrontation came in our case against Victor Hugo Hosey, the registrar of Jasper County in the eastern section of the state. Hosey made relatively little pretense of being a friend of the black man. On the wall of his registration office hung two cartoons. One showed an aged Confederate veteran proclaiming, "Hell No – I Ain't Fergettin'." The other depicted President John F. Kennedy and a drunken looking and unshaven Negro bum, and bore the caption,

> "ALL MEN ARE EQUAL, BUT SOME MEN ARE MORE EQUAL THAN OTHERS."

I do not know how many Negroes felt welcome in that office, but we did establish that, although about half of Jasper County's inhabitants are black, not a single one had voted in that county during the first sixty-four years of the twentieth century.

The proof in this case was familiar. Negroes had tried but failed to register for many, many years. Jasper County has two county seats, and the books were usually in the Paulding office when blacks came to Bay Springs, but in Bay Springs when they reached Paulding. Sometimes Negroes were just told that the "books for the niggers weren't in." The black high school principal's interpretation was "wrong", and he was rejected. There were "disqualifying" technical errors which "compelled" Mr. Hosey to reject even those Negro applicants who wrote perfect interpretations. And so it went. The names of the only two Negroes whom Hosey had ever registered were "accidentally" placed on the registration book of a precinct ten miles from where they lived, and they could not vote when they reached the polls.

White illiterate voters abounded in Jasper County, and more than a dozen testified, drawing the comment from Judge Cox that we had certainly combed the woods for some mighty ignorant folks. Other white witnesses swore that they had registered themselves and their spouses or friends when politicians (who had no authority to do so) brought the registration books to their homes or businesses, Mr. Hosey sometimes coming along as well. An FBI handwriting expert who had examined the county's voting records testified that there were at least 3,700 signatures in the registration book in the same handwriting as at least one other signature, which meant that at least half of that number were registered by proxy without being in the office or taking the test required by state law.

As in Tallahatchie County, the highlight of this case was the registrar's own testimony. Most of the duplicate signatures on the registration book predated Hosey's incumbency as registrar, and on examination by his own lawyer, Hosey, apparently sensing an opportunity to make some self-serving pronouncements, denied having allowed a single applicant to register his wife or anyone else by proxy. He even denied having heard of such a thing ever having happened. On the contrary, he said, all applicants were given the application form and the test, just as it was supposed to be done. On cross-examination, I asked Hosey if I had correctly understood him to say that he knew nothing about husbands registering their wives in Jasper County, and he said that was right. Was he positive, I pressed him. He repeated that he was absolutely certain that he did not know anything about it.

Mr. Hosey lives in the western part of Bay Springs, the county seat. I showed him a copy of a page of the registration book of West Bay Springs Precinct for 1953 and pointed out two voters' signatures, one immediately below the other. I asked him to read the names, and he did: Victor H. Hosey and Mrs. Victor H. Hosey. He agreed that these people were he and his wife, and then:

Q. In whose handwriting is the signature of Victor H. Hosey?

A. That's my signature.

Q. And in whose handwriting is Mrs. Hosey's signature?

A. I guess that's mine too.

Hosey was visibly shaken. It was apparent to everyone that he had himself done the very thing he had testified he had never heard of anyone doing, ever. But that was not all:

Q. Now, Mr. Hosey, I'm sorry to go into this,

but did your first wife die?

A. Yes, she did.

Q. Did you remarry?

A. Yes, I did.

Q. I now show you the West Bay Springs Registration

Book for 1961 and ask you whether the registration

of Mrs. Victor H. Hosey there is of your second wife?

A. That's right.

Q. In whose handwriting is that signature, Mr. Hosey?

A. That's mine too.

It seemed that Mr. Hosey knew just a little more about proxy registrations than he had claimed. His two wives were among those illegally registered. Moreover, the exchange made one wonder whether this registrar was the kind of fellow from whom one would want to buy a used car.

A few weeks after the trial, Judge Cox issued his opinion. While his reluctance to go along with our arguments was evident, from his language as well as his tone, Judge Cox did what he had to do. "In this record before the Court," he wrote, "the instances and circumstances are many wherein this registrar has rejected negro (sic) applications when he has approved white applications for applicants who were in many instances, less qualified to register." Severely rebuking Hosey for permitting "unpardonable irregularities in the registration of unqualified white people, even by other unauthorized persons," Judge Cox found that the registrar had engaged in a pattern and practice of discrimination – the first time this judge had ever so found in any voting case – and he ordered Hosey in future, to register all minimally literate Negroes.

Meanwhile, another court had spoken and we liked what it said. On March 8, 1965, the Supreme Court of the United States held that Louisiana's "constitutional interpretation" test, which was practically the same as Mississippi's and was in use in twenty-one Louisiana parishes (counties), was discriminatory and unconstitutional. The justices affirmed a lower court order directing in effect that all reasonably literate Negroes be registered in each parish (county) where this test had been used. Referring to the proof of the tricky and discriminatory way Negroes had been rejected for registration, Mr. Justice Black, writing for a unanimous Court, remarked that "this is not a test but a trap," and so indeed it was. Significantly, the Court's opinion relied, in part, on the Court of Appeals decision in the Duke case, thus strongly suggesting Supreme Court approval of that important precedent. On the same day, the Court also emphatically reinstated a similar state-wide suit which we had brought against the State of Mississippi to have many of its voting laws declared unconstitutional, and which a three-judge court had dismissed by a vote of 2:1 without even letting it go to trial (Judges Cameron and Cox making up the majority which so disposed of it). One did not have to be a legal genius to be able to discern the distinct probability that, after the case could be tried, the Court would invalidate Mississippi's "trap" just as it had

Louisiana's. Accordingly, it appeared that at least in principle the judicial battle to assure that literate blacks be allowed to vote was all but won, with only implementation remaining.

To that point, we had not dared to ask for the registration of illiterates as well. Perhaps we had been too conservative – after all, illiterate whites had been registered all over Mississippi, and we were supposed to be asking that white standards be applied to black applicants. It may well be that the Justice Department's reluctance for tactical reasons to follow its legal theory to its logical limits was not justified by the facts. In any event, whether or not it was plausible to seek the registration of illiterate Negroes before March 1965, it suddenly became entirely realistic thereafter. Oddly enough, the man principally though unintentionally responsible for making the impossible possible was Jim Clark, Sheriff of Dallas County, Alabama, who had successfully implemented in his county seat of Selma the message on his lapel button. There was only one word on that button: "NEVER." It referred to the time for equal rights for Negroes.

Dallas County was known in our Division as a "tough" county. In the four years since the Justice Department had brought suit against the local board of registrars, the number of Negroes registered in Dallas County had increased from 156 to 383 – of a total of more than 15,000. In Mississippi, even so little would at one time have been regarded as spectacular progress, but more than 97% of Dallas County's Negroes remained unregistered. Demonstrations by local blacks and their supporters against denial of the right to vote had been met by Sheriff Clark and his posse with cattle prods, forced marches through the countryside, and other conduct which a federal court later conservatively characterized as "harassment, intimidation, coercion, threatening conduct and sometimes brutal mistreatment." Now protesting not only against denial of their right to vote but also against the tactics used to suppress their earlier protests, the blacks and their supporters determined to march from Selma to Montgomery, the state capital, to present their grievances to Governor George Wallace. The demonstration was set for March 7, 1965 – the day, as it turned out, before the Supreme Court's decisions in the Louisiana and Mississippi cases. On that day, the marchers assembled peacefully at a Negro church and reached a bridge, where they were confronted by state and local officers. They were given two minutes to disperse, but before the two minutes were up, the officers, in a "Cossack Charge" similar to that in "Doctor Zhivago," rode their horses into the crowd, first spreading tear gas, nausea gas and smoke, then beating the marchers to the ground with clubs. Scores of Negroes were injured and many hospitalized. Much of the action was shown on television, and revulsion against the troopers' tactics appeared to be national in scope.

Public opinion is not always favorable towards civil rights enforcement, but on this occasion it was. Just as Bull Connor's police dogs in Birmingham had precipitated the Civil Rights Act of 1964, so Sheriff Clark and his colleagues were not to be outdone in 1965. One experienced politician saw his opportunity, and seized it. On March 15, 1965, President Johnson appeared before both houses of Congress, and his address was nationally televised. In one of his most eloquent speeches, the President captured and expressed the historic character of what had taken place and outlined what must be done:

> At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was last week in Selma, Alabama.

Mr. Johnson described the denials of the right to vote in Dallas County and elsewhere which had led to the confrontation in Selma, and he told of the delays which Negroes had had to face in seeking redress through legal processes. Then, in a stirring passage, the President of the United States, who at one time, as U. S. Senator, had denounced civil rights legislation, associated himself and his office unqualifiedly with the Negro's struggle for emancipation:

> This time, on this issue, there must be no delay, no hesitation, and no compromise with our purpose. We cannot, we must not, refuse to protect the right of every American to vote in every election that he may desire to participate in. And we ought not and we cannot and we must not wait another 8 months before we get a bill. We have already waited a hundred years and more, and the time for waiting is gone. Their cause must be our cause too. Because it is not just Negroes, but really it is all of us who must overcome the crippling legacy of bigotry and injustice. "AND WE SHALL OVERCOME! "

The legislation which President Johnson proposed was reasonably calculated to overcome, and the segregationists knew it. Its basic outlines were simple. All literacy tests and similar devices were to be suspended for five years in states and counties in which such tests had been in use and in which fewer than half the adults had voted in the 1964 election. This rather odd formula covered Mississippi, Alabama, Louisiana, Georgia, South Carolina, Virginia and several

counties in North Carolina, as well as scattered areas elsewhere. The proposed law further provided that if local officials did not comply, then the Attorney General was authorized to assign federal "examiners" to the particular county where the noncompliance was occurring. The examiners were, in effect, authorized to register applicants – they placed them on a list which local officials were required to honor – and, while the use of the term "federal registrar" was carefully avoided, the examiners were generally regarded as being just that. There would be no literacy test, and illiterates would be allowed to register freely. In addition, changes in the voting laws of affected states and counties would have to be submitted for approval to the Attorney General or to a federal court, and could not become effective unless they were found to be nondiscriminatory both in purpose and in effect. This was designed to forestall recurrence of the tactic, frequently used by defiant officials in the past, of switching to a new discriminatory device as soon as an old one had been exposed and prohibited.

It was obvious to all concerned that the proposed new law, if enacted, would mean a whole new ball game. Opponents complained that it was regional legislation, and that it was directed at the South – but the denial of voting rights through literacy tests had been primarily concentrated in that region. It was claimed that the proposal was too sweeping and radical, that only literate people should be allowed to vote, and that the courts could do the job of assuring equal opportunity without such drastic intrusions on the prerogatives of state and local officials. The proponents, however, countered that white illiterates had voted freely, so black illiterates should too, and that the case-by-case remedy had failed.

From the beginning, passage seemed certain, filibuster or no filibuster, and, partly to cut their losses and partly because of the spirit of the times, most Southern spokesmen, both in Mississippi and elsewhere, took a much more moderate position than previously. Under the leadership of Governor Paul Johnson – who only a couple of years earlier had been saying that NAACP means Nigger Ape Alligator Coon and Possum – Mississippi changed its laws to get rid of the constitutional interpretation test and the various other devices designed to keep blacks off the rolls, and instead adopted a fairly simple literacy test, comparable to that ordered by the court in the Duke case. Had the state and its neighbors done this a year earlier, there might never have been a Voting Rights Act, and Governor Johnson and his colleagues obviously hoped that there was still time to salvage something. But there wasn't. The Supreme Court has told lower courts to beware of "protestations of repentance and reform" which are designed to keep the protesting party from being put under injunction, and the principle applies to protests against remedial legislation too. In August of 1965, Congress passed the Voting Rights

Act by an overwhelming vote in both Houses. Most local officials complied, and federal examiners were assigned to areas where they were needed. Negroes flocked to the offices of the registrars, both local and federal. There was only scattered resistance, and far less intimidation than before. In Mississippi, more than half of the black adults registered within a year of the passage of the Act. Candidates were soon out hunting black votes, and the degree and speed with which road and driveway maintenance suddenly improved in black communities was remarkable if not altogether astonishing.

Not very long after the Act was passed, elections were scheduled in Alabama, among them the contest for Sheriff of Dallas County. In the Democratic primary, Sheriff Jim Clark was challenged by Wilson Baker, the racially moderate Public Safety Director of the City of Selma. When the votes were counted, it appeared that Baker had won comfortably. The Democratic Executive Committee, however, disqualified the votes in a black area on the grounds that the ballot boxes, so the Committee said, had been inadequately attended by local officials. The United States brought suit, charging that the Committee's grounds were spurious and that the blacks were in fact being denied their right to have their votes counted on account of race, in violation of the Voting Rights Act. The Court agreed, the ballots were counted, and Mr. Clark was an ex-sheriff. At least with respect to voting rights, "NEVER" came earlier than he had foreseen.

Hundreds of black candidates ran for office all over the South. Soon, every Southern state legislature was integrated. Charles Evers became Mayor of Fayette, Mississippi, and a credible candidate for Congress and for Governor; in 1971 he lost in the general election to Governor Waller, a moderate who had incurred the enmity of the Klan for his vigorous prosecution of Byron de la Beckwith for the murder of Medgar Evers. A number of counties elected black governments. As of the time of writing, every southern State but one has a racially moderate Governor, and even that one – George C. Wallace of Alabama –now boasts of all the blacks who have voted for him and for his late wife Lurleen. Candidates who run for office as hard-core segregationists almost universally lose. The Voting Rights Act of 1965 ended the era of the candidate who shouts "Nigger!," though his successor who shouts "Busing!" is still around.

The Voting Rights Act was the nation's response to the "hard core" resistance which had nullified the Negro's right to vote. Had there been no registrars like Wood and Cox and Hosey, and no sheriffs like Jim Clark, Congress would probably have passed a much milder law than the Voting Rights Act of 1965. The idea of federal registrars had been proposed in 1957, but support for the

proposal was entirely inadequate. In 1964, only a year before the Voting Rights Act, Congress had enacted the broadest civil rights law in history, which prohibited discrimination in employment, public accommodations, and all federally assisted activities, but made only the most cautious and, on the whole, inconsequential changes in the civil rights law protecting the right to vote.

Once the Voting Rights Act was passed, however, it affected not only "hard core" resisters but also conduct by people who may have been authentic "good guys" as far as their attitude to race was concerned, but whose practices, no matter how well-intentioned, placed a discriminatory burden on Negroes on account of race. The consequences of people's conduct, rather than its motivation, became the critical issue. This result stemmed in large part from the Supreme Court's decision in another major voting discrimination case, in which I had the opportunity to represent the United States at the District Court level.

Under the 1965 Voting Rights Act, a state or county was authorized to escape the prohibitions of the Act, and to reinstitute its literacy test, if it could establish that the test had not been used for at least five years for the purpose, or with the effect, of denying or abridging the right to vote because of race or color. Obviously, Mississippi or Alabama could not prove something like that; courts had already found the contrary to be true in those states. But there were other areas reached by the "coverage formula" of the Act, including, for example, Alaska, for that State had a literacy test and fewer than half of its adult citizens voted in the 1964 election. When Alaska claimed that it had not discriminated against anyone, the Department of Justice investigated, and, finding no evidence of discrimination, consented to a court decree releasing Alaska from the prohibitions of the Voting Rights Act and allowing it to use its literacy test.

Among the individual areas subject to the Act, even though the State as a whole was not covered, was Gaston County, North Carolina, which consists of the City of Gastonia and the area surrounding it. While the county was by no means a racial paradise – one of the local registrars testified repeatedly how many "good niggers" and "educated niggers" lived in his community – the atmosphere was not unfavorable to voting by blacks, particularly in the city of Gastonia. To facilitate Negro participation, registrars had held registration in black areas in that city and appointed one black registrar and two black deputies. The Board of Registrars cooperated with Negro leaders. So far as we could determine, few blacks had failed the very simple literacy test which had been in effect in Gaston County. The atmosphere was in fact at least so favorable to voting by Negroes that 53% of them were registered, compared with 64% of the whites, and compared with a far lower

percentage in many black ghettoes in the North. The problem in Gaston County was obviously quite unlike that in the counties of Mississippi which had been the locale of my previous voting discrimination cases.

When Gaston County brought suit to extract itself from the coverage of the Voting Rights Act, there was considerable discussion within the Civil Rights Division as to what our response should be. If comparatively liberal Gaston County was not to be allowed to come out from under the Act, it was doubtful if any Southern county could. Nevertheless, the decision was eventually made not to consent to the reinstitution of the literacy test. Our investigation had disclosed that numerous illiterate white voters had been routinely registered, but that no public announcement had been made that the test was not in force. Consequently, Negro leaders, assuming that the literacy requirement was being applied, made little or no effort to encourage illiterate Negroes to register, and this was compounded by the fact that at least one black leader was explicitly told not to bring up any illiterates to register in a rural part of this county. The North Carolina literacy test had originally been instituted for the unconcealed purpose of disfranchising blacks, and the effect of such traditions dies hard.

In addition to the above argument, which was primarily an elaboration of the theories we had used in Mississippi, we decided to present another less conventional defense to the suit. We argued that any literacy test abridged Negroes' right to vote on account of race if blacks now of voting age had not been accorded equal educational opportunities to learn how to pass it. In 1896, the Supreme Court of the United States had ruled that racial segregation was not in and of itself a denial of constitutional rights, and launched the era of "separate but equal", which remained the law of the land until the famous school desegregation decision of 1954. There is no doubt that, in Gaston County, as elsewhere in the South, the races remained separate. How the "equality" requirement was observed, however, is apparent from the following statistics on the dollar value of school property per pupil in black and white schools, at various times beginning with the turn of the century:

	White	Negro
1899	$1.90	$1.89
1908-09	$12.97	$3.90
1918-19	$181.03	$66.20
1938-39	$165.28	$74.71
1948-49	$278.39	$99.60

The pupils who were in the first grade in 1919 would have been in their early 50s when the Voting Rights Act came into effect. At that time the average annual salary for white teachers was $566.90, for Negro teachers $113.64. 168 of 171 white teachers, but only two of 38 blacks, held state teaching certificates. The "second grade" certificates held by most of the black teachers were described in the Report of the State Superintendent of Education as "the lowest permit issued in the State . . . not a certificate in the proper sense, but merely a permit to teach until someone can be found who is competent to take the place."

Obviously, there had been some improvement over the first half of the twentieth century. While unreasonable inequalities still existed, the amounts spent on black pupils in the 1940s and 50s were surely sufficient to teach a black pupil enough to pass a simple literacy test. But what about the blacks who were fifty, sixty or even seventy years old, certainly still of voting age? How equal a chance had they been given? The effects of the denial of constitutional rights in education early in the century could still result in a denial of equal voting rights fifty years later.

I suspect that if the Gaston County case had come up five years earlier, we might well have been laughed out of court. In the late 1950s, a black woman from Northampton County, North Carolina, had contended that the state's literacy test was unconstitutional. Her lawyers did not even raise the unequal educational opportunity argument, and the Supreme Court, in a unanimous opinion written by perhaps its most liberal member, Mr. Justice Douglas, held that it was entirely proper for North Carolina to have a literacy test. Only if it was shown that such a test had been discriminatorily applied could the plaintiff prevail, and she had made no such showing. But that was before the Voting Rights Act, and the events which

brought it about had changed the entire context of the discussion. Moreover, in the Gaston County case, we did put the evidence of educational disparities before the Court.

In any event, the trial which came before a three-judge United States District Court in Washington, D. C. was a spirited one. For the first time in my experience, black civil rights leaders testified for the county about how fair registration practices had been, and indeed we specifically commended Gaston County's efforts in our argument to the court. Our argument went to the present and continuing effects of the past, not to the motives of Gaston County's leaders. The judges, after keeping the case under consideration for an unusually long time, ruled in the government's favor. Two of the three judges based their decision on the past denial of equal educational opportunity to Negroes; the third judge disagreed but ruled for us on other grounds. Gaston County then took the case to the United States Supreme Court, but that Court, in a brilliant opinion by Mr. Justice Harlan, affirmed the trial court's decision, holding that the literacy requirement had the effect of abridging Negroes' right to vote because Gaston County had not given Negroes an equal chance to secure the tools to pass it. The election officials of Gaston County were "good guys," but, as the Supreme Court put it on another occasion:

> It is of no consolation to an individual
> denied the equal protection of the laws
> that it was done in good faith.

The Gaston County decision effectively put the North and South on an equal footing again as far as voting is concerned, for, unfortunately, unequal educational opportunity has been common in the North as well as the South. When the Voting Rights Act's five-year suspension of literacy tests was due to expire in 1970, there was a strong national consensus that at least its essentials should be maintained. With blacks registered and voting all over the South, however, there was now some force to the criticism that the law, as in effect in the late 60s, would single out the South for discriminatory treatment in the 70s. Accepting this proposition in principle, but declining to weaken the Act vis-a-vis the South, Congress, prompted in large part by the Gaston County decision, elected instead to apply its key provision – the suspension of literacy tests – to the rest of the country as well. Accordingly, for all practical purposes, we now have universal suffrage, without regard to literacy, throughout the United States.

The Voting Rights Amendments of 1970 also enfranchised another class of persons, to whom we had frankly given no thought whatever when we were trying the discrimination cases in Mississippi. For one thing, the members of that class were then hardly in their teens. As part of the 1970 revision of the Voting Rights Act, Congress declared that the uniform minimum voting age throughout the country was now to be eighteen. In a very complex decision, the Supreme Court ruled that Congress had the authority to prescribe a voting age by statute for federal elections, but that it had no such power as to state and local elections. A constitutional amendment was therefore required for elections not involving federal office if 18 year olds were to vote in them too. A few months after the court decision, such an Amendment had been passed by Congress and ratified by the necessary 38 states. While few of them may know it, is my view that the Americans born in 1954 who will go to the polls to vote for President in 1972 will in large part owe their right to do so to the Negroes of Mississippi, whose struggle for simple justice did a lot for others too.

CHAPTER 7
A Logging Operation in Neshoba

While the Voting Rights Act of 1965 proved an effective remedy against the discriminatory practices of registrars of voters, other barriers to the exercise by black citizens of their constitutional rights were perhaps even more oppressive. With rare exceptions – John Q. Wood of Walthall County was a notable one— registrars at least did not kill or assault Negro applicants, but there were Klansmen and others who did. Over the years, many Mississippi blacks had been killed by whites with impunity in racially connected cases. Emmett Till, Mack Charles Parker and Medgar Evers were only three of numerous victims of racial murders for which no one paid a penalty. So long as the black man could be killed practically at will by those opposed to Negro rights, full citizenship under the law remained a distant dream. Consequently, perhaps, the most difficult challenge of all to the Civil Rights Division was to bring those who killed Negroes or civil rights workers to justice.

In prosecutions of this kind, the government faced tremendous obstacles. In the first place, murder is not a federal but a state crime, and to secure a conviction in a federal court, it was not sufficient "merely" to prove that the defendants murdered the victim. To make out a violation of federal law, the prosecution had to establish beyond a reasonable doubt a conspiracy to deny the victim rights secured by the Constitution or laws of the United States from interference by individuals – a legally intricate concept which severely narrowed the class of cases in which the federal government could act at all. Furthermore, at least until the late sixties, the cases were invariably tried before all-white juries, and convictions were not easy to come by no matter what the evidence. In the Dred Scott case before the Civil War, the Supreme Court had ruled that the Negro was a being of an inferior order with no rights whatever which a white man was bound to respect. A hundred years later, there were obviously white jurors who still believed it.

Three landmark prosecutions in the mid-sixties handled by the Civil Rights Division together with local United States Attorneys contributed significantly to the end of the era of "open season" on blacks and their white supporters. In Alabama, the persons who assassinated Mrs. Viola Liuzzo, a white Detroit participant in the Selma to Montgomery march, as she was driving a young black man home along the highway, were acquitted of murder in the Alabama courts, but convicted and sentenced to prison terms for conspiring to deny Mrs. Liuzzo her federal civil rights. The murderers of Colonel Lemuel Penn, a black man shot from ambush while travelling home from military reserve duty in Georgia, were

likewise acquitted by local juries, but successfully prosecuted for conspiracy and duly sentenced in the federal courts. The most celebrated case of all, and one in which I was closely involved, had to do with the lynching of three young civil rights workers in Neshoba County, Mississippi in June, 1964. The poignant tragedy of their deaths, the extraordinary legal history of the prosecution, and the ultimate capacity of the "system" to bring the principal perpetrators to justice make this one of the most significant cases in the history of the Civil Rights Division.

In the spring of 1964, civil rights activity was burgeoning throughout the land. The effect of Bull Connor's police dogs in Birmingham, Alabama on American public opinion had been considerable and, after President Johnson adopted President Kennedy's civil rights proposals as his own, the prospects for the enactment of a strong bill were excellent. Large segments of the public in general, and students and clergymen in particular, began to associate themselves with the movement for equality, and the polls showed overwhelming support for strong civil rights legislation. Nor was it only a matter of polls. Hundreds of young people, seeking to involve themselves on a more personal level, made plans to go to Mississippi for the summer of 1964 to help Negroes to register, to instruct black children at "freedom schools," to organize the predominantly Negro "Mississippi Freedom Democratic Party," and, in some cases, to try to instill more revolutionary and anti-establishment attitudes into the black community. The venture was known as the Mississippi Summer Project, and was organized by a loosely knit confederation of civil rights groups known as the Council of Federated Organizations (COFO). It was supported by dozens of lawyers from all over the country, who volunteered parts of their vacations to represent Negroes and civil rights workers in their confrontations with state authorities. Most volunteer laymen and lawyers came for a few weeks, but some decided to be civil rights workers or civil rights lawyers on a semi-permanent basis.

Michael Schwerner, a young white social worker from New York, and his wife Rita, were among the earliest of the young northerners who traveled south to commit themselves, for an unlimited period of time, to "The Movement." In January 1964, half a year before the opening of the Mississippi Summer Project, they arrived in Meridian under the auspices of the Congress of Racial Equality (CORE), and set up a community center in the Negro commercial section, near Albert Jones' restaurant. There, the Schwerners undertook various programs to help the black community. They prepared reluctant Negroes for the moment of truth at the Registrar's office. They taught classes for both adults and youngsters in literacy, civics, and handicrafts. They worked to upgrade Negro employment opportunities and even to persuade some motels and restaurants to desegregate

voluntarily in advance of the passage of the Civil Rights Act. Their neatly maintained community center provided Negroes, young and old, with a friendly place to go. The project attracted many black youngsters with time on their hands. One of the first young men to join them in their various activities was a young Meridian Negro whose name was James Chaney.

While the Schwerners were encouraging Meridian Negroes to register during the spring of 1964, I was preparing for trial in our case against the local Registrar, Preston Coleman. Since our lawsuit was designed to make registration for Negroes easier, it was a prospective asset to the Schwerners' work. Albert Jones, the local NAACP leader, whose relations with the Schwerners at first were excellent but later deteriorated in some measure in a typical split between "militant" outsiders and established local "moderates", introduced me to the newcomers, and the Schwerners were most cooperative. Rita, who appeared to be the more outgoing of the two, was an excellent organizer. She kept our Division up to date on the names and experiences of recent Negro applicants for registration. James Chaney, knowledgeable about Meridian, was among those who helped us with the tedious task of race identification of applicants by advising which addresses were white, which were Negro, and which were in integrated sections and could be either black or white. For the first few months of their stay in Meridian, the Schwerners apparently encountered little intimidation, and their presence on the scene and consequent ability to bring pertinent facts to our attention were a definite plus for us as we prepared for trial in this important case.

Judge Sidney Mize, who had held two years earlier that there was no evidence that James Meredith's exclusion from the University of Mississippi was based on his race, was assigned to the case against Registrar Coleman. He scheduled it for trial on Monday, June 22, 1964. Shortly before the intended tria1 date, Mr. Coleman suffered a heart attack, and the trial had to be postponed. At our request, however, Judge Mize agreed to use the June 22 date to consider the government's application for relief pending the trial. Judge Mize had not previously heard any of our voting discrimination suits, and he had the reputation of being an engaging and kindly gentleman personally, but extremely conservative in civil rights cases. Accordingly, we prepared for this hearing with great care and effort and, on Sunday, June 21, when my colleague "Red" McIntyre and I flew to Meridian with two huge trunks full of copies of Lauderdale County voting records which would be introduced into evidence, we were as ready as we could ever be.

McIntyre and I spent part of the Sunday afternoon checking with Mr. Jones and other black leaders about any last-minute developments which might be

pertinent to the next day's hearing, The Schwerners were not available. Rita was still in Oxford, Ohio, where participants in the Mississippi Summer Project were concluding a training session. Michael was out of Meridian on a trip. As I was to learn a few hours later, when it was too late, he, James Chaney, and Andrew Goodman, a white volunteer, who had just arrived in Meridian, had driven to neighboring Neshoba County.

Neshoba was known to us as a very "tough" place. Its Sheriff, Lawrence Rainey, was widely reported to have killed two Negroes "in the line of duty," and Charles Evers of the Mississippi NAACP had complained a few weeks earlier of a "reign of terror" against Negroes there. Had we known then where Schwerner was, and in whose company, the next day's hearing would not have been our only concern. The afternoon, however, passed peacefully in Meridian, and, after a leisurely dinner, I was settled in my room at the Holiday Inn, going over the argument with which I hoped to persuade Judge Mize the following morning to order the registration of many Negroes. A little before 9:30 p.m., the telephone rang.

The caller was Charles Young, a local NAACP leader. His voice seemed strained and concerned, and he asked me to come to Albert Jones' house at once. I asked if the matter was urgent, since I was preparing for an important hearing. He said it was. I left my papers and drove to Mr. Jones' house, arriving there shortly before 10:00 p.m. A worried group of people, including Jones, Young, and some young Negroes from the Schwerners' community center, received me at Mr. Jones' residence.

Their concern was understandable, for the news was bad. Schwerner, Chaney, and Goodman had driven to Neshoba County to investigate a particularly brutal occurrence in the Longdale Community near Philadelphia a few days earlier. A Negro church at which Schwerner had met with local black citizens had been destroyed, and a number of elderly Negroes had been beaten by unidentified whites. The three young men had intended to find out what they could about the incident. They had left word that they would be back in Meridian in the early afternoon, and that if they had not returned by 4:00 p.m., the volunteers were to start making telephone calls to determine their whereabouts. When they were not back on time, a volunteer had called the Jackson COFO office, and phone inquiries had been made at local hospitals and jails, but no word had been received as to where the trio might be.

For an integrated group, and particularly this integrated group, to go to Neshoba County on that particular Sunday was a dangerous venture. Their failure to return, or even to call in, was indeed disquieting. The situation presented a

practical problem of the utmost urgency and a legal question of considerable delicacy. If, as already seemed possible, the three missing men had been assaulted or worse by private individuals, without any participation by officers of the law, this would have been a violation of Mississippi law but probably not of any federal law. The FBI, which is only authorized to investigate possible violations of federal law, and not of state law, would have been without jurisdiction to take any action. Private violence directed against individual citizens was at that time a violation of federal law only if the victims were engaged in the exercise of one of a very narrow class of rights protected by federal law against violation by other individuals. These rights included petitioning the federal government, voting in a federal election, and being safe in federal custody, to mention three prominent examples. The investigation by civil rights workers of Klan violence was not a federally protected right in this sense of the term, and private citizens' interference with such activities would not have been sufficient to confer federal jurisdiction. The FBI did, however, have jurisdiction to determine its own authority. It could make an initial investigation to determine whether the case was one in which it could properly conduct a comprehensive investigation. The matter was obviously one of great urgency.

The next two and a half hours were spent in an attempt to discover any facts that might be helpful in bolstering the FBI's jurisdiction and in locating the three men. An attempt to reach my boss, Bob Owen, was unsuccessful, for the switchboard at his motel in Columbia, Mississippi had closed. We attempted to reach Negro contacts in Neshoba County, but they had no telephones. I learned from the persons present, and passed on to the FBI, additional information – the license number of the station wagon, the clothes the young men were wearing, and their destination in Neshoba County. As we heard nothing, however, our hopes began to fade. Jones and Young, who had fought for black men's rights in Mississippi for a long time, said little. They had seen it all. They knew.

By early next morning, it had been learned that the three young men had been arrested by Cecil Price, Deputy Sheriff of Neshoba County, for alleged speeding and "investigation", and that they had been released from the county jail after 10 o'clock that night and had started back for Meridian. No one admitted to having seen them thereafter. In view of the possible participation in their disappearance of an officer of the law (Price), the FBI's jurisdiction was far clearer than it had been the previous evening, and John Doar in Washington authorized a full scale FBI investigation. On the morning of June 23, the young men's station wagon was located by the FBI at the edge of a swamp near Philadelphia, and any remaining doubt that they had met violence evaporated.

As the case became front-page news all over the country, hundreds of sailors from the Meridian naval base joined the search for the men or their bodies. Some white Mississippians thought the whole disappearance was rather funny, and some took the view that the government was making far too much of a fuss. Charles Hills, a columnist for the Jackson Clarion Ledger, whose uncomplimentary views regarding integrationists in general and Robert F. Kennedy in particular were no secret, wrote a column on June 23, 1964, which led off with a few words expressing boredom about a legal whiskey bill, and which continued as follows:

> Governor Paul Johnson, after no news conferences for weeks, called in the newsmen and all he could talk about was a burned up station wagon they found in Neshoba County or somewhere. Leads one to look elsewhere for something to write about. For instance, things are a lot livelier up Nawth. A while back we read about a Negro rapist undressing a white woman right on a main street in New York. Crowds of people were passing and not a soul stopped to look. Must've been a might ugly woman.

Mr. Hills completed this tasteful column by introducing his readers to "Good Ole George," a new six-stanza Wallace for President song which was to be sung to the tune of "When the Saints Go Marching In."

On June 27, less than a week after the disappearance of the three civil rights workers, the Meridian Star published an editorial which read in full as follows:

> LBJ: COFO Tool
>
> We commend Senator John Stennis and the Laurel Leader Call for asking President Lyndon Johnson to discourage the invasion of Mississippi by pro- "civil rights" students.
>
> It is a good thing to do everything one can for the Southern cause.
>
> However, insofar as actually getting results the senator and our neighboring newspaper might as well tell it to the birds.
>
> Lyndon Johnson is the creature, the tool of the so-called Negro Revolution.

> He would no more go against COFO than Khrushchev would go against Communism.
>
> His fanatical concern for his missing friends in Neshoba County should convince us of this is nothing else has. Do you think that he would have behaved likewise if the men had been segregationists? We should say no!
>
> If we haven't learned the truth about Lyndon Johnson by this time, we deserve anything we get.

The search for the missing trio continued and, for a while, produced no results. Mississippi newspapers reported that local officers were "pleased" with the progress of the search, and published photographs of "searchers" lying on the trunks of their cars. There was muttering that it was all a hoax and that the missing men were probably in Cuba or somewhere. Prominent people lent credence to this kind of remark. On July 22, for example, a United States Senator commented that there was just as much evidence, as of then, that the men were voluntarily missing as there was that they had been abducted. Mississippians, the Senator said, were attempting to preserve the peace in the face of a Communist-backed conspiracy to thrust violence upon them. Two weeks after the Senator's comments, the buried bodies were discovered under a dam twelve miles from Philadelphia.

The Meridian Star's front-page headline was not, one might say, "low key":

> FIRST THING WE SAW WAS A FOOT; DAM DIGGER SAYS 'THE NIGGER WAS LYING KIND OF ON TOP OF THE WHITE MEN.

Press speculation now turned to the question of how the bodies got there. On August 6, the Star reported that:

> One farmer stopped on a downtown street told a reporter yesterday “I think it was those integration groups that got rid of them. They couldn't let them live after they disappeared for everyone would find out it was a hoax.

The newspaper's editorial on the same date, headlined "CAUSE FOR OPTIMISM", read as follows:

> A new hate campaign against Mississippi is sure to follow the finding of the bodies of three civil rights workers near Philadelphia.
>
> We know that, no matter who the murderers are, the 'civil rights organizations' share the blame, inasmuch as they care nothing for how much violence they provoke.
>
> The 'liberals' won't give us a fair shake no matter what. We are used to this. We have been a whipping boy for years.
>
> Nevertheless, we can take great consolation from what we ourselves know to be the truth, regardless of the foul lies that others tell.
>
> Furthermore, we know that more and more people in other parts of the county are coming to understand and sympathize with our cause.
>
> Truly, in spite of everything, we have good reason to be optimistic.

This was the Star's editorial greeting to the finding of the bodies.

To say that the white people of Neshoba County, or at least their leaders, were unsympathetic towards the federal investigators who had descended on their county would be to understate. There existed among Klansmen and many other segregationist whites a kind of code of honor, which held that crimes against Negroes or "nigger lovers" were no crimes at all, that Northerners in general and "Feds" in particular were the enemy, and that no-self respecting white man would assist them in any way in their efforts to help the Negro. Rumor had it that just about everybody in Neshoba County knew how and by whom the three civil rights workers had been murdered, but there was no indication that the perpetrators of the crime felt any concern that they would be apprehended. Rumors of their complicity notwithstanding, Lawrence Rainey remained Sheriff and Cecil Price his Chief Deputy. The murderers of other Negroes had gone free, and it is doubtful that racial feeling had been as strong at the times of those cases as it was during the summer of 1964, with hundreds of Northern student "invaders" in the state helping "agitators" among the "niggers" to challenge the established order. Nevertheless, it seemed likely from the discovery of the bodies that the code of honor had been

violated, and that somebody had talked. Nor was there much doubt in anybody's mind that the FBI had paid for the information, which probably meant that a white man had "sold out" and broken the "code of honor" for money.

Under the generalship of Bob Owen, and, later, John Doar, and with the remarkable investigative skills of the FBI, an intensive effort was initiated to ascertain the facts about this crime, to bring the evidence before a jury and the public at large in a courtroom, and to persuade a twelve white Mississippian jurors to convict the murderers. Dogged by bad luck, the prosecutors and investigators persevered until the job was done. There was probably never a case in which our Division was involved which we all wanted to win as badly as this one. Nevertheless, throughout the proceedings, there was not a single occasion on which Bob Owen and his colleagues departed from completely fair procedures or infringed in any way on the defendants' constitutional rights.

The legal effort did not have an auspicious beginning. Following the discovery of the bodies, the FBI investigation uncovered evidence linking Sheriff Rainey, Deputy Sheriff Price, and several other local officers with the alleged mistreatment of Negro prisoners in their custody. Price was the same man who had taken the three civil rights workers into custody on the day of their disappearance, and the arrest of the two passengers (Schwerner and Goodman) "for investigation" because Chaney was allegedly speeding appeared to be an abuse of his authority as an officer and probably a willful violation of their constitutional rights. While the bodies had been discovered, there had not yet been a major "break" in the case, but it was always possible that, if appropriate persons were brought before a grand jury and compelled to testify, someone who knew would talk. Consequently, a federal grand jury, composed of twenty-two whites and one Negro, was convened in Biloxi, Mississippi to hear the evidence which the government had assembled.

Proceedings before a grand jury are secret, and what transpired cannot be made public, but at the conclusion of the government's presentation, the grand jury returned indictments against Rainey, Price, and others alleging mistreatment of Negro prisoners (only a misdemeanor, or minor crime, under federal law). No indictment was returned either in relation to the murder of Chaney, Schwerner and Goodman by parties unknown or their arrest by Deputy Sheriff Cecil Price. Under all of the circumstances, the securing of unprecedented (in Mississippi) indictments for the comparatively less important offenses was no mean accomplishment, but for all that appeared, we were no closer to having

solved the murders of the three young men. Then, suddenly, there was a major break.

On December 4, 1964, nearly half a year after the murders, the FBI arrested 21 individuals on charges of conspiracy to deprive the three civil rights workers of their constitutional rights, in violation of two old Reconstruction statutes. Several law enforcement officers, including Rainey and Price, were among those charged, and it was their alleged participation in the conspiracy that was claimed to have made the defendants' conduct a federal crime as well as a state law violation. Within hours, Miss Esther Carter, the United States Commissioner, set bail, and the defendants made bond and were promptly released.

A week later, a preliminary hearing was held in Meridian on the question whether there was probable cause to hold the nineteen defendants and to require them to post bond while preparations were made to secure an indictment from a federal grand jury. Bob Owen again represented the government, and, dramatically, he produced his first witness, Special Agent Henry Rask of the Federal Bureau of Investigation. Owen asked Rask whether the FBI had secured a confession in the case, and Rask said yes. Horace Doyle Barnette, a Klansman from Meridian, had confessed.

Miss Carter now made a dramatic and controversial ruling. The attorneys for the defendants had voiced their objections as Owen asked Rask about the confession. They claimed that such testimony was inadmissible as "hearsay" evidence. This would undoubtedly have been so had this been a full trial. In general, a witness cannot testify about what another told him for the purpose of proving the truth of the other's statement, for to permit such a procedure would deprive the other side of its opportunity to cross-examine the person claiming to know the facts first hand. At preliminary hearings such as that before Commissioner Carter, however, the rules of evidence are far less stringent. It was the government's position that the rule against admission of hearsay evidence did not apply. Owen argued that while the FBI agent's testimony about a confession would not be admissible at the trial against anybody except the man who made it (Barnette), such evidence is routinely admitted at probable cause hearings and should be accepted here.

Miss Carter is not a lawyer. Seated near her, however, and apparently advising her, was young Tom Stennis, who had been law clerk for Judge Cameron of the United States Court of Appeals, Meridian's most eloquent spokesman for segregation and states' rights. Miss Carter, either on Stennis' advice or on her own,

upheld the defendants' contentions about Rask's proposed testimony being hearsay, and when Owen failed to produce Barnette to take the stand (Barnette was not in court), Miss Carter ordered the charges against the defendants dismissed and their bond money returned. The government had been routed. The dismissal of the charges was a blow, particularly to the black community. Mississippi Negroes had had little opportunity to bone up on the law of hearsay in preliminary hearings, but they saw another example of "white man's justice" as the nation's press carried photographs of Sheriff Lawrence Rainey and the other defendants, grinning and arrogant, treating the proceedings as a joke, and walking out free men.
Most of the damage, however, was psychological. Even if Miss Carter had ruled in our favor, it would have been necessary to secure a grand jury indictment before the defendants could be brought to trial, and such an indictment could still be sought, whether the men were held in the meantime or not. The principal effect of Miss Carter's dismissal of the charges was that the defendants would be free of charges and would not have to put up bond pending any action by the grand jury. We did, after all, have a confession, all that we needed was twelve votes for indictment in a 23-member grand jury, and the men could then be brought to trial. The grand jury was reconvened, this time in Jackson.

Bob Owen, assisted by John Doar and the United States Attorney, Robert Hauberg of the Southern District of Mississippi, a first-rate criminal prosecutor, presented the government's case. The FBI had not been idle while the lawyers argued procedural points. James Jordan, a Meridian construction worker and a member of a militant branch of the Klan, had confessed to the FBI and implicated several other Klansmen from Meridian and Neshoba County. Barnette, as it later turned out, repudiated his signed confession and was presumably of no help to the prosecution, and it appeared that Jordan's testimony would be crucial to the case. It became known that Sheriff Rainey and Deputy Price were trying to serve some legal papers on Jordan, and rumors spread that they would try to arrest him. Jordan's whereabouts had been secret, and, since the Neshoba County jail was not, from the prosecution's point of view, the ideal place for this witness, security around the federal courthouse was heavy. Jordan was not arrested, and the grand jury returned an indictment against the eighteen defendants, most of them identical to those who had been arraigned before the United States Commissioner the preceding December. Once more, the accused men put up bond and, once again, they were released.

The attorneys for the defendants, attempting to prevent the case from coming to trial, now made numerous attacks on the legal sufficiency of the indictments and on the FBI's procedure in the case. Their principal contention was

that the indictment was unlawful because, in effect, the real charge against the defendants was murder, a state crime, and that the federal statutes under which the indictment had been secured did not apply to the conduct with which these defendants were charged. The legal issue was a complex one. The justices of the Supreme Court had in the past been closely divided on questions involving the reach of the old Reconstruction laws on which the indictment was based, and it was not then clear how the precise question as to the legality of this indictment would be resolved. After reading extensive briefs and hearing oral argument, Judge Cox held that the charges under Section 241 of the Criminal Code – a felony punishable by ten years imprisonment – were legally insufficient and would have to be dismissed, while the charges under Section 242, a misdemeanor, punishable by one year's imprisonment, were legally adequate and would be sustained. The result would have been, had Judge Cox's decision been upheld, that the alleged principals in one of the most notorious murders in recent years would be tried for a misdemeanor, a technical legal term for a minor or petty offense.

The United States promptly appealed directly to the Supreme Court under a special statute which authorizes bypassing the United States Courts of Appeals in cases of this kind. The case presented some issues similar to those in the prosecution of Klansmen who had ambushed and murdered Negro Colonel Lemuel Penn as he drove along a Georgia highway, and the cases were heard together. In two opinions by former Justice Abe Fortas, which delved into the statements of Congressmen and Senators nearly a hundred years earlier in order to discern the intention of Congress in passing these laws, the Supreme Court reversed the trial court rulings and reinstated the charges against the defendants. Finally, it appeared that the time had come when the defendants could be brought to trial.

But now a new, extraordinary obstacle intervened, and one that was filled with irony. In a case involving a perjury indictment against Joni Rabinowitz, a white civil rights worker charged with lying to a federal grand jury in Macon, Georgia, the Court of Appeals for the Fifth Circuit, which rules on appeals from District Courts in both Georgia and Mississippi, held that the traditional method by which the grand jurors had been selected by the federal court in Macon was not in compliance with a recent act of Congress and tended to exclude Negroes and other groups from juries on account of their race. The system of selecting jurors in the Southern District of Mississippi was similar to that held unlawful in Georgia. Consequently, the attorneys for the defendants now asked Judge Cox to dismiss the indictment on the grounds, among others, that the grand jury had been unlawfully selected. In what must seem to the layman one of the most remarkable of all legal anomalies, Cecil Price and others, Klansmen all, who would undoubtedly try to

remove any Negro from any jury which might try them, and who probably did not believe that Negroes ought to be allowed to serve on juries at all, were arguing that their rights had been violated because Negroes had not been accorded an equal chance to serve on the grand jury which indicted them!

Since the grand jury in the Meridian case had been selected in the same way as that in the Macon case, the United States was in no position to oppose the defendants' motions, and the indictments for which Bob Owen and his colleagues had fought so hard, and which had already been sustained by the Supreme Court, were dismissed with the government's consent. The defendants' bond money was returned to them, and we had to start all over again.

Indefatigably, Owen reassembled his proof, as well as additional evidence which the investigation had now uncovered. A new grand jury was convened, this time under a system of selecting jurors which had been approved by the Court of Appeals. The racial composition of the new jury reflected the democratization of the mode of selection; this panel included half a dozen Negroes among its 23 members. Our witnesses had to testify all over again. On February 27, 1967, 32 months after the disappearance of the men, the new grand jury handed down indictments similar to those previously dismissed. On this occasion, however, there was an important addition to the ranks of the defendants. Sam Holloway Bowers, Jr., a business man from Laurel, Mississippi who was later identified in testimony as the Imperial Wizard of the militant White Knights of the Ku Klux Klan, was among those against whom indictments were returned. This time, the action of the grand jury held, and in October 1967, nearly three and a half years after the deaths of Schwerner, Chaney, and Goodman, Lawrence Rainey, Cecil Price, and sixteen other defendants went to trial.

There were 31 white persons and 19 Negroes in the group from which the trial jury was selected. There were eighteen defendants, each of whom was given one "peremptory challenge", that is, the right to disqualify one juror without giving any reason for objecting to him. Each side was also given ten additional peremptory challenges. The defendants therefore had more than enough "strikes" between them to assure that the trial jury would be all-white. For the long-suffering Mississippi Negro, white man's justice would now face its sternest test. The defendants undoubtedly remained confident that no white Mississippi jury would convict them of a crime of this kind, and past experience must have seemed reassuring.

The leader of the prosecution team, however, was John Doar. Doar believed that the American system of justice could be made to work even in racial cases arising in Mississippi. It was not long since he had personally secured a conviction in the slaying of white civil rights worker Mrs. Viola Liuzzo, following the Selma to Montgomery march. Could he do the same in Judge Cox's court in Mississippi?

As the trial proceeded, there were laid bare in the public record the details of a cold-blooded conspiracy and execution. There were many anxious moments during the trial for John Doar and his team. The worst occurred when James Jordan, the only government witness who had been present at or near the actual homicide, and who, after two secret grand jury appearances, was now to tell his story in open court for the first time, was taken ill on the eve of his testimony. It looked for a time as though Jordan would not be able to testify at all. Finally, he recovered and told his story. While space does not permit a full account of all of the evidence at this memorable trial, the following factual statement, taken substantially verbatim from the government's brief to the Court of Appeals at a later stage of the case, tells it like it was.

“On June 22, 1964, a Sunday, Michael Schwerner and Andrew Goodman, white, and James E. Chaney, Negro, were confined in the Neshoba County Jail, located at the county seat, Philadelphia, Mississippi. The official jail docket of the County reflects that the three men were arrested by "Price”, the Deputy Sheriff of Neshoba County. Chaney was arrested for "speeding;" the other two were marked "holding for investigation." After dark, on the same day, the three were released. The jail docket reflects that Chaney "Paid fine $20.00;" the other two were "Released after Investigation." According to Mrs. Ninnie Herring, the jailer's wife, the boys were released by Cecil Price, the Deputy Sheriff, at 10:30 p.m. Following their release from jail, the three men disappeared. Shortly after midnight their station wagon was set on fire.

On June 23, 1964, special agents of the Federal Bureau of Investigation located the station wagon off the road in the brush at the edge of a swamp located about thirteen miles northeast of Philadelphia on Highway 21. A watch found in the burned out station wagon had a hand setting of 12:45.

On August 4, 1964, FBI agents uncovered the bodies of the three youths, buried approximately fifteen feet beneath the top of an earthen dam. The dam was located about a mile off the main road deep in the woods on the land of Olon Burrage, about ten miles southwest of Philadelphia. Five bullets, one in Schwerner, one in Goodman, and three in Chancy, were found in the bodies.

Price had locked them in jail at about 4:00 p.m. the afternoon of June 21. Price knew that they were civil rights workers and that they drove a station wagon which belonged to the Congress of Racial Equality.

They remained in jail. Mrs. Herring said that in running the jail, she and her husband normally followed the practice of releasing individuals from jail if they made bond or paid the fine. According to her, it was not necessary for the Sheriff or Deputy Sheriff to be around. "If it is a little bond they have told us that we would know just as well as they would what to do and for us to go ahead and accept the bond and let them out." A schedule of fines established by the Justice of the Peace was posted in the jail, for various offenses, including speeding. On the basis of this practice, Mrs. Herring said that she and her husband had been releasing persons from jail "all these 12 years then they pay off or make bond, we go ahead and release them because a lot of times we can't get a hold of the law." The three were not released at that time, however. Price controlled the release. Mrs. Herring did not even have their personal belongings, and never saw their car keys.

At about 10:30 p.m., Price came into the jail prepared to "release them all." Mrs. Herring said Price went around to the cells and "asked the colored boy if he wanted to pay off and Chaney asked him how much was it and he told him it would be $20.00." After the fine was paid, Mrs. Herring made the entries noted above, on the jail docket. When asked why she wrote "Released after investigation" for Schwerner and Goodman, she said, "Well, that's what he [Price] said." No investigation was made by Price at the jail, according to Mrs. Herring, and, in fact, "no one talked to them while they were in jail" prior to their release. As the three left the jail, Mrs. Herring said "Price told them 'see how quick you all can get out of Neshoba County' and they thanked him and went on out. "

When the bodies of the three were found six weeks later, Dr. Featherstone, the autopsy physician, concluded that each died of a gunshot wound. He found a puncture wound in the chests of Schwerner and Goodman, and a puncture wound in the upper abdominal area of Chancy. Featherstone followed these wounds to bullets which he removed from each body. These three bullets were fired from the same gun at contact range – that is, the gun was up against the body.

Schwerner was a native of New York. He had lived in Mississippi since at least February of 1964, in the Negro neighborhood of Meridian. Schwerner headed the COFO (Council of Federated Organizations) office, also located in a Negro

neighborhood. According to a Reverend Johnson, a local Negro minister, Schwerner worked on voter registration, upgrading jobs for Negroes, and police treatment of Negroes. Generally, he wore overalls or blue jeans, and a "goat beard."

Shortly after Schwerner began working in the Meridian area, the White Knights of the Ku Klux Klan began organizing there. Wayne Roberts, Jimmy Arledge, Jimmy Snowden, and Doyle Barnette joined the Meridian (Lauderdale County) unit in April and May of 1964. Cecil Price and Billy Wayne Posey belonged in adjacent Neshoba County. Sam Bowers was the State leader of the White Knights, the Imperial Wizard.

The White Knights was a self-styled "militant" organization, dedicated to the perpetuation of racial segregation and the destruction of its enemies. "As Militants," Imperial Wizard Bowers explained in his Executive Lecture, "we are disposed to the use of physical force against our enemies."' He continued, "If our enemies can be driven out of the Community by Propaganda, well enough. If they continue to resist, they must be physically destroyed..."

Violence was at the heart of the organization, and specific procedures were established for approving various levels of violence. The most drastic measure was "elimination," death. Klan procedure required that Sam Bowers approve any "elimination" personally. Without Klan approval for a project there would be no financial support.

Michael Schwerner was known and hated by the Klan. The local Meridian Klansmen referred to him as "Goatee," and he was often the subject of discussion at Klan meetings prior to the killing. According to the witness Delmar Dennis, the subject of voting to eliminate "Goatee" came up at a Klan meeting in the spring. Dennis testified that Killen, the Klansman leading the meeting, told the group "we were not yet organized in a Klavern and it would not be necessary for a local Klavern to approve that project, that it had already been approved by the state officers of the Klan and had been made a part of their program and it would be taken care of." At a subsequent meeting attended by Dennis, there was grumbling that "even though the state had approved the elimination of Schwerner that nothing had been done about it." Witness Wallace Miller, another Klansman from Meridian, described another meeting at which Schwerner was discussed. He said that " prior this particular meeting, they wanted to go whip Schwerner, [but] at this meeting, they reported they had not been able to see him. Mr. Killen told us to

leave him alone (sic) that another unit was going to take care of him, that his elimination had been approved ... by the Imperial Wizard, " who was Sam Bowers.

In Neshoba County, an area in which Schwerner had been working and holding meetings, there was a lot of talk about civil rights workers working in the county, according to Bernard Breazeale, a member of the Neshoba County School Board. Schwerner and Chaney had been in the Mt. Zion Negro Community, which is located about ten miles east of Philadelphia, several times in April and May 1964, and they had held a meeting in the Mt. Zion Church on May 31, 1964.

On Sunday afternoon, June 14, 1961, Deputy Sheriff Price and Bob Barnette drove out to Mt. Zion Community to the Wilbur Jones residence, just north of the Mt. Zion Church. A Negro couple, driving a car with Arkansas license plates, was visiting relatives in the community. Price followed the Arkansas car up to the Jones' residence and talked to Mr. Jones, telling him "he had orders to check on that car, said it had been said that some white people riding in the car with them." After Price found out from Jones who the Negroes were, he said, "y'all know what's going on around here and we does too, he says now if they are down here for any stuff like that we are just not going to have it. ..." Barnette asked Mrs. Wilson, the woman from Arkansas, why she didn't get it stopped. She protested she and her husband "wasn't taking any part in the civil rights activities no way no how."

On June 15, 1964, the next day, according to defense witness Breazeale, Price was also out on the Longdale Road near the Mt. Zion Church not far from where he had accosted the Wilsons the previous day – purportedly checking on vandalism in an abandoned Negro school.

On June 16, 1964, Klansmen from Neshoba County held a meeting 'in an old gym out in Neshoba County and invited members of the Meridian Klan unit to attend. The same night a group of local Negroes were holding their regular "leaders and stewards" meeting in the Mt. Zion Church. "Hop" Barnette interrupted the meeting and reported to the group that "he had passed the Mt. Zion Church and there was meeting being held there and must be an important meeting because the church was heavily guarded." According to Dennis the discussion which ensued involved suggestions that "there probably were civil rights workers in the church or it would not have been heavily guarded," and that "Schwerner" might also be present at the Mt. Zion Church. Dennis said volunteers left the Klan meeting to go to the church; they were armed; Wayne Roberts went with them. Mrs. Beatrice Cole, a 61-year-old Negro woman, who was attending the "leaders

and stewards" meeting, said that as she and the other Negroes were leaving the church they were accosted by a large group of white men. She and her husband were stopped as they were leaving the churchyard. Her husband was questioned about what kind of meeting was occurring and was then searched and beaten. When the group returned to the Klan meeting, Dennis said that defendant Posey and a Klansman named Birdsong reported on what happened at the church. "Wayne Roberts had blood on his hands, or knuckles," Dennis testified, "and he told me he got this when he was beating a nigger." Later that night the Mt. Zion Church burned to the ground.

On June 21, 1964, five days after the incident at the church, Schwerner, Goodman, and Chaney vent to the Mt. Zion area, drove around the community with a local Negro named Ernest Kirkland, and spoke to several Negro families about the beatings and church burning on June 16. In the early afternoon they finished their inquiry and headed back toward Philadelphia. Shortly after 3:00 p.m., two state highway patrolmen, Wiggs and Poe, parked approximately four miles east of Philadelphia for traffic control on Highway 16. Patrolman Poe testified that he saw Price, shortly after they parked, traveling east on Highway 16 – which is toward the Longdale Road – in the Deputy Sheriff's car. A few minutes later, Poe received a radio call from Price saying that "he had a good one, or was chasing a good one ... George Raymond." According to Poe, Raymond was known to Price as a civil rights worker from Canton, Mississippi. After this call, Poe saw the station wagon traveling west on Highway 16 toward Philadelphia, and Price was behind in his car. Shortly thereafter, Price again radioed the highway patrolmen, for assistance. Poe and his partner immediately drove to the eastern edge of Philadelphia, where Chaney, Schwerner and Goodman were changing a flat tire on the station wagon. Price told Poe that he "arrested the Negro for speeding, he was the driver, and the other two for investigation, and he asked if we would help him take them to jail. After the tire was changed, Poe drove Schwerner and Goodman to the jail; Wiggs, his partner, drove Chaney. Price took the three into the jail. The time was "around 4:00 o'clock."

Shortly before 6:00 p.m., in Meridian, James E. Jordan, a local Klansman, drove to the Longhorn drive-in restaurant, operated by Frank Herndon, the Exalted Cyclops or President of the Meridian Klan unit, to pick up his wife who worked there. According to Jordan, Killen came to the drive-in, talked to Herndon and then told Jordan that "he had a job he needed some help on over in Neshoba County and he needed some men to go with. He said that two or three civil rights workers were locked up and they needed their rear ends tore up. He said the Sheriff's Deputy locked them up." Killen identified only one of them – "Goatee."

Jordan said that they "started calling then on the telephone trying to line up some more men to go with us." Jordan went over to Mr. Akins' Mobile Homes on Tom Bailey Drive, where additional phone calls were made. The men assembled at Akins'. They included Roberts (Jordan had picked him up), Doyle Barnette, Arledge, Snowden, and others. Jordan said that Killen told the men "they had three of the civil rights workers locked up and we had to hurry and get there and we were to pick them up and tear their butts up." Killen said the three would be stopped by highway patrolmen on the outskirts of town. The cars were gassed up, the men were given gloves, and Killen told the group that "he would go ahead as he had to get on back there as fast as he could and make the arrangements..." According to Jordan, Killen told them to park on the far side of the courthouse when they got to Philadelphia. Roberts left with Killen. Jordan went with Barnette, Arledge, and Snowden. When Jordan and the other three arrived in Philadelphia, they parked where they had been told. Killen told them once more to move and to wait to be notified of the release.

Within 10 to 15 minutes, Jordan said, a city police car came up and said “they're going on Highway 19 toward Meridian, follow them”. They left and drove down Highway 19 toward Meridian and stopped near a highway patrol car on the outskirts of Philadelphia. They pulled up behind a red car which contained Posey and Roberts. According to Jordan, Posey got out of the other car and talked to the highway patrolman. Patrolman Poe said he and Wiggs were at this location and that Posey got out of his car and came over to their patrol car and asked, "Where is Price?" Poe's partner, Wiggs, said, "I don't know." Jordan said Posey then came over and told them "never mind they will be stopped by the deputy sheriff, these men are not going to stop them." About that time the deputy's car came by, said something to the man in the red car, and the deputy's car, and we took off to follow them. The chase had begun. The deputy was Cecil Price. Posey's car broke down, and he got in with Jordan and the others. Jordan said "we went on back toward Meridian from Philadelphia to a cut off highway, I don't know which number it is, toward Union, and we were traveling at a pretty high rate of speed and about that time we caught the tail end of the deputy's car ahead of us. We saw the little wagon in front of him which he had pulled over to the side of the road, by turning on his red light.” Jordan said that Price put the three into his car and he "heard a thump like the deputy was rushing them up to get in there or where he hit one of them or the car or what, but [he] did hear a thump." Subsequently, Price told Delmar Dennis that he had concluded it was Jordan who was giving the information to the Bureau about the civil rights workers because "Jordan was the only person who could have seen him hit Chaney the night the three men were killed."

The group, with the three young men in Price's car, turned around, went back to Highway 19 and proceeded toward Philadelphia to an unpaved road three to four miles up Highway 19. Within minutes the three were dead. According to Jordan, he was let off at the corner of the dirt road, as a lookout. Jordan heard several shots, he ran up to the area and he saw Schwerner, Chaney, and Goodman lying on the ground. Price, Roberts, Posey, Arledge, Snowden, Barnette and Jordan were there. Jordan said they loaded the bodies into the station wagon. Price turned around, and left; Posey got in the station wagon with the bodies, said "just follow me, I know where we are going. They drove over several back roads to a dam site and, according to Jordan "opened the back of the station wagon, took the boys out and took them down to this hollow." There were two bulldozers there. Jordan and Snowden, at Posey's instruction, went up to the road to wait for the bulldozer operator. In a little while, although they did not see the operator, "we heard the bulldozer crank up", and operate for about 20 minutes. Shortly thereafter Posey told him that "Herman will take it [the car] to Alabama" and burn it. The group reassembled at a warehouse, put the license tags back on Doyle Barnett's car, and drove back to Philadelphia. They pulled up near a police car that contained Price and the same policeman who notified them that the boys had been released. Posey talked to the men in the police car and, Jordan said, "came back and told us to go on home that everything would be taken care of." Then they went on to Meridian, arriving there "close to one o'clock."

In the days and weeks after the events of that Sunday night, there was talk among Klansmen of what occurred. About a month after the killing, Bowers complimented Jordan on the job. "Sam said the best thing to do was not to talk about it, that everything was well done, it was a job to be proud of, if there were any instruments involved they should be gotten rid of." Prior to the killing, Bowers had told Jordan in May 1964 that Schwerner "was a thorn in the side of everyone living, especially the white people, and that he should be taken care of."

On January 6, 1965, Bowers wrote Delmar Dennis about the killing of the three civil rights workers after two Federal Bureau of Investigation agents sought to interview him. Bowers wrote in code, on a typewriter under an assumed name. Bowers told Dennis in the letter that two representatives of the main plant accused him of being involved in the large logging operation [case of the missing civil rights workers]. Bowers wrote, "that while the situation as regards the big logging operation is horrible, it is not hopeless. My experience this morning convinces me that the main plant is in possession of all the information regarding our secret logging operation due to the loose talk of some of our truck drivers, [local officers

in the Klan] but that as far as facts are concerned they have nothing of value for which they could sue us." Bowers told Dennis he could show the letter to "our scaler" [Klan investigator] and discuss it with other "saw mill employees" especially those deep in the swamp." [Those arrested at that time in connection with the killing of Schwerner, Chaney and Goodman.]

Also, Bowers, consistent with the policy of assisting only those in need on projects "approved by the Klan", sent money through Dennis to Roberts and Posey; Posey requested it for the defendants involved in this case.

Shortly after the bodies were found, Sam Bowers told Delmar Dennis that he was pleased with the job. Bowers characterized it as "the first time Christians had planned and carried [out] the execution of Jews."

END OF PASSAGE FROM GOVERNMENT'S BRIEF

The evidence related above was presented to the jury in a trial which lasted nine and a half days. After the jurors retired, it appeared for some time that they would be unable to agree on a verdict. The foreman sent five written notes to the judge, one asking for a transcript of the testimony (which was not yet available), and the subsequent ones reading as follows:

Note 2:	This jury is hopelessly deadlocked.
Note 3:	I honestly believe that we are in an impossible situation and could not possibly reach a verdict if we stayed here a year.
Note 4:	I am absolutely certain that from here on we are simply wasting everyone's time. I deeply regret this, but there is nothing I can do about it.
Note 5:	I see no possible way to solve our impasse unless you can further clarify for the jury what actually constitutes reasonable doubt.

After the jurors had been deliberating for nine hours and fifty minutes, Judge Cox, whose able and impartial conduct of this trial (unlike his handling of the voting discrimination cases) won widespread praise, addressed them again and delivered a variation of what is known to lawyers as the "Allen charge," or "dynamite charge." The substance of this "charge" to the jury is an explanation that the jurors have heard all of the evidence, that if they are unable to agree on a

verdict, the facts will have to be presented all over again to another jury which is no better qualified, and that the minority should give proper consideration to the opinion of the majority in determining whether their views are sound. The "Allen charge" has been criticized as tending to induce jurors to compromise, but Judge Cox, conscious of such criticism and determined to treat all parties fairly, emphasized to the jurors that they were not to surrender any conscientious conviction about the weight or effect of the evidence in order to reach a verdict. Judge Cox further explained that if the jury agreed as to the guilt or innocence of some defendants but not of others, they should so report, and a mistrial could then be declared with respect to those defendants as to whom no agreement could be reached.

There was more commotion about the "dynamite charge." Judge Cox kept two of the defendants, Price and Roberts, in jail over the weekend (while the others were free on bond) after they had allegedly made "blustering" remarks about the charge. The judge quoted the two as having said something like:

> Judge Cox just gave that dynamite
> charge, we've got some dynamite
> for him ourselves, haven't we?

Stating that "I'm not going to let any wild man loose on any civilized society and I want you locked up", Judge Cox let these two men rue their words in the County Jail. The threatening remarks by these defendants, however, did not come to light until after the big news that the jury had reached its verdict.

The reading of the verdict began with an extraordinary slip of the tongue by the clerk. The paper containing the verdict had a separate sentence with respect to each defendant, and Deputy Sheriff Cecil Ray Price was the first on the list. As he read the verdict aloud, the clerk first reported that the jury had found Price not guilty, then excused himself and read correctly, guilty. Altogether, of the eighteen men on trial, seven – Price, Bowers, Posey, Horace Doyle Barnette, Snowden, Arledge and Roberts – were convicted. All but Bowers had been identified in the testimony as having been at the scene of the murders, and Bowers, of course, was shown to have authorized and masterminded the entire "logging operation." The jurors were unable to agree on the guilt or innocence of three of the defendants, including Ethel Glen "Hop" Barnette, Rainey's predecessor (and successor) as Sheriff of Neshoba County, and Reverend Edgar Ray Killen, whose conduct at the trial was found to be so "scurvy" by the court that Judge Cox later described him as a "defendant...who is alleged to be a preacher." The remaining eight defendants

were found not guilty and freed. Bowers and Roberts were sentenced to ten years imprisonment (the statutory maximum term), Deputy Sheriff Price to six, and the other defendants were each given three-year terms. On November 27, 1967, Judge Cox denied various motions on behalf of several defendants to upset their convictions on various grounds. On July 17, 1969, the Court of Appeals for the Fifth Circuit affirmed the convictions. Finally, on February 26, 1970, the Supreme Court of the United States declined to review the case, and, nearly six years after the deaths of the three young men, the convicted defendants, having received due process of law in the broadest sense of the term, were taken into custody to begin serving their sentences.

John Doar announced his retirement from our Division a short time after the trial. Haynes Johnson of the Washington Star interviewed him on the occasion of his announcement, and reported that:

> ... In reminiscing about his government career, [Mr. Doar] has nothing but praise and kind words for his associates and colleagues. He also goes out of his way to compliment the people of the South. The Mississippi trial which he prosecuted this fall, resulting in the first conviction of Klansmen by an all-white jury since Reconstruction, was an example of this.
>
> "The country", he said, "was surprised. People seemed to think it was remarkable that the citizens of Mississippi did their duty. But they were wrong."

Some further progress in Mississippi justice is reflected in the following article, which appeared in the Washington Post of November 14, 1968.

> KLAN LOSES SUIT BY NEGROES
>
> Vicksburg, Miss., Nov. 13 (UP1)--A Federal court jury hearing a damage suit against the White Knights of the Ku Klux Klan awarded more than $1

million today to relatives of a slain Negro cattle tender.

The 12-member jury, including eight Negroes, deliberated 90 minutes before ruling that the White Knights of the Ku Klux Klan and three individuals must pay $22,150 in actual damages and $1 million in punitive damages in the death of Ben Chester White. The suit was filed by White's son and other unnamed relatives.

The suit was against the White Knights and James L. Jones, 58, Ernest Avants, 37, and Claude Fuller, 58. The three were charged with the slaying but Avants was acquitted by one circuit court jury and another could not reach a verdict at Jones's trial. Fuller has not yet been to trial.

White, 65, was found floating in a creek near Natchez in June, 1966. He had been shot 17 times with a rifle and once with a shotgun.

CHAPTER 8
The Camera Never Lies

The conviction and imprisonment of Cecil Price and his co-conspirators in the Neshoba County murders, together with the successful prosecutions of the killers of Colonel Penn and of Mrs. Viola Liuzzo, established that vigilantes could no longer rely on impunity if they killed their victims. But death was not the only peril which a black person had to fear from the proponents of white supremacy. Killings were not as infrequent as they should have been, but they occurred far less frequently than lesser violence against Negroes, often perpetrated by officers of the law. The problem of relations between nonwhite citizens and white policemen remains one of the most explosive in the field of race relations, especially in the urban ghettoes. Often, the rights and wrongs of a given situation are complex, for the perspective from which the law enforcement officer looks at the circumstances is quite different from the viewpoint of the black man. It is the obligation of federal law enforcement personnel to exercise restraint in appraising conflicts between police and citizens, for not every mistake of judgment by an officer is or ought to be a federal crime. Ever since the days of Reconstruction, however, certain intentional misconduct by an officer towards a citizen has been a misdemeanor, punishable by a year in prison and a $1,000 fine. Prior to 1965, almost our entire resources in Mississippi were directed to securing the right to vote. After the enactment of the Voting Rights Act, however, Civil Rights Division personnel began to involve themselves in prosecutions of law enforcement officers for violating citizens' constitutional rights.

The federal statute which prohibits willful denial of federal rights, and under which we undertook such prosecutions, is Section 242 of the Criminal Code, and it is referred to by our lawyers simply as "242." Ordinary police brutality, such as the beating of a prisoner, violates this statute; an officer has a responsibility to allow a judge and jury to determine the prisoner's punishment, and he may not substitute summary violence – a crack on the head with a billy club – for the due process of law. This does not mean, of course, that an officer may never use his club, or even his pistol. The use of necessary force to bring a prisoner under control, or to protect lives and property, is lawful. Section 242, however, is concerned with the situation where the officer abuses the authority entrusted to him and – under what lawyers term "color of law" – takes advantage of the power which the state has given him to willfully deny a person rights secured by the Constitution and laws of the United States.

"242" cases have been exceptionally difficult for us to try, especially in Mississippi. The burden of proof is a staggering one. The leading Supreme Court case arose out of the following facts, as stated in the opinion of the Court:

> This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy, in arresting Robert Hall, a citizen of the United States and of Georgia. The arrest was made late at night at Hall's home on a warrant charging Hall with the theft of a tire. Hall, a young Negro about thirty years of age, was handcuffed and taken by car to the courthouse. As Hall alighted from the car at the court house square, the three petitioners began beating him with their fists and with a solid bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the courthouse yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.

Georgia would not and did not prosecute the defendants for murder or even manslaughter, but the United States brought charges under 242, and an all-white jury convicted the defendants and the judge sentenced them to imprisonment and to pay statutory fines. The defendants appealed the judgment of conviction to the Court of Appeals, which affirmed the convictions and sentences and, finally, to the United States Supreme Court.

With obvious reluctance, the Supreme Court set aside the convictions and ordered that the defendants be retried. The Court held that the statutory prohibition against "willful . . . deprivation of any rights secured or protected by the Constitution and laws of the United States" was somewhat vague – Supreme Court justices often disagree on whether particular conduct deprives someone of his constitutional rights. Since defendants in criminal cases have a right to know whether a particular act is criminal or not, the statute would have to be construed as requiring the prosecution to prove a very high standard of willfulness indeed in order to support a conviction. Since a difference of opinion, or even a mistake of judgment as to what the Constitution requires, may not constitutionally be made a crime, the Court held in effect that it would not be enough for the prosecution to

show that Screws and his companions had a generally bad purpose and knew that what they were doing was wrong. In order to convict them, the prosecution would also have to establish beyond a reasonable doubt that the defendants specifically intended to deprive the victim of a particular constitutional right – in this case the right to be tried by a court rather than by ordeal or torture. The trial judge had failed to instruct the jury that the defendants could not be convicted unless this kind of willfulness was proved, and consequently, the Supreme Court, in an opinion by Mr. Justice Douglas, known as one of the Court's most consistent liberals, reversed the convictions and ordered a new trial for the defendants. Justices Roberts, Frankfurter and Jackson would have gone even further and thrown out the convictions altogether, without opportunity for a new trial. Justice Murphy, who was a former Attorney General, argued in a forceful dissent that the majority's ground for reversal was academic and unrealistic, since there could be no doubt that Screws and his companions knew that Hall had a constitutional right not to be beaten to death and that they had intentionally deprived him of that right. Whatever the merits of the respective opinions, it is doubtful whether ultimate justice was done in the particular case. At the new trial, another jury, after being instructed as to the elements of the crime in accordance with the Supreme Court's decision, acquitted the defendants and they went free.

The government's inability to put the defendants behind bars in a case as aggravated as that of Screws foretold that the path to convictions in less extreme cases in Mississippi would be a difficult one. Moreover, the system of selecting jurors then in effect was still producing only a token number of Negroes on the panels from which juries were selected, and the defendants always had enough challenges to assure all-white juries. Consequently, during the year 1966, we tried five "242" cases in the Southern District of Mississippi; in each of them, the victim was Negro, the defendants were white, and the jury was all-white. Two of these cases were assigned to me.

The first of the two was a somewhat routine case in which two officers were charged with inflicting summary punishment on a woman by beating her without just cause; one was alleged to have ordered the beating and the other to have carried it out. A Negro woman, Mrs. Lula Wright, had been found guilty by a justice of the peace of negligently allowing fire to spread from her land to that of a Negro neighbor. Mrs. Wright was ordered to pay a fine, she was given a limited period to pay, and if she could not raise the money in time, she would go to jail. She was unable to raise the funds and, on the appointed day, an elderly constable (Watkins) and a strapping game warden (McFarland) came to arrest her. She was chopping cotton in the field, and several other Negroes were with her. Her

testimony, and that of the other Negroes, was that she obeyed the instructions of the officers to get ready and come with them, but that she had argued with the officers and had complained that "you wouldn't do me like this if I was a white woman." According to the Negroes, the victim never did anything threatening, and she was laying down her hoe by the railing on her porch when, without provocation, McFarland smashed her on the head with a billy club. Mrs. Wright and the other Negroes testified that Watkins, who was in charge of the operation, had told McFarland to "get the billy" (club) from their car when Mrs. Wright talked back to him. As the Negroes told it, the officers had brutalized the Negro woman for talking back – a classic case of summary punishment.

Watkins did not testify, but McFarland, on direct examination by his lawyer, told a different story from that related by our witnesses. He had been deputized, he said, because Watkins had told him he had to arrest a "bad Negro." They had arrived at "Lula's "house and the woman had been rebellious from the start. She had walked from the field sullenly and reluctantly, and she had then stood on the porch holding the hoe at port arms, challenging the officers to "come get me." She had calmed down, Mr. McFarland said, and seemed to be putting her hoe away when, suddenly, she whirled, swung at him with the hoe, and missed him only by inches. He had struck her, he testified, in self-defense. McFarland said he had been in law enforcement for many years, he had made numerous arrests, and he had never had to use or used force before. McFarland was a fine looking officer, tall and straight as a ramrod, and, although he had only a sixth grade education, he evidently made a fine impression on the jury.

Both McFarland and Watkins were carrying firearms at the time of the arrest, and our knowledge of rural Madison County, Mississippi made us very doubtful indeed of McFarland's story. If a Negro woman in this area had attacked an officer with a hoe, in the judgment of those of us who knew Mississippi, then either she would have been dead or, at least, the officers would have charged her with assault with a deadly weapon, or attempted murder, or some other serious crime. After Mrs. Wright came out of the hospital following treatment for her injuries, however, someone paid her fine and no charges were filed against her. Afraid to remain in the community, Mrs. Wright, a widow, moved to Chicago. We had anticipated that McFarland would testify approximately as he did, however, and we knew that, in a pure swearing match between poor rural Negroes and white officers in a case in which no one lost his life, the chance for a conviction before an all-white Mississippi jury was negligible. Our only hope – a slim one in any event – was to change the context of the swearing match by establishing on cross-examination that the defense version was fabricated, and that unlike the

prosecution testimony, which stood up well under vigorous cross-examination, McFarland's story contradicted common sense and common experience. I tried to do so, and the testimony proceeded substantially as follows:

Q. Mr. McFarland, you testified you have been a law enforcement officer for several years?

A. That's right.

Q. You have made numerous arrests?

A. Yes.

Q. I take it you have arrested both whites and Negroes.

A. Yes sir.

Q. Rich people as well as poor people?

A. Right.

Q. Have you also arrested persons whom you knew personally?

A. Yes, I have.

Q. If they violated the law, you arrested them anyway?

A. That’s right.

Q. Do you consider it your job to let people off if they have violated the law?

A. No, sir, I sure don't.

Q. So, in enforcing the game and fish

laws, if someone commits a violation, you charge him with breaking the law, even if he is a friend?

A. That's right.

Q. Now, I think you testified that Constable Watkins told you beforehand about this woman?

A. Yes, sir, he said she was a bad Negro.

Q. When you arrived and the constable read the warrant, what did she do?

A. At first, she just sort of chopped with the hoe in front of her, near Mr. Watkins' feet, listening to him read the warrant.

Q. I think you said she then walked to the porch and then stood with her hoe at port arms and challenged you?

A. Yes, sir.

Q. That was when Mr. Watkins told you to get the billy?

A. Right.

Q. And then, as you were on the porch, she swung at you and barely missed

your head?

A. She sure did.

Q. Was that when you struck her?

A. Right, I had to.

Q. Do you think Mrs. Wright behaved very well while you were there?

A. No, she didn't.

Q. You had no reason to favor her, did you?.

A. No sir, I sure didn't.

Q. Would you say she attempted to assault you?

A. Yes, sir, she barely missed my head.

Q. Was it a pretty good-sized hoe?

A. Yes, sir, it sure was.

Q. She is a pretty big woman, isn't she?

A. Yes.

Q. Would you say that in her hands it was a dangerous weapon?

A. I sure would.

Q. So, actually, she assaulted you with a dangerous weapon.

A. Yes, sir.

Q. Now, you testified that, if someone violated the game or fish laws, you charged them with an offense. Did you charge Mrs. Wright with assault?

A. No sir.

Q. What did you charge her with?

A. Nothing.

Q. No further questions

In summation to the jury, I argued that McFarland's own conduct belied his version of the facts. A man who enforced the law as uniformly as McFarland said he did could not reasonably be supposed to have been so favorably impressed by Mrs. Wright's conduct that he would make an exception in her case and let her off. The only reasonable inference was that it did not happen as he told it, but rather as the Negroes did – and that the victim was summarily punished by the officers simply for the "crime" of talking back to them. The jury did not, however, see it our way, and rendered a verdict of “Not Guilty” after deliberating for less than half an hour.

If there was one thing to be learned from the McFarland case, it was that we probably could not get a conviction in a non-capital case in Mississippi which produced little more than a swearing match between local Negroes and white officers. In the next "242" case, however, we had what promised to be a horse of a different color. This time we would not have to depend on a swearing match, because we had the photographs.

The scenario of this case was the small town of Morton, Mississippi, population approximately 2,300, in Scott County, a heavily wooded region between Jackson and Meridian which is a part of the Kisatchie National Forest. Scott County seemed an improbable locale for a case arising out of civil rights activity. It is immediately south of Leake County, and the activists in the Harmony Community thought that Scott County was hopeless –the whites were too mean and the Negroes too scared. I had made exploratory contacts in the county in 1963, but few Negroes had applied to register and many seemed to be afraid. There were only a handful registered, and one of these – a woman who

held a position which depended on white favor – had asked abruptly why the Kennedys were picking on Mississippi, why didn't they send us to California instead. She added that the Communists were behind it all. We had never brought a voting discrimination suit in Scott County and, except for a publicized case of a Negro accused of raping a white woman, nothing had disturbed the status quo.

George Raymond changed all that. George is a dark-skinned young Negro who wears a goatee, and he is easily recognizable in the front of the group in the photographs that are part of this chapter. In the summer of 1965, he was in his early or mid-20s, and he was one of the leaders of the Congress of Racial Equality (CORE) in Mississippi. His headquarters was at the "Freedom House" on Lutz Avenue in Canton, Madison County – the same county where Mrs. Wright had encountered McFarland and Watkins, and which, with its substantial Negro majority, has always been an area of considerable resistance to Negro demands. The first time I met George was in February, 1964, shortly after the "Freedom Day" demonstration in Canton during which Negroes had sought to register in large numbers and were said to have been described by Judge Cox as a "a bunch of niggers on a registration drive" who acted "like a bunch of chimpanzees." As I interviewed Negro applicants for registration in preparation for trial against Madison county's registrar, I was followed all around Canton that day by two pickup trucks – one red and one blue – filled with some of the meanest looking characters I had ever set eyes on, and, frankly, I was scared when they followed me that evening along lonely Highway 16 all the way to the Leake County line. In fact, I was thoroughly relieved when they turned around after evidently being satisfied that I had left Madison County.

George Raymond – a tough cookie if ever there was one, although he was a strict adherent of the doctrine of non-violence that characterized CORE under the leadership of James Farmer – did not seem to be afraid at all. He was arrested literally dozens of times on all kinds of charges and roughed up in custody on a number of occasions. According to a Highway Patrolman's testimony in the trial of the murderers of Schwerner, Chaney, and Goodman, Deputy Sheriff Price originally thought that George Raymond was the Negro traveling with Schwerner, and, if so, he may well have believed that he had caught just about the most valuable prize in the area. It was common talk in and around Canton that the Klan was supposed to be out to "get" George Raymond, but he continued his activities, encouraging Negroes to register, leading protests, testing public accommodations, and staying around no matter how much he got in many of the white folks' hair.

In the spring of 1965, George went to Morton to see whether there was any civil rights activity possible in Scott County. Many of the Negroes were afraid to

become involved, but George made good contacts among the teenage high school students, and he met one family in Scott County that was not afraid of anything – Mr. and Mrs. Peterson of Ludlow and their children, who included Classie, aged 16, and Lizzie be, aged 14. In Picture No. 3 in this chapter, Lizzie is the strikingly pretty little girl in white slacks in the trio leading the group; Classie, in white blouse and dark slacks, is immediately behind. With these and other teenagers, George Raymond arranged that a "test" would be made of the racial policies of the Gulf Cafe in Morton – the main eating facility in the town which, ordinarily, served Negroes only in the rear. The "test" was intended to determine whether Negroes could be served in front as well. Up to that time, so far as could be determined, nobody had ever tried to find out.

Whatever he may be, George Raymond is not naive. He undoubtedly knew that news of the proposed test would get back to the white authorities, for he had talked to so many Negroes that it was inevitable that someone would "Tom" on him. He probably had few illusions about what the authorities would do; in any event, he instructed the students that there were three possibilities:

> (1) They might be intercepted or assaulted en route, by officers or private citizens;
>
> (2) They could reach the Gulf Cafe, and be denied service; or,
>
> (3) They might be served.

Whatever might happen, he directed them to be orderly, to obey all traffic laws, to do whatever law officers told them, and to be non-violent at all times. George was a disciple of "We Shall Overcome," not "Burn, Baby, Burn!"

The march, if that is what it was, was scheduled for June 16, 1965, and, when George arrived, he was accompanied by a rather mild young white man wearing a suit and carrying two cameras. The man, whose name was Charles Currier, had spent two years at Columbia University and had left to work with CORE in New York, Louisiana and Mississippi. His specialty was photography.

The first we heard of these events was on June 18 or 19, when one of the volunteer attorneys for the Lawyers' Constitutional Defense Committee (LCDC), an affiliate of the American Civil Liberties Union which was now representing Negroes all over Louisiana and Mississippi, called me from Jackson and told me

that an officer had routed an attempted test of a public accommodation in Morton and had beaten a couple of heads. The attorney related that there had been a photographer along who had taken pictures and had made a thrilling getaway, that the film, after being hidden, had been smuggled out of Morton, and that the history of the entire episode would soon be available on photographs. He was as good as his word. Within a few days, we received from LCDC a set of pictures which include Nos. 1 through 13, reproduced in this chapter. While these pictures are self-explanatory, the following explanation may be helpful in showing the sequence of events which later resulted in the prosecution of Morton's Chief of Police, Lauris Grogan Sessums on a charge of willfully depriving Raymond, Currier and others of their constitutional rights:

Picture No.	Explanation
1	George Raymond, on the left, is shown, talking to the group at the Negro school before their walk to the cafe.
2	The group in the same area.
3	The teenagers walking along the access road to Mississippi Route 13, led by Lizzie Peterson and two other girls; George Raymond is to the side of the middle of the group.
4-6	Shots of parts of the group along the access road.
7	Seven members of the group on the side of State Highway 13, next to a plant near the intersection of U.S. Highway 80.
8	The front of the group is seen on the side of the road as two officers drive up. The car which has pulled over is driven by Constable Bates. The car with the bubbletop which is just making the turn is driven by Sessums.
9	Sessums alights from the car as the group stands quietly on the side of the road.
10	Sessums has waded into the group - his holster is visible at the left -and Raymond and the others are in retreat.
11	Sessums is seen stooping to pickup his billy club, The fleeing boy at the right is Eddie Henry Kincaid, age 15.

12	Holding his billy club in his left hand, Sessums is pulling his pistol out of his holster.
13	Sessums shoots into the air - the smoke from his pistol is clearly visible. The students scatter, with George Raymond bringing up the rear. [Photograph missing]

Picture 1

Picture 2

Picture 3

Picture 4

Picture 5

Picture 6

Picture 7

Picture 8

Picture 9

Picture 10

Picture 11

Picture 12

There can be few cases involving violence in which the prosecution has had available such remarkable action pictures. It is interesting to speculate what a similar series of shots would have revealed about the confrontation between Officers McFarland and Watkins and Mrs. Lula Wright.

Two of us went to talk to George Raymond, and this meeting was itself an experience. George was working in Leake County, and we arranged to meet at the CORE headquarters in Carthage – a little unpainted wooden shack on an unpaved street on which there was no recognizable line where the "sidewalk" stopped and the "road" began. George parked his pick-up truck outside the shack, and I did the same with our rented car. We were interviewing George inside when we heard a car drive up, and there was a loud knocking on the door. George opened the door and a sturdy police officer asked loudly whose truck that was and whose car that was. I came out too and, as George was pulling out his driver's license, I introduced myself and showed my Justice Department identification. The officer, whose tone had initially been quite abrupt, looked at my I.D. and then, self-conscious but smiling, held out his hand.

"Schwelb, he said, "I'm Jenkins." "Officer Jenkins, " I replied, "I'm Schwelb." He was now so agreeable that it crossed my mind to introduce George to him as “Mister” Raymond and to try to deadpan the officer into shaking hands with the young civil rights worker, but this Walter Mitty style thought did not bring words to my lips or movement to my limbs. Officer Jenkins told us benignly that we should pull the vehicles over a little further down the street, which we did, and nobody even got a ticket. It is questionable whether George would have got off so easily alone, but be that as it may, there is a warm and tender spot in my heart for Officer Jenkins of the Carthage, Mississippi police.

When we resumed the interview, George went over the events of June 16 with me and, essentially, the photographs told the story. Sessums had alighted from the car in a fighting mood, demanding to know who had given "you _____ niggers" a parade permit. Raymond had tried to speak to him, but Sessums had waded in with his billy club, aiming a couple of blows at Raymond's head or shoulders; Raymond put his arm in the way, and there had been discolorations on his forearm (photographed by the FBI) to prove it. Sessums, spying the photographer, had run across the street and flailed at him, landing two or three blows on his shoulders. Constable Bates, a much younger man, had simply stood there, rifle in hand, taking no action. Raymond had later been arrested and charged with parading without a permit, disturbing the peace, and resisting arrest, and Sessums had threatened him with a lynching party. Eventually, he was released on bond, and all charges against him were later dropped.

I visited Morton to talk to some of the students involved. As a group, they were exactly what they appeared to be in the photographs – nice, healthy, and rather middle class type teenagers. There were, of course, differences between the activists and the others. The pretty Lucas girls (Florine, aged 13, in dark clothes and white sneakers, fourth from the last in picture 6, and Catherine, aged 17, dressed in light colored clothes who is next to last in picture 6) were the daughters of a Negro store owner in Morton who welcomed civil rights involvement about as much as the people of Czechoslovakia welcomed their Soviet "liberators" in August 1968. Not surprisingly, these girls seemed reluctant even to talk, and were completely unwilling to testify. The Peterson girls, on the other hand, had been to civil rights meetings, and they were conscious of the "Movement" and of the stirring that had come to Mississippi. They wanted to participate. As soon as they were persuaded that the government was there to help them, they simply could not do enough for me. Eddie Henry Kincaid, a remarkably engaging 15-year-old, was the same way, and soon every teenager who had been in the demonstration had been interviewed. While there were differences in recollection –there was considerable disagreement as to exactly what Sessums had said, and as to how many shots were fired – all of the students corroborated the basic facts of Raymond's account. There were some 18 in the group, they walked quietly along the side of the road, there was no traffic and no disturbance, and Sessums had waded into the teenagers for no reason whatever that they could see. Lizzie Peterson and Eddie Henry Kincaid made the best witnesses. Their looks, their youth, their candor and their poise would, I thought, make as good an impression on a Mississippi jury as could be made in a civil rights case.

Currier, meanwhile, had enlisted in the Army and had joined the Green Berets. A rather gentle young man who looked anything but tough, he was a little incongruous as a member of this elite Special Forces outfit, but he had made a number of parachute jumps, and his career with CORE showed that he was no coward. Currier's story was remarkable. He took the photographs from across the street, and he continued to shoot pictures until Sessums assaulted him. Then he ran for it and, fearing capture, threw his film cartridges under a Negro church, where they were later recovered by local Negroes. He was under the impression that the police and, the way he told it, almost the whole town were out looking for him, and he hid in two friendly homes until nightfall. Then, guided by some local youths, he hiked the fifteen or so miles to the Peterson house near Ludlow under cover of darkness, and he stayed with the Petersons until he was picked up by some civil rights workers and driven back to Jackson.

Whether or not the situation was as perilous as Currier thought it was – he was absolutely convinced that his life was in serious danger until he got out of Scott County – is unclear. After what had happened to the three civil rights workers in Neshoba County, however, there was no disposition on our part to dispute the point. In any event, there appeared to be no doubt that Sessums assaulted Currier for no justifiable reason – the photographer was not even parading, and Currier was willing to identify his photographs and explain the story they told in open court.

There have certainly been more serious instances of police misconduct than this one. Nobody was killed or even seriously hurt. Sessums might well have felt that Negro kids demonstrating for equal rights in a little place like Morton, Mississippi could cause nothing but trouble, and he was there to keep the peace. At the same time, it was simply intolerable that youngsters who were behaving in as orderly and decent a manner as the photographs show these kids to have been should be dispersed and scared half out of their wits when their conduct was in all respects lawful. It seemed inconceivable that Sessums would have done anything like this to a well-behaved group of white children; in fact, his use of a racial epithet as he waded in seemed to show that race was on his mind. There was no justification for the assaults on Raymond and Currier. Accordingly, a criminal complaint was filed under 242, charging Sessums with unlawfully interfering on account of race with the students' right to assemble and with inflicting summary punishment on George Raymond and Charles Currier. Sessums was not arrested. He was simply served with a copy of the criminal information, and he remained free without bond. He retained as his attorney Roy Noble Lee, the son of a justice of the Supreme Court of Mississippi, and he pleaded not guilty.

Meanwhile, the LCDC civil rights lawyers were not idle. Even before we filed our criminal information, they had instituted a civil suit on behalf of George Raymond, claiming that Sessums had violated Raymond's constitutional rights, and they sought to recover substantial damages on their client's behalf. In this suit, Raymond's attorneys had one significant advantage over the distinguished lawyer representing Sessums. They had the photographs and, apparently, Sessums and his attorney did not even know that they existed.

In civil suits in federal court, the parties are allowed to have their attorneys take the testimony of opposing parties and witnesses in advance of the trial in order to find out what they are going to say at the trial and to avoid surprises. This is usually done by pretrial deposition. The party or witness comes to the examining attorney's office or to some other place and answers questions put to him by the attorneys. He is sworn to tell the truth, and the testimony is taken down by a court

reporter. On March 23, 1966, the attorneys for George Raymond took the pretrial deposition of Mr. Sessums. While the officer's lawyer might well have applied to the court to postpone the taking of the deposition until after the trial of the criminal case against his client, he did not do so. Consequently we were able, by simply securing a copy of the deposition, to discover the defendant's version of the events. In an ordinary criminal case, this would not have been possible, for a prosecutor cannot require a criminal defendant to give pretrial testimony, or, for that matter, to testify at the trial.

Mr. Sessums' version of the incident was indeed remarkable. I quote from it at length, and I invite the reader, as he scans these passages, to examine the photographs taken of the scene which Mr. Sessums was describing and compare it to his sworn description:

> Q. When you first arrived at the scene, will you tell us what you saw?
>
> A. Well, the first thing I saw when I got there they had the road blocked, holding hands, whooping and hollering and using profanity, and I asked them, I said, break it up, and I said unblock this road and get back over the hill. And this George Raymond said, I'm going to march or go to hell one. And I said, you get out of this road, if you don't I'm going to have to carry you in, I'm putting you under arrest now, when he said I'm going to march or go to hell. I reached to get him and when I did he came up with a knife from his right side and started to stab me. One girl, I presume it was a girl, hollered cut the muddle-fucker's God damn head off and when I did all of them started to rush in on me, and when they did I reached and got my revolver and fired it in the air four times, and so they dispersed.
>
> Q. Now going back a moment, Mr. Sessums, were they on Highway 13 or on Highway 80 when you saw them?
>
> A. Highway 13.
>
> Q. And would you describe Highway 13 as to about how wide it is – how many lanes?
>
> A. It's just two lanes.
>
> Q. One in each direction?
>
> A. Yes sir.

Q. Is there a shoulder on the road?

A. Not much.

Q. Is there some kind of earth or grass shoulder?

A. Yes sir, there's some I imagine.

Q. And when you saw the plaintiff and the group he was with were they on the road or on the shoulder?

A. They were in the middle of the road.

Q. About how many were there?

A. I would say about 75 or 80.

Q. Could it have been as much as 100?

A. I couldn't say. There was a road full of them.

Q. It certainly wasn't fewer them fifty was there?

A. No sir.

Q. And it could not have possibly been as few as twenty?

A. No sir.

Q. You are sure of that?

A. Positive.

Q. And you said they were holding hands and blocking the road, is that right?

A. Whooping and hollering and cussing.

Q. First describe how they were holding hands and blocking the road?

A. A lot of them just joined hands.

Q. And were they 8 or 10 abreast across the road?

A. There was about five of them abreast, like this, a lot of them.

Q. And stretched across the road?

A. Yes sir.

Q. They weren't one in back of the another, were they?

A. They were all over the place. They were abreast four and five and six, holding hands.

Q. And you said they were making a lot of noise and using profanity when you got there?

A. Yes sir.

Q. Were they doing this before you got out of your car?

A. Yes sir, they were doing it when I got out of my car. There was all but a riot there.

Q. You say it was all but a riot there?

A. Yes sir.

Q. Other than this large group of people - by the way, were they all Negroes?

A. All that I seen was.

Q. Other than this large group of Negroes on the road, was there anybody else around?

A. Yes, sir they had a lot of people blocked there and it was at the entrance to a processing chicken plant, and it was a lot of people gathered around.

Q. What makes you think that there was almost a riot there?

A. Well, they were hollering back, some of the people were wanting to get through in automobiles and they were hollering and cursing.

Q. Were there automobiles held up by this group?

A. Yes sir, and trucks.

Q. Automobiles and trucks?

A. Yes sir.

Q. And all of this was going on before you even got out of the car?

A. Yes sir.

Q. And you said then that they were advancing on you, is that correct?

A. Yes sir.

Q. About how many of them were advancing on you?

A. Oh, it was a road full of them, I don't know.

Q. Was it the whole 75 or 80?

A. They were all coming down the hill on me there.

Q. And that's when you pulled your gun out?

A. Yes sir.

Q. Did you issue any order before you fired the gun?

A. Yes sir. I hollered "Stop", and they kept coming.

Q. And then you fired the gun four times?

A. Yes sir. In the air.

Q. And after you fired it, was that when they ran?

A. Yes sir.

Q. And it is your testimony that until the time you fired the gun they kept advancing on you?

A. Yes sir.

Q. And you felt threatened by the way they were advancing on you?

A. Yes sir, I sure did.

Q. Going back to when you first arrived at the scene and without giving us any specific profanity tell me again just what you saw the group doing, aside from blocking the highway?

A. They were whooping and hollering and using profanity at the people standing over at the side of the road, and jumping up and down and hollering to the top of their voices.

Q. Were they clapping their hands?

A. Yes, sir, some of them were jumping up and down, some of them were clapping their hands, and some of them hollering don't break the line, and I don't know what all.

Q. Were they moving all over the road?

A. Yes sir.

Q. You would describe them then as a very riotous mob of people?

A. Yes sir, it was dangerous looking to me.

Q. And at that time or any time when you were there, were there a large group of cars in the area?

A. Yes sir, there were cars there. Oh, you mean parked there?

Q. Parked or riding back and forth at the scene?

A. I don't know. It's a pretty busy highway. It's traffic there all the time.

Q. Why did you return there later in the afternoon?

A. I went over there looking for some knives and things that they threw down.

Q. Some of the other people had knives too?

A. Yes sir.

Q. About how many knives were there?

A. I don't know. We picked up ten or fifteen, knives and scissors and ice picks, and what have you.

Q. Is it your testimony that from the group which you first described you picked up ten or fifteen knives and other weapons?

A. Yes sir.

Q. Are those all with the City Clerk?

A. Yes sir.

Q. Now what was the nature of traffic on Highway 13?

A. They had it blocked. They couldn't go either way.

Q. Does traffic use that Highway 13 going both directions?

A. Yes sir. It's a very busy highway, very busy.

Q. What direction does the highway run?

A. Well, 13 runs north and south.

Q. Now, I want to ask you whether or not this plaintiff, George Raymond, and these other persons were hindering the passage of traffic along that highway?

A. Yes sir.

Q. Were they stopping the passage of traffic along the highway?

A. Yes sir.

Q. State whether or not you asked these people, including the plaintiff, to unblock the highway, or to remove themselves from it?

A. I did.

Q. Did they do it?

A. No sir.

Q. Now then, state whether or not it was your opinion that they were violating the law there in your presence?

A. Yes sir. They were breaking every law that I ever seen.

———

Q. Was your testimony that when you got out of your car when you first arrived at the scene your gun was in your holster, is that correct?

A. Yes sir. When I got out of the car it was in the holster.

Q. And thereafter when this group advanced on you you pulled out your gun and fired two shots?

A. No sir, four shots was fired.

Q. Four shots. Were all of these shots fired before George Raymond advanced on you with a knife?

A. Yes sir. Yes sir.

Q. And thereafter, he ran away, is that right?

A. Well, after – yes sir, he left there running with the rest of them.

Q. That was after you fired those four shots, is that right?

A. I fired the shots and then he kept coming on me with a knife, and it was a girl, I took it to be a girl, said cut the God damn son of a bitches head off. They were whooping and hollering and I looked and it was just a crowd of folks coming in on me.

Q. Yes, but after you fired the shots at some point Raymond turned around and ran, is that right?

A. Well, after I fired the shots Raymond kept coming on me with a knife, and that's when he come up with a knife, and that's when I used the night stick on his right arm.

Q. Oh, then after you knocked the knife out of his hand, then he ran?

A. He ran.

Q. Did you fire any more shots after that?

A. No sir.

Q. Between the first shot and the last shot that you fired, did you ever put your gun back in your holster again and then redraw it?

A. No sir.

Q. And when they were running down the road or up the hill, did you chase them at all?

A. No sir.

Q. And you didn't fire any shots at that time?

A. No sir.

Q. Did you ever drop your night stick during this?

A. Yes sir.

Q. When was that?

A. I lost it that day somewhere up there in the weeds.

Q. I mean during the time that you were either being advanced on by the group or that you were chasing them did you drop it and then pick it up?

A. No sir. When I lost it I never did see it any more.

Q. You never dropped it during this incident and pick it up again?

A. No sir.

Q. You are sure about that?

A. Yes sir.

The case now appeared really out of the ordinary. Not only did we have pictures which would, it seemed, show who was telling the truth and who was not, but we also had in our possession a document which appeared to establish quite conclusively that the defendant had told a completely fabricated version of the incident in order to keep out of trouble. While a conviction in this case never appeared probable, I thought we would at least have a chance if we could show not only that the defendant did what we said he did, but that he lied about it so profusely under oath. It was therefore essential to our case that, at the trial, the jury should not only see the photographs, but also hear what Sessums had said about the incident before he knew what the camera had recorded.

The problem was: how could we get this deposition before the jury? If Sessums testified, his deposition could be used to impeach him, but he might very well decide not to testify. If his deposition testimony had been, in some sense, an admission of guilt, it could be put in evidence, but since what he had said was designed to exonerate him rather than to admit anything, it was doubtful whether the deposition could be admitted under that theory. Nevertheless, the fact that Sessums had, or so it appeared, lied about the incident seemed clearly pertinent quite apart from admissions and impeachment. Surely there must be a legal theory to support this common sense feeling! Legal research was appropriate, and I hit the books.

There is little that is so exhilarating to a lawyer as finding some law that precisely fits his needs for a case which he is preparing. The leading work on the law of evidence is by a man called Wigmore, and here is what Wigmore said:

> It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribes or spoliation, and all similar conduct – is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth or merit.

A federal judge will usually be impressed by Wigmore, but if he is not, he has to follow the law as stated by the Supreme Court. The old Supreme Court decisions to which Wigmore had referred us said, among other things, the following:

> Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, on his behalf, at his instigation, they had the right not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him on the theory of his innocence, but also to regard false statements in explanation or defense made or procured to be made as in themselves tending to show guilt. The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury.

In a case called Allen v. United States, decided in 1896, the trial judge had instructed the jury as follows:

> You will understand that your first full duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless; and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis of a presumption against him, because the law says that he who resorts to perjury, he who resorts to subornation of perjury to accomplish an end, this is against him, and you may take such action as the basis of a presumption of guilt.

The defendant was convicted and appealed, claiming this instruction to be unfair, but the Supreme Court affirmed his conviction, stating that "the fabrication of testimony raises a presumption against the party guilty of such practice."

These authorities made a lot of sense and reflected the law in its best light; the legal rules corresponded with simple human experience. If the facts show a man to have been innocent, he has no reason to try to conceal or distort; if he does so, this indicates a consciousness of intentional wrongdoing. Actually, Sessums' lying about the incident was arguably worse than his conduct on the scene, and from then on our strategy was to make the photographs and the Sessums deposition, and the contrast between them, the theme of the case. A Mississippi

jury would have some sympathy with an officer who broke up a civil rights protest, but perhaps it would be different if we could prove that the truth was not in him. A juror who would praise a segregationist might, we hoped, react differently to a perjurer.

In view of the authorities quoted above, it seemed probable that we could get the deposition before the jury. Our chances for a conviction would be significantly greater, however, if we could persuade the judge, in his charge to the jurors, to instruct them in accordance with these authorities; to tell them, in other words, that if they believed Sessums to have been lying about what had happened, they could consider such lying as significant evidence of consciousness of guilt and, indeed, of guilt itself. Judge Cox, who was to try the case, had expressed strong feelings about perjury, and perhaps he might give such an instruction. If he did, this might have considerable influence on the jury, for he was an influential figure among white Mississippians, and it was hard to see how the jury could reach any conclusion other than that Sessums had lied. We prepared a brief to muster the legal arguments, and some proposed instructions which we would ask Judge Cox to give to the jury.

Finally, the day of the trial arrived. We began with the selection of the jury, and there was not a single Negro in the group from which the twelve jurors would be selected. The defense made resourceful use of its challenges, and the jury which was chosen seemed a particularly difficult one from our point of view. In the McFarland and Watkins case the jurors, although they had voted for acquittal, had seemed to be a conscientious group; they listened attentively to the evidence and, after the trial, came out to shake hands with me and discussed the case in a spirit of candor and mutual respect. We had disagreed, but agreeably. In this case, however, several of my colleagues and others who watched the trial received the impression that the jurors, by their facial expressions and general demeanor, held us and our witnesses in utter contempt, and this atmosphere permeated the trial from the very beginning. It was soon obvious that my opening statement, which was designed to tell the jury what we intended to prove and to make the jurors receptive to our evidence, had failed in its objective. We could only hope that the jurors' reaction to the witnesses themselves would be different.

Eddie Henry Kincaid and Lizzie Peterson testified first and told their stories in an appealingly open and candid way. Mr. Lee, the defense counsel, made little attempt on cross-examination to shake them in their accounts, or to get them to admit any of the raucous behavior and blocking of traffic which characterized Sessums' version of the incident. He focused, instead, on matters which would

probably influence the jury. He asked Eddie Henry his father's name, and whether his father knew that he was going to demonstrate – and this series of questions was accompanied by a knowing look in the direction of the jury box. Mr. Lee had considerable ability in establishing rapport with the jurors, and it was soon apparent that every point of this kind was scoring heavily. Mr. Lee elicited from Lizzie Mae the fact that Charles Currier, a white man, had stayed at her home, and he masterfully conveyed, in tone and countenance, the traditional Mississippi view of such interracial visitation. At one point, his pronunciation of the word Negro lapsed close enough to "Nigger" for me to leap to my feet with an objection. When I did so, he said he was sure that I had misunderstood, but the image of the integrationist government lawyer from Washington had become even more pronounced than before. In spite of these tactical pyrotechnics, however, the two teenagers had related a consistent and credible story, and we thought we had put on a pretty formidable evidentiary case even before the pictures came in.

The last witness on the first day of trial was Charles Currier. Testifying in uniform, Currier conspicuously placed his green beret next to the witness box, a frankly pre-rehearsed gesture designed to accentuate the fact that he was no beatnik. Currier told of his background, including his parachute jumps, and then we produced our thirteen photographs, which he promptly identified and explained. The FBI had made enlargements to a size that covered much of a blackboard, and each picture was mounted in turn and could be plainly seen from the jury box. Currier told his story in a matter of fact, somewhat underplayed, manner, and when he had finished, Mr. Lee barely cross-examined him at all.

After Currier's testimony, the trial was adjourned for the day and – perhaps wishfully – I told myself that we had made up some ground lost during Mr. Lee's charismatic communications with the jury and that the decision was not yet foreordained. We spent much of the evening with George Raymond, trying to persuade him to be factual in expression and calm in tone, and to avoid the use of the witness box as an ideological forum. George would undoubtedly tell the truth, but the manner in which he told it would be important. In a previous trial, there was a tendency on his part to focus on his indignation rather than on the facts, and we were determined that this would not happen in this case.

It didn't. The next morning, George, goatee and all, was so calm and factual that Judge Cox later remarked privately that he could not believe it was the same man who had testified at the earlier trial. The cross-examination of Raymond, too, was remarkably perfunctory; Mr. Lee had obviously decided that our witnesses would not corroborate Sessums' story and he would rely on his own witnesses to

do that. Moreover, before the jury hearing this case, Raymond's goatee was cross-examination enough.

Raymond's testimony concluded our proof of what had happened, and the next part of our case was what Sessums had said about it. Following Raymond to the stand was the court reporter who had transcribed the testimony at Sessums' deposition. Obviously, our only chance to win depended on the impact of this witness. I had carefully set the scenario. Two of the photographs –Nos. 9 and 13– were in full view of the jury as I asked the court reporter to read the passages from the Sessums deposition reproduced earlier in this chapter. Everybody who had seen the photographs and testimony juxtaposed - lawyers, secretaries, research analysts, everybody - had found the combination remarkable, and my colleagues were closely watching the reactions of the jurors; if one or more of them seemed impressed, the closing argument could be directed to him or them in the hope that his or their persuasive powers would be effective vis-a-vis the remaining jurors. I noticed no reaction, however, and my colleagues later confirmed that, so far as they could determine, not a single juror so much as batted an eyelid during the court reporter's entire testimony. That, in effect, was the ball game. Or was it?

After one FBI agent with expertise in photography testified that Currier's photographs were authentic and had not been tampered with, and a second identified photograph of the discolorations of George Raymond's arm, we rested and Mr. Lee immediately summoned a series of defense witnesses. The doctor who had treated Raymond testified that his injuries were trivial, and then a series of citizens of Morton, led by the town's Mayor, testified that they had seen the incident, that there had been a large group of teenagers, and that they had been noisy and blocked traffic. No witness had seen weapons on any of the children, but the Mayor did say that the group had been advancing on Sessums when he used his billy club. The cross-examination became somewhat heated when I confronted him with Photographs 9 and 10 and asked him, somewhat sarcastically, how many inches it was that the students were supposed to have advanced. The Mayor stuck to his story, however, as did the others and, had it not been for the photographs, the defense version to this point might have seemed quite credible. That made it more remarkable that the power structure of Morton, Mississippi, was prepared to testify to a state of affairs which seemed to have been conclusively proved to be false by photographic evidence.

Constable Bates, who had stood silently by, firearm in hand, during the entire incident, made a good witness for the defense. Avoiding some of Sessums' more extreme exaggerations, he nevertheless calmly related how the group had

been a traffic hazard and how dispersal was necessary to avoid all kinds of difficulties. Mr. Lee asked each of the defense witnesses whether, in his opinion, a public accommodations "test" by a group of teenagers would have caused racial trouble in Morton, and each said that it would. Finally, Mr. Lee called the defendant to the stand.

We had not expected Sessums to testify. The momentum with the defense witnesses had all been Mr. Lee's way, his other witnesses were undoubtedly more effective than Sessums would be, and the risk of putting the man who gave that deposition on the stand seemed completely out of proportion to anything that could be gained. It was probably six of one and half a dozen of the other. Mr. Lee knew his business and was obviously confident of winning anyway, and perhaps Sessums wanted to counter-attack. Whatever the motivation, I was suddenly heartened. We would have another chance at what I regarded as the weakest part of their case. Perhaps after all...

It was not to be. Sessums repeated most of his deposition testimony, the photographs to the contrary notwithstanding. There were some variations; he now said that someone else, and not he, had found many dropped weapons on the scene afterwards and he had not brought them to court. With a flourish, however, he produced a pocketknife which, he said, Raymond had pulled on him and which he had knocked out of Raymond's hand.

If there was anybody in that crowded courtroom who believed this vignette, I do not know who it was. In 1965, a Negro active in CORE in Morton, Mississippi, who attacked the Chief of Police with a knife would expect to be charged with something a good deal more serious than parading without a permit, and it would be somewhat unusual for the charges against him to be dropped. Questioned on this point, Mr. Sessums produced little in the way of logic, but logic is not everything in criminal trials. It was established that there was not even a "parading without a permit" ordinance in effect in Morton at the time of the incident; such an ordinance was conveniently enacted almost immediately thereafter. I asked Sessums if it was his testimony that, after he was attacked with a knife, all he charged Raymond with was parading without a permit, disturbing the peace, and resisting arrest. He acknowledge that this was true, but added in an exasperated voice:

> Look, mister, what did you expect me to do, let him get me with the knife?

Several jurors tittered. The initiative belonged to Sessums. He was unable to explain discrepancies between his pretrial and trial testimony; his attempts to explain the photographs defied both logic and eyesight, but it made no difference. The most we were able to score was debating points, and this was not a debate but a jury trial. In the eyes of the jury, Sessums was winning, and the cross-examination reinforced this crucial psychological fact instead of reversing it.

The closing arguments the following morning were anticlimactic. I went over the evidence with the impassive jurors arguing that, in order to acquit, they must find that Sessums rather than our witnesses was telling the truth. Contrasting the photographs again with the Sessums' deposition and the defense testimony, I reminded the jury that the issue was not whether demonstrations were justified but, essentially, which side here was telling the truth. The United States Attorney liked the summation, but as far as the jury was concerned it apparently went over like a lead balloon.

Mr. Lee's closing was short and to the point. The whole world was watching this case to see what kind of a deal an officer doing his duty would get. The United States Attorney in Jackson has signed the Criminal Information, Mr. Lee told the jurors, but it was Mr. Schwelb from Washington who was trying the case. The attorney for George Raymond in the big civil damages suit, Mr. Alvin Bronstein, had been sitting in the front row throughout the trial and would, of course, gain heavily in case of a conviction, and while Mr. Lee said with some irony that he was not suggesting collusion between the government and Mr. Bronstein (what an unfortunate name from our point of view that was), he felt compelled to remind the jury that these were the facts. It was not only this fine officer who was standing trial here, Mr. Lee concluded, but the town of Morton and, indeed, the whole State of Mississippi. He urged the jurors to go to the jury room and to come up with a verdict of NOT GUILTY in "a very short time." As usual, Mr. Lee's rapport with the jurors was complete, and it was, indeed, an effective summation.

Judge Cox then hammered the next to last nail in our coffin. His charge to the jury was scrupulously objective, but he declined to give our requested instruction as to what conclusions the jurors might draw from a belief that one party or the other was lying. We had asked that he instruct the jurors that if they believed Sessums had lied on his deposition to cover his tracks, they might infer from such lying a consciousness of guilt, and from such consciousness, guilt itself. Judge Cox stated in the absence of the jury that these instructions correctly stated the law, but that he would let the jury draw its own inferences from its own

experience with respect to possible lying by any of the witnesses. Perhaps it was not an altogether unreasonable ruling, but it eliminated the possibility of an instruction which, while perfectly fair, could only have helped us on the proven facts. If Judge Cox had energetically instructed the jury as we requested, it is possible that one or other of the jurors might have been swayed. But it was not to be.

Thirty-eight minutes after they began their deliberation, the jurors returned and acquitted the defendant. I congratulated Mr. Lee and told him that I was impressed with his skill and that I would like to have a return match before a jury in Harlem. He smiled and acknowledged that the result might be different. With his rapport with juries, I am not even so sure about that! In any event, he was a good deal friendlier to me than the jurors were, and not one word passed between them and me as they left for their homes.

*****

It was a tough one to lose. I was particularly afraid that the fine young people who had helped us would feel grossly disillusioned about what must have seemed like a typical miscarriage of justice perpetrated by the white man's law in the white man's court. They might even be afraid of reprisal, and perhaps with reason. This was Scott County, not Leake County, where the Harmony folks are not afraid of anything.

Scott County is not really different from Leake County. I drove to the Petersons to tell them the melancholy news. They shrugged their shoulders and smiled and thanked us for our hard work. Mrs. Peterson's father, Lizzie's grandfather, a gallant old gentleman who was living unprotected in the country but ready to put up civil rights workers any time, nightriders notwithstanding, said it was a wonderful thing that these children were able to go to Jackson to tell their stories. In his youth, he explained, "We did not have that opportunity." The Negroes' disappointment seemed far less pronounced than ours. Eddie Henry Kincaid was looking forward to going to a white school the following fall, and the Peterson girls would probably go too. It is difficult to be sure whether or not these teenagers and their parents were engaging in the traditional activity expected of them in Mississippi, namely, of telling the white man what he wants to hear, but they showed nothing but friendliness and appreciation. I am no cynic and I took them at their word.

Then again, it all depended on how you looked at it. One of my colleagues had only kept his Mississippi jury out for ten minutes, and we had a lawyer who prosecuted a 242 case in Memphis, Tennessee, whom we called "Seven minute Lou." The McFarland jury had only taken 25 minutes; perhaps the 38 minutes was a great victory after all. The trouble was that my colleague, "Lash" Larue, had outdone us all. He kept his jury out for 43 minutes. He is now a law school professor and, with that record, I am sure he teaches Criminal Law.

Chapter 9
"I Ain't Servin No Niggers"

Perhaps it was symbolic that only a few days after President Johnson signed the Voting Rights Act of 1965, the black Los Angeles ghetto of Watts erupted like a volcano. In 1963, shortly before his death, Medgar Evers had been quoted as saying that Mississippi would become a wonderful place in which to live, just like New York. It is doubtful whether he would have used this particular comparison two or three years later. Just as we were finally resolving the voting problem in the deep South, it became evident to everyone that the Negro residing in a Northern city had grievances as pressing as those of his counterpart among the magnolias. With the new tools provided to our Division by the Civil Rights Act of 1964, particularly the provisions prohibiting racial discrimination by employers and labor unions and those authorizing the institution of school desegregation suits, the Justice Department now had the power to do something about conditions in areas outside Mississippi, Alabama, Louisiana and Georgia, where the voting problem had been most acute, and where virtually all of our voting enforcement had been concentrated. Moreover, the old Reconstruction Statute – Section 242 of the Criminal Code – was available to deal with aggravated police misconduct, always a pressing problem in the teeming ghettoes.

The passage of the Voting Rights Act made it possible to enforce voting rights through the federal examiner machinery and without tortuous lawsuits. Some reordering of our meager resources was obviously appropriate. Experienced attorneys and enthusiastic newcomers were needed to work in areas which had not previously received visits from Civil Rights Division attorneys. In July, 1966, John Doar asked me to leave my assignment in Mississippi to become Deputy Chief of the reorganized Eastern Section, which then consisted of eight lawyers for the entire area of the country bounded by and including Pennsylvania on the north and east, North Carolina and Tennessee on the south, and Ohio and Michigan on the west. As the reader can discern, our manpower was hardly adequate for the task of enforcing all civil rights laws in the affected states, especially since our area included Virginia, North Carolina and Tennessee, parts of the Old Confederacy to which hardly any resources had previously been allocated, and in which violations of the civil rights laws proved easy to find. It was, however, a beginning.

From 1966 to 1969, the Eastern Section (of which I later became Chief) bustled with activity in employment discrimination, school desegregation, voting, police misconduct, public accommodations and, after the passage of the Civil Rights Act of 1968, discrimination in housing. An elite group of young lawyers

and research analysts threw themselves into the fray with remarkable gusto. Many of our cases involved dramatic factual situations and important legal questions. Two of them generated an unusual degree of public interest, for they reflected both hard-core resistance and the almost endless character of civil rights litigation when a segregationist has made up his mind not to be reconstructed. The first involved a little cafe a stone's throw from Washington, D.C., and the second the school board of a small rural county in eastern North Carolina.

I have always suspected that the case of United States v. McKoy had its origin, either psychologically or through historical coincidence, in Atlanta, Georgia. After the passage of the Civil Rights Act of 1964, a man named Lester Maddox, who operated a restaurant in Georgia named the Pickrick, refused to comply with its public accommodations provisions, and he armed his customers with axe handles to drive away any Negroes who showed the temerity to seek to exercise their rights. An injunction was entered against him, but he continued his defiance. In a transparent scheme to avoid the new law, he now claimed that he excluded integrationists because of their political beliefs rather than Negroes on account of their race. Predictably, he considered any Negro seeking service at his restaurant an integrationist. The Supreme Court sustained the constitutionality of the public accommodations law, and Maddox's attempts to find relief in the courts were as unsuccessful as his arguments were illogical. Maddox was found in contempt of court, but his conduct did not result in his departure from the front pages. In 1966, he was elected governor of Georgia by the state legislature after no candidate received a majority of the votes. In 1968, for a few weeks immediately preceding the Democratic Convention, Mr. Maddox was an announced candidate for the presidency of the United States!

Whether the political success encountered by Mr. Maddox served as a source of inspiration to other restaurateurs has not been established, but, on the whole, there was remarkable compliance even in the deep South with the public accommodations law. Some establishments in rural areas remained quietly segregated in the absence of any complaint about their unlawful practices, but after being sued, their proprietors usually complied with the law. Other restaurant owners set up so-called private clubs, but when, as in most instances, these "clubs", which were private in name only, actually admitted the white general public, the courts struck down the bogus facade and ordered these establishments to desegregate. There were a few restaurant owners, however, who remained vocally and openly defiant, in the style of Lester Maddox. One of these was Roy Elder McKoy.

On June 12, 1965 – just four days before George Raymond led his teenage friends on their abortive walk to the Gulf Cafe in Morton, Mississippi – Mr. Joseph T. Flakne, former Special Assistant to the High Commissioner of the Trust Territory of the Pacific Islands (Micronesia), was entertaining Mr. Bailey Olter, then the Assistant District Administrator of the Ponape District of that Territory, and showing him Washington, D.C. and its surroundings. Mr. Olter was a guest of the State Department and was a person of some prominence. He was an educator, a Senator in Micronesia, and according to testimony in the case, he had been invited to represent the United States before the United Nations Security Council.

Mr. Flakne and Mr. Olter visited the Manassas Battlefield Park and were driving towards the Skyline Drive in Shenandoah National Park. In the vicinity of Marshall, Virginia, Mr. Flakne recalled that on previous occasions, he had received excellent food and service at the Belvoir Restaurant on Highway 55, and he brought his visitor there. As they entered the picturesque little rural establishment, a waitress – actually Mrs. McKoy, for the place is operated by the McKoys with no help from anybody – told them that "we do not serve dark skinned people." Mr. Flakne, taken aback, explained that Mr. Olter had represented the United States before the Security Council and was not a Negro, but Mrs. McKoy responded, "I didn't say 'Negroes;' I said 'people with dark skins.'"

Mr. Flakne, concerned over the effect of such incidents on international relations, advised the State Department what had happened, and the State Department referred the matter to the Justice Department. There was an FBI investigation, and the McKoys candidly told the interviewing agents that they did not serve non-white persons, never had served them, and had no intention of doing so in the future. Our Division requested the United States Attorney to write to the McKoys and ask them to comply with the law, and this was done, but no answer was received.

This was the posture of the case when I came to the Eastern Section. I thought that under the circumstances, we should institute suit against Mr. McKoy, but I was persuaded that one last try to secure voluntary compliance would be in order. I called him on the telephone, explained the purpose of my call, and was about to explain the requirements of the public accommodations law to him when he interrupted me and said: "You can get this through your head: I ain't serving no God-damned nigger in here, and that's it." He hung up with a vehemence that jolted my ear. A week later a lawsuit was filed in the United States District Court in Alexandria to restrain the McKoys from racial discrimination in the operation of their establishment.

In order to bring a restaurant under the public accommodations law, the plaintiff, whether a private individual or the United States, must show either that it serves or offers to serve interstate travelers, or that a substantial amount of the food or other products sold has moved in interstate commerce. While the FBI investigation had brought us most of what we had to prove, it was likely, in the light of Mr. McKoy's attitude to date, that the suit would be defended. One of my colleagues, Monica Gallagher, and I decided to drive down to Marshall to look at the place. We observed a small country cafe, with room for 35-40 people, featuring home cooked meals. Five of the seven cars the parking lot had out of state license plates, so obviously the establishment served interstate travelers. We had a cup of coffee and observed Mr. McKoy, a short, sturdy, ruddy-faced and nervous-looking man perhaps in his early 40s; his wife was a somewhat heavy and motherly looking lady with glasses. We were served a cup of coffee without any question as to where we came from. Legally, this was important, for it showed that the McKoys were prepared to serve any white person, including interstate travelers. The case was, we thought, a simple one, and we anticipated no difficulty in winning on the merits.

The complaint in the case was personally served on the McKoys on October 19, 1966. On November 1, Mr. McKoy sent the following neatly typed letter to the United States Attorney in Alexandria:

Dear Sir:

I am writing in reference to the summons, Civil Action File No.4251, that my wife and I received October 19, 1966, concerning my Restaurant operating procedures. While reading the provisions enclosed in the summons, I failed to see any act that says we must forfeit our freedom to become white slaves to the Federal government or any other organization just because I am an individual private business man.

I have in the past and will in the future continue to conduct my business as I see fit according to location and conditions.

Sincerely,
/sgd/ Roy E. McKoy

The Federal Rules of Civil Procedure require that the complaint be answered within twenty days, but since the McKoys took no other steps to respond to it, we had this letter filed as their Answer. A hearing was set for January 27, 1967, and the defendants were personally served by a Deputy United States Marshal with notice of the hearing.

In preparation for the trial, we prepared affidavits, one by me in which I told of my observations at the restaurant and the out of state cars parked there and of my abortive telephone conversation with McKoy, and the other by Mr. Flakne in which he described the refusal of service. The defendants did not show up at the hearing, and Monica, who was trying her first case, contended that, since the defendants had not denied the allegations of our complaint, judgment could be entered on the basis of our complaint and the affidavits. However, Judge Oren D. Lewis, who presides over federal suits in Alexandria, wanted to hear live evidence, so Mr. Flakne and I testified in open court. Judge Lewis, finding the evidence sufficient, signed an Order which we had prepared for his signature enjoining Mr. and Mrs. McKoy from discriminating against Negroes in the operation of the Belvoir Restaurant. The following day, a Deputy United States Marshal served the McKoys with a copy of the injunction.

This should have been the end of the McKoy case. Our experience, even in rural Mississippi, was that the most intransigent-sounding restaurant operators usually calmed down and complied once injunctions had been entered against them, for disobedience of an injunction is contempt of court. Nevertheless, it was questionable whether a man whose views were like those that McKoy had demonstrated would comply with an injunction any more than with an Act of Congress. We did not have long to wait to find out.

The Washington, D.C. area is full of student organizations and other groups interested in civil rights issues and oriented towards activist solutions. John Stein, then a 26-year-old law student at George Washington University who was active in one of these groups, learned of the injunction and decided to organize a "test". Stein was friendly with Pharnal Longus, a black social worker with the Southeast Neighborhood Development Program in the Anacostia section of Washington, and he invited Longus to accompany him and some of his friends on the "test". Longus agreed, and, on February 12, 1968, a group loosely sponsored by Stein and Longus drove to the Belvoir Restaurant. For some reason, however, Longus brought along about ten Negro teenagers with whom he was working in Anacostia. The entire group consisted of some fifteen people in three cars, and, it was obvious, to put it charitably, that the planning of this "test" was something less than brilliant.

Nevertheless, as the entire tale unfolded, it appeared that the episode had resulted in an unusually blunt case of contempt of court.

John Stein, his blonde girlfriend Mary Lee Newbold (now Mrs. Stein), Longus, and Maria Leftwich, another Negro social worker, came to see me at the Justice Department to report on the incident. As they told the story, the three carloads had driven to the Belvoir Restaurant that Sunday afternoon, the adults wearing business clothes, the teenagers casually dressed. Several got out of their cars and three – Mary Lee Newbold and Pharnal Longus, followed by John Stein, approached the door. A white man wearing an apron and acting as though he was the owner told them that he did not serve colored and that they would have to go down the road to get something to eat. John Stein then told the man he understood he was under court order to integrate the restaurant, to which the man heatedly responded that he didn't give a damn about any court order and directed the group to get off his property. Stein asked him his name, and McKoy (for it was indeed he) declined to respond, and continued to shout at the group to leave, which they did. Stein and his companions advised that only a handful of the group – perhaps five – were at the door during the entire course of the conversation, and there was no question of any siege. There was some doubt, in view of the brevity of the encounter, whether McKoy even knew how large the group was. In any event, if the group's account was true, then McKoy, by his own statement, had declined to serve them because he did not serve "colored" and because he did not care about the court order, not because of the size of the group.

Charging someone with contempt of court is serious business, and we had to get McKoy's side of the story. We asked the FBI to interview McKoy and, in the meantime, Monica and I went to Anacostia to meet some of the teenagers, to explain our function, to interview them, and to determine if any of them would make suitable witnesses in any further proceeding.

Our trip to Anacostia was a disturbing one. The black teenagers in Scott County who had encountered Sessums, and others elsewhere in Mississippi who attended desegregated schools had, for the most part, been optimistic, friendly, cheerful youngsters whose enthusiasm was infectious. Many of the Anacostia kids seemed to me to be entirely different. Sullen, defiant, embittered, and in some cases, completely uncooperative, most of these teenagers had already been in juvenile trouble of one kind or another. Several of them were unwilling to talk to us at all. Others exaggerated to the point where that verb seems hardly adequate, and one assured us that the proprietor had pointed a gun at the group and "the first thing he said was 'get the hell back.'" It was soon apparent that we would not find

any witnesses among them who would help us to win the case, and the experience graphically underlined the need for the kind of reorganization which would put some of our resources on bettering conditions in the cities. If children were so disillusioned with our society by the time they had reached their early teens, there was indeed cause for concern for the future. I tried to explain the government's civil rights responsibilities and programs, but most of the boys could not have been less interested.

When we received the FBI Report, it was apparent that the qualifications of the boys as witnesses did not make any difference anyway because there were no real issues of fact. As later described by one of the agents in his court testimony, the interview went as follows:

> We identified ourselves to him as special agents of the FBI and asked him if he was Mr. McKoy and he acknowledged that. He said "It is about them Niggers?" I advised him that we were there concerning a complaint that was received about his refusal to serve some Negroes on the preceding Sunday, February 12, and also that he did not have to talk to us and had a right to a lawyer. He said that "I am not going to serve those" -- he used some profanity, and with that he started to turn away, and he came back a little bit after we tried to tell him about the injunction, if he realized the seriousness of this. At that point he had a glass of milk in his hand and said that he had bought this with his own money and that he is going to sell it to whoever he pleased and that – words to the effect that he didn't care about any injunction. We asked if we might talk to his wife since her name was listed in the complaint, and he said no, he didn't want us talking to his wife. At that point the conversation was terminated and we left the restaurant.

It seemed to me that the poor planning of the test was really a side issue. The number of testers did not concern McKoy; he had not even mentioned it. There was an apparent violation of the order accompanied by a complete lack of any intention to abide by it. We had a responsibility to act to enforce the injunction and to vindicate the authority of the court, and I drew up contempt of court papers. We filed affidavits by John Stein, Mary Lee Newbold, Pharnal Longus, and Maria Leftwich in support of an application for an order directing that McKoy show

cause why he should not be, held in civil contempt of the order of January 27, 1967. Judge Lewis signed the order – this is relatively routine – and a hearing was set for March 7, 1967. Because McKoy had not shown up at the last hearing, we had him served personally by the U.S. Marshal to eliminate any doubt about his being advised as to his obligation to attend. In addition, I wrote him a letter advising him once again of the hearing and of his right to be represented by counsel.

Since, so far as we could tell, Mrs. McKoy played no part in the events of February 12, our contempt proceedings on this occasion were directed solely at Mr. McKoy. We were asking the court to imprison McKoy and fine him $50 per day until he complied with the order, so one might have expected him to show up on this occasion, but he did not do so. Instead, he sent the following letter, which he evidently prepared together with his wife, to Judge Lewis in Alexandria, with copies to President Johnson and the then acting Attorney General, Ramsey Clark:

> Sir:
>
> I am writing in reference to a Court Order to show Cause, Civil Action number 4251, that I received March 2, 1967. I wrote a letter November 1, 1966 pertaining to this same issue but it was not accepted and I do not expect this letter to be accepted. I want you to know I will not appear in the Alexandria Courtroom on March 7, 1967 for several reasons. Mainly, you will not listen to what I have to say. Besides you communistically inclined people think you can sit in courtrooms and tell other people how to live and think.
>
> The only thing we have to show cause is our American heritage and constitutional rights to exercise our freedom in <u>life, liberty and pursuit of happiness</u> as we so desire, which does not include the dark people. Our restaurant and home (which is under one roof) is not supported by public funds from the Federal, State nor Local governments. Our four children are not fed and clothed by the welfare programs or neighborhood organizations. I pay my taxes, as a citizen should; I have a license to operate my business; I do not black-market, and bootleg; I keep my nose out of other peoples affairs and I expect them to do the same. Those people listed in the Order came here for the

> purpose of disrupting peace, which I object to and therefore refused to let them enter my Restaurant.
>
> *Sincerely,*
>
> */sgd/ Roy E. McKoy*

I had not seen this remarkable letter before the hearing opened, but, with McKoy absent, I expected this to be as routine a contempt case as I was ever likely to find. I was wrong.

As the hearing opened, Judge Lewis advised that he had received a letter from McKoy, described its salient features, and then asked that the McKoys be called to establish that they were not in court. I explained that we were only citing Mr. McKoy because, while Mrs. McKoy participated in the operation of the restaurant and was responsible for the 1965 denial of service which gave rise to the original injunction, we had no evidence that she participated in the denial of service which formed the basis for the alleged contempt and we did not even know if she was there. This seemed to irritate the judge:

> I really don't know whether you are trying to fool the Court or trying to be chivalrous, maybe both and I appreciate the trait, but you ought to be chivalrous all the way.

After some discussion, Judge Lewis dismissed the original injunction as to Mrs. McKoy, apparently on the ground that we had failed to cite her in contempt, and he did so even though I assured him that we did not know if she was there on the pertinent occasion and could not prove a case of contempt against her on the February 12 incident.

Judge Lewis then asked me to call my witnesses and I opened with the very attractive and blonde Mary Lee Newbold. Miss Newbold told her story as she had told it in my office, with Judge Lewis occasionally putting in questions of his own which indicated some skepticism. For example:

> THE COURT: Were there other people in there? I mean do you know whether this restaurant was open for business or not?

THE WITNESS: The sign said it was open.

THE COURT: Did you look? Was it open for business?

THE WITNESS: We weren't allowed in the restaurant. I couldn't see.

THE COURT: So you didn't make any inquiry or you don't. Were any other cars or people in there? This is not a big place.

THE WITNESS: Yes. As we drove up a man left, so that was another indication that it was open.

THE COURT: Was he -- I mean can't you see in there?

THE WITNESS: No, I couldn't see because --

THE COURT: You don't know whether the place was open for business or not then.

THE WITNESS: Yes, it said "open." There is a light, Neon sign that said "Open."

THE COURT: Because a sign out there -- I mean on Sunday afternoon. I just want to know if it was open...

Miss Newbold testified, in response to further questions from me, that the man to whom they spoke was dressed in a white T-shirt and apron and did not say anything about being closed but told them to leave because he didn't serve colored. Judge Lewis then took over the questioning, and Miss Newbold candidly admitted that the venture was a "test." Judge Lewis was not satisfied:

THE COURT: You were going out there to cause him to go to jail if you could, isn't that the reason?

THE WITNESS: No, your Honor. We were hoping he would serve us.

THE COURT: Do you want the Court to believe you were just honestly an interstate traveler, you just by coincidence stopped in this restaurant.

THE WITNESS: No, your Honor.

THE COURT: -- with a colored man to see if he would get to eat, is that what you want the Court to believe?

THE WITNESS: No, your Honor. We went out there to see --

THE COURT: I didn't think you did.

THE WITNESS: We certainly didn't mean to antagonize him. I agree we weren't very wise bringing 15 people.

BY MR. SCHWELB.

Q. You wanted him to serve you?

A. Yes, we certainly did.

MR. SCHWELB: That is all, your Honor.

THE COURT: The court is satisfied what she went out there for, so it doesn't make any difference what she says. You went out there to catch the man. Somebody sent her out there for that purpose. I mean this court is not that naive.

Maria Leftwich and John Stein also testified, the latter at Judge Lewis' request, and encountered similar criticism from the court, and the Special Agent of the FBI testified as previously stated. Judge Lewis however, was obviously distressed by the whole proceeding:

> ... I have done many things as a Judge that I had to do that I didn't necessarily like to do, including sentencing people, I am not going to issue an injunction in this Court and have a bunch of busybodies, and I will call them that – they can call themselves anything they want to – going around organizing trouble and then coming in and wanting me to put them in jail and fine people $50 a day. I just don't think that is the way to do business.
>
> I granted the injunction unhesitatingly when it was a meritorious case that made it, and I certainly would hold a man in contempt if he was willfully and deliberately violating it. But how can I in good conscience when you on a Sunday afternoon bring 15 people in a peaceful, rural community that is bothering nobody, and children, and everything else, for the sole purpose of putting somebody in jail?

> I think everybody ought to be treated as gentleman and lady when they act as such. But when they go out asking for trouble I don't think they ought to cry too much if they get in a little trouble. And I am not going to permit this court, unless I have to, to be made an instrument of that kind. We have had peace and tranquility in Virginia. We have had excellent relations, as far as I know, in Northern Virginia among the races, and I hope we always keep that way, and we will keep that unless too many outsiders proceed to upset a very peaceful apple cart.

When I told Judge Lewis that we were not trying to put McKoy in jail or to punish him, but rather to coerce him into compliance, the Judge repeatedly expressed great distress about my use of the word coerce:

> No civil contempt law requires me to coerce anybody to do anything. I will never coerce anybody or allow the process of this Court to be used in coercing anybody, regardless of what the Department of Justice says.

I think this problem was more a semantic one than real -- the leading Supreme Court decision says that,

> judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes, to coerce the defendant into compliance with the Court's order and to compensate the complainant for losses sustained,

and my phraseology was identical to that of the Court. The phrase, however, sounds tyrannical in the abstract, and this simply reinforced the offense which these testers' conduct had obviously given to Judge Lewis' sense of fairness.

The judge further objected that we had not proved the identity of the person alleged to have violated the injunction. We contended that he was wrong for several reasons. McKoy had not denied the allegations of the complaint, and failure to do so in a civil lawsuit is ordinarily deemed an admission that they are true. He had in effect admitted the incident to the FBI. The witnesses had testified that a man dressed as the proprietor would be, with T-shirt and apron, had ordered them off "my property." Finally, in his curious letter to the court, written in response to the Order to Show Cause, McKoy had admitted refusing the group service. Nevertheless, the judge held that the proof was insufficient and, on the

joint grounds of lack of identification and of "entrapment" by Stein's group, he dismissed the contempt proceedings.

It was obvious to me that Judge Lewis was conscientiously doing what he believed was right, and while I thought his decision incorrect on the law, and while I would have preferred him to have questioned our witnesses in a different manner, it never occurred to me to accuse him of lack of conscientiousness or honest conviction. Judge Lewis calls them as he sees them – and within half a year he decided a precedent-making school desegregation case in our favor when he thought we were right. The McKoy case, however, was so laden with emotional content that the Washington newspapers treated it as a major sensation, and the Washington Post saw fit to lecture the judge in an editorial about his oath of office:

Busybodies?

There is a kind of upside-down, Alice-in-Wonderland quality about Judge Oren Lewis's reaction the other day to an attempt by civil rights enthusiasts to force the desegregation of a Fauquier County, Virginia, restaurant. Judge Lewis himself had handed down an order in January requiring the restaurant owner to desegregate. But when a racially mixed group composed of about 15 youths from Washington which was recently denied service at the restaurant sought a contempt citation against the owner, Judge Lewis angrily denied their request and berated them as "a bunch of busybodies going around and organizing trouble and then coming in and wanting me to put people in jail."

Judge Lewis's objection to the group appears to have been grounded on the consideration that they were led to this particular restaurant not so much by hunger as by idealism, less by a desire for food than by a desire for justice. Does this make them busybodies? If so, the Rev. Martin Luther King has been a busybody several scores of times; and so have all those concerned and principled men and women who have gone about the country demanding that places of public accommodation obey the law. The law would have little meaning without such busybodies.

"We have excellent relations between the races in Northern Virginia," Judge Lewis said. "I think we can keep them that way unless too many outsiders upset the applecart." Well, it is just possible that relations between the races that seem "excellent" to Judge Lewis may seem entirely unsatisfactory to Negroes who want equal treatment in public places—now and throughout the whole state. The intransigent restaurant owner in Fauquier County who chooses to defy the law and fancies himself, perhaps, a kind of rural Lester Maddox on his way to the Governorship of the Old Dominion may seem a romantic anachronism to Judge Lewis; to us, he seems a willful and persistent lawbreaker. Judge Lewis needs a reminder that his sworn business is to uphold the law.

I also received a lecture, in the form of an anonymous letter:

> Attorney Frank E. Schwelb.
>
> It is men like you who make people lose faith in there country and government. What are you looking for graft you don't need the vote. So what is it you are looking for, if the shoe was on the other foot I wonder what you would do. Here is a man in business minding his business paying his taxes doesn't he have any say whom he wants to serve, where is justice or are we going communistic, here we are sending our boys to fight this way of live and yet by doing what you suggest we are practising it so if a person in business and has no say where is justice a man can go out and Kill he gets away with it, and some are trying to make an honest living must be forced to do what he in his heart feels is not right, and along you come, and you think you know it all, to Force this man to give up his business.
>
> What is happening to you men who think you want to run other peoples lives ask a small business man what is really going on with the colored help they were forced to hire they tell there friends, when the man goes to the Bank and there they are to hold him up. That is alright with you (eh). Well wake up young men or we all will be on the other side of the fence, because you are not dealing with people but with cannibals try and cross them watch out.

The Washington Post's front page news story about the hearing stated that the ruling "apparently shocked Justice Department attorney Frank E. Schwelb," and, at 6:45 in the morning after the hearing, a reporter from the Washington Daily News called me on the telephone to ask if I was in fact shocked. I sure was by the sound of the telephone at such an hour. The News then sent a feature writer down to interview the McKoys, and she wrote a picturesque feature story about their picturesque views and cafe. The case was, in fact, front page news and bar and cocktail party chatter, and I even received a letter from a state court judge in New York who wanted portions of the transcript for a book he was writing. The little country restaurant probably generated more national publicity than the case of United States v. Mississippi challenging the constitutionality of the voting laws of Mississippi.

Writing letters was not the only reaction to the sensational hearing in Alexandria. Monica Gallagher, who liked Judge Lewis, but whose sense of fairness

was as much hurt by the decision as Judge Lewis' was by our case, wept. Pharnal Longus was furious and made acid comments about the white man's legal system. Adam Stein, John Stein's older brother, who was also a law student, reacted with less talk and more action. On, March 9, two days after the hearing, Stein, two Negro law students from Howard, and a friend who was a reporter for the Evening Star, tested the restaurant again and were pushed out by McKoy with the vocal assistance of his wife. The story, again, was prominently featured in the newspapers. A Washington Post reporter telephoned McKoy and related, in the March 10 edition, that

> McKoy confirmed in a telephone interview that he had refused to serve the three. "I mean what I say," he declared. "I'm putting up a sign on my door tonight that we do not serve niggers."

The three law students brought assault charges against McKoy, but these were dismissed after only Stein showed up in time for the hearing. Stein described the events to Judge Marriott in the Fauquier County Courthouse, and that judge's reaction was that "there's been no more assault here than a man on the moon." It was obvious that events were moving to some kind of climax and that matters could not be left as they were. Certainly, after McKoys' vehement reactions were widely reported in the press, it seemed improbable that anyone but a civil rights worker would test his place now.

Our research persuaded us that Judge Lewis was wrong on all counts. The Supreme Court had expressly, and unanimously, held that, in a civil rights case, the motives of the "tester" are irrelevant and that it is no defense to a charge of discrimination to show that the Negroes who sought service did so in order to institute a lawsuit, or even expected to be arrested. The Court of Appeals for the Fourth Circuit, which was the court to which one would appeal from Judge Lewis' decisions, had summarily reversed a South Carolina decision which we thought somewhat comparable to that of Judge Lewis here. I thought it likely that we could win on appeal from Judge Lewis' decision, but this would take time, and the factual case before the Court of Appeals – that of the test by 15 people – was probably weaker than the second test, with only three. Despite my emphatic disagreement with Judge Lewis, I continued to hope that he was a fair-minded man, and I thought that it would be preferable to dispose of this case in his court and secure compliance from McKoy there. If we failed, we would probably be able to appeal adverse decisions on both unsuccessful "tests" and thus strengthen our already excellent prospects for victory at the appellate level. I therefore recommended that

we seek a new contempt citation based on the experiences of Adam Stein and the two Negro law students. My recommendation was accepted, and, on April 3, 1967, less than a month after the first trial, I was before Judge Lewis again, asking him to issue a new order directing McKoy and, on this occasion, his wife, to show cause why they should not be held in civil contempt. Judge Lewis and I engaged in several interesting exchanges in open court. I cited a Supreme Court case to him, and he countered:

> THE COURT: ... this is not a suit in trying to put somebody out of business. That is what you are trying to do.
>
> MR.SCHWELB: I am trying to make him comply.
>
> THE COURT: Quit.
>
> MR.SCHWELB: I mean it doesn't make me happy if somebody gets stubborn, as he seems to be. It really doesn't. I think this law ought to be complied with until we get something better. He is a hold-out, the second one in the history of this thing, so far as I know. Maddox was the first.
>
> THE COURT: Have you tested all of the rest of them in Virginia?
>
> MR SCHWELB: No, sir.
>
> THE COURT: Have you encouraged the United Planning Organization --
>
> MR SCHWELB : I haven' t encouraged anyone. We have other suits in Virginia, your Honor.
>
> THE COURT: ... I know you've got 400 willing Howard students. You've got --
>
> MR SCHWELB: ... Two of them went this last time.
>
> THE COURT: -- several of them in your office up there, haven't you?
>
> MR. SCHWELB: Negro attorneys, yes sir.
>
> THE COURT: And you've got United States Marshals, haven't you?
>
> MR. SCHWELB: I don't have them, but there are such people.

Judge Lewis then apparently suggested that we send up a Negro Marshal to test the establishment:

> THE COURT: How am I to look back of the facts and determine whether it is a coincidence, they just happen to get by that way when they feel like a Coca-Cola.
>
> MR. SCHWELB: Honestly, your Honor, assuming I wanted to send United States Marshals down there, I am sure the people I work for wouldn't let me send anybody down there, and if they found out I did, I'd get in some hot water, because I don't think it appropriate for us to do it.
>
> THE COURT: Why is it appropriate for Mr. Stein – who is Mr. Stein?
>
> MR. SCHWELB: A law student. He is a Civil Rights advocate.
>
> THE COURT: Who is he, to take it upon himself to police. He is not a policeman, is he?
>
> MR. SCHWELB: I think he's got a right. He's certainly got a right to go there for the purpose of determining if the court order is being obeyed, and I think, really, particularly in this situation, with the press –
>
> THE COURT: I hope he lives long enough in the world to learn that when you proceed to stick your nose in other people's business all the time, you sometimes get other people's noses stuck in your business...

Despite our obvious disagreement, Judge Lewis did sign another Order to Show Cause and a new hearing was set for April 12, 1967, five weeks after the earlier hearing. We subpoenaed our witnesses – they included reporters from the Washington newspapers to whom McKoy had made admissions – and, in order to avoid any further identification problems, we subpoenaed the McKoys themselves. If they did not show up in response to the subpoenas, they would be in contempt on that basis, and bench warrants could be issued to bring them to the court.

After the unpredictable history of the case until that time, I really had no idea whether the McKoys would turn up, subpoena or no subpoena. I likewise had absolutely no idea how Judge Lewis would rule on this occasion. When I arrived in Court, however, an attorney from Lynchburg, Virginia named Frank McCann introduced himself to me and told me that he was now representing the McKoys, and, a little while later, the two defendants walked into the courtroom too. Perhaps we could now get down to the business of trying this case in the normal manner, with the litigants in the courtroom represented by counsel and with the parties making their contentions in legal briefs rather than sensational letters and pontificating editorials which generate more heat than light.

Mr. McCann asked for a continuance until early May; he indicated that he would seek to have the original injunction dissolved on the grounds that the Civil Rights Act did not apply to the Belvoir Restaurant and that, in any event, the Act was unconstitutional. I thought he had no chance to prevail with either argument, but I was glad to see counsel in the case, and without objection from me, the court continued the case until April 28, so that both parties had ample opportunity to write briefs and prepare their contentions. After the brief session, I sat down with Mr. McCann and urged him to secure his clients' agreement to comply with the Act, but he was evidently an ideological lawyer who said he opposed both compulsory segregation and compulsory integration. It was apparent that he had been hired by the McKoys, or volunteered his services to them, to make an ideological argument of some kind. This he had every right to do, and we parted on the best of terms, arranging to exchange briefs in advance of the hearing.

I was startled when I received Mr. McCann's brief. It was not a brief at all in the normal sense. Eighteen of the twenty legal size pages were designed to show that the public accommodations law was unconstitutional – a proposition which had been unanimously rejected by the Supreme Court – but neither the pertinent decisions of that Court nor in fact <u>any</u> decision by <u>any</u> court was cited in the entire document. It was, in fact, a philosophical rather than a legal argument, and its basic theme was that there were two kinds of ideological groups, integrationists and segregationists, and these in turn were divided into private and governmental integrationists and private and governmental segregationists. It was Mr. McCann’s view that the governmental integrationists and segregationists – those who wish to impose national policies favoring segregation or integration – were depriving people of their constitutional rights. The rights said to have been invaded – by requiring the McKoys to serve Negroes – were numerous: freedom of speech and of religion in violation of the First Amendment, liberty and property in violation of the Fifth Amendment, trial by jury under the Sixth and Seventh

Amendments, “individual segregationist” rights under the “Ninth Amendment,” the “right to discriminate” said to be reserved to individual citizens by the Tenth Amendment, and the prohibition against slavery and involuntary servitude in the Thirteen Amendment. With respect to the last argument, the brief stated that

"If this is not involuntary servitude, we need new dictionaries.”

What puzzled me most was that Mr. McCann, who had been an Assistant United States Attorney and undoubtedly knew how to write the more prosaic types of briefs with which most lawyers are familiar, had not even mentioned in all twenty pages the one argument which stood a good chance to prevail with Judge Lewis – the contention that the statute did not apply to persons seeking to “test” compliance rather than trying to secure service in the normal course of business. I thought this wrong, but it was far more plausible than all of the laissez-faire polemics in the brief, and it would certainly be more plausible to a judge like Oren Lewis, who was guided so strongly by his own personal notions of fairness. I could only conclude that a deliberate choice had been made to use the lawsuit as a forum for constitutional views that stood no chance whatever of prevailing. Tactically, this was to my side's advantage, for these theories would surely be even less acceptable to a practical minded judge than the legal contentions we were citing to him. Our contentions at least had the virtue of being consistent with Supreme Court decisions, and it was likely that it would be my adversary who would now be arguing with the judge most of the time, rather than myself. I would have preferred, however, to have fought out the real question with an attorney who would contest real issues, not what I regarded as phantoms. The emotional binges which had characterized this case until this point could then have been avoided, and, with practical advocates on both sides, even emotional issues can be rationally resolved on a basis of mutual respect in accordance with the law. This is difficult where the client on one side writes letters to a federal judge calling him “communistically inclined” and where the attorney writes a brief on his behalf treating unanimous Supreme Court decisions as if they did not exist.

I had a chat with Mr. McCann before the hearing started, and he confirmed what I had suspected. He and McKoy wanted to "test" the constitutionality of the law in general and as applied to the Belvoir Restaurant in particular. He said his clients, who had four children, were prepared to go to jail if that is what they had to do in order to “test” the law. The fact that the law had already been tested and unanimously upheld by the Supreme Court did not seem to make any difference to either lawyer or client. In any event, the McKoys were in court, and we would at

least get a judicial determination as to whether Mr. McCann's arguments were sound law or ideological metaphysics.

The hearing started with an argument by Mr. McCann that the original injunction issued in January should be set aside for "mistake" on the grounds that,

> the defendants mistakenly believed that they could not get justice in a United States Court, and that their constitutional rights would somehow be recognized without active defense of those rights on their part and did not realize that by not answering the original complaint and by permitting a default judgment to be entered against them, they thereby became liable, upon the continuation of their restaurant operation policy, to the subjection to a fine or imprisonment without trial by jury.

As one might have expected, Judge Lewis was unimpressed by this contention, but he agreed to allow the defendants to put on evidence designed to show that the Belvoir Restaurant was not covered by the Act.

Mrs. McKoy, who testified first, described the restaurant and its location. She said she and her husband had no employees, that it had an advertisement in the Yellow Pages, that she served about 100 people a day, and that the restaurant grossed about $24,000 a year with a cost of $13,600 for food and supplies. That was all. On cross-examination by me, Mrs. McKoy conceded that she and her husband had turned away Negroes both before and after the injunction, that it was on account of their race, and that she would continue to do so. She and her husband were the only ones who worked there, and if anyone was turned away by a man, it was by Mr. McKoy. She admitted that the establishment served the white public and made no inquiry where they came from, and this tied up the "coverage" issue beyond all dispute. Judge Lewis tried hard to explain to Mrs. McKoy her obligation to obey a law passed by Congress and upheld by the Supreme Court, but she stood firm:

> When the Constitution takes my right away from me.... I feel that it should not transgress against me...and take my freedom away from me.

It was apparent when Mr. McKoy followed his wife to the stand that she was the more thoughtful and better educated of the two. McKoy added little on direct examination, but he was candid about his intentions when I cross-examined him:

Q. Now, you serve the general public, except Negroes, that is your general policy?

A. That is right.

***

Q. And when a Negro comes in now, you don't serve him?

A. No, sir.

Q. You won't serve him in the future?

A. No, sir.

***

Q. Now, you don't deny, do you, that it was you who refused service to that group that the first hearing was about?

A. I refused them, yes.

Q. You refused them personally

A. I blocked them at the door.

Q. Right. And the second time a group came --

A. I blocked them again at the door. I

Q. You and your wife refused to serve them?

A. I blocked them a t the door.

Q. Your wife told them?

A. I don't know what she said. I told them I didn't serve them. I put them out and meant for them to stay out.

Q. You would do the same thing again?

A. I would do the same thing again.

Q. It is accurate that you would rather go to jail than serve Negroes?

A. That is right.

Seldom can anyone ever have testified more candidly add readily to his own contempt of court. There was an amusing moment on re-direct examination when Mr. McCann asked Mr. McKoy, who claimed he had served me three times at his restaurant (I had been there only once), what his plans were on that score:

Q. Would you serve Mr. Schwelb if he came into your restaurant?

A. No, sir, I sure wouldn't.

Q. Why wouldn't you?

A. Because he is a segregationist and he is a mixed group.

Then, as McCann tried to use his client to develop a philosophical theory, McKoy had trouble following where his lawyer was leading:

Q. You wouldn't serve him because he mixes with Negroes, is that it?

A. I wouldn't serve him, no, sir. He comes in my restaurant, he causes trouble. I wouldn't take him back.

Q. I see. You agree he has a right not to come to your place if he wants to?

A. He has no right to come in my place.

Q. You agree he has a right not to come in?

A. He has a right not to come.

Judge Lewis went to great pains to try to explain McKoy's obligations to him, with so little result that he was moved to remark, in a revealing comment about his generous attitude:

THE COURT: Well, now, you know the trouble with this world, it is a funny world, some people want to help people; people don't want to be helped, and you are one of them. You don't want me to help you, isn't that right? You just don't want me to help you?

THE WITNESS: I don't know.

Mr. McCann tried to find support for another of his constitutional theories from his client, but with indifferent success:

> Q. Have you attempted to find out how you could get out from under this law?
>
> A. No, I haven't.
>
> Q. You haven't.
>
> A. Sell out, I guess. That is the only way I know.
>
> Q. Did you contact me with the purpose in mind of having me challenge the applicability of this law to you, to your business?
>
> A. Did I do what?
>
> Q. Did you employ me, or come to see me about representing your interests in trying to find out whether or not this law applied to your business?
>
> A. Yes.

McKoy is a rather simple man whose grammar is sketchy, and I think he was bewildered by much of what his lawyer and the court asked him. He did not want to serve Negroes, and the intricacies of articulating a reason or a theory for his ideas were beyond his comprehension. Who knows how many generations it took to accumulate the bewilderment and hatred – or was it just plain obstinacy – that came face to face with the law and with the last third of the Twentieth Century in the federal courtroom in Alexandria, Virginia that day.

After a recess to give Mr. McCann a last opportunity to reason with his client, Judge Lewis, in a rather moving decision, dismissed all of the McKoy's constitutional and related defenses as frivolous. He complimented the defendants on their "courage", but found that they had obstinately refused to obey the law or the orders of the court. He found both in civil contempt and sentenced each to imprisonment for two months, such imprisonment to be renewed at that time unless they agreed to comply. They might, at any time, as we had proposed, purge themselves of contempt by agreeing to obey the orders of the court. Moreover, Judge Lewis tempered justice with mercy and deferred imposition of punishment

on Mrs. McKoy for two months so that she could be with her children. Judge Lewis reiterated his view of meddling by "busybodies" and indicated that the defendants need not serve them. McKoy was delivered to the custody of the United States Marshal and spent the weekend in jail – the first person to be imprisoned for a violation of an injunction issued pursuant to the Civil Rights Act of 1964. All of this happened without our having to call a single witness. Ironically, at the March 7 hearing, at which government witnesses testified and at which the McKoys did not appear, the defendants were in effect cleared. On April 28, when the McKoys testified and were represented by counsel, and no government witnesses testified, the defendants were held in contempt.

After a weekend in jail, McKoy appeared in court on Monday and agreed either to close his restaurant or to serve everyone regardless of race. He was released by Judge Lewis with our consent, and I expressed gratification and told Judge Lewis that "although we disagree on parts of the law, I am respectful of your fair attitude on the matter." I meant both halves of that statement.

Frank McCann appealed the injunction to the Court of Appeals, which summarily rejected his contentions. He applied to the Supreme Court to review the case, but, as expected, that Court declined to do so. All these questions had been settled long ago. The Washington Post reported on August 22, 1967 that a Virginia lawyer named James C. Kent had started a fund drive to pay McKoy's legal expenses. In magnificent hyperbole, Kent described McKoy as

> a bell ringer in the ears of the judicial branch of government, who have sometimes collaborated with the other branches of government in leading us with catastrophic brinkmanship to a state of near anarchy in the field of racial relations.

It is remarkable how all of Mr. McKoy's adherents appear to be committed to a policy of low-key understatement.

McKoy soon reopened his restaurant, and, so far as we have been able to determine, he and his wife have complied with the Order. As of the time of writing, in any event, we had received no complaints. His heart has not changed, however. Posted in large lettering on the wall of the Belvoir Restaurant is a notice which reads as follows:

> OUR GOVERNMENT HAS UNCONSTITUTIONALLY TOLD US WHOM WE MUST SERVE WHEN OPEN FOR BUSINESS

In July, 1967, a Washington Post reporter observed the sign as well as place mats attacking the "Civil Wrongs Act of 1964." A portion of the inscription on the mats says the McKoys

> ... expect to continue to fight against this Act's unconstitutional and tyrannical trampling of your and our God-given unalienable individual rights protected by the First, Fifth, Sixth, Seventh, Ninth, Tenth, and Thirteenth Amendments to the Constitution of the United States.

When the Post reporter was in the restaurant, Mrs. McKoy was expounding her views orally to a customer. A grandmother from Missouri looked at the sign, shook her head, and told the reporter:

> I don't go along with this. I'm in the catering business and I would just as soon work a Negro wedding as a white one. One person is just as good as another as far as I'm concerned.

It is arguable that the posting of McKoy's sign is incompatible with his duty to correct the effects of past discrimination, but we have thought that in the absence of continued refusal of service, litigation of this point is not an appropriate allocation of our limited resources. Perhaps the McKoys will one day remove the sign voluntarily and not only admit orderly persons of all races but also make them welcome.

CHAPTER 10
County With a Klan

While the McKoy case prompted headlines and editorials in the Washington Post, school desegregation drew the greatest part of our Division's resources. The Civil Rights Act of 1964 had provided tools for the government with which it could do a job which had been left undone for the decade following the Supreme Court's 1954 decision holding compulsory school segregation unconstitutional. The tools were of three kinds, two to be exercised by the Justice Department and the third involving HEW'S power over the federal purse strings.

Title IV of the Civil Rights Act of 1964 authorized the Attorney General, upon the complaint of a parent unable to bring action on his own behalf, to institute suit to desegregate the school system. Previously, such suits could only be brought by parents at their own expense, and conditions of poverty, intimidation, and the dearth of black lawyers resulted in relatively few such cases being started in the Deep South. Title IX of the Act authorized the Attorney General to intervene in – that is, become a party to – school desegregation and similar suits brought by private individuals if the cases were of "general public importance" and involved alleged denials of equal treatment under the law. This meant that when a federal court suit involving important factual or legal issues was started by a Negro parent, the government could enter the case, usually on the parent's side, and put the authority and resources of the United States behind an attempt to establish an important principle of law or to desegregate a school district. Finally, Title VI of the Act provided that federal financial aid was to be withheld from recipients – schools, hospitals and other public institutions – which failed to comply with federal desegregation requirements. It was this last provision which made the greatest initial difference, because it hit the discriminator where it hurt most – in the pocket book. The Department of Health, Education and Welfare issued "Guidelines" in accordance with the new Act, which described in general terms what was required of a school district in order to be eligible to retain its federal funds. Each district had to come up with a "desegregation plan" consistent with HEW requirements or its funds would be cut off.

The new procedures made a difference. With a few notable exceptions, Southern school boards had previously taken no steps towards desegregation unless required to do so by court order. Now school authorities could no longer wait for somebody else to do something; unless they took the initiative themselves, they would be out of federal money, which most of them badly needed. Not surprisingly, the results of the new rules were in some respects quite striking. The

following table shows the rise in the percentage of black pupils in the eleven Southern states who attended desegregated schools in the school years immediately before and after the effective date of the Act:

Year	Percentage
1963-1964	1.17
1964-1965	2.25
1965-1966	6.01
1966-1967	10
1967-1968	13.9
1968-1969	20.3
1969-1970	40 (approximately)

Before 1969, however, this was practically all "one-way" integration. With very few exceptions, it was only the white schools which were desegregated, while the Negro schools remained all-black. The reason for this pattern lay in the so-called freedom of choice plans which were in vogue in all of the Southern states. Under these plans, each pupil was either required to select his own school or was reassigned to his former school but given the opportunity to file an application to transfer. As everybody who has had anything to do with school desegregation knows, the parents of white pupils in Southern states do not elect to send them to black schools. As a federal court in Alabama has frankly put it,

> . . . the reasons are obvious why school officials have not chosen other plans, such as the neighborhood school plan, for under such a plan

white students would immediately be required to attend Negro schools in their neighborhoods.

In its first set of guidelines, issued in 1965, HEW had approved freedom of choice plans without specifying whether it regarded them as valid forever or only for a transitional period. Since such plans produced at most token desegregation, while alternative devices like unitary zoning (on a neighborhood school basis) or the "pairing" of white and black schools (with one offering some grades and the other the remaining grades), would usually result in complete or substantial integration, most Southern school districts opted for freedom of choice. This transferred to the Negro pupil and to his parents the burden of dismantling the existing dual system based on race. With the strong traditions and mores which characterized the region, nobody expected a deluge of applications from Negroes to attend white schools, and no such rush developed. By approving freedom of choice plans, at least for the time being, the United States government was committing itself to the proposition that token integration was permissible even where complete integration would have been possible. Surprisingly, there was at this time little outcry by anybody against the government's tolerance of tokenism.

If "free choice" was to be approved as a method of desegregation, it appeared to many of us that such approval should at least be conditioned on the absence of overt intimidation. The power of custom and habit, and the tradition of enforced acquiescence by the Negro in the white man's preferences, were sufficient obstacles to the success of free choice even in the absence of physical or economic coercion. In one case, in Tennessee, Negro plaintiffs argued that the economic dependence of the black man on the white man made free choice unworkable; the court held that the choice feature might have to be eliminated on proof of actual intimidation, but that the alleged coerciveness of the underlying situation alone was insufficient to warrant court interference. There were counties, however, in which the actual coercion which had been missing in the Tennessee case existed in full measure. Our investigations in some areas turned up shootings into homes, cross-burnings, threatening telephone calls and notes, and all of the many pressures traditionally associated with the Ku Klux Klan. Many of us believed and urged that at least in these cases, the government should attack "freedom of choice" as a misnomer and as unconstitutional segregation, thinly disguised because, as a practical matter, the choice was not free. In 1966, the Justice Department had not brought such a case in Mississippi, but on transferring to the Eastern Section, I inherited the first suit in which the Department adopted this position. The suit involved Franklin County, North Carolina.

Franklin County is not so very unlike the small rural counties in Mississippi described in earlier chapters of this book. It is, largely, farming country – cotton, corn, and tobacco. More of the roads are paved than in comparable areas of Mississippi, but many of the Negroes live in pitiful little unpainted shacks, both in the county seat (Louisburg) and in the countryside. The economic plight of the average Franklin County Negro is reflected in the following statistics from the 1960 census, which provide scholarly corroboration for what the visitor to the county can readily see with his own eyes:

Category	% of All-White Persons in Category	% of All Non-whites in Category
Family Income over $3,000 per year	58.3%	13.2%
Family Income over $5,000 per year	29.5%	2.7%
Family Income over $7,000 per year	12.1%	0.7%
Persons with Income over $3,000 per year	27.8%	4.9%
Persons Residing in Owner Occupied Units	63%	29%
Median Income – Families	$3,507	$1,281
Median Income - Persons	$1,701	$595

The population of Franklin County is evenly distributed among whites and Negroes, and, in 1965, of about 6,000 pupils in the school system, approximately 55% were black. The members of the School Board, however, were all white, as was the Superintendent of Schools. So was every elected official, every judge, and indeed every person in a position of authority and power. That is how it had always been in Franklin County since the end of Reconstruction many generations ago.

In July 1966, the school system of Franklin County, which had ostensibly been "desegregated" for a year, still reflected the general racial tone of the community. Only six of more than 3,000 Negro pupils had finished the year in white schools. There were seven white and five Negro schools in the county, and, generally, they were arranged in such a way that a Negro school and a white school offering the same grades were located, more or less side by side, in each of the principal communities. In some areas of the county there were white but not black schools, and Negro pupils were bused far away. Epsom community, for example, had a white school (grades 1-12) but no Negro school. There were only 72 pupils in the upper four grades at this school, 39% of capacity. The Negro pupils in the

Epsom area – Negroes make up a substantial majority of the local population were bused every day, fifteen miles each way, to all-Negro Riverside School in Louisburg which, at that time, was badly overcrowded and operating at more than 126% of capacity! Similarly, Negroes who lived near the all-white Edward Best High School, which also had far fewer pupils than it could accommodate, took the long bus ride twice a day to an all-black school as overcrowded as Riverside. In Youngsville, the white school, serving grades 1-12, was about half a mile from the little wooden Negro school (grades 1-8). The Negroes of high school age from Youngsville did not go to Youngsville High in their town, which would have had plenty of room for them, but rode 15 miles each way to overcrowded Riverside.

In addition, the School Board went to remarkable lengths to assure that there would be as little "mixing" as possible on school buses. Since the bus drivers for the various schools were often high school students, and since it was evidently considered unthinkable that the same buses should stop at a black school and a neighboring white school and carry pupils to both, a different arrangement was made. The black pupils at Youngsville Elementary rode the same buses with the black pupils at Riverside, fifteen miles away, rather than on the "white" bus, which took their white neighbors to the white school half a mile from them!

Long before the Supreme Court held compulsory segregation in public education to be unconstitutional, the Franklin County school board had the duty, both under federal law and under the North Carolina Constitution, to provide equal educational opportunities to Negroes, even though they attended separate schools. This obligation, however, was (in Shakespeare's phrase), "more honored in the breach than in the observance", and when the suit against the Franklin County school board was first brought in December 1965, there was plenty of separation but no equality. Documents filed by the school authorities with the State Board of Education in Raleigh reflected the following contrast between the predominantly white and Negro schools.

	White Schools	Negro Schools
Valuation of School Property Per Pupil	$913.44	$285.16
Acreage of School Property Per Pupil	.04	.01
Pupil-Classroom Ratio	22.8 to 1	34.9 to 1
Library Volumes Per Pupil	9.05	4.0
Pupils Per Teacher	24.9	31.8
Students Per School Bus	43	64.1

Moreover, the Negro teachers, most of them handicapped by a segregated and inferior education, were in many cases less equipped to teach the children in the black schools than were their white counterparts. The system of extensive busing to keep Negro children in segregated, inferior schools was therefore self-perpetuating.

Several of Franklin County's Negro ministers were active in the NAACP and worked hard to improve the lives of their people and the educational opportunities available to their children. While there had been some token desegregation in North Carolina as early as 1957, the rural eastern portion of the state, in which the percentage of Negro population is greatest, adhered to its old ways. In 1963, no steps had been taken by the Franklin County School Board to comply with the Supreme Court's ruling, and the Negro ministers decided to do what they could to persuade the Board to comply. The first Negroes applied to attend white schools – they were immediately rejected – and in 1964, a petition signed by several hundred black citizens was presented to the Board requesting that the schools be desegregated. The Board, however, took no action on the petition. Clinton Fuller, the editor of the local "Franklin Times," who was also Vice Chairman of the Board of Education, reported on these early attempts to desegregate the schools in a hostile tone, and the applicants for transfer, identified on the front page of the newspaper, felt the sting of white community disapproval. But there were no bombs – not yet.

There was no integration in Franklin County in 1963 or 1964, but the passage of the Civil Rights Act of 1964 and the promulgation of the HEW Guidelines in 1965 meant that this county, too, would have to do something to desegregate if it was to preserve federal funds. There was some controversy as to

what, if anything, should be done – 767 white citizens, apparently believing (mistakenly) that refusal of federal funds would allow the school system to remain segregated, petitioned the School Board to do without the much-needed money. However, under the leadership of the Board's attorney, E. F. Yarborough, a desegregation plan was adopted. The plan provided that, in four of the twelve grades for 1965-66, and in the remaining grades for the following year, each pupil (or his parent or guardian) would have the right to select his own school and would be assigned accordingly. The plan further provided, in accordance with the HEW Guidelines, that for 1965-66, pupils in grades other than those officially desegregated should have the right to apply for what were called "lateral" transfers, which were to be granted or denied on a racially nondiscriminatory basis. This seemed to mean, in effect, that all grades would be desegregated on a "free choice" basis.

The years 1964 and 1965 witnessed an upsurge of Ku Klux Klan activity in many parts of the South, and minor violence ensued as the Klan marched in full robes and regalia through Louisburg, the county seat of Franklin County. Shots were fired into the store of a white businessman who was in charge of the Christmas parade and refused to make the Negroes march at the rear; he resigned in the face of a campaign of threats and harassment. The NAACP leaders, however, encouraged Negro parents to apply to transfer their children to white schools, and a total of 76 Negro pupils applied to cross racial lines. While this number represented fewer than 2 1/2% of the total, such a small percentage was not atypical and, had nothing else unusual happened, Franklin County would probably never have become a major legal battleground in North Carolina over desegregation of the schools. The problem was that even this 2 1/2% token desegregation was, in 1965, unacceptable to the School Board and to important segments of the white community. The overreaction that ensued brought this school system more travail, more litigation, and, in the end, more and faster desegregation, than any other rural district in North Carolina. It was like Bull Connor and Jim Clark all over again.

The School Board's reaction to its new plan was to construe it as narrowly as possible and then some. One Negro pupil had been living with his grandmother all of his life. On his behalf, and at his urging, she indicated the local white school on his choice form. She heard nothing about the matter over the entire summer. A few days before school opened, the grandson's choice was denied because the application had not been signed by his parent or legal guardian, and the boy was reassigned to the all-Negro school. The pupil's parents lived in the North, and his grandmother had registered him at the black school every year since he started the

first grade. Apparently she was regarded as being enough of a parent or guardian to do that, but her signature was not considered sufficient to send him to a white school. "Why are the white folks so hateful to us?" the old lady asked me, after relating the story in her little shack in the Negro section of Louisburg. There was no ready answer.

The most controversial action taken by the School Board was not its interpretation of who could fill out forms for transferring pupils but its after-the-fact imposition of "criteria" for "lateral" transfers (those in the eight grades in which choices were not required of all pupils), which resulted in all applications for such transfers being denied. The application forms for such lateral transfers which were used in the district contained a space for the pupil or his parent to furnish his reasons for asking to attend the white school of his choice. Nothing was stated as to what, if any, standards would be used to determine eligibility, or what reasons were acceptable or unacceptable. Most applicants wrote that the white school was close to their homes, or had better equipment, or was just plain better, or gave no particular reason except that they preferred the school. After the choice period was over, the School Board announced that applications for lateral transfers would be approved only if the applicant had indicated that he wished to transfer in order to take courses not available at the school which he had been attending. In accordance with its "criteria," the School Board ruled that none of the applicants had qualified for a lateral transfer, and all of these pupils were reassigned to all-Negro schools. Eight of the twelve grades remained completely segregated. Rev. Robert Latham, a white minister who was sympathetic to the aspirations of the Negroes, and who had functioned as a kind of emissary between the School Board and the Negro leaders, urged the Board Members to approve the transfers and to avoid the atmosphere of suspicion and mistrust which he was sure would follow denial of the applications, but to no avail. As a result, only 31 of the 76 Negro requests to attend desegregated schools were accepted. Understandably, the black community felt that the School Board was hostile and intransigent, and the Franklin Times, for its part, editorialized that the Negroes were unreasonable. Race relations were at their worst.

Franklin County had a strong Ku Klux Klan, and sympathy with the organization's aims and opposition in the county to desegregation were not confined to active Klan members. This situation was well known to the editor of the Franklin Times, Mr. Fuller, who had written and published articles about the Klan. It was certainly predictable, under the circumstances, that reprisals might be visited upon Negroes who sought to desegregate the schools if their names were made public. The choice period was conducted in the late spring, and school did

not open again until the fall, so the Klan and its allies had several months to do whatever they thought necessary or appropriate to safeguard white Christian civilization (which Klansmen routinely equate with racial segregation). Nevertheless, Mr. Fuller published the names of the Negroes seeking transfer, over the protest not only of Rev. Latham, the white minister friendly to the Negroes, but also of a fellow School Board member whom Fuller bluntly told to mind his own business. The law presumes that a man intends the natural and probable consequences of his conduct, and, if that maxim has any application to the Franklin County situation, Mr. Fuller must bear some responsibility for what happened next.

The publication of the names was followed by a campaign of intimidation directed at black parents who had applied to send their children to white schools. More than seventy intimidatory incidents were enumerated in the government's brief at the trial of the case in July 1967. Some of the incidents described were major catastrophes to the victims, and others merely disagreeable and humiliating irritants. But when one studies this melancholy history and considers the alternatives facing the Negro parent, one can understand why, after the summer of 1965, no more than 1.5% of the Negro pupils ever elected to attend white schools. The following examples illustrate how it was for blacks who had the temerity to seek a desegregated education in Franklin County under what was supposed to be a desegregation plan.

Mrs. Irene Arrington, a middle-aged widow, and her father, Sandy Jones, lived in neighboring houses located in the rural Moulton community. Each made application during the initial choice period in 1965 for their children to attend white Louisburg High School. The news was soon on the radio and in the Franklin Times. As Mrs. Arrington later testified:

> . . . I had a lot of telephone calls, started around suppertime and would last until 11:00 o'clock, and a lot of them would tell me, asked me was I trying to get white, why did I want my children to go to an all-white school. Some of them was telling me that something was going to happen to you, you are going to get killed.

Phone calls like that to an unprotected widow in a remote area are bad enough, but the threats were not idle. On two separate evenings within a three-week period in May and June 1965, Mrs. Arrington's home was riddled with bullets. On the second occasion, Mr. Jones' home was attacked in the same manner by nightriders who fired into the family car, which was "decorated" with shotgun pellets. The Franklin Times featured the story with a four-column headline and

with photographs of the damaged houses and automobile. The account in the Times concluded with what must have been the least reassuring reassurance of the century:

> A reliable source reported that it was believed that race was not involved, as such, in the case . . . .

Mrs. Arrington and Mr. Jones reluctantly withdrew the applications for their children to attend the white school, and the intimidation directed at them promptly ceased.

Margaret Crudup, a dark-skinned teenager of great poise and beauty, had been attending all-Negro Riverside High School, seventeen miles from her Youngsville home. She was an honor student with an "A" average. Margaret and several of her friends decided to apply to Youngsville High School, half a mile from her home, for their senior year. After they applied, they had second thoughts because of fear of reprisal, and their fears were not groundless. Soon the Crudups found the following primitively scrawled, anonymous note in a letter delivered to their rural mailbox:

> Dear Mr. and Mrs. Crudup we hear that you are sending a child to Youngsville School. Well we are giving you 30 days to get out of Franklin County. Pay your land what you owe him if any. Leave your crop. We are not going to warne you agane. We will start in your family and will start with you to killing.

Understandably, the Crudups had Margaret write a letter on their behalf to the Superintendent asking him to reassign her to Riverside, and this was promptly done. A few months later, the Crudups moved to the vicinity of all-white Edward Best High School, but kept their children in an all-black school to which they had to take a long bus ride every day.

Rev. Luther Coppedge, a Negro minister and one of the organizers of the desegregation efforts in the county, was unfortunate enough to be particularly associated with the desegregation suit that resulted because his son was the first named plaintiff in the complaint. Rev. Coppedge and his family incurred more reprisals for a longer period of time than anybody else in the county. After his selection of all-white Edward Best High for his son was announced over the radio and in the Franklin Times, he was plagued by anonymous calls, sometimes as many as fifteen a night. A cross was burned outside his home. Rev. Coppedge

was warned by a white friend that white merchants would deny him credit or financial help of any kind, and they did. Nails were scattered in his driveway on several occasions, causing flat tires. Sugar was placed in the gasoline tank of his tractor. Two of his dogs were poisoned. The church at which one of his relatives was the minister was completely destroyed by a bomb, and the Franklin Times published a front-page photograph of the rubble under the caption "SERVICES CANCELLED." There were explosions in the vicinity of Rev. Coppedge's home on at least two occasions, although no damage was done. Finally, in 1967, after the District Court had held so-called free choice in Franklin County to be unconstitutional and Rev. Coppedge's name was widely publicized in the press, shots were fired into his home on two separate occasions, and on the second, on Christmas Eve 1967, bullets missed members of the family by inches.

Perhaps the meanest reprisals of all were those directed at the family of Rev. Sidney Dunston, whose home had been threatened with bombing back in 1963. The Dunstons, middle class Negroes who had enough money to maintain a neat and attractive house, had a foster home license from the county and, for many years, they had opened their homes and their hearts to orphans or other homeless children. Most of the children for whom the Dunstons cared were of school age, and, when freedom of choice came to Franklin County, Rev. Dunston applied to enroll his foster children at a white school. The family received the typical Franklin County reprisals – kerosene in their well polluted their water supply, nails were scattered in their driveway, and they received dozens of threatening telephone calls – and they took all of this in their stride. In addition to the more conventional brands of intimidation, the Dunstons' foster home license was taken away on the grounds, so the responsible county official was reported as saying, that

> the general sanitary conditions of the home would be more in keeping with the raising of pigs than children.

As a consequence, three foster children were taken against their will from their warm and comfortable home with the Dunstons (as clean a country home as I have ever seen) to live with their unmarried mother in an unpainted shack in neighboring Johnston County.

By the time school opened in the fall of 1965, the denial of the lateral transfers on the basis of "after the fact" criteria and pervasive intimidation made it apparent to the Negroes that, unless something was done, their desegregation efforts would go to naught. After numerous withdrawals during the summer only ten black pupils were still scheduled to enroll in white schools. Two never showed

up and two more dropped out within a few days of the opening of school. Only six Negro pupils – less than one-fifth of one per cent – actually attended white schools for the 1965-66 school year, and the entire racial picture of the Franklin County school system was not significantly different from what it had been for many, many years.

Rev. Coppedge, Mrs. Arrington, and several of the other Negro parents consulted with Julius Chambers, of Charlotte, a prodigiously productive young NAACP lawyer who had been the first Negro to attend the University of North Carolina Law School, and who had graduated near the top of his class, with respect to the possibilities of going to court to secure their rights. On December 8, 1965, Chambers filed suit in the United States District Court in Raleigh on behalf of eleven Negro families to desegregate the Franklin County school system and to reorganize it on nonracial lines. The defendants answered the complaint, denying that they had engaged in any unlawful conduct. In the meantime, Howard Fink, a lawyer from the Antitrust Division of the Justice Department who had been temporarily assigned to the badly undermanned Eastern Section of our Division to work in North Carolina, had been in Franklin County interviewing Negro students, parents, and leaders. Fink recommended that the United States intervene in the suit under Title IX of the Civil Rights Act of 1964 on the grounds that it raised significant legal issues and was therefore a case of "general public importance." Attorney General Katzenbach signed the necessary papers and, on January 20, 1966, with the leave of the court, the United States filed its "Complaint in Intervention." This document, after describing the history of segregation in Franklin County and relating the school board's denial of the lateral transfers, summarized the intimidation to which black parents seeking to transfer their children to white schools had been subjected. The complaint then made history by asking the court to order the defendants to change to some plan other than freedom of choice unless they could prove that choice would be free in fact as well as in theory. For the first time, the United States had attacked the legality of a freedom of choice plan.

The individual plaintiffs and the United States sought to salvage as much desegregation as possible for the second semester of the 1965-66 school year and applied to the court for a preliminary injunction which would allow the Negro pupils who had filed applications for lateral transfers to attend the white schools they had chosen. A hearing was promptly had before Chief Judge Algernon L. Butler of the Eastern District of North Carolina. The United States was represented by Howard Fink, who argued that the nondisclosure of the criteria for lateral transfers was inherently unfair, since the Negroes had not been given the

necessary information to enable them to exercise their rights. Judge Butler, while critical of the school authorities for failure to disclose the criteria in advance, ruled that the School Board had acted in good faith, and that it would not be in the interest of the pupils applying for lateral transfer to change schools in the middle of the school year. Accordingly, on February 24, 1966, Judge Butler entered an order denying the request for a preliminary injunction and leaving the remaining issues in the case to be litigated at a hearing to be scheduled later in the year. The first skirmish had gone to the defendants.

In the meantime, Howard Fink combed Franklin County for any evidence of intimidation he could find. He was an energetic investigator, and he discovered many of the acts of intimidation that had occurred through the spring of 1966. In accordance with the Rules of the court, he filed a statement of what the government proposed to prove at the trial, and it was an imposing array of evidence of reprisal, worthy of what would be our first case tried on the theory that intimidation makes "free choice" unconstitutional. Fink then left the Department, and the case was turned over to me.

The trial was set for July 25, 1966, and since we had a new trial team, and since the case was one of such far-reaching significance, we went down in force. Three of my colleagues, a research analyst, and I were in Raleigh and Franklin County for more than a week in advance of the trial, locating and interviewing witnesses, studying and assembling school records, researching the law and preparing legal papers. By Sunday evening, July 24, all of our witnesses were under subpoena, our brief was prepared, and all eventualities (or so we thought) had been discussed. Our excitement matched the importance of the case. If we could show that freedom of choice in Franklin County was fiction rather than fact, this would surely have an electric effect on desegregation throughout the South. Not only would justice be done in Franklin County, but Klansmen everywhere would be on notice that their night riding would ironically result in more and speedier integration, not less. Hopefully, removal of the incentive for violence would contribute to more peaceful communities and to the realization by Negro parents and students of their constitutional rights.

On the day set for the trial, the federal courthouse was buzzing. Our witnesses were present, and the press was there in force. Mr. Yarborough, the ruddy faced School Board attorney from Louisburg who affected the "old country lawyer" style, arrived with his co-counsel from Raleigh, Erwin Tucker, who had been specially retained because of his experience in federal practice. We were about to leave our headquarters in the United States Attorney's office for the

courtroom, when we received word that Judge Butler wished to see all of the attorneys in his chambers, and down we all went.

A small, rather frail, bespectacled and scholarly gentleman, Judge Butler introduced himself warmly and made us all comfortable. He disposed of ceremonial matters swiftly, and advised us that he had read all the papers on file and would like to simplify the case. The Court of Appeals for the Fourth Circuit in Richmond had just ruled in another case that School Boards had the duty to begin the desegregation of their faculties, and the judge was prepared to order the Franklin Board to do the same. If he also required that the individual plaintiffs be admitted to the schools of their choice, would an order so providing satisfy all parties? Mr. Yarborough and Mr. Tucker smiled benignly and said it would. We just gulped.

I tried to explain the government's position to the judge. What was at stake here, I said, was not just which school the individual plaintiffs would attend, but rather what the School Board was required to do in order to dismantle the unconstitutional dual system of schools based on race. Freedom of choice might be a satisfactory transitional method if the choice was truly free, but no real freedom existed in Franklin County. If the vigilantes were allowed to succeed in preventing integration in this county by terror methods, this would simply spur them on to try the same thing elsewhere. If we could prove the facts that we alleged to be true, far more sweeping relief than that suggested by Judge Butler would be appropriate. Julius Chambers, on behalf of the individual plaintiffs expressed similar views, but it was soon apparent that we were not getting very far.

The judge was plainly troubled. First of all, the claimed violence had been done by outsiders, not by the School Board, and he doubted, despite Fuller's publication of the names of desegregating parents, if he could “penalize” the defendants for what unknown terrorists had done. The elimination of “freedom of choice” troubled him even more. “I really don't think we should substitute compulsion for freedom”, he insisted. Once you did that, the judge said, and once the principle of compulsion was established, such compulsion could be used for less benign purposes than those which we were here proposing. I argued that what he called “compulsion”, or assignment of children to schools by the school boards, had always been the practice until the prospect of integration had come along. All we were asking for was that pupils be assigned to nearby schools regardless of race. In any event, one could hardly call what was going on in Franklin County “freedom”. Judge Butler listened politely, but it was apparent that he was not ready to make a sensational and precedent-setting decision to strike down the

defendants' free choice plan, at least not then. Within an hour or two, our alternatives were apparent. We could insist on an immediate trial (against the judge's wishes), almost certainly lose the case, and try our luck on appeal. Alternatively, we might try to reach an acceptable interim compromise. It was the second alternative to which Judge Butler was adroitly leading us. He obviously believed that an amicable settlement would be in the best interest of the school system and, indeed, of all concerned. He displayed remarkable skill as a conciliator and negotiator to bring the positions of the various parties closer together. It seemed a worthwhile effort and, recognizing that in any event our chances on appeal would be slim if we rejected a reasonable plan favored by a highly respected District Judge, we sat down to several days of the kind of hard and close bargaining that sometimes takes more out of a lawyer than examining witnesses or matching forensic skills before judge or jury.

The shape of an interim settlement gradually began to emerge. Since we contended that the spring 1966 free choice period (which had resulted in only 23 Negroes electing to attend white schools) had been made ineffective by intimidation, a new choice period would be held in August under the protective supervision of the court. Each Negro parent would receive a letter from the School Board explaining his right to a free and unfettered choice, and any intimidation was to be reported to the United States Attorney. The Board would be ordered to make a substantial start on faculty desegregation, to hire and assign new teachers on a nonracial basis, and to encourage present faculty members to accept transfers across racial lines. Counsel for all parties would meet in Louisburg with the Board and with members of the Negro community, who were to be selected by the lawyers for the Negroes, and would explain the order and solicit cooperation with its terms by everybody. There would be no trial as such, but the testimony of all of the witnesses would be taken before a court reporter and made a part of the record of the case so that they could be used at any later stage of the proceedings. Decision with respect to the issue of disparities between the white and Negro schools was postponed for later development by the parties. An interim order outlining what was now being required of the defendants was entered on July 27, 1966, and, although the case was settled for the time being, the lawyers spent three days taking the testimony of the Negroes and their allies who had been subjected to reprisals. It was grueling, it was tough, but it later proved to be worth it.

The result of this round was a stand-off of sorts. Our legal point had been partially made, at least to the extent that the results of the choice period which we claimed not to have been free were set aside, and a beginning had been ordered in desegregation of the teaching staffs. At the same time, “freedom of choice” was to

continue, for a while at least, and while the supervision of the court and its pronouncements against intimidation might give greater courage to a few Negroes, nobody knew what effect it would have on the nightriders. Moreover, we had not yet secured the explicit decision we had sought on the issue of law which made this case so important – could a school board's "freedom of choice" plan be held invalid because of intimidation by third parties?

The end result of this skirmish was to buy time for Franklin County and to give its plan another opportunity to prove itself in action. If the School Board accomplished substantial faculty desegregation, if the nightriders were quiet, and if the community cooperated, perhaps freedom of choice might be acceptable, at least in the short term. If these goals were not realized, then the opposing parties would soon be squaring off again, and the issue which the court managed to avoid for 1966-67 would surely have to be faced for 1967-68.

During the new court-ordered freedom of choice period in August 1966, the Negro leaders worked hard to encourage their people to desegregate the white schools. Forty-nine Negro pupils elected to transfer in comparison with twenty-three who had so chosen during the spring choice period which the Court had set aside – a significant increase, perhaps, but still only 1½% of the total. The School Board's accomplishments in faculty desegregation were unimpressive. Of the twelve schools in the system, nine continued with all-white or all-Negro faculties, and the total integration of teachers which Franklin County accomplished was to assign Negro librarians to each of two white schools and a white librarian and a part-time white English teacher (five hours a week) to all-Negro Riverside High. Otherwise, everything remained as segregated as ever.

The situation with respect to intimidation did not change much either. While the new court-ordered choice period was going on, shots were fired into the home of a Negro woman whose children were enrolled in Negro schools, and, while the relevance of this incident to desegregation and its effect on people's minds were admittedly conjectural, the Franklin Times wondered aloud as to whether the shooting would affect the court order. Then, during the very first days of the school term, nightriders fired a volley of shots into the home of a Negro whose two daughters had just enrolled for the first time at previously all-white Louisburg High School. The vigilantes and their allies were back at work!

Among the witnesses who had testified for us on deposition at the time of the Interim Order in 1966 were three white men. Two were ministers – Rev. Latham, the emissary of 1965, who had received a burning cross and nails in his

driveway and a death threat to his wife in return for his efforts, and Rev. Frank Wood, an idealistic young preacher in his twenties who had been subjected to various forms of harassment, including a cross-burning, telephone threats, and cars circling in front of his house after his wife, a school teacher in an adjoining county, had entertained her pupils, including two Negro children, at their home. The third white witness was Superintendent Fred Rogers of the separate Franklinton School District, whose moderate racial views had subjected him to cross burnings and other pressures from the more militant members of Franklinton's white community. To be a “nigger-lover” is often even riskier than being a “nigger,” and within a few months of their testimony, these three men had, for all practical purposes, been run, out of the county; Rev. Wood's all-white congregation sent him packing by a vote of 83 to 6!

It was not difficult to surmise that, in the atmosphere that prevailed once again in Franklin County during the 1966-67 school year, there would be no significant upsurge in the number of Negroes seeking to transfer to white schools for 1967-68. When only 45 Negro pupils chose white schools for 1967-68 – a drop of 4 from the previous August – nobody was very astonished. The prospects of eliminating the dual system of schools by “free choice” under these conditions, however, appeared very slim indeed, and we were committed to desegregating the schools in fact, not merely in theory.

In 1966, the principal issue in this case had been intimidation and its effect on the lawfulness of free choice. As we prepared for trial in 1967, however, and studied the school system in detail, it became evident that, quite apart from coercion, the whole way in which the schools were run was essentially irrational. Why should there be two high schools, one white and one black, in communities where there were hardly enough students for one? Why should pupils be transported fifteen miles each way to an overcrowded school when they lived next to a half empty one? Why should expenditures per pupil be so uneven as between white and Negro schools? It required no educational specialist to surmise that the schools would not be run in this way if all of the pupils were of one race, and I suspected that there was no rational justification for many of the School Board's practices; they served only to keep the races apart. A lawyer's suspicions, however, were not evidence, and if Judge Butler was to be persuaded, we would need proof – in this case; expert proof. Such proof was forthcoming from a remarkable young educational scholar named William Stormer, who held the imposing title of Assistant Chief of the School Construction Section of the Division of School Assistance of the United States Office of Education of the

Department of Health, Education and Welfare. Anything Bill Stormer doesn't know about schools is not worth knowing.

With the leave of the court, Stormer spent two days inspecting the Franklin County schools, and several other days analyzing all kinds of school documents relating to curricula, expenditures, school plants and all of the other factors that go into the evaluation of a school system. Carefully, and with scrupulous objectivity, he studied the data and reached conservatively phrased and carefully documented conclusions. There were findings which were less than helpful to our case, e.g., Stormer found some disparities between several of the white and Negro schools to be less pronounced than they appeared to be from the School Board's own documents, and he did not hesitate to say so. On the basic issue of the irrationality of the organization of the school system, however, his conclusions, carefully documented by statistics, were devastating to the Board's position in court.

Stormer found, and later testified, that the most remarkable characteristic of school organization in Franklin County was that in each of several communities there were white and Negro schools serving the same grades located essentially side by side. It is generally agreed among educational experts that a high school cannot provide a modern diversified curriculum at a reasonable cost per pupil unless there are at least 100 pupils per high school grade. In most of the high schools in Franklin County, there were fewer than fifty pupils per grade; in one (Epsom) there were fewer than twenty, and yet the county operated two secondary schools in several communities. This meant that facilities and courses were either duplicated or available only in one high school when they should be offered in both. It was extremely expensive to run schools in this way and you got far less education for the same amount of money. Stormer knew of no educational advantage whatever for this arrangement. An obvious solution in Franklin County, which would make it possible to diversify the curriculum available to the pupils, avoid duplication, and bring about more economical use of existing facilities, would be to "pair" the "side by side" schools, using one for all of the children, white and Negro, in some grades and the other for the children in the remaining grades. Everybody could then go to the school in his neighborhood which offered the grade in which he was enrolled. Stormer testified that such a "pairing" would not only be educationally sound in terms of every rational consideration of which he was aware, but would also completely integrate the schools.

When Stormer gave this testimony, the defendants, after some hesitation, decided not to ask him a single question on cross-examination, and we had on record, without contradiction, expert proof that the way in which Franklin

County's schools were run served no valid educational purpose but made it possible to keep white and Negro children apart. This was important not only for the "atmosphere" of the case, but also to help to win in the court of public opinion. Segregationists were always saying that the government cared nothing for education but only for integration. Here, by undisputed expert proof, we had shown that a segregated dual system is not only unlawful from a constitutional standpoint, but also educationally wasteful and irrational. It was the School Board that was putting racial separation ahead of the education of the children in its charge!

In order to avoid a protracted trial, the court ordered that each side should present the testimony of most of its witnesses by means of depositions. Under this procedure, the witness would testify under oath before a court reporter with lawyers for all parties asking him questions, and the judge would then read the completed transcript instead of hearing the witness in person. Besides that of Bill Stormer, we took the depositions of numerous Negroes and persons friendly to them to show the history of intimidation which had inhibited their choice. We also introduced into evidence documents (such as threatening notes) and newspaper reports, which showed the publicity which had been given to the acts of intimidation and which had undoubtedly added to their chilling effect. The defendants, seeking to rebut our proof, took the depositions of several dozen Negro parents, who testified that they selected all-black schools for their children out of preference rather than because of fear. On cross-examination, however, most of these parents acknowledged that they had heard of many of the acts of violence which had occurred in the county, and that they had no way of knowing if similar misfortunes could happen to them if they chose desegregated schools. One Negro mother, under the skillful cross-examination of Julius Chambers, acknowledged that she did not know how her children would be treated in a white school and was "kind of afraid to find out;" her testimony hardly helped the School Board.

The defendants did establish, however, that overt intimidation was not the only reason why Negroes did not choose white schools. Custom and habit, coupled with an unwillingness to become pioneers, were also important factors contributing to that result. We did not dispute this, but contended that the very fact that two schools were maintained in the same community, one for whites, one for Negroes, stacked the choice and preordained its result. Free choice, we argued, was a misnomer in the situation in which it was here supposed to be exercised.

The trial was set for Raleigh for July 25 and 26, 1967 – exactly a year after the case was originally supposed to be tried. Judge Butler is a cautious and rather

conservative man, but he is one of the fairest and most objective judges on the bench. For several days prior to the trial, he had steeped himself in the thousands of pages of depositions and exhibits in the case, and he knew the facts cold. He had asked all parties to negotiate in good faith towards securing a consent decree, and we had tried to do so, but without success. The School Board still wanted so-called freedom of choice, and we thought that such a plan was unconstitutional in Franklin County. Consequently, on this occasion, Judge Butler held no conference with the lawyers to try and bring about a settlement, but directed us to proceed with our case.

Most of the evidence was already in by way of depositions, and only two live witnesses were called. Rev. Coppedge, the Negro minister whose son was one of the plaintiffs, testified about the intimidation to which he had been subjected, and he disclosed, among other things, that his last harassing telephone call had come only three days before the trial. The only witness for the defendants was County Superintendent of Schools, Warren Smith, who attempted to defend the county's school organization and its record on faculty desegregation, which had been so devastatingly criticized by Bill Stormer. Mr. Smith faced sharp cross-examination by NAACP attorney Chambers and by me, and, on occasion, some distinctly critical questioning by the judge. It appeared from the testimony of Mr. Smith that the projected faculty desegregation for 1967-68 affected only five teachers out of a total of more than 200; four had crossed racial lines the previous year. Two of the five teachers involved were Negroes who had given depositions on behalf of the government in which they testified that they were prepared to cross-racial lines, and that was how the School Board came to reassign them. Had it not been for these two, faculty desegregation in Franklin County would actually have decreased from 1966-67 to 1967-68. This was no way to abolish the dual system.

Judge Butler was plainly irritated by the failure of the School Board to take vigorous steps to bring about some faculty desegregation in compliance with his order of the previous year, and the defendants' obvious inability to satisfy him on this issue had the effect of making the Board seem intransigent (as, indeed, it was), of putting its lawyers on the defensive, and of giving our side the initiative in the case as a whole. As the Superintendent's testimony proceeded, it was apparent that we were scoring point after point on cross-examination as we confronted him with some of the Board's practices, including the busing of Negro pupils long distances past under-utilized white schools to overcrowded Negro schools, the operation of segregated and overlapping bus routes, the maintenance of two small high schools in communities in which the population barely justified one, and the remarkable

disparities between the white and Negro schools. The defendants were reeling, and this was picked up by the spectators in the courtroom and by the local press.

When it was time for argument, I stressed Stormer's testimony and argued that the School Board was so intent on keeping the races apart that it engaged in irrational and educationally unsound practices which hurt the children in its charge. The lawyers for the School Board appealed to the Court, emotionally at times, to preserve freedom of choice, contending that a few vigilantes should not be allowed to spoil things for the entire population. Judge Butler, however, expressed impatience with their argument:

> Now, just one bomb directed at the home of a Negro patron whose child attends a predominantly white school could well prevent an uninhibited freedom of choice in that community. And it's the uninhibited freedom of choice that distinguishes the constitutional freedom of choice from the unconstitutional freedom of choice.
>
> Now, it is in the evidence that as a result of these bombings, shootings, contamination of wells, that although each of these incidents has been investigated by the North Carolina State Bureau of Investigation, by the Federal Bureau of Investigation, it is my understanding from what I have heard up to this point that not a single arrest has been made and consequently not a single person has been punished for those acts of violence and intimidation.
> Now, a primary purpose of government, all government, is to maintain law and order; and a government that has the power to protect life, liberty – which would include; freedom of choice – and property from lawless conduct and fails to do so – I say a government that has the power and fails to do so, is not worthy of the name, whether it be local, state or national.
>
> Now, this conduct has gone on for years. Apparently it is not disputed that there have been bombings which occurred, shooting into the homes, contamination of the drinking water. Now, if those things would have an effect on a reasonable mind – and apparently they had effect on the members of the School Board in Anson County – and if they had a similar effect on the minds of the Negro patrons of the schools in Franklin County, then there is an atmosphere of intimidation in that community that may inhibit freedom of choice,

> and if it does, then freedom of choice is no longer a constitutional method.

It was a remarkable statement from the same judge who had expressed such reservations a year earlier about tampering with freedom of choice, but it represented the essence of our legal system – an intelligent man with convictions of his own but with an open mind was influenced by competent evidence introduced as prescribed by law to change his previous opinion.

After the trial, Judge Butler took the case under consideration, and the defendants, who were quite apprehensive as a result of his remarks in open court, asked us to negotiate further, which we did. Their offers were now more generous than before, but, once again, there was no way to overcome the disagreement over the constitutionality of the county's freedom of choice plan. Unable to reach agreement, we wired the judge that we could not settle. Judge Butler promised to decide the case promptly, and we awaited his ruling.

The decision came down on August 17, 1967 and it was a big one. After relating the history of school desegregation in Franklin County, and observing how far it lagged behind that in North Carolina as a whole, Judge Butler addressed himself to the pressures which had inhibited the exercise of choice. He did not waste a word as he wrote the pertinent findings in characteristically lucid prose:

> 8. There is marked hostility to school desegregation in Franklin County, and wide publicity has been given to acts of intimidation, threats and reprisals against Negro parents who have requested reassignment of their children to previously all-white schools.
>
> 9. Before the adoption of a plan of desegregation in Franklin County, attempts to desegregate the schools resulted in threats against several of the persons involved. After the adoption of the freedom of choice plan of desegregation, the acts of intimidation, threats and reprisals against Negro parents continued. Explosives were placed at Negro homes, several Negro homes were shot into, wells were contaminated with oil, and tacks or nails were placed in driveways. As a result of the harassment, intimidations and reprisals against Negro parents and their families, several withdrew their requests for assignment to previously all-white schools and sought reassignment to all-Negro schools.

10. The intimidations and threats continued throughout the 1965-66 and 1966-67 school years, sometimes as many as 100 harassing telephone calls to a Negro family during the course of a school year. In March, 1967, during the freedom of choice period for the 1967-68 school year, the intimidations intensified. The Reverend Luther Coppedge, father of one of the Negro plaintiffs, testified that he received six to eight harassing, anonymous telephone calls a day, the last such call on the night of July 22, 1967, only three days prior to his testimony in the trial of this case.

11. Since the beginning of the freedom of choice plan in 1965, there has been a decline each year in the number of Negro students requesting reassignment to previously all-white schools. During 1966-67 in North Carolina, 64,600 of 409,707 Negro students attended desegregated schools, representing 15.4 per cent. The percentage in Mississippi was 2.5 percent. In the Franklin County school system for the coming year, 1967-68, the percentage is presently fixed at about 1.5 per cent.

12. Community attitudes and pressures in the Franklin County school system have effectively inhibited the exercise of free choice of schools by Negro pupils and their parents.

Judge Butler then turned his attention to the legal consequences of the facts he had found. Noting that the Court of Appeals for the Fourth Circuit – the court directly above him – had recently ruled, in an opinion by Chief Judge Haynsworth, that "freedom of choice is acceptable only if the choice is free in the practical context of its exercise," Judge Butler continued:

Every freedom of choice plan must be judged on a case by case basis. The plan must be tested not only by its provisions, but by the manner in which it operates to provide opportunities for a desegregated education....

It is a permissible plan so long as it comports with constitutional standards. It is constitutionally impermissible and, indeed, a misnomer when the choice is not free in fact.

This court has found that community attitudes and pressures in the Franklin County school system have effectively inhibited the exercise

> of free choice of schools by Negro pupils and their parents. So called 'freedom of choice' under such circumstances is an illusion.

On the basis of his Findings of Fact and Conclusions of Law, Judge Butler entered a sweeping order. The county's freedom of choice plan could no longer be followed, and the defendants were required to reorganize their system into a unitary one based on the consolidation of grades or schools (pairing), or nonracial zoning (neighborhood schools), or some combination of the two. Since the 1967-68 school year was scheduled to open within a few days of the decision, Judge Butler did not require complete reorganization immediately, but directed that this be accomplished "at the earliest practicable date." In the meantime, for the 1967-68 school year, the School Board was ordered to transfer approximately 300 Negro pupils to white schools – obviously a step designed to remedy the overcrowding at the Negro schools while the white schools had plenty of room. School opened in early September in accordance with the interim provisions of the order, and 300 Negro pupils, as well as a total of 24 white and Negro teachers, crossed racial lines.

We did not expect the School Board members to accept the end of "free choice" without a struggle, and they did not surprise us. The Board appealed the decision to the Court of Appeals and applied to Judge Butler for a stay of his order until the appeal was decided. Judge Butler promptly denied the application for a stay. Mr. Yarborough and his colleagues then took the appeal "upstairs" and the battle moved to the Court of Appeals in Richmond. That court, in an opinion by Chief Judge Haynsworth, ordinarily an outspoken adherent of "freedom of choice" desegregation plans, affirmed Judge Butler 's order and had some harsh words for the county and its School Board. After identifying Franklin in the opening sentence of the opinion as "a county in which there has been much Ku Klux Klan activity", describing some of the acts of intimidation that had taken place there, and detailing the Board's failure to desegregate faculties in accordance with Judge Butler's original order, Chief Judge Haynsworth wrote:

> In the most charitable view, the School Board's response to the Court's order to encourage faculty transfers across racial lines was wooden and little calculated to procure the result the Court envisioned. The School Board took no other steps to alleviate the threatening conditions. It offered no special protection. It gave no assurances. It did nothing. Under the circumstances, it is not surprising that few Negro pupils availed themselves of the right of transfer into a

formerly all white school and that 98.5% of the Negro pupils in the district remained in all-Negro schools.

The School Board next tried delay. It filed a plan with the District Court which would have postponed conversion to a unitary system until after a bond issue and the construction of new schools – probably four or five years. Judge Butler summarily rejected the plan as a delaying tactic and ordered the Board to file another which would completely eliminate the dual system in the fall of 1968. The Board defiantly responded with an obviously non-complying plan which would not have been fully effective until the fall of 1970. Unable to secure the cooperation of school authorities, Judge Butler, on August 5, 1968, entered an Order, which we had proposed on the basis of William Stormer's expert testimony, directing the Board to reorganize the schools for the fall of 1968 on a geographic basis, with the white and Negro schools in each area "paired", so that one would offer certain grades and the other the remaining grades.

The Board now asked for still another stay of the order, claiming that it could not accomplish all that the judge was requiring in time for the fall of 1968. Judge Butler denied the stay in a blistering opinion which ruled that there were no significant difficulties preventing integration in 1968, and that such minor difficulties as might exist were the result of the Board's recalcitrance and refusal to make preparations in accordance with the earlier orders of the court. The judge accepted the principle of law, urged on him in our argument, that a recalcitrant school board should not be granted further delay where its own intransigence and inaction have created practical difficulties which it could have avoided. The defendants applied for a stay to the Court of Appeals; the application was denied; they then pressed a new appeal, this time from the order requiring integration in the fall of 1968, and the appellate court, in another opinion by Chief Judge Haynsworth, denied the appeal as completely lacking in merit. The School Board having no choice in the matter, the fall of 1968 saw the Franklin County system open without white schools or Negro schools. In general, the old white schools were used for the upper grades and the Negro schools for the lower ones. Race was no longer a factor in the assignment of pupils to schools, and each school in the county had a black majority.

The School Board was not through yet. Soon after school opened, we received complaints that the children were almost as segregated as ever. Unable any longer to assign children to schools on the basis of race, the Board now contrived to put them in segregated classes within the schools. An investigation by the FBI revealed that the great majority of black pupils in grades 1 through 8 were

in all-Negro classes taught by Negro teachers, whereas all of the white pupils were in predominantly white classes generally taught by white teachers. After repeated rebukes from Judge Butler and Judge Haynsworth, the defendants were at it again! In January 1969, we brought proceedings to have the Board and its members held in contempt of court. It seemed that this county was to schools what Roy Elder McKoy was to the restaurant business.

The School Board's defense against our charges was that pupils had been assigned to sections on the basis of scores on achievement tests. Since the first grade was the most segregated grade of all, and the children's "achievements" could not have been and were not tested before they came to school, we were sure that this was untrue. We asked Judge Butler to order the Board to produce the test scores and section assignments for our inspection. The Board resisted tooth and nail, but the judge directed that the records be made available. What they showed was remarkable. It was apparent from the Board's own documents that, no matter how low a white child's score, he was always placed in the predominantly white, or "upper" section. The great majority of black pupils were always put in the lower section, no matter what their scores might be. On many occasions one could not determine from the test scores which was supposed to be the upper section and which was the lower!

A few examples illustrate what the Board had done. In the eighth grade at one school, the white teacher's class had twenty-nine whites and no Negroes, the black teacher's thirty-five Negroes and no whites. Six black pupils scored higher on the achievement tests than an equal number of whites. They were all racially assigned anyway, test or no test. The Assistant Superintendent in charge of assignments, who had denied that she had ever considered race before she was confronted with the evidence, reluctantly admitted when confronted with its documents that she was a party to the discussions at which the decision to ignore the test scores was made.

In the fourth grade at one of the elementary schools, the "upper" section had 27 whites and 4 Negroes, the "lower" class no whites and eleven Negroes. Of the pupils for whom the Board retained test scores, all but one in the "lower" class scored 3.0 (third grade level) or higher. One half of the pupils in the predominantly white "upper" scored less than 3.0. A white boy with a score of 0.7 was in the "upper" section. Negroes with scores of 3.9, 3.4, 3.3 and 3.0 were in the "lower" section. What was the Assistant Superintendent's explanation? She had none, except "test scores."

In the first grade at one elementary school, the School Board claimed that pupils had originally been assigned according to "maturity and experience" (quite a criterion for six-year olds) and then reassigned on the basis of scores on a test. The groupings for reading were, indeed, integrated:

Upper Section	13 W	17 N
Lower Section	10 W	20 N

The records showed, however, that in all subjects except reading – ranging from arithmetic to physical education – the pupils remained divided as follows:

Upper Section	23 W	7 N
Lower Section	O W	29 N

The only test which was ever given to the pupils was a reading test, and, in cross-examination of the Assistant Superintendent, I sought an explanation of why the pupils were divided as they were for classes other than reading. After first claiming, irrationally, that it was "test scores," and then changing to a kind of "free choice" explanation (again attributing "choice" to six-year olds!), she finally said that children of this age needed to identify with their teachers and often called them Mama. Surely I understood, the lady lectured me, that a black child could not call a white teacher Mama. Earlier, she had sworn that she had never considered race in assigning a pupil, and that there were no exceptions at all. She was not the most truthful witness whom I had ever heard.

We pressed Judge Butler for a hearing on the contempt of court charges, but his health was poor and his docket full, and the 1968-69 school year ended without the matter having been brought to trial. I suspect that the members of the School Board and their attorneys were happy to avoid a trial in which the county's assignment of pupils by "test scores" would have been brought to light within the four walls of a courtroom. In any event, all parties – the black plaintiffs, the government, and the School Board –agreed to the entry of a consent decree which effectively ended internal classroom segregation as well as the formal dual system which preceded it. Franklin County now really has a unitary system of schools. But it had taken considerable effort, and then some more.

CHAPTER 11
The Court Says Now!

If desegregating the schools of a county in North Carolina had its difficulties, one could not expect that the elimination of the dual system in the State of Mississippi would be easy. It was not. Nowhere was legally enforced segregation more vehemently defended than in the Magnolia State. Death had accompanied the first desegregation of an educational institution in Mississippi, for two men were killed on the night of September 30 to October 1, 1962, before James Meredith was registered at Ole Miss (the University of Mississippi), which had to be occupied by federal troops in order to enforce the order requiring his admission. The strategy of implementing the Fourteenth Amendment in Mississippi brought President Nixon and Attorney General Mitchell into conflict with the U. S. Civil Rights Commission, with many of their own subordinates at the Justice Department, and, eventually, with the justices of the Supreme Court of the United States in that Court's first major action under Chief Justice Burger. Much has been written about the highly publicized lawyers' "rebellion" in the Civil Rights Division which arose out of this issue in August, 1969, and it is fair to say that everybody concerned had an opinion; I certainly did. This chapter is intended, however, not as the expression of a point of view, but rather as a fair relation of the facts, with an attempt to place them in their proper historical perspective. Perspective is important, for the Mississippi school crisis of 1969 did not happen suddenly, and its origins go back many years.

When the Civil Rights Act of 1964 became law, the public schools of Mississippi were completely segregated, and the black schools, while separate, were not equal. Under slavery, it had been a crime to teach a slave to read or write or to give him books or pamphlets. Plessy v. Ferguson, implicitly approving separate but, equal schools, was decided in 1896, but those in authority in Mississippi thought the "equal" part was a joke. James Vardaman, who was governor of the state from 1904 to 1908, held the view that "The Negro, like the mule, has neither pride of ancestry or hope of posterity." He thought education to be a "positive unkindness" to the Negro; why "squander money on his education when the only effect is to spoil a good field hand and make an insolent cook." Vardaman's philosophy remained the dominant approach in Mississippi throughout the first half of the twentieth century. Thus, the instructional cost per child in Mississippi since the turn of the century has been as follows:

	1900-1901	1929-1930	1939-1940	1949-1950	1956-1957	1960-1961
White	$8.20	$40.42	$31.23	$78.70	$128.50	$173.42
Negro	$2.67	$ 7.45	$ 6.69	$23.83	$ 78.70	$117.10

Even these statistics probably exaggerate the expenditures on black children, for it appears that some funds earmarked for Negro schools actually went to white schools. The State Superintendent of Education reported in 1930-31 that "in many counties . . . Negro children are forced to attend school in mere shacks or in church houses," and, in the same year, "98.3 percent of all children in schools for the colored race were in grades one to eight inclusive and 1.7 percent in grades nine to twelve." Since there was a lack of adequate Negro colleges, "the quality of work done in the school room by the majority of negro [sic] teachers would not rank very high when measured by any acceptable minimum known to the leaders in educational thought." Nevertheless, it was reported in the 1930s that "teachers in the lower grades frequently have in their charge from seventy-five to one hundred and fifty pupils. A third of the Negro schools were, at that time, "conducted in churches, lodges, old stores, tenant houses, or whatever building is available."

These conditions persisted until the 1950s, when an attempt was made to upgrade Negro schools as one means of blunting any demands for desegregation. A few months after the Supreme Court's 1954 decision holding segregation in public schools unconstitutional, the relatively moderate Governor Hugh White met with 90 black leaders to try to strike a bargain: if they would support "voluntary segregation," Negro schools would be brought up to the level of the white schools. The Negroes almost unanimously rejected the proposal, but "equalization" continued, at least with respect to physical facilities, so that there are in many parts of the state attractive modern schoolhouses constructed during the 1950s for Negroes. This is, however, by no means universal; the photographs on the following pages of and inside several Negro schools in Noxubee County were taken in 1966 and used as government exhibits in the case of United States v. Noxubee County Board of Education. (See page 235.)

Section 207 of the Mississippi Constitution required that "Separate schools shall be maintained for children of the white and colored races," and all other considerations were subordinated to the achievement of this paramount goal. Lauderdale County, where my Mississippi experience had all started, was a case in point. There are two school districts in the county, one encompassing the city of Meridian, and the other serving the outlying areas. In the county system, there

were five schools, all offering grades 1 through 12 – Northeast Lauderdale, Northwest Lauderdale, Southeast Lauderdale, Southwest Lauderdale, and Middleton Attendance Center. The first four were all white. Middleton, located near Meridian in the center of the county, is all-black and overcrowded. Negro children residing near each of the white schools were bused every day, some as much as 15 miles each way, to Middleton, from all sides of the county. The whites attended their local school, and those living near Middleton were bused to one of the white schools anyway. It is a graphic example of busing to preserve segregation; neighborhood schools in rural areas ordinarily mean complete integration, and busing is absolutely essential to the maintenance of segregation to any degree. It is perhaps a measure of the incongruity of politics that during the 1968 election campaign, George Wallace (whose inaugural address as Governor had called for "Segregation today! Segregation tomorrow! Segregation Forever!" – and thus for the perpetuation of a system which can only exist by extensive busing – was warning voters that, unless he prevailed, their children would be bused all over the town to suit some "pointy headed briefcase-totin' bureaucrats" in Washington. It is perhaps, a matter meriting some thought that this remarkable variance between fact and campaign rhetoric was never effectively brought to the attention of the public by anyone representing Wallace's Democratic or Republican opponents.

While Mississippi bused its black pupils along the dusty dirt roads to keep them in inferior, sub-standard schools, little effort was made in the courts to desegregate anything for a full decade after the Supreme Court's 1954 decision. For one thing, there were only three active black lawyers in the state, and an attempt was made to disbar one of them after he undertook the desegregation suit in Leake County. The plaintiff in one of the suits, NAACP leader Medgar Evers, was murdered in 1963 while the suit was pending. The one Negro who did win a desegregation suit – James Meredith – needed federal troops to put and keep him in Ole Miss, and others who had tried to exercise their rights had not found the white community receptive. Nevertheless, suits had been instituted, in spite of all of these obstacles, to desegregate the schools in Jackson, Biloxi, and Leake County, and federal courts in Mississippi were at last confronted with the problem of how to enforce the Supreme Court's desegregation decision in a society to whose leaders such enforcement would evidently be intolerable.

After the 1954 decision, Mississippi, like other southern states, enacted so-called pupil placement laws. While these laws sounded wonderfully nonracial on paper, their common feature in application was that black pupils were placed in black schools and white pupils in white schools. If a Negro had the temerity to

apply for a transfer, he had to go through a complex administrative process. At the end of this process, if he was still of school age, he would be denied a transfer on some "nonracial" ground and would be reassigned to his black school. When the Jackson, Biloxi and Leake County Negroes brought their suits, the complaints were dismissed by Judge Sidney Mize on the grounds that the plaintiffs had not exhausted their "administrative remedies." On appeal, however, the Court of Appeals reversed, holding that the plaintiffs were eligible to transfer without going through the administrative labyrinth set for them by the pupil placement laws. The court sent the cases back to Judge Mize for further proceedings. That judge, in a remarkable opinion filled with testimony and statistics which were supposed to show that Negroes are inherently inferior to whites, urged the Supreme Court to overrule its desegregation decision, but stated that he was required by the appellate courts to order desegregation. Consequently, he ordered that the schools be desegregated, but only at the rate of <u>one grade per year</u>. This meant that by the fall of 1975, pupils in all grades would have the right to transfer. This did not mean that white and Negro schools would be eliminated by 1975, only that something supposedly resembling "free choice" would be available then. For 1964-65, this privilege would be available only to first graders in the three districts.

Court-ordered integration in the fall of 1964 involved only 61 Negro pupils. In Leake County, the prospective desegregators were visited by county officials, and all but Debbie Lewis withdrew their applications. In spite of the minimal integration, many whites acted as though the end of the world had come. On August 24, 1964, the Meridian Star expressed its views as follows:

> Truly Mississippi has come upon evil days; we have been delivered into the hands of the Phillistines.
>
> Some of us may be tempted in the agony of our oppression to give up hope – to yield the struggle,
>
> Yet this we cannot – dare not – ever do. It is our sacred obligation to keep up the fight for our precious Southern way of life. We must never rest until this foul pollution of integration is forever banished from our soil.
>
> Down to the end of time our children must be taught to know that integration is evil, and that they must never associate in any way socially with the other race.

Two days later, with a headline spurring its readers to "CARRY ON THE FIGHT," The Star wrote as follows:

> The horrors of school integration are upon us with a vengeance. On Monday, in Biloxi, Negroes and Whites will be forced to attend school together below the college level for the first time in our state.
>
> The Carthage and Jackson schools are scheduled to be forced to do likewise.
>
> We can find no words to adequately express our shock – our revulsion – at this abominable crime of race mixing.

While the Star did not speak for the entire State, editorials of this kind did little to make the transition – perhaps mini-transition would be a better word – go more smoothly.

The beginning of court-ordered school desegregation came in July of 1964 with the enactment of the Civil Rights Act of that year. As indicated in the preceding chapter, the new Act prohibited federal financial aid to segregated schools and gave all school districts, including those in Mississippi, the choice between adopting a desegregation plan or risking loss of their federal funds. Moreover, suits were now brought, both by Northern volunteer attorneys on behalf of black parents and by the Department of Justice, to desegregate school districts in all parts of the State. Some school boards remained adamant, but most submitted desegregation plans, some by compulsion of a court order, others "voluntarily" in order to maintain eligibility for federal funds. Accordingly, the fall of 1965 witnessed the beginning of token desegregation – a handful of black children in white schools – in a majority of the school districts in the state. The Court of Appeals for the Fifth Circuit, bringing judicial requirements into line with HEW Guidelines, outlawed "one grade per year" plans such as that approved by Judge Mize, and required that at least four grades be desegregated per year, with free choice in all grades by 1967-68. There began something which might be termed systematic enforcement of gradual token integration. By the fall of 1965, much of my time and that of my colleagues working in Mississippi was taken up with school desegregation issues.

It was, in many respects, a discouraging business, for now the victims of the cruelty which permeated the attitudes of many whites to the exercise by Negroes of their rights were small children. When black pupils and their parents, rather than

the School Board, have to take the initiative to accomplish desegregation, they become obvious targets of reprisal. Negroes in white schools are in a vulnerable situation. Most of the children of their age and race are still at the black school, and they find themselves in a small minority among white children who have, in many cases, been trained by their parents to reject them. In some instances school administrators, whose voting constituency consisted of white people but not of Negroes, could or would do little or nothing to make the black pupils feel comfortable in their new surroundings, and many innocent children suffered.

In Leake County, a little Negro second grader with pigtails told me that a nice white classmate played with her until the white girl was told by her daddy that he would "whip" her if she continued; now the little black girl had no playmates. In Neshoba County, where the three civil rights workers had been killed, the Negro pupils were literally driven out of the white schools, and I recall how one seventh grade girl, who had been an honor student at the Negro school, was burned with a cigarette lighter, given black eyes, and beaten up by older white boys and forced to call them "Sir" and to sing for them on the school bus. By 1968-69, the Neshoba schools were completely segregated again. In Meridian, the home of Sadie Clark, an articulate and talented girl who was the first Negro graduate of the white high school, was the target of nightriders, and shotgun pellets barely missed her and her sister Gwen as both girls slept. (See page 234.) In the City of Grenada, a gang of white toughs attacked Negro pupils on their way to the white school. The victims included a little girl who had a brace on her leg as a result of polio. Another victim, a boy, had his leg broken. Judge Clayton later found that officers had done little or nothing to protect the children, but criminal prosecutions against the alleged miscreants resulted in acquittals. In Calhoun County, shots were fired into the homes of several Negro parents who selected white schools, and no desegregation occurred. In some instances, white pupils, teachers and parents did what they could to make the black children comfortable, and this attitude became more common as time passed, but on the whole, especially during the first year or two, the Negro pupils who were the vanguard of desegregation did not fare well. Many, in fact, expressed the wish that they were back in the black school with their friends.

Moreover, Negro children from separate but supposedly equal schools were, understandably, far behind academically, particularly in the upper grades. In Leake County, twelfth graders who transferred from unaccredited Greer High School to the white high school in Carthage tested at the 5th to 7th grade levels. I interviewed some of them, and they were unable to name an English-speaking country outside the United States, or to state from whom America secured her

independence, or even, surprisingly, to identify the parties or the issue in the Civil War. In black schools, these pupils had been routinely promoted, and they could not hope to compete with white youngsters who had attended real high schools all of their lives. Disheartened, many returned to black schools. By the same token, it was not surprising that white parents resisted total integration in the face of these disparities, particularly in counties, such as Noxubee, where Negro pupils outnumbered white students by four to one.

By the fall of 1967, all twelve grades in all districts were supposed to be desegregated, "freedom of choice" style, and in most cases they were. By this time it had become apparent that "freedom of choice" was only an acceptable solution to the school problem if token integration was all that needed to be accomplished. More than 97% of the Negro pupils in Mississippi were still in black schools during the 1966-67 school year, all the white pupils remained in white schools, and faculty desegregation was practically nil. Revised HEW Guidelines were issued providing that freedom of choice was only acceptable if it "worked", and "working" meant a steady increase, year by year, in the number of black students attending desegregated schools. Few school districts were progressing at the required rate. In 1967, in the Jefferson County, Alabama case, the Court of Appeals for the Fifth Circuit approved the Revised Guidelines and indicated that, while free choice would be given a chance, it was not automatically lawful. If freedom of choice did not desegregate the schools promptly and effectively, school authorities would have to try something else.

In August, 1967, in North Carolina, Judge Butler decided the Franklin County case, described in the last chapter – the first decision anywhere in the country to hold "freedom of choice" to be unconstitutional. A few weeks later, Judge Oren Lewis of the Eastern District of Virginia – the same judge who had presided in the McKoy case – accepted arguments for the United States similar to those based on the Stormer testimony in the Franklin County case, and held that the modified freedom of choice plan for Loudoun County, Virginia was constitutionally invalid even thought there was no evidence of intimidation such as that in Franklin County. While the court's order did not specify the grounds for the decision, we had argued that there was no rational basis for retaining all-black schools in a county which was 85% white, and that the sole reason for the county's modified freedom of choice plan was to perpetuate racial separation; it appeared that Judge Lewis had agreed. In the fall of 1967, United States District Judge Frederick Heebe of New Orleans wrote a trenchant opinion analyzing the educational shortcomings and irrationalities of "freedom of choice," and strongly suggested that unless the school board could show something rational or positive

which its freedom of choice plan was accomplishing other than continued separation of the races, he would probably require the defendants to try something else. Suddenly, the freedom of choice plans which had enabled the southern states to keep desegregation at a token level were in danger of judicial extinction, and segregationists who two years earlier were shouting that desegregation by free choice was a hideous crime were now extolling its virtues as though they had invented it. It was a curious transformation.

In May 1968, the Supreme Court spoke. In the landmark case of Green v. The County School Board of New Kent County, Virginia, which was decided with companion cases from Arkansas and Tennessee, the Court held, in a unanimous decision written by Mr. Justice Brennan, that freedom of choice plans were valid only if they worked to desegregate the entire school system as promptly and as effectively as reasonable alternative methods would accomplish that end. The court suggested obvious alternatives, such as "pairing" of white and Negro schools so that one school would offer some grades and the other the remaining grades, or nonracial geographic zoning (neighborhood schools). In New Kent County, there were only two schools, one white, one black, each offering grades 1 through 12. In three years under "free choice", fifteen per cent of the Negro pupils had transferred to the white school, but no whites had attended the black school. The rate of desegregation was far ahead of most districts in Mississippi, but it was obvious that by simply drawing zones (one school was in the western part of the county and one in the eastern, and there was no residential segregation), or by placing some grades in one school and the remaining grades in the other, the School Board could eliminate the dual system immediately, root and branch. Under these circumstances, the Supreme Court held that New Kent County's freedom of choice plan was unconstitutional, and that it was incumbent on the School Board to adopt and implement a plan which "promises to work realistically, and promises realistically to work now," to create a system without white schools or Negro schools, but just schools. The word now was underlined in the Court's opinion.

The Supreme Court decisions in these cases also eliminated as a legal defense one of the contentions which the School Boards were most energetically pressing. Both the Virginia case and the, Arkansas case arose in predominantly black counties; in the Arkansas case the Negro majority was 2:1. In the Tennessee case, which involved "free transfers" rather than "free choice," the issue was whether white pupils who lived in a predominantly Negro zone could be permitted to transfer out to white schools. In all three cases, the School Boards argued that unless whites were permitted to avoid black schools by "free choice" or "free transfer," they would flee the system altogether. The Court held that even if this

were true, it would make no legal difference. The constitutional rights of the Negroes to a desegregated education could not be denied because white parents were opposed to their exercise and might take drastic action if the law were enforced. Lawyers for the School Boards argued that, if the whites fled, the schools would become all black, and the Negroes would have no opportunity for a desegregated education, but the Court was unimpressed.

While not a surprise to constitutional lawyers, the Supreme Court's decision in the Green case and its companions stunned Mississippi. There was a good deal of wishful thinking about what the decision might mean, but the fact was that few, if any, districts in Mississippi had any chance at all of successfully defending free choice plans under the stern criteria applied by the Supreme Court. From May, 1968, when the New Kent County case was decided, any competent lawyer could have told school authorities throughout the state that their free choice plans would not long survive. The only question left for rural districts was timing. School Boards must adopt plans "which promise realistically to work, and promise realistically to work now." Did the word now qualify the word promise or the word work?

There was considerable discussion at the Justice Department and at HEW in the spring and summer of 1968 as to what terminal date should be sought for the implementation of the Green decision. The underlined word now suggested that 1968-69 might be appropriate, and, indeed, the District Judge in the New Kent County case initially ordered the School Board to complete the job in the fall of 1968; later he gave the Board a year's grace. In Beaufort County, North Carolina, Judge John Larkins, who is generally regarded as middle of the road on civil rights, ordered the School Board to completely integrate by the fall, and, when Chief Judge Haynsworth and two colleagues on the Court of Appeals for the Fourth Circuit unexpectedly stayed execution of the order, Mr. Justice Black of the U.S. Supreme Court promptly vacated the stay and put Judge Larkins' decree back into effect. The Supreme Court obviously meant business. Nevertheless, in most instances, the United States pressed for some steps to desegregate pupils and faculty for 1968-69 and completion of the job, in almost all instances, in the fall of 1969. Most though not all courts agreed with us. At least for rural school districts like New Kent County, Virginia, in which the absence of residential segregation made a unitary system easy to achieve by "zoning" or "pairing", we would ask that the terminal date for all but the most exceptional districts be the fall of 1969.

It was to the United States Court of Appeals for the Fifth Circuit, with responsibility for Florida, Georgia, Alabama, Mississippi, Louisiana and Texas,

that the greatest number of school desegregation cases came for review. In the summer of 1968, that court consolidated for hearing forty-four appeals from District Court decisions upholding freedom of choice plans in several deep South states. Among these forty-four were the bulk of the cases from the Southern District of Mississippi. The court quickly made it plain that it intended to enforce the Supreme Court decision in the Green case and that it would brook no nonsense from the School Boards or from anyone else. On August 20, 1968, in a decision known as Adams v. Mathews, the Court summarized the Supreme Court decision and then interpreted it as follows:

> If in a school district there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in Green.

Noting that nonracial geographic attendance zones and the consolidation (or pairing) of white and black schools were obvious alternatives to the freedom of choice plans, the appellate court sent the cases back to the District Judges with directions that they apply the proper standards to the facts of each case, giving the suits the highest priority. Should the District Court find that the existing freedom of choice plan was inadequate – and, in the light off the criteria set by the appellate court, this was certainly intended to be a foregone conclusion – then the District Court should require the Board

> (1) To take forthwith such steps toward full desegregation as may be practicable in the first and second semesters of the 1968-69 school year, and
>
> (2) To formulate and submit to the court, by November 28, 1968, a plan to complete the full conversion of the school district to a unitary, non-racial system for 1969-70 school year.

One of the affected School Boards sought a rehearing of the decision in Adams v. Mathews and, on September 24, 1968, in a supplement to its opinion, the court reemphasized its views as to proper timing. In a rather casual sentence, the judges took "notice of the fact that there are still many all-Negro schools in this circuit, all of which are put on notice that they must be integrated or abandoned by the commencement of the next school year," and went on to something else. Those School Boards which were or claimed to be unable to convert from a

freedom of choice plan to a unitary system for 1968-69 could hardly claim that they had insufficient warning as to 1969-70.

If 1968 had not been an election year, it is just possible that Adams v. Mathews would have been taken as conclusive by all concerned. The controversy over school desegregation was now at its peak, however, in the midst of the presidential campaign, and Richard M. Nixon was favored to win. Mr. Nixon's remarks on the issue had been extremely circumspect. The Republican candidate said he was against segregation, against freedom of choice where it was segregation in disguise, but against forcing integration in a positive way, such as by busing to correct racial imbalance. Except perhaps in emphasis, Mr. Nixon had said comparatively little with which the pro-civil rights forces could disagree, although his speeches sounded less integrationist than those of his principal adversary, Vice President Hubert H. Humphrey. The Civil Rights Act of 1964, which was the expression of national support for civil rights, expressly provided that no court was to construe it as requiring busing to undo de facto segregation, so Mr. Nixon's opposition to such busing was nothing unusual.

The problem is that politics is not law, and its hallmark is imprecision. The stepchild of imprecision is speculation. Senator Strom Thurmond of South Carolina, who had run for President as a Dixiecrat twenty years earlier, was staunchly supporting Mr. Nixon against the feisty challenge of George Wallace, and Mr. Thurmond was telling his constituents that he and Mr. Nixon had the same views on school desegregation – i.e., they favored freedom of choice. The candidate did not disavow his influential supporter. Most black leaders, on the other hand, were supporting Vice President Humphrey. The media were speculating that there would be some softening on school desegregation if Mr. Nixon were elected, and most judges and School Board members read the newspapers.

The Chief Judge of the United States District Court for the Southern District of Mississippi is William Harold Cox, who had presided over many of our voting cases and over the trials of Cecil Ray Price and others arising out of the Neshoba County killings. His colleagues were Judges Russell and Nixon (the latter is not related to the President). All three had been practicing attorneys in Mississippi before their elevation to the bench, and they heard arguments from their former colleagues at the bar that complete integration would ruin Mississippi's public school system by bringing about massive white withdrawals. Many people held the view that Green v. New Kent County and Adams v. Mathews were all very well in theory but self-defeating in practice. In a case I had handled in South

Carolina involving School District No. 2 of Calhoun County, which was 3:1 black, and in which the Superintendent testified at his deposition that God meant the races to be separate, our efforts produced an unfortunate result. All of the white teachers and pupils withdrew from the system rather than face the prospect of desegregation. Things were not measurably different in Prince Edward or Surrey Counties, Virginia or Taliaferro County, Georgia. There was a fear that much of Mississippi would finish up like these counties did, and the three District Judges were undoubtedly influenced by this view. What might seem to be a simple legal problem was less than simple in practice.

The School Boards, hoping that the climate had changed in favor of "freedom of choice", addressed their arguments to the doubts which the judges felt as practical men concerned with the fate of education in the affected systems. Once again, they relied on evidence that the scores of Negro pupils on achievement tests were lower those of their white counterparts, and they argued that this was a reason to retain freedom of choice. To some judges, the implicit admission in this argument that freedom of choice would keep integration to a "manageable" minimum would have indicated that such a plan could not "work now", as required by appellate decisions, and would have made the contention self-defeating. Nevertheless, such evidence did point up a practical problem which would arise if Districts with heavy black majorities were completely integrated.

The Mississippi judges were apparently impressed. In spite of the rigid time schedule prescribed by the appellate court in Adams v. Mathews, they did not issue an opinion until May 13, 1969. Then, in spite of Green and Adams v. Mathews, and in spite of the fact that no Negro pupils' were enrolled in white schools in at least one of the 33 districts and fewer than 10% in all but two of them, the District Court again upheld the freedom of choice plans. To most lawyers, the decision was plainly incompatible with what the Supreme Court and the Fifth Circuit had ordered, but there it was, just the same.

In the meantime, Richard Nixon had become President, John N. Mitchell Attorney General, and Jerris Leonard Assistant Attorney General for Civil Rights. Mr. Leonard, a former State Senator from Wisconsin, where he had been a leading advocate of open housing, had made it plain to our Division from the outset that, whatever rumors we might have heard, he proposed to enforce the civil rights laws. Soon our cases – involving employment discrimination, public accommodations, housing discrimination, criminal matters and school desegregation – were being routinely signed by Mr. Leonard and by the Attorney General and brought in the appropriate courts. Mr. Mitchell had a gruff image in the press, which associated

him with the so-called “Southern Strategy”, but he had a good-natured and apparently cordial meeting with the Civil Rights Division leadership in his first week in office, and he processed suits proposed by our Division affirmatively and with dispatch. Early in the administration, we had filed a controversial motion in the Houston, Texas school desegregation case, asking that this city's free choice plan be struck down and that comprehensive relief be ordered.

As Mr. Mitchell and Mr. Finch, the Secretary of HEW, were settling down in their new positions, intensive conferences began between Justice and HEW personnel as to how school desegregation enforcement could best be handled. President Nixon had expressed himself forcefully about the importance of education as well as integration, and the Administration looked for a formula or approach which would both apparently and actually accord proper weight to educational problems. It was hoped that an unambiguous recognition of educational considerations would lead to greater acceptance by Southern whites of the kind of desegregation being required by the courts, and that the transition would consequently be smoother. The appropriate formula appeared to come from nowhere on March 31, 1969, in Columbia, South Carolina.

The four federal District Judges in that state – Chief Judge Martin and Associate Judges Hemphill, Russell and Simon – had held consolidated hearings in the South Carolina desegregation cases, and, in August 1969, they had by-passed our request for some relief for the 1968-69 school year by directing the parties to file briefs and make oral arguments on the meaning, to South Carolina, of the Supreme Court’s decision in Green. All of this was to be done after the opening of school in the fall of 1968. After everyone had argued in writing, the court scheduled a hearing for all of the cases for March 31, 1969. Since I had been in charge of our South Carolina litigation, I travelled to Columbia, wondering what was up. At the beginning of the hearing, the court circulated to the attorneys a proposed opinion and order affecting all of the cases, inviting their comments. The opinion stated that the rules of law applicable to school desegregation had been determined by the Supreme Court, and that all that was now left was the matter of implementation. Since experts from HEW'S Office of Education were better equipped than courts to manage the transition from dual to unitary systems, the court would order each school board to work with HEW to decide on a satisfactory plan. If all parties could agree, the court would enter an order based on HEW’s plan. If they could not agree, the court would consider alternative plans presented by the parties, giving due weight to HEW'S expertise, and would enter an appropriate order.

The attorneys were given half an hour to study the proposed opinion and order and to prepare appropriate comments. To me, it seemed a novel but constructive approach, and I telephoned Mr. Leonard for instructions. He concurred, and I passed on to the court the government's favorable reaction. NAACP lawyers for the individual black plaintiffs also liked the proposed order, but lawyers for the School Boards, seeing what they thought was the handwriting on the wall, expressed vigorous objections. The judges, brushing the objections aside, entered the order unchanged. The decision, known as Whittenberg v. Greenville, was widely hailed as a victory for desegregation.

The Administration quickly picked up the Whittenberg principle and asked for this kind of relief in cases throughout the country. The decision of the three district judges upholding freedom of choice in Southern Mississippi had come down six weeks after Whittenberg, and there had been a similar decision by three judges in the Western District of Louisiana. The Whittenberg procedure appeared to hold out some prospect of making complete integration more palatable to the pro-freedom of choice judges and school authorities in Mississippi, Louisiana and elsewhere. Certainly, the judges in South Carolina were not pioneering integrationists, and if this approach appealed to them, why might it not to others? Time was short, and so both the Department of Justice and the NAACP appealed the Mississippi cases on an expedited basis to the Court of Appeals for the Fifth Circuit. The government specifically requested the court to direct the school boards to work with HEW, as in South Carolina. We pressed the court for prompt and effective action.

On July 3, 1969, the Court of Appeals reversed the decision of the Mississippi District Judges. The appellate court noted that no white children were attending Negro schools in any of the districts, that the percentage of Negro pupils in white schools ranged from zero to 16%, that there was at most token faculty desegregation, and that under the criteria set forth in Green and in Adams v. Mathews, the freedom of choice plans were all constitutionally inadequate. Accepting the government's suggestion as to the proposed Whittenberg procedure, the Court of Appeals

> deem[ed] it appropriate for the Court to require these school boards to enlist the assistance of experts in education as well as desegregation, and to require the school boards to cooperate with them in the disestablishment of their dual system.

At the urgent request of the government, the court prescribed a rigid timetable for submission and implementation of desegregation plans, so that the 1969-70 deadline set in Adams v. Mathews might become a reality.

On the very same day that the Court of Appeals entered its opinion in the Mississippi cases, Attorney General Mitchell and Secretary Finch released a joint statement on the government's school desegregation policy. For several weeks, there had been reports in the press that the Administration was about to announce a relaxation of the HEW Desegregation Guidelines and that various forces within and outside the government were struggling to gain the upper hand. The Finch-Mitchell statement, however, did not read like a major retreat. With respect to substance, the cabinet officers committed the government to the goal of ending racial discrimination in schools "steadily and speedily in accordance with the law of the land," but "in a way that will improve, rather than disrupt, the education of the children concerned." With respect to timing, the statement condemned the "setting, breaking and resetting [of] unrealistic deadlines," but, in defining the requirements of an acceptable desegregation plan, Mr. Finch and Mr. Mitchell stated that

> In general, such a plan must provide for full compliance now – that is, the 'terminal date' must be the 1969-70 school year. In some districts there may be some reasons for some limited delay. ...
>
> Additional time will be allowed only where those requesting it sustain the heavy factual burden of proving that compliance with the 1969-70 time schedule cannot be achieved; where additional time is allowed, it will be the minimum shown to be necessary.

The main change contemplated by the Joint Statement from prior procedures was to stress court action rather than fund cut-offs by HEW, and even this was less of a departure from the Johnson Administration's method of operation than some spokesmen for the new Administration contended. The fact is that even under prior Secretaries, HEW had been reluctant to terminate aid to districts with black majorities, since most federal assistance went to impoverished Negro pupils. Hard core districts with Negro majorities represented much of what was left to desegregate. While the press generally depicted the Joint Statement as more of a retreat than it was, prompting segregationists to welcome it and black leaders to condemn it – the urbane and usually restrained Roy Wilkins of the NAACP said it almost made him vomit – most of those of us in the Civil Rights Division who

supported vigorous law enforcement were more pleased than displeased. From what we had read in the newspapers, it could have been much worse.

The Finch-Mitchell statement and the Court of Appeals decision in Mississippi seemed to be speaking the same language, and a team of HEW experts visited the Districts involved. The team was led by Dr. Gregory Anrig, Director of the Equal Educational Opportunities Division of HEW's Office of Education, a former school principal with considerable experience in preparing desegregation plans. There had been some doubt as to what kinds of plans in terms of timing Dr. Anrig's office would propose. In South Carolina, HEW had proposed total desegregation for 1969-70 in most districts, but had suggested an extra year for school systems with a black majority or with construction problems, and there were reports in the press that all the HEW plans had initially required immediate integration, but that extensions had been given after political pressure was applied. On August 11, however, the date prescribed by the Court of Appeals, Dr. Anrig submitted to the District Court the proposed HEW plans for the thirty-three Mississippi school districts. The plans were based on "pairing" and unitary geographic zoning (neighborhood schools), and thirty provided for complete integration for 1969-70; the remaining three (Hinds County, Holmes County, and Meridian) provided for full implementation in 1970-71 because the districts were constructing new school buildings, a fact which, in Mr. Anrig's opinion, warranted limited partial delay. No exception was made in black majority school districts. Dr. Anrig's letter of transmittal stated:

> I believe that each of the enclosed plans is educationally and administratively sound, both in terms of substance and in terms of timing.

It now appeared that the HEW representative had found immediate integration of 30 districts educationally practicable as well as legally proper, and that prompt integration would result.

Under the tight time schedule directed by the Court of Appeals, any objections by the School Boards or other parties to the HEW plans were to be filed by August 21, ten days after Dr. Anrig had disclosed HEW's proposals. We knew from experience that most or all of the school districts would fight on, and my colleague Bob Moore, then the Deputy Chief of the Southern Section, led a team to Mississippi to prepare a factual and legal defense of the HEW plans. Hurricane Camille had just devastated the Gulf Coast of Mississippi, and Bob's team had to do much of its work under trying circumstances. Working extraordinary hours,

Moore and his colleagues secured affidavits from the HEW team members confirming the reasonableness of the plans and readied for the coming showdown in court. They were ready for the battle when, all of a sudden, the plans which they were preparing to defend were withdrawn.

The harbinger of this unusual development was a letter dated August 19, 1969 from Secretary Finch to Chief Judge John R. Brown of the United States Court of Appeals for the Fifth Circuit. Similar communications were addressed on the same day to the three district judges for the Southern District of Mississippi. The general import of the letter was that the Secretary had personally reviewed the 33 plans in his capacity as "the Cabinet officer of our government charged with the ultimate responsibility for the education of the people of our Nation." Indicating that he was gravely concerned that the time allowed for the development of these terminal plans had been inadequate and that the schools were scheduled to open in a very short time, Mr. Finch wrote that

> The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining would most surely, in my judgment, produce confusion and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

Accordingly, Mr. Finch asked for additional time for Office of Education personnel to "go in to each district and develop meaningful studies in depth and recommend terminal plans to be submitted to the court not later than December 1, 1969." On August 21, 1969, Bob Moore, who had expected to be defending the plans and pushing for faster desegregation, as he had done for many years, was required instead to file a motion formally asking the court for the delay which Secretary Finch had requested. In view of the confidentiality of the communications to the court (the letters had been delivered by safe hand courier), Moore had not learned of the change of direction until the preceding day.

Events now moved swiftly as the issue escalated into a major national controversy. The Court of Appeals immediately ordered the District Court to hold a hearing on Monday, August 25, 1969, on the government's request for delay, and directed that court to submit its recommendations to the appellate court for prompt review. Over the weekend, Secretary Finch called a number of the HEW experts who had worked on the Mississippi plans to his office, where they, were interviewed by the Secretary, Assistant Attorney General Leonard, and Frank

Dunbaugh, the supervisory attorney in charge of the cases. According to a press report, Dr. Anrig and seven other educators declined to testify in support of the requested delay – having assured the court that the plans were sound as to timing, Dr. Anrig was hardly in a position to do so – but two HEW educators, Jesse J. Jordan and Howard O. Sullins, agreed to testify and the scene moved back to Mississippi.

The prescribed hearing was held in Jackson on August 25, with Assistant Attorney General Jerris Leonard personally representing the United States. Early in the hearing, the NAACP lawyer representing the black plaintiffs, made a symbolic motion, asking that the United States be made a defendant rather than a plaintiff, since, he asserted, the government was no longer seeking to protect the rights of the Negro children. The motion was denied. In response to questioning, Leonard Sullins, the team leader who developed several of the plans, and Jordan, a member of the committee which had reviewed all of them, testified that the HEW plans were reasonable but that there was now insufficient time to implement them. They made reference to such problems as revamping school bus routes, reorganizing faculties, preparing students, re-planning federally funded projects, and rescheduling classes. The testimony was general – the witnesses did not differentiate between the various districts or specify particular difficulties applicable to one or more but not all of the systems – but both educators expressed the view that the transition from dual to unitary systems is smoother if neighboring school districts are brought along at the same rate of speed.

On August 26, the day following the hearing, the District Court approved the government's request for delay and recommended that the Court of Appeals do the same. On August 28, 1969, the Court of Appeals issued an opinion which, after reciting the facts and noting that the original time schedule for the cases had been set after the government had previously proposed it and after government lawyers had assured the court that the time would be sufficient, granted the application for the delay in submission of plans until December 1. The court stated in its order, however, that

> It is a condition of this extension of time that [the new plans] require significant action toward disestablishment of the dual school systems during the school year September 1969 to June 1970.

The court's caveat came too late for the opening of the new school year, which occurred in all 33 districts on a freedom of choice basis. In a period of fewer than

ten days, the course of school desegregation in Mississippi had been radically altered, at least for the immediate future.

The government-sponsored delay in desegregation immediately became the subject of a national controversy. Former Assistant Attorney General Pollak, who had led our Division during 1968, was quoted in the New York Times as saying that

> The United States government has turned its back on all those elected officials who now have to answer to their constituencies about why they, too, didn't flout the law by stalling

There was also some speculation as to the role of Senator John Stennis of Mississippi in these developments. "Wouldn't it be awful," the same Times article quoted former Attorney General Ramsey Clark," if this was Stennis cashing in on his ABM chips?" A few days later, a copyrighted article in the Jackson, Mississippi Daily News, written by Charles Overby, a former member of the Senator's staff, headlined "ACTION BY SENATOR STENNIS STAVED OFF SCHOOL MIX TRY," detailed alleged dealings between Senator Stennis and the Nixon Administration which were said to have led to the change of course. Overby asserted that Senator Stennis, after his repeated attempts during the summer to soften the government's policy had been unsuccessful, had written to the President at the Summer White House in San Clemente, California that unless the HEW plans were modified, he would have to go to Mississippi to be with his constituents. This would have left the Administration's military authorization bill, which Senator Stennis was piloting through the Senate, in the hands of the next ranking Armed Services Committee member, Senator Stuart Symington of Missouri, a critic of the Administration's defense policies. The article went on to state that Senator Stennis was contacted and reassured on August 16, (a Saturday) by Defense Secretary Laird, Attorney General Mitchell, and HEW Secretary Finch, and that Mr. Finch's letter to the court withdrawing the plans was dispatched on August 19, the following Tuesday. As the alleged dealings with Senator Stennis were disclosed, the United States Civil Rights Commission, a federal agency to which Congress had entrusted the responsibility of evaluating the civil rights performance of other Departments of the government, characterized the Mississippi action as a "major retreat."

Critics of the Administration's new position – and in the early days of the dispute it was they who garnered most of the publicity as government spokesmen withheld comment – supported their allegations or intimations that political pressures had impaired law enforcement by pointing to what they considered the

legal inadequacy of the government's justification for its acts. It was noted, accurately, that the alleged administrative difficulties to which Secretary Finch and the government witnesses had pointed as justifying delay – transportation routes, grade reorganization, adjustment of physical facilities, etc. – were identical to those asserted year after year by counsel for the School Boards, opposed by government lawyers, and generally minimized as inconsequential by the courts. Moreover, it was recalled that the schools of Chesterfield County, South Carolina, which had opened in the summer of 1968 on a largely integrated basis in accordance with an HEW-approved desegregation plan, were closed after intensive white pressure and then reopened on a freedom of choice basis eight days later. If "administrative obstacles" were so easy to overcome in one direction, i.e., to slow down desegregation, the critics argued, then why not in the other, i.e., to dismantle segregation more quickly?

Nowhere was the controversy more intense than within the Justice Department's Civil Rights Division, and soon events at the Division became an important part of the national discussion. Most of the attorneys in the Division are young and regard themselves as practical idealists. They work long hours of overtime, and they are certainly not in the Division for the money, for most or all of them could earn far more elsewhere. All of them are committed to the cause of equal treatment under the law and to the philosophy that the legal process is the most appropriate means by which this should be achieved. Many of the lawyers were emotionally stung by the government's action in the Mississippi case, particularly when the stated grounds for that action seemed to reiterate the arguments of their adversaries in court. The lawyers also read newspaper reports of political intervention by legislators unsympathetic to their works, and they did not like what they read. The circumstances of the change of direction – with Bob Moore and his team working in hurricane-torn Mississippi for plans which had been withdrawn without their knowledge – did not help to make them feel any better. A number of the attorneys began to consider and discuss possible action to protest the decision and to try to avert any recurrence.

On August 25 – the day that Jerry Leonard was in Jackson seeking District Court approval for the delay in desegregation, a notice was circulated among the "line" lawyers (those below supervisory rank), stating that "Recent events have caused some of us to question the future course of law enforcement on civil rights," and announcing a meeting for the following evening at the apartment of Patrick King, one of the participants in the protest, to determine what action, if any, should be taken. Section Chiefs (including myself) and Deputy Section Chiefs, as members of the leadership of the Division, were thought to be in too

delicate a position to participate in the meeting, and they were not invited. While it was the plan of the organizers of the activity to operate quietly and to present any grievances to the Attorney General before publicizing them, an unidentified minority of the dissidents obviously wanted these events in the headlines, and everything was leaked to the press as it was happening. Even before the first protest meeting took place, the wire services carried a sensational (and inaccurate) story to the effect that Civil Rights Division lawyers were meeting to discuss mass resignations. Consequently, when some forty attorneys gathered at King's apartment on the evening of August 26th, Fred Graham of the New York Times was literally on the doorstep. It was intrigue in a goldfish bowl. From then on, despite the refusal of most of the lawyers in the Division to discuss these events with reporters, who were hovering over all of us like a swarm of bees, a constant leak of information enabled the press to print reasonably accurate reports of what was going on in the Division on a daily basis.

At the meeting of August 26th, the lawyers quickly rejected all talk of mass resignations, as well as an emotional draft statement, the work of a single attorney, accusing their superiors in unprofessional polemics of violating their oaths of office. Instead, they selected five of their number to draft a constructive and dignified statement of their concerns. Fred Graham was not admitted to the meeting, but practically everything that happened was reported on page 1 of the fallowing morning's Washington Post and New York Times.

President Nixon and Attorney General Mitchell were in California when the story about the lawyers' protest broke, and Jerry Leonard was in Louisiana. When I arrived at the office on August 27th, however, there was a note for me to call Leonard Garment at the White House. Len had been a former partner of the President and Attorney General at the New York law firm of which I had also been an associate following my graduation from law school, and I had worked closely with him during my years in the firm's Litigation Department. He is a brilliant lawyer and a savvy operator. After Mr. Nixon had come to the firm, he and Garment, although previously on opposite sides of the political fence (Len was a liberal Democrat) had apparently developed a mutual respect and liking for one another, and Garment had played an important role in the Nixon election campaign. Garment had always been interested in civil rights, and after the election he became a member of the White House staff as adviser on minority and other problems. I called Len back and he asked me to come to his office right away. I did.

Garment had read the newspaper reports describing the protest meeting. Recognizing that, the protesters were professionals who were raising serious issues, he asked me to give him a rundown on the essential facts of the controversy and of the substance of the lawyers' complaint. Since I had not attended the meeting at Pat King's apartment, and since my position as a Section Chief made me ineligible to participate in the protest, I was unable to give him the lawyers' views first hand, but the subject matter of the dissatisfaction was well known to me, and I briefed Garment to the best of my ability. After we had discussed the matter for some time, Garment made several suggestions. If the attorneys' complaints could be stated in a frank but constructive manner, emphasizing issues rather than polemics, he thought the lawyers' views might be given appropriate consideration. Garment also suggested the possibility that, if the statement of protest was one to which the Attorney General or Assistant Attorney General could reasonably respond, perhaps this could be done, and then both the statement and the response might be released to the press. Garment assured me that there was no disposition on the Administration's part to take a punitive attitude towards the protesters, and I expressed my appreciation for this assurance.

Garment's suggestions seemed to me fair and constructive. Several of the leaders of the protest were close friends of mine, and I knew them to be motivated by principle. My relationship with Jerry Leonard was also excellent, and I judged him to be sincere in his desire to enforce the civil rights laws vigorously and effectively. I had seven years invested in the Civil Rights Division, and I did not want the Division to be destroyed by dissension in its ranks. As a veteran of the Division and as a Section Chief, I thought that I had the confidence of its top leadership. At the same time, as an activist in civil rights law enforcement, I believed I was trusted by the leaders of the protest. I appeared to be an appropriate intermediary. I agreed to meet with the committee which was drafting the protest statement and to pass on Mr. Garment's suggestions, and I did so. I added my personal recommendation that the statement which they were preparing be written in the tone which Mr. Garment had suggested, so that it could initiate a constructive discussion between reasonable lawyers.

Garment and I had agreed not to publicize our meeting, but it was reported in the following day's Washington Post and Los Angeles Times. On August 29, 1969, three days after their first meeting, the protesting attorneys delivered to the White House, to the Attorney General's office, and to Mr. Leonard the following statement, signed by 65 of the Division's 72 line lawyers:

August 29, 1969

To: Honorable John M. Mitchell
Attorney General of the United States
Honorable Jerris Leonard
Assistant Attorney General of the United States

We, the undersigned attorneys in the Civil Rights Division, are gravely concerned by events of recent months which indicate to us a disposition on the part of responsible officials of the federal government to subordinate clearly defined legal requirements to non-legal considerations when formulating the enforcement policies of this Division. In particular, we are concerned with recent policy decisions relating to the enforcement of constitutionally required school desegregation. We are of the view that the decision to withdraw desegregation plans submitted by the United States Office of Education in a group of Mississippi school cases is a clear example of this subordination of the requirements of federal law to other considerations. Based on our experience, we are convinced the decision reflects a disregard for the merits of each case. Careful study by attorneys directly involved, including consultation with Office of Education personnel, led them to the conclusion that the plans filed were sound and capable of implementation.

It is our fear that a policy which dictates that clear legal mandates are to be sacrificed to other considerations will seriously impair the ability of the Civil Rights Division, and ultimately the Judiciary, to attend to the faithful execution of the federal civil rights statutes. Such an impairment, by eroding public faith in our constitutional institutions, is likely to damage the capacity of those institutions to accommodate conflicting interests and insure the full enjoyment of fundamental rights for all.

We recognize that as members of the Department of Justice, we have an obligation to follow the directives of our departmental superiors. However, we are compelled, in conscience, to urge that henceforth the enforcement policies of this Division be predicated solely upon relevant legal principles. We further request that this Department vigorously enforce those laws protecting human dignity and equal

rights for all persons and by its actions promptly assure concerned citizens that the objectives of those laws will be pursued.

cc : Honorable Richard M. Nixon
President of the United States

The Statement of Protest was not made public at this time, and the lawyers took elaborate precautions, successful on this occasion, to avoid a leak of its contents to the press. Nevertheless, the fact that the document had been delivered quickly became known, and its substance could surely be inferred from the circumstances. It was now time for the government to respond.

Before the Mississippi crisis began, Attorney General Mitchell had told a delegation of visiting Negroes that they should "Watch what we do, not what we say," with respect to school desegregation. The first response to the lawyers' protest came by actions, not words. Several school boards in various Southern states which had agreed with HEW to implement complete integration plans at the opening of the school year reneged at the last minute. Similar retreats had occurred on several occasions in previous years, but the Administration's critics suggested that the reversal of direction in Mississippi had not contributed to the sense of inevitability which discourages such changes of heart. In any event, our Division moved swiftly and effectively to bring the renegers into court, and favorable decrees were quickly secured in cases in Georgia, Louisiana, and Northern Mississippi. One of the attorneys handling these cases was Pat King, the host of the rebellious lawyers' meeting; ironically, a radio station, grasping at imaginary straws, claimed that he had been punitively demoted! In Georgia, where a state-wide school desegregation suit had been filed a few weeks earlier (Governor Maddox's response had been apoplectic), the United States asked the court for a preliminary injunction which, if granted, would require total integration in every school district in the state beginning with the 1970-71 school year. In South Carolina, we were asking the Court for 1969-70 desegregation in Chesterfield and Saluda Counties although only a few days remained before the opening of school; the court ruled against us.

In St. Louis, before the United States Court of Appeals for the Eighth Circuit, the government asked that an Arkansas school district be required to desegregate without delay. When one of the judges asked the attorney for the government, a bright and glib 27-year-old named Gary Greenberg, who had been one of the protest leaders, how he differentiated the Arkansas and Mississippi cases, Greenberg tried to do so. To another question as to his views, Greenberg

reportedly said that the court could not expect him to defend the Attorney General's action in Mississippi, since he and most of his colleagues disagreed with it. His conduct at this argument was later to cost Greenberg his job, but Leonard was in Louisiana and, for the time being, nothing happened.

The government's actions in Georgia, Louisiana, Arkansas, Northern Mississippi and even Senator Thurmond's South Carolina made it clear that at least there was to be no "across the board" retrenchment in school desegregation, and I think that such little talk among the lawyers of mass resignations as there had ever been ended with these developments. The occasion for the lawyers' protest, however, had been the Mississippi cases, and there was some disgruntlement as Mr. Mitchell remained in California, Mr. Leonard stayed in Louisiana, and no response to their complaint was forthcoming. Finally, on September 19, Mr. Leonard, having returned to Washington a few days earlier, called a meeting of the entire Division. He first announced that two of the veterans of the Division, Section Chiefs Frank Dunbaugh and Jim Turner, had been promoted to Deputy Assistant Attorneys General – a decision generally popular with the lawyers. Mr. Leonard then distributed to his assembled subordinates his response to their protest. He said that the Attorney General was in full agreement with his views. He added that his memorandum, which consisted of four single spaced pages, had not been released to the press, but that if it were leaked to any newspaper, the memorandum would be distributed by the Department's Office of Public Information. A few days later, the memorandum was summarized by Fred Graham in the New York Times, and it was then made public by the Justice Department.

Mr. Leonard's memorandum to his lawyers, entitled "Some Considerations of Policy in the Enforcement of Civil Rights Laws," is an important document reflecting the Nixon Administration's approach to civil rights in general and to school desegregation in particular. Mr. Leonard began by expressing his commitment to the principle of equal opportunity for everyone in all areas of the Division's responsibilities. This commitment was to be carried out with a sympathetic approach to all concerned. Negotiation and conciliation would usually precede coercive remedies. With respect to school desegregation, Mr. Leonard noted that courts regard community attitudes as legally irrelevant, and rightly so, since courts "cannot go out and deal with these problems," but he expressed the view that people's attitudes were our business, and that Justice Department attorneys have an obligation to work with school boards to overcome unfavorable community feelings. For this reason, the Administration had suggested the Whittenberg remedy of HEW experts to assist school boards in their task. Then, addressing himself to the issue of timing, Mr. Leonard wrote:

> It is important to set deadlines; but to set deadlines and then to abdicate our responsibilities in helping to meet them by working with the hard problems is a disservice. In short, we plan for this Department and for HEW to help school boards in every way we can to come up with plans which promise realistically to work now, and to prepare for implementation of those plans. If in some cases we do not have enough time, I am not going to be embarrassed if I need to ask for additional time.

Mr. Leonard concluded by responding to the principal issue raised by the protest statement – that of political interference. After expressing the view that the request for delay in the Mississippi cases was a "sound" decision, he wrote as follows:

> Finally, the question has been raised as to the impact of political pressures on law enforcement. I think all of us realistically must recognize that all government agencies are constantly subjected to political pressures from all sides of the political spectrum. This has been true throughout history, and will continue to be true. The real question is whether decisions are sound; and in the decision-making process in the enforcement program of this Division, I intend to exercise my best judgment and to rely heavily on the advice of experienced lawyers in the Division.

Many of the lawyers were disappointed with Mr. Leonard's memorandum, regarding it as an admission of political influence and a weakening of the government's posture on school desegregation. Few disputed the obligation of government attorneys to work with school boards in trying to minimize community opposition, and the fact was that we had always done this, under all administrations. The lawyers believed, however, that the need for this activity should not postpone desegregation. Community programs, they thought, could proceed just as well, if not better, in the context of integrated schools as they could while the dual system remained intact. Soon after the release of Mr. Leonard's memorandum, the dissident lawyers met again and voted to release the text of their Statement of Protest to the press. Meanwhile, the newspapers were again full of accounts about the protest and about alleged political pressures, and on September 25, a story appeared in the Washington Post alleging that the attorneys handling the Mississippi case had the HEW plans ready to file ahead of time, but were directed not to do so until after the Senate vote on the Anti-Ballistic Missile

program. So far as I know, there was nothing to the story, but it added fuel to the fire.

The controversy was in full swing once more when President Nixon met the press on September 26. As expected, he was asked several questions about the Mississippi matter, and the occasion gave him the opportunity to spell out his views on desegregation in some detail. Noting that criticism of his policies had come from the South as well as from integrationists, he said:

> It seems to me that there are two extreme groups. There are those who want instant integration and those who want segregation forever. I believe that we need to have a middle course between those two extremes. That's the course on which we're embarked. I think it is correct.

A reporter observed that it was fifteen years since the Supreme Court made its decision, and asked the President how much longer school segregation should be allowed to exist anywhere in the country. Only as long, the President replied,

> . . . as is absolutely necessary to achieve two goals; to achieve the goal of desegregated schools without at the same time irreparably damaging the goal of education now for the hundreds of thousands of black and white students who otherwise would be harmed if the move toward desegregation closes their schools.

Finally, asked about Senator Stennis' reported role in the controversy, Mr. Nixon said:

> Senator Stennis did speak to me along with several other representatives from Mississippi with regard to his concern on this problem. But anybody who knows Senator Stennis and anybody who knows me would know that he would be the last person to say, look, if you don't do what I want in Mississippi, I'm not going to do what is best for this country. He did not say that and under no circumstances, of course, would I have acceded to it.
>
> With regard to the action in Mississippi, that action was taken by this Administration because it was felt that better than cutting off the funds, with a disastrous effect on the black and white students affected by that, it, the better course was the one that we did take, the one

which gave more time to achieve desegregation without impairing education.

The second half of the President's last answer was factually incorrect. The HEW plans proposed by Mr. Anrig and withdrawn by Mr. Finch did not affect the rights of the districts involved to receive federal funds. The issue was one as to what an appropriate court order would provide, and under the law, the funds would have continued to be available no matter what plan the court ultimately ordered to be implemented. The President's apparently inadvertent error aside, however, the government's general approach was clear. Obviously, it involved some departure from the prior Administration's more deadline-oriented policies, and those who supported these policies were not happy.

Mr. Nixon's press conference was on a Friday. The dissident attorneys requested the Justice Department's Public Information Office to release their now month-old Statement of Protest on the following Monday, and, after some high level consultation, it was agreed that the Office would lend some assistance. Gary Greenberg, who had been on vacation following his controversial remarks in the Court of Appeals in St. Louis, was back in Washington and became active in making arrangements for dissemination of the protest statement to the news media. Jerry Leonard, who was still spending most of his time in Louisiana, also agreed to hold a press conference in Washington on Monday, September 29. The protest statement was released to the press, and shortly thereafter, the embattled Assistant Attorney General appeared before the microphones in the Justice Department's Great Hall and made himself available for questions.

At the beginning of the press conference, several of the reporters present attempted to goad Mr. Leonard into condemning the dissident attorneys for publicizing the "in-house" dispute. Mr. Leonard would not be goaded. He stated that a frank discussion of disagreements was never detrimental, and that the attorneys were respected professionals who, he was sure, would abide by the Department's decision once it had been made. Asked about continuing disagreement with Administration policies, by the 65 signers of the protest statement, Mr. Leonard responded that "sixty-five lawyers are wrong, I guess."

The Assistant Attorney General was then subjected to some harrowing questioning on policy generally and in the Mississippi case. With respect to Senator Stennis and the ABM, he remarked that if there was any connection between the ABM vote and the Mississippi cases, "it is too remote for me to see." Asked what the Justice Department would have done if Secretary Finch had

decided to recommend that the plans prepared by Dr. Anrig be implemented on schedule, he stated that the Justice Department would have tried to enforce such a decision, but that there would have been massive litigation, school closings and boycotts, and it would have taken years to bring these districts back into line. Finally, in response to a question as to what would happen if the Supreme Court were to order complete integration across the nation, Mr. Leonard stated that "nothing would change," for the order would have to be enforced and his Division lacked "people and bodies" to enforce such a decision. Mr. Leonard's reference was apparently to the feasibility of carrying out the obligation to desegregate immediately every dual school system in the country, but it was taken to refer to the Mississippi districts then before the Court, and the press treated it, to some extent, as an intimation to the Supreme Court that the Justice Department would not carry out the Court's orders in a pending case. Mr. Leonard clarified the point the following day, but the publicity as to the clarification never caught up with that generated by the earlier remark, and the incident further inflamed the protagonists in the dispute. The Assistant Attorney General was attacked by editorials in various newspapers, and a U. S. Senator suggested that he resign; Mr. Leonard was then quoted as having characterized his critics as "running off at the mouth."

On October 1, two days after Mr. Leonard's press conference, Gary Greenberg was asked to resign and did so. Mr. Leonard had been away when the young lawyer had told the court that he could not defend the Attorney General's Mississippi decision, and, while then Deputy Assistant Attorney General David Norman (now the head of our Division) had told Greenberg that the matter was "very serious", no action was or could be taken until Mr. Leonard's return. Mr. Leonard and three staff members met with Greenberg, and the Assistant Attorney General questioned him about his argument in the Arkansas case. Greenberg related the facts, including his controversial response to the judge's question, and Leonard asked him if he still felt the same way. Greenberg, who is not humble, stated that his duty was to the United States and to his oath of office rather than to Mr. Mitchell personally, and that he could not in good conscience defend the Attorney General's decision in the Mississippi matter. If the issue arose again, he would make the same response. Mr. Leonard then told the scrappy young lawyer that he (Leonard) had lost confidence in Greenberg's ability to represent the Attorney General, and he asked Greenberg to resign. Greenberg suggested that he be given a month or so to find another job, and that he would leave quietly, without disclosing the reason for his departure and thus endangering the morale of his colleagues. Mr. Leonard said he was prepared to keep Greenberg on for two weeks on a special project outside the Department, but insisted that he vacate his office at 5:30 that evening, two and a half hours after the meeting. Greenberg

rejected the offer of employment outside the office and agreed to resign forthwith. The following day, Greenberg called a press conference and, showing considerable poise and skill before the cameras, related his side of the events of the past afternoon, as well as the reasons for the protest, to an audience which became a large one after parts of the tape were shown on national television.

The relation of the events culminating in the forced resignation of Gary Greenberg reinforced my belief in the peculiar genius of the law as the best method of settling disputes. The various protagonists in this controversy had disputed each other in the press, and there was considerable mutual indignation. A young lawyer had, in my judgment, over-reacted to actions taken by his superiors, and the superiors, I thought, had over-reacted right back. Similar comments could be made as to other developments in the dispute. While all of the press statements were going on, the NAACP Legal Defense Fund attorneys were pressing their application to have the Supreme Court review the Mississippi cases, known as Alexander v. Holmes County Board of Education. The government objected, but the Court agreed to hear the appeals on an expedited basis. The President's Committee for Civil Rights Under Law, established at the request of President Kennedy to provide legal help to plaintiffs in civil rights cases, filed a friend of the court brief on behalf of the black children which was signed by, among others, John Doar. Noting Mr. Leonard's press conference comment that the Justice Department lacked the manpower to enforce integration decisions, the Committee offered to make volunteer attorneys available, allegedly in accordance with federal statutes. The National Education Association also filed a brief on behalf of the Negro plaintiffs.

At the Supreme Court, Jack Greenberg (no relation to Gary), for the Negroes, gave an eloquent argument for the proposition that the time for delay was over. John Satterfield of Yazoo City, Mississippi argued for the school districts and claimed that their free choice plans were valid and that the NAACP lawyers were scoundrels. Jerris Leonard, arguing for the United States, contended that the lower courts had given careful attention to the facts and would move as fast as was practicable under the circumstances, and he asked the Supreme Court to affirm their judgment. He stated that the end of the dual system was now in sight, though admittedly far off, and he asked the Court not to do anything “precipitous.” Mr. Justice Black, who had at an earlier stage of the case said of dual systems that there was no reason why "such a wholesale deprivation of constitutional rights should be tolerated another minute,” asked Mr. Leonard drily whether anything could be “precipitous” after so many years. It was clear how he was going to vote.

On October 29, only six days after the oral argument in the Alexander case, the Court, which includes a Chief Justice appointed by President Nixon, three justices appointed by President Eisenhower, two by President Roosevelt, one by President Kennedy, and one by President Johnson, announced its unanimous decision:

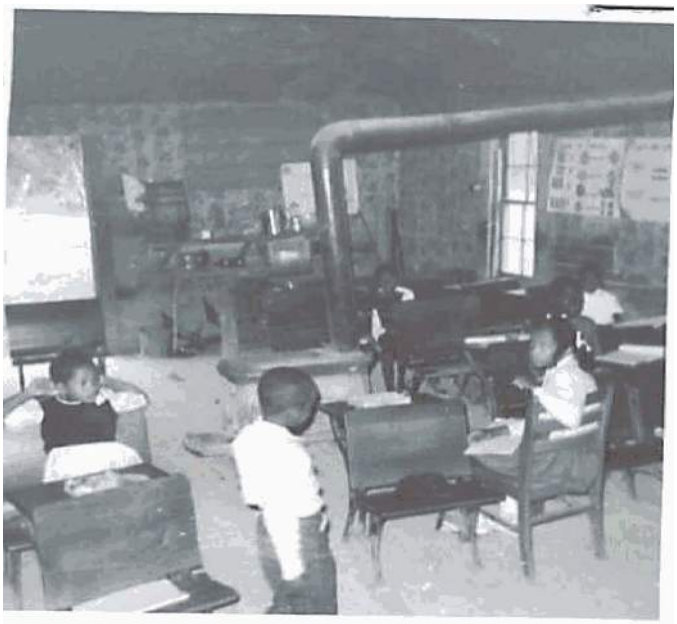
> . . . Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools . . .
> Accordingly
> It is hereby adjudged, ordered and decreed:
> . . . that the cases are remanded to that court to issue its decree and order, effective immediately, . . . directing that [the school system] begin immediately to operate as unitary school systems . . .

The Supreme Court's order added that any proposed changes in desegregation plans to be ordered by the Court of Appeals were to be considered after, not before, the schools have been completely integrated. On the day following the Court's decision, according to Newsweek, a hand-lettered placard was displayed outside one of the offices in the Civil Rights Division, reading:

YES, VIRGINIA, THERE IS A CONSTITUTION

In January 1970, the Mississippi districts in question were peacefully desegregated. Some whites fled the public schools, and some districts resorted to internal segregation, Franklin County style, but, by and large, the rural dual system was dead. The cities remained.

Sadie Clark and her sister Gwen point to shotgun pellet holes in their screen door.



CHAPTER 12
Negroes at Lakeside?

As the Supreme Court was putting an end to formal dual school systems based on race, our Division was being reorganized to prepare for a new era in civil rights enforcement. Racial problems had become national rather than sectional. With massive disfranchisement of Southern blacks a thing of the past, and with the side-by-side white and black schools in the rural South practically eliminated, the country had become reasonably homogeneous from the standpoint of civil rights. In voting, the pressure was now on to eliminate literacy tests in the North as well as the South, and one of our Division's recent major cases involving deliberate racial discrimination in voting had as its locale not some hamlet in Mississippi or Louisiana, but rather Gary, Indiana, where a white-controlled machine sought to defeat a black candidate by casting ballots for fictitious white voters.

By 1970-71, more black pupils were attending predominantly white schools below the Mason-Dixon line than above it, and the major remaining issue – schools segregated as a result of racial neighborhood patterns – was as pressing in Pontiac, Michigan and Pasadena, California, as in Jackson, Mississippi and Houston, Texas. Job discrimination, whether ingenious or ingenuous, affected Northern and Western blacks to a degree comparable to that prevailing in the South. Problems between Negroes and police officers were as acute in Northern urban ghettoes as anywhere, and contributed to riots in Watts, Newark, Detroit and many other cities, with heavy loss of life and damage to property. While segregated public accommodations were thought of as a southern phenomenon, symbolized by Lester Maddox and his axe handles, even this problem had become national, for much of the controversy now centers around exemptions for establishments, North and South, claiming to be “private clubs” – a claim that is typically made in the suburbs of major cities. Finally, segregated patterns in housing pervade the nation, and when Congress passed the Fair Housing Act of 1968, everyone was aware that the impact of this law would not be merely sectional. This may have been why opposition to a national fair housing law was successful for so much longer than the resistance to other civil rights legislation.

With the problem now national, the most effective use of the Division’s manpower could be accomplished by organizing our resources along subject matter lines – Education, Employment, Housing, Criminal (primarily police misconduct) and a joint section for Voting and Public Accommodations. As a section chief of a “regional” section under our prior organization, I was given the opportunity to

head a “subject matter” section for the nation as a whole. For me, the choice was easy. I picked the Housing Section.

If there was one area of American life in which racial segregation was most extensive, it was housing. The pattern of increasingly black inner cities surrounded by virtually all-white suburbs is familiar to all Americans. The circumstances under which many blacks, Puerto Ricans and others live in the ghettoes are appalling. The conditions in our decaying cities constitute the most pressing domestic problem of our nation. Negroes in all-black neighborhoods pay more for housing than whites pay elsewhere, even thought the dwellings are usually inferior and often dilapidated. They live in the midst of overcrowding, crime, poverty, narcotics addiction and squalor. Municipal services in the inner city are often inferior. The disease rate is higher. The schools are inadequate. Decent jobs are unavailable. Unemployment is high. Families break down. Welfare costs are staggering. Danger of injury to person and property is always present. The prospects for improvement often seem dim. The physical and psychological damage suffered by a child brought up under these conditions is incalculable.

Besides its inherent injustice, racial segregation in housing cripples the national effort to assure equal opportunity in other areas of American life as well. The remaining school districts in which segregation is a major factor are, by and large, metropolitan systems where racial residential patterns make massive busing the only means presently available to alleviate racial concentrations. Employment opportunities are moving with America’s industry from the inner cities to the suburbs. If nonwhites are locked in the city, and cannot live where the jobs are, they cannot compete equally for these jobs, no matter how nondiscriminatory an employer’s practices may be. Accordingly, rapid progress towards equal opportunity in housing appears to be an indispensable condition for the elimination of the nation’s major social ills. It is the only way to stop what the Kerner Commission saw as America’s drift towards two societies, one white and one black, separate and unequal.

The federal government has a particular responsibility to stop the drift towards urban apartheid, for it has, unfortunately, done much to promote it. Public housing, with which the federal government has always had a close connection, is probably even more segregated, nationwide, than private housing. At least until the late 1940s, the Federal Housing Administration affirmatively recommended, and sometimes even required, that racial restrictive covenants be included in documents of title, so that the presence of what were euphemistically called

"inharmonious" groups might be avoided. In administering its responsibilities towards federally assisted housing, urban renewal, the selection and location of sites for low cost housing, and in many other ways, federal officials had contributed to the perpetuation of racial segregation. This occurred under all administrations, Republican and Democratic. In recent years, federal courts have found in individual cases that federal officials have participated in, or have not adequately prevented, racial discrimination by local housing authorities. In one such case, the government official found to have failed to assure nondiscrimination was Robert Weaver, the black Secretary of Housing and Urban Development under President Johnson and a former NAACP leader. In another case, the finding was against his successor, George Romney, a leading Republican advocate of civil rights. Both of these men were genuinely committed to equal rights, but institutional traditions die-hard.

Under the Fair Housing Act of 1968, however, all federal departments have the obligation to administer their programs affirmatively to promote fair housing. The government owes that to its non-white citizens. The opportunity to participate at a leadership level in the Justice Department's effort to correct the effects of past errors was one that particularly attracted me. Jerris Leonard, then the head of our Division, had sponsored fair housing legislation in Wisconsin, and I believed him to be committed to a vigorous and aggressive approach. I was, therefore, confident that my efforts would not suffer for lack of support from the leadership of the Division. It was my greatest challenge.

Our Section began with only twelve attorneys, and they were quickly dispatched to urban and suburban areas all over the country to make contact with fair housing groups and other individuals and organizations to determine what the problems were. It would be easier to relate what they weren't. We soon became aware that almost every kind of housing discrimination existed, often in hard-core form, in each major urban area with which we had contact. Even where state laws or local ordinances forbade housing discrimination, the amount of noncompliance was significant. The resources available to state and local commissions were often extremely limited, and existing legislation assuredly had not done away with the dual housing market based on race.

The greatest volume of complaints arose with respect to exclusion of blacks from apartment houses. Often, the proprietors and resident managers, assuming that other whites shared their distaste for blacks, made admissions to white strangers which they later rued. No fewer than three white Civil Rights Division lawyers, looking for apartments in the Washington, D.C. area, related that resident

managers of the different buildings at which each of them applied assured them that they need not worry about “niggers,” or “colored,” because the management did not rent to them; our subsequent suit in one of the cases and strong out of court settlements in the other two were helped immeasurably by the managers’ ill-advised candor.

In Jackson, Mississippi, a black woman applied for an apartment and was told that there were no vacancies; there was said to be a long waiting list. We asked the FBI to investigate, and it turned out that the names on this “waiting list” consisted of the immediate relatives of the owner, including his mother by her maiden name; some of the relatives lived in Morton, Mississippi, home of Lauris Grogan Sessums, who also told tall tales. As usual when it is exposed, the fraud did not pay – our lawsuit against the owners was favorably settled only after they paid substantial damages to the black lady whom they had excluded. These examples are almost at random – discrimination in rentals appeared to be common, North and South, East and West.

Discrimination by real estate companies in the sale of single-family homes was another major phenomenon which contributed to the segregation of neighborhoods. Some real estate agents did not sell to Negroes at all; when our case against a major Atlanta firm, which was headed by Governor Lester Maddox's former Real Estate Commissioner, came to trial in late 1971, that company had sold perhaps 10,000 homes since the early 1960s, but not a single one to a black family. Some companies charged blacks more for a bad house than whites for a better one, and others included a “concealed race tax” when they reluctantly sold to a Negro in a white area.

Equally common was the practice of discrimination by “steering.” Many companies would sell to blacks, but only after “steering” them to black or racially changing areas. If such “steering” was to be successful, different listings had to be shown to whites and blacks, a common practice which, in effect, created a dual market – some companies even kept dual sets of books. University City, Missouri, near St. Louis, was regarded as one of the nation’s ideally integrated areas, but one of our most important early lawsuits alleged that four major St. Louis real estate companies were contributing to its re-segregation by telling black prospects what a wonderful area it was while at the same time discouraging whites from buying there, sometimes by disagreeable references to “coons” and “niggers.”

A close relative of the practice of “steering” is the activity commonly known as “blockbusting,” which seriously imperils the long-term achievement of

desegregated housing. It is not uncommon, when the first blacks move into a previously all-white neighborhood, for some brokers to initiate an aggressive campaign of encouraging whites to sell. This may be done by repeated, unsolicited telephone calls and visits, by flooding the area with literature and "for sale" signs, by placing low income blacks into a home to scare the neighbors, and by many other means, some overt, some more subtle. The Fair Housing Act makes it unlawful to attempt to induce homeowners to sell by representations about the race of the people moving into the neighborhood, and we promptly brought suits to end such practices in a number of major cities. Unfortunately, it is easy to violate the spirit of this law without disobeying its letter. When there are "for sale" signs all over the neighborhood, it is not necessary to say that blacks are moving it, for the frightened homeowners already know that. One of our Section's most important tasks is to devise means of dealing with the "sophisticated" blockbuster, so that desegregated housing does not become merely a "way station" between all-white and all-black.

Black brokers have to make a living too, and, in most communities, they have offices in black neighborhoods. Many or most black home seekers deal with black brokers or agents, and choose their homes from listings available to those brokers. Often, the black broker does not have any listings in suburban or other white areas, for he is not a member of the multiple listing service to which the white brokers who have those listings belong. His non-membership may be voluntary, but then again, it may not; some multiple listing services have "blackball" rules, which permit the exclusion of an applicant if, say, three of twenty members vote against his admission. They do not have to give a reason. Such a rule may only deny membership to the black broker for unstated, discriminatory reasons, but also keep his customers, most or all of them black, from obtaining listings in lily-white suburbs, and segregation is maintained. Some of our most significant lawsuits have been aimed at this kind of discriminatory arrangement.

Real estate professionals are not the only folks who keep out a lot of blacks all at once. Every community has zoning laws, so that it can determine what kinds of buildings will be built, and where. Occasionally, local zoning powers, or other "land use controls," are abused by local authorities to discriminate against people because of race. When Roman Catholic authorities made land available in an all-white ward in the largely segregated city of Lackawanna, New York, for the construction of integrated low and moderate-income housing, city officials suddenly decided that the land was needed for recreational purposes, and that the sewers would be overloaded by a new subdivision. Never before had Lackawanna

taken effective action to resolve its sewer crises, and the areas where blacks were concentrated were far more crowded and had inferior health standards. Proponents of the proposed housing development sued the city, and they were soon joined by the Civil Rights Division. The court found that the city had used the sewer problem and the supposed need for a park at that particular location as contrived pretexts to keep out the housing, which many citizens actually opposed because of its racially integrated character. Lackawanna, New York, is not the only place where this kind of thing has happened, and a fair accommodation of the problem, which will allow local authorities to make decisions without dictation from courts and the federal government, but which will at the same time prevent them from abusing their authority through covert discrimination, is one of the most important problems in the housing field.

The task of the Housing Section, when confronted with problems of this magnitude, was a formidable one. We had a group of "eager beavers" who worked hard and liked to win, but a dozen young enthusiasts could not deal with every "pattern or practice" of housing discrimination in the land. We took action in as many as we could, at the rate of about fifty lawsuits a year, all over the country. But our lawsuits could only scratch the surface and deal with the tip of the iceberg. Much would have to be done through court suits by private persons and organizations or civil rights groups, and through regulations by other federal, state and local agencies. In particular, voluntary compliance would have to be promoted. The most useful thing we could do, I thought, was to try to move the law along. If we could establish that subtle, perhaps even innocently intended, practices which result in unequal treatment violate the Fair Housing Act, and if we could persuade courts, once discriminatory practices had been exposed, to do something really effective about them, our handful of cases could be used as precedent by everyone concerned with fair housing. Precedents for securing effective relief became our top priority.

In the days of the "voting cases" in Mississippi, we had learned that the prospects were best for obtaining a really far reaching and effective remedy when the proof of discrimination was the strongest. Moreover, once a strong precedent of this kind was set, it could often be applied far beyond the hard-core areas where it originated. The Voting Rights Act had enfranchised black citizens, even illiterate ones, not only in the "tough" counties of Mississippi and Alabama, but also in relatively liberal Gaston County, North Carolina, and, eventually, all over the nation. From the first day of the existence of the Housing Section, we were looking for cases with the kinds of striking facts which would give rise to the sort

of injunction which would really work to give Negroes their rights. The case which set the pattern came to us in a surprising way.

Some of the most booming real estate business of the late sixties and early seventies has been dome by "land sales" companies which purchase attractive lakeside properties, divide them into lots, and then try to sell them to city dwellers as recreational or retirement properties to which they can escape from the cares of urban life. Some inhabitants of metropolitan areas want to escape desegregation as well as pollution. When the land sales companies attempt to accommodate the white purchasers' real or fancied prejudices, they run afoul of the law. Obviously, blacks have more pressing problems in this country than obtaining second homes in recreational communities, and these cases are not our highest priority. All the same, it was worth looking into some of them.

In the summer of 1969, a girl named Deborah telephoned a local fair housing organization, and later the Housing Section, to report with some indignation what she had been asked to do as part of her summer job. Deborah was angry, and understandably so. A twenty-year-old white college student at a university in Maryland, she had answered a newspaper advertisement and had taken a job as a telephone solicitor for one of the many land sales companies which were trying to attract residents of the District of Columbia to developments in the countryside. She did not like what she was asked to do.

One of the principal methods used by Deborah's new employer to obtain prospective buyers for its almost two thousand lots was a massive telephone solicitation campaign. The lots were not particularly expensive, and the operation was geared to the middle class urban resident who wanted a modest vacation retreat rather than to the person who owned a plush home and belonged to a country club. Telephone calls were made to lists of residents in neighborhoods in which the inhabitants were in the appropriate income range. Potential buyers were invited to have salesmen call on them and give them information about the property or to attend free dinners at local motels where slides of the development would be shown and the advantage of the community explained. Deborah's job was to make telephone calls to potential customers and to try to persuade them to receive company representatives in their homes. Deborah was working next to a high school boy named "Dieb", and she was going about her business when, as she later related in an affidavit, the boy remarked:

> Oh, another double-X." or words to that effect. I asked him what he meant, and he asked me if I had not been told the code yet. He said

> that Double-X meant probable Negro, and that we were not supposed to solicit Negroes, but rather to find polite ways of discouraging them. He said that he had been instructed that the cards of known Negroes should be thrown away or destroyed. The boy further said that the $1.00 bonuses which solicitors received if they set up appointments for salesmen were not awarded if the appointments turned out to be with Negroes. Since I am opposed to racial discrimination, I was indignant, and I asked one of the supervisors of telephone solicitors, whose name I do not remember, if what the boy had said was true. She said it was. I therefore decided not to continue to work for the company.

The following working day, Deborah called the office to say that she would not be back and why. She was advised that the policy to which she objected originated from the home office and was the result of objections to integration on the part of prospective white residents of the community.

The Fair Housing Act does not say, in so many words, that blacks as well as whites must be sought out as purchasers. It does provide, however, that it shall be unlawful to refuse to sell, rent, or otherwise make unavailable or deny housing on account of race, color, religion or national origin. Taking the view that the words "make unavailable or deny" are pretty all-inclusive, and that a statute of this kind should not be construed to permit any kind of discrimination if such a construction could reasonably be avoided, we concluded that courts should and probably would hold that discriminatory solicitation is within the coverage of the Act. Certainly we would urge them to do so, should the question arise, for the Supreme Court had held years before that the law forbids "sophisticated as well as simple-minded" modes of discrimination. Accordingly we requested the Federal Bureau of Investigation to conduct a comprehensive investigation, including interviews with present and former officers and employees of the company, to determine if a discriminatory policy existed as Deborah had alleged. These investigations take two or three weeks, and we expected that no further action could be taken until we had an opportunity to study the FBI report. On this occasion, however, we received striking new information even before the Bureau's Report was in.

Marian, another white 20-year-old college student, also had a summer job with the company, but she had started after Deborah had left. Marian contacted the Justice Department while the FBI investigation was still going on. She too told of the discriminatory instructions that were given to her and to other employees, but her most striking information was not the confirmation that there had been

discrimination, but rather the remarkable reaction of her employers to the FBI investigation. The company, she advised, had not changed its discriminatory policy. It had just changed its code. Before the FBI came, the symbol double-x was used to designate contacts who were supposed to be discouraged because they might be black. Such contacts were still to be discouraged, Marian reported, but the records were now to be marked with the number "2", which was to mean what double-x had meant before. Don't stop discriminating, just change the code!

Marian had indicated to us that several of the supervisors were young girls like herself, and that most of them objected to discrimination and followed the company policy only because they needed the money. One of the supervisors, a girl named Montyne, had left to join members of her family in California, and she spoke freely to us when we contacted her. The affidavit which she finally gave us read as follows:

> 1. I am 20 years old, white and live with my grandparents at Huntington Beach, California. During the summer of 1969 I worked as a supervisor and a dispatcher at the office of [the developer] in Maryland. My main job was to make appointments for salesmen to visit people and interest them in buying lots at the company's development in Virginia. I am making this affidavit to tell about the racial discrimination which was practiced at the office while I worked there.
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> 2. When I first came to work in May, 1969, the man who was in charge of the solicitation office told me it was the company policy not to encourage Negroes to purchase lots. If I found that a person to whom I was talking on the phone was a Negro, I was supposed to, and did, discourage him from pursuing his interest in any way. For example, if I called to reconfirm an appointment with a person who sounded black, I would tell him that the public relations man could not make it on the scheduled evening after all. Afterwards, I would tear up the person's card and never call him back. The same policy continued when "Bo," a new supervisor, was in charge.
>
> 3. There was also a rigid policy of racial discrimination in employment at the company and we were not allowed to hire Negroes. The hiring procedure was very informal, and no particular qualifications were required for most of the jobs; in fact, young girls like me who were college age became supervisors after a very few weeks. The boss told us, however, that we were not to hire black

people. I recall that the applications of Negroes were marked with checkmarks to distinguish them from the others, and I think the boss told me that this was in case somebody forgot to check. There were plenty of Negro job applicants, both in person and by phone, and plenty of vacancies as the turnover was quite high, but black people simply were not hired. On one occasion, a French Canadian or French-speaking Negro couple came in to look for a job for the wife. I protested to the boss that the woman was highly educated and obviously qualified, and he admitted this, but said we could not hire her because of the policy.

4. There was an FBI investigation in August, 1969, of possible racial discrimination at our office. At about that time, Bo called the supervisors (including myself) into the office and said that the FBI was on his back and that we would hire a black girl so that we would have one when they came back. He said he would fire the girl in a few weeks after the heat was off. He also directed that the code used to identify probable Negroes on their cards would be changed from Double-x to 2. Code 2 was previously used for persons who were not interested in buying lots, so consequently all Negroes would be treated as uninterested, whether they were in fact interested or not.

5. The discrimination against Negroes did not stop after the FBI investigation, nor was there any less of it. The only difference was that the code for black people was changed.

That was not all. The FBI found the high school boy who had first communicated the discriminatory policy to Deborah, and he told us how blacks were turned away by various phony stratagems from dinners to which they had been mistakenly invited. Other employees told us that for the few days that the one black employee did work at the solicitation office, a white girl reviewed her work without her knowledge and weeded out possible Negroes who may have been contacted. Finally, an Army dentist to whom a company salesman had tried to sell a lot explained how the salesman had described to him a five-step policy which the developer had designed to keep out blacks.

The representatives of the company and its parent, a giant developer which, through subsidiaries, operated forty such developments, denied any discriminatory practices. Only five of some 1100 lots had been sold to Negroes, however, and we wondered how even those five had made it through. Another subsidiary of the

parent company had previously been found by a federal judge to have engaged in discriminatory practices and ordered to desist. With evidence of the kind we had accumulated, we thought that both the Virginia subsidiary the practices of which we had investigated and its parent company should be under court order, and not just a court order prohibiting discrimination, but one which required affirmative steps adequate to correct the effects of past discrimination. In fact, this looked like a case in which a court would find a need for far-reaching measures to undo the damage that had been done, and might set a precedent which could be used effectively in other kinds of cases. Accordingly, on October 13, 1969, the government sued both the parent and the subsidiary for housing discrimination and job discrimination. We filed the affidavits we had assembled describing the defendants' discriminatory practices. We awaited the company's response.

The lawyers for the defendants quickly expressed interest in settling the case. Once the affidavits were a matter of record, there was no disposition to make a last ditch stand against the government. In spite of the widespread discrimination that we had uncovered, or perhaps because of it, the corporation's officers and attorneys displayed a reasonable and progressive attitude. As negotiations began, it became apparent that the case would be a kind of "first." We had settled housing discrimination cases before, but none had presented a situation in which the issue of what, if any, affirmative action a defendant must take to make up for its past discrimination was so cogently presented. It was therefore essential that any settlement we reached be strong enough to assure for Negroes the full vindication of their rights. At the same time, the decree should be just to the defendants too, and our goal was to leave the company as much freedom in the operation of its business as would be compatible with equal opportunity for all.

The defendants were represented by competent counsel, and the negotiations were full of proposal and counter-proposal, thrust and parry. Initially, the defendants claimed that the parent company was not doing business in Virginia and could not be sued there, and asked the court to dismiss the case as against the parent company. We countered that the parent was doing business through its subsidiaries, and we insisted that any settlement put the parent and all of its subsidiaries throughout the country under injunction, so that we could be assured of fair dealing not only in Virginia but in every state in which the parent or any subsidiary did business. Eventually, the defendants agreed to this. They also accepted the proposition that the defendants would embark on an affirmative program to attract black purchasers and employees, and would make detailed periodic reports to the court and to the Justice Department which would show how the remedial measures were working. It was also agreed that all of the corporate

defendants would be under injunction, so that any violation of the settlement would constitute contempt of court. The government agreed, on the other hand, that the defendants need not admit any violation of the law, and that the settlement would be sought without any court ruling as to whether there had in fact been discrimination in the past. Under these ground rules, we proceeded to negotiate the details of what specific steps the parent company and its subsidiaries would be required to take to market to blacks and to assure equal opportunity for all.

The negotiations went on for several weeks. By the end of January, the parties had agreed to a settlement containing the kind of affirmative program which the government thought adequate and which the defendants thought fair. On February 5, 1970, after giving the proposed order the most careful study to assure himself that it was in conformity with the law, a United States District Judge in Richmond signed a consent decree – that is, an injunction to which all parties agree – which disposed of the case. Most of the provisions of the decree applied not only to the Virginia development about which the student-employees had complained, but also to all of the parent company's other subsidiaries. The companies were placed under injunction against any discriminatory practices involving either housing or employment. Their employees were required to sign statements to the effect that they understood what the order required of them, and that they could be fired if they did not obey. The consent decree bound all of the defendant's agents and employees, from the company president to the most junior telephone solicitor.

The highlights of the decree, however, related to the affirmative steps to be required of the defendants. Since most purchasers and employees were secured through telephone solicitation and newspaper advertising, much of the decree dealt with these subjects. The Virginia subsidiary was ordered to solicit in Negro areas where the residents had sufficient income to purchase lots. The goal of the program was that "at least 30% of those solicited shall be Negro." The company was also required to recruit black employees at all levels of employment so as to achieve a fully integrated work force at the earliest practicable date. The order also required the defendants to contact logical sources of Negro employees, such as predominantly black schools and colleges, the Urban League, the NAACP, and prominent black citizens to advise them of the affirmative program. The company was also required to "endeavor to place Negroes in supervisory and professional positions as vacancies for which they are qualified arise."

Perhaps the most notable feature of the order was that relating to newspaper advertising. Twelve full-page advertisements about the Virginia property were to be placed in "black" newspapers in Washington or Richmond during the year

following the entry of the decree. All advertising, no matter what its form or where it was placed, was required to include a prominent statement of the company' s nondiscriminatory policy. Finally, 80% of the advertising depicting people using the facilities of the development was required to show blacks as well as whites doing so. All in all, the order required a strong affirmative effort to make blacks feel welcome at this development, so that they might share with their fellow citizens the advantages that nature provides over urban decay.

Such a court order is strong medicine to segregationists. After the order was signed and reported in the press, we received an anonymous letter from a man who told us that this kind of order made him sick and convinced him that Attorney General Mitchell was no better than his Democratic predecessors. He scrawled WHITE IS BEAUTIFUL at the bottom of his letter, but the contents hardly proved his point. At the opposite end of the spectrum, one of the parent company's subsidiaries in Ohio received a letter from a woman who praised it for openly and voluntarily welcoming nonwhites in its advertising; we never had the heart to tell her how this came about. In any event, the results of the order were gratifying. Negroes as well as whites were soon employed as solicitors and salesmen. Hundreds of blacks were invited to solicitation dinners. Advertisements showing blacks and whites at lakeside appeared in the press, and it soon became apparent once again, in housing as in voting, that the law can make a difference. Less than 1/2 of 1% of the purchasers of lots at the Virginia property before the suit were black, but the defendants' first Reports to the Court showed that of 513 persons who bought after the decree was entered, 59 were Negroes. That was not all. By the fall of 1971, the various subsidiaries of the parent company had sold more than 800 lots to blacks, more than a tenth of the total number of buyers. The company did not report a single unpleasantness as a result of these sales. Just as the Voting Rights Act had worked in concrete, bread and butter terms to give black citizens the vote, so affirmative relief, and, particularly, affirmative marketing, had worked to give nonwhite citizens not only equal housing opportunities, but also attractive lakeside homes. The United States Commission on Civil Rights hailed the decree as "particularly significant in that it sets an important precedent for affirmative action," and patted the Housing Section on the back for its work. State and local agencies, too, asked for copies of the decree.

It was soon evident that it had been worth our while to expend some of our precious resources on recreational property cases. But it was not sufficient that lakeside developers – for several others soon agreed to similar settlements – be required to take affirmative steps to correct the effects of past discrimination. We turned to other kinds of housing to apply the same principles.

The owners and managers of apartment complexes were common targets of our suits, and among our cases were those against two giant concerns, one in Los Angeles and one in New York City, alleging various types of discrimination in housing. In Los Angeles, the defendants controlled apartment houses with a total of almost 9,000 units, and our Complaint alleged that blacks had been discriminatorily excluded from a number of them. The evidence had been brought to our attention by an energetic fair housing group on the West Coast, which had received complaints about the buildings in question and had sent black and white "checkers" to determine if members of both races would be treated equally. They weren't, and our lawsuit resulted. The defendants denied that they followed a discriminatory policy, but they were willing to embark on an effective affirmative program, and another landmark consent decree was negotiated. This one required not only an end to discrimination in housing and employment, inclusion of fair housing statements in advertising, placement of ads in the minority press, and equal maintenance of predominantly white and predominantly black buildings, but also cooperation with the non-white community in relation to the communication of vacancies. Specifically, once a week, the landlord would give a list of vacancies to the fair housing organization which had brought the information about the case to our attention. The defendants, the government, and the fair housing group all cooperated to make the decree work, and many blacks and Mexican Americans learned of apartments in previously white complexes and moved into them. The lawsuit and the settlement received headlines in the Los Angeles newspapers, and publicity and precedent combined to make similar arrangements possible with other major landlords in California and elsewhere.

The New York case involved an even larger group of defendants who controlled more than 21,000 units. The thrust of this case was somewhat different. Not too many years ago, this landlord had rented almost exclusively to white people, but he had been among the first in the area to rent to blacks. The essence of the complaint was not exclusion of blacks from his holdings, but rather that the Brooklyn rental agency for the organization “steered” blacks to certain buildings and away from others. We alleged that, as a result of this “steering,” certain buildings had changed in character from predominantly white to virtually all-black, while others remained all-white. We also claimed that the landlord maintained the white buildings more effectively than the black, and that Negroes and Puerto Ricans were thus being "steered" to live in conditions which were not only segregated but inferior as well.

This case, too, caused quite a hubbub in New York, and, once again, the landlord wanted to settle. We agreed fairly quickly on how future discrimination would be eliminated. Besides the general prohibition, the landlord's rental agents were to post lists of vacancies, and each applicant would be shown the vacancies in all buildings. Each applicant would also sign a log indicating when he came in, and it could thus be determined what vacancies there were when he came. The landlord was also ready to make a public record of his nondiscriminatory policy, and advise all applicants about it, and we agreed on a formula for equal expenditures for maintenance. The toughest question was, however, what would be done about those tenants who had allegedly been unlawfully "steered" to black buildings. We insisted that affirmative steps be taken to put these individuals or families, so far as possible, in their "rightful place," i.e., into the position which they would have occupied if there had been no discrimination. The landlord, on the other hand, denied that there had been any steering in the first place, and he and his attorneys were, at first, adamant on this issue. They said we should drop it, period.

It looked for a while as though no settlement could be reached, but, as we argued and cajoled late into the night, a breakthrough came. We had insisted that residents of the ”black” buildings be allowed to move to “white” buildings as vacancies arose, at no cost to them – the landlord should pay their moving expenses. The landlord’s attorneys complained that this would be an admission of guilt inconsistent with their professions of innocence, and they resisted, tooth and nail. Finally a compromise of sorts was reached. The tenants of the black buildings choosing to move would be permitted to do so. They would be excused from their leases, and, in the interest of promoting integration, they would receive the equivalent of one month’s free rent if they moved. They would be notified of this option, which would remain open, for one year, to the first fifty tenants who applied. The numerical limit of 50 was pretty academic, as it was unlikely that so large a number would want to uproot their families now that they were living where they had been steered. A far greater number might have wished to live in the “white” buildings in the first place. Nevertheless, if they wished to move, they could do so now at minimal expense. The decree was the first in the nation which provided a financial inducement to blacks to move to “white” buildings. It was a precedent on which we hoped to build.

These “consent decrees” with the land developer and the giant landlords in Los Angeles and New York, together with two-dozen other such settlements, were managing to make affirmative action an incident of housing discrimination negotiations – the expected thing, so to speak. What we still needed, however was

a clear, unequivocal decision by a court, in a case in which the parties were in disagreement, that the kind of relief we had been asking for is the law. That soon came too. In a case we had brought against the owners of an all-white apartment house in Atlanta, the District Judge had held that we had not proved a "pattern or practice" of discrimination, and he decided the case in favor of the defendants. Our evidence had been strong, however, and we appealed to the Court of Appeals for the Fifth Circuit – the same appellate court which had decided the Duke case and so many other voting discrimination cases, and we emphasized the importance of granting relief which not only assured equal treatment in the future but also required defendants to take affirmative measures to correct the effects of their past discrimination. At the oral argument of the appeal, the judges indicated by their questions that they thought that the trial judge had been wrong in finding that there was no pattern or practice of discrimination, and one of them – Chief Judge John R. Brown – was particularly interested in what we thought the remedy should be. I told the court of our consent decrees, and Judge Brown asked for copies of some of them. Then, in a landmark decision, the Court of Appeals reversed the trial judge's decision and directed him not only to prohibit further discrimination by the defendants, but also to enter a strong affirmative order which was to include the principal features of our consent decrees. The owners of the 96-unit apartment house had to notify rejected black applicants of their opportunity to rent without discrimination, post a fair housing sign in the rental office, include fair housing statements in all advertising and in promotional literature and brochures. They were ordered to tell their employees and all rental agencies with which they dealt of their nondiscriminatory policies.

In addition, the defendants were required to adopt and implement objective rental standards and procedures under which an applicant could be rejected only if he failed to meet a specific requirement applicable to everybody alike. Before the lawsuit, the apartment manager did not rent to people she did not like, and she evidently did not like any of the black applicants, regardless of their qualifications. In order to enable us to detect any repetition of such a pattern, the defendants were required to make regular reports to the court as to their disposition of all rental applications, from whites as well as from blacks, and the facts pertinent to each. The decision – United States v. West Peachtree Tenth Corporation – represented for housing discrimination what United States v. Duke had been for voting. But the breakthrough had come much more quickly.

A case like West Peachtree Tenth Corp. is a little sobering. The defendants were not the only people in Atlanta who discriminated, but they were the only apartment house owners there whom we had sued to that point, and, consequently,

the only ones who had to put "fair housing" in their newspaper ads. There were undoubtedly worse discriminators about whom we had never been told, and against whom we had therefore taken no action. To that extent, equal justice was frayed. As former Attorney General Clark has written, this is unfortunately true even in the criminal law. Arrests are made in only a minority of violent crimes, and not all of those result in convictions. It is always more satisfying when an effective remedy is applied equally "across the board," and, in the absence of far greater resources to bring civil rights cases, this is difficult to accomplish by resort to lawsuits alone. Lawsuits desegregated individual school districts to some degree even before 1964, but it was only when the Civil Rights Act of that year authorized HEW to cut off federal funds from segregated districts that there was any movement by most of them towards meaningful desegregation.

Accordingly, it is important that agencies with authority to issue regulations and prescribe conduct pick up and draw on the legal principles established by our lawsuits. It was therefore particularly satisfying to the lawyers in the Housing Section when, in June, 1971, a few months after the West Peachtree Tenth decision, the Department of Housing and Urban Development issued a Circular requiring affirmative marketing to advance fair housing by all sponsors of FHA-assisted developments. The specific measures were very similar to those in the West Peachtree Tenth case and in the Justice Department's consent decrees. If effectively enforced, they can provide realistic equal opportunity in housing. FHA-assisted housing is not all housing, but it is certainly a substantial start.

Chapter 13
What Now? The Seventies and Beyond.

The past is prologue. The civil rights problems of the 1970s, dominated by the existence and character of the inner city, are different in kind and in scope from those to which the Civil Rights Division and the nation were addressing themselves ten years ago. The question is fairly raised whether the techniques which enfranchised the Southern Negro have any relevance to securing full participation in American society for the urban black man in Watts or Detroit or Newark, whose exploding rage imperils national unity and, perhaps, national survival on an acceptable basis. It may well be that one whose professional life has consisted of attempting to deal with racial problems through legal means may not be universally regarded as the most objective judge of their pros and cons, especially in the eyes of justifiably impatient young blacks. There may also be those who would challenge, and not without reason, a trial lawyer's expertise on questions involving social policy rather than trial strategy. Nevertheless, I venture to suggest that the problems of rural Mississippi of the early sixties, and the manner in which the American legal system dealt with them, are of more than merely historical interest. There is no single simple solution to the nation's racial crisis, but I am confident that there will be greater progress sooner if the injustice of existing institutions and practices is proved with evidence and not just denounced with fervor. To me, that is one of the lessons of the sixties.

This is not to suggest that court cases alone will do the job. They never have. While the Civil Rights Division's voting suits, involuntarily helped along by the likes of Bull Connor and Sheriff Clark, graphically laid out the chapter and verse of the problem, it took the Voting Rights Act and the federal examiner machinery to make actual voters of most southern blacks. The injustices of compulsory racial segregation in rural southern schools had been denounced by civil rights advocates and judges, and had often been exposed in minute detail, as for example, in Franklin County, North Carolina, but it was not until Congress decided that school districts which did not desegregate could not have any more federal money that across-the-board progress was made. With respect to both voting and schools, the national decision which committed the necessary muscle to ensure the elimination of unacceptable and unjust conditions was not applied until a compelling rational and moral case had been made, in court by the lawyers and on the front lines by Dr. Martin Luther King and his technique of nonviolent confrontation with injustice. It is generally acknowledged that the participation of prominent clergymen in the civil rights movement of the early sixties made many previously uncommitted citizens search their consciences and recognize the

contradiction between racial discrimination and the golden rule, and this hastened enactment of major civil rights laws. But neither the clergy nor those who heed its counsel could have been adequately mobilized on the basis of mere rhetoric.

Things have not changed. I believe that most of the real progress likely to be made in resolving the major civil rights problems of the last third of the twentieth century will result from the same process as that which has led to advances on earlier issues. An examination of the crucial problem of job discrimination illustrates my point. Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment, explicitly disclaims any requirement of preferential treatment to redress racial imbalance, and quotas are therefore at least suspect. When pervasive, longstanding and discriminatory exclusion of blacks from craft unions in the building and construction trades was laid out in case after case brought by the Justice Department, however, some assumptions began to change. Courts, unable to find less drastic means of eliminating the continuing consequences of past discrimination, began to include such comparatively drastic relief in their decrees as "one to one" admission ratios, which meant that for a given period at least, one of every two new members admitted to previously all-white union would have to be non-white. Eventually, Attorney General Mitchell, in a formal opinion sent to the Secretary of Labor, and, ultimately, the courts, upheld the legality of the so-called Philadelphia Plan, which provided in principle that on federal construction projects, contractors must take all reasonable steps to meet specific minority hiring "goals" based loosely on the percentage of non-whites in the population. There was considerable opposition to the Philadelphia Plan; the Comptroller General of the United States, disagreeing with Mr. Mitchell, took the view that it constituted discrimination in reverse. I have considerable doubt as to whether the plan could have sailed through the courts as successfully in 1964 as it did in 1971. What intervened, in my view, was the dissection by the courts of the exclusionary practices the craft unions, which ranged from outright, hard-core rejection of applications from Negroes to less direct but equally effective methods of exclusion, such as limitation of membership to relatives of incumbent members, when all of the incumbent members were white.

It is also revealing that perhaps the most far-reaching remedy for discrimination in employment has arisen in cases involving a class of unions which have been widely regarded as the most implacable foes of integration. In the first major employment discrimination case which I handled, an official of a large Midwestern city quoted the union's business agent as telling him that the union had a quarter of a million dollars in its treasury, and that he would spend every cent

before integrating. Albeit unintentionally, the business agent and others like him might as well have written the Philadelphia Plan about which they are now so indignant.

Getting the job, or getting into the union, does not end the black man's problems. To stay with the building trades for a moment, the unions are often more than mere bargaining representatives. Many operate exclusive hiring halls which refer all workers, nonunion as well as union, to available jobs. The Justice Department's first job discrimination suit was brought when it turned out that just about every skilled worker involved in building the great and picturesque Gateway Arch on the west bank of the Mississippi in St. Louis was white. In running their hiring halls, the unions gave preference in work referral to persons with experience under union contracts. Black electricians and sheet metal workers, not having been union members, had low seniority and little chance to work. The unions had shown some willingness to accept and even recruit black members after the Civil Rights Act was passed, but it would take time for those so admitted to accumulate the priority needed to get the good jobs. Painstakingly, the government assembled proof that the racial composition of the unions was due to discriminatory practices reaching back many years before the Act was passed. Irrelevant, said the unions. Unpersuasive, ruled the trial judge. But the appellate court agreed with our contention that, given pre-Act exclusion of blacks, an otherwise permissible rule giving work priority to persons with union experience carried the effects of pre-Act discrimination into the post-Act period, and violated the fair employment law. It was something like the “grandfather clause”, which exempted persons whose grandfathers had voted before the Civil War from onerous literacy requirements in Southern states. Negroes' grandfathers had been slaves and had not been allowed to vote, and the grandfather clause carried the effects of their disfranchisement two generations further. Just as the Supreme Court struck down the grandfather clause, so the appellate court invalidated the unions' priorities.

Title VII contains a specific provision upholding the legality of bona fide seniority systems and other comparable arrangements. The fact that whites may have had greater seniority than blacks, without more, would not have been held to constitute a violation of the law. It was the proof of the discriminatory origin and unfair consequences of the arrangement as applied that accounted for the favorable result of the St. Louis Arch case. Today, the legal doctrine underlying that decision is accepted pretty much as a matter of course, and a comparable analysis has invalidated the seniority systems of large companies like Philip Morris, Crown Zellerbach and Bethlehem Steel. Anyone doing business with the government understands that built-in mechanisms which capitalize on past discrimination

instead of correcting it are out. There has been understandable impatience with the rate of change, an impatience reflected by the various competing proposals to strengthen the powers of the Equal Employment Opportunity Commission. But at least the relief which should be accelerated is comprehensive rather than perfunctory, and can really improve job opportunities.

The national experience with respect to fair housing has not been different. The Fair Housing Act itself was passed during the emotional aftermath of the assassination of Dr. Martin Luther King, and there are those who believe that, had it not been for the national feeling of guilt that followed that tragedy, this legislation would not have been enacted at all. We have seen in the last chapter how it was the Justice Department's response to the hard core, deliberate discrimination of a land sales company that set the pattern for wide-ranging affirmative relief in cases involving private developers, and how that pattern was followed both by the courts in fashioning relief in litigated cases and by HUD in setting civil rights standards for federally assisted housing.

These were not isolated examples. President Nixon is, in general, an advocate of local responsibility and had expressed himself forcefully against what he called “the forced integration of the suburbs.” After it was painstakingly proved by civil rights lawyers from the Justice Department and the NAACP, however, that the true basis for the exclusion of federally assisted housing from a white area of Lackawanna, New York was racial discrimination, and after the Supreme Court had let that decision stand, the President made the prevention of racially discriminatory zoning a significant element of his June, 1971 statement of federal housing policy. Judicial findings in suits by private plaintiffs that federal officials had failed to assure nondiscrimination by recipients of federal financial assistance, and had sometimes even participated, at least passively, in local officials' discriminatory conduct, have likewise had their effect. Federal guidelines for the selection of sites for low cost housing, and for encouraging communities to accept it, have subsequently been remarkably progressive for an administration with an image as conservative as President Nixon's.

Progress is being made in allowing non-white people to live in formerly white areas, both by opening access to existing dwellings and by the construction of housing in which they can afford to live. By and large, however, housing integration is a one-way street. Government action can enable some blacks, Chicanos, Puerto Ricans, Asian-Americans and American Indians to move into previously all-white neighborhoods, but it is virtually impossible, as a practical matter, to desegregate many non-white areas, so that one-race residential

neighborhoods are likely to be with us for many years to come. An enforcement program which enables a fortunate few to leave the ghetto, but which pays no heed to those who are left behind, would not serve the nation well. Accordingly, the effective presentation of the cases, now being brought in growing numbers, to require both governmental and private defendants to give inner city-dwellers equal value for their money in housing and associated services is of paramount importance.

The disparities alleged in current cases run the whole gamut. One suit alleges the provision of inferior sewer facilities, street lighting and other municipal services in black parts of town. Another charges that defendants' lending practices are specially geared to exploit helpless ghetto-dwelling borrowers. A Justice Department action in Alabama charges a real estate company with collecting a "race tax" from black home purchasers, with the builder paying closing costs on new homes in white communities but not in black. Few such cases have come to trial as this is being written, and none has reached the Supreme Court. If the plaintiffs prove the injustices they have alleged – and the contrast between conditions in black and white parts of most cities suggest that many such claims may have merit – the legal process can become an important engine of change in still another crucial area. It is predictable that the courts will develop far more effective remedies and legal doctrines if the plaintiffs build and present strong evidence in these cases than if they don't, and legislative and administrative bodies will follow suit.

The problem of housing discrimination is closely interwoven with school desegregation. In the 1970s, the principal focus of the school issue is in metropolitan areas, where residential segregation makes real integration impossible without considerable transportation of students, usually by bus. Busing is not an easy problem, no matter how it is presented. Many persons, whatever their race, may be sympathetic with civil rights and equal opportunity, but they still balk at the transportation of their children to schools in other parts of town in the interest of an abstraction like racial balance. Few members of Congress send their own children to the public schools of the District of Columbia, and the press occasionally reports with some delight that such prominent black citizens as Walter Fauntroy, the District's non-voting delegate in Congress, have children in private schools. Doubts about busing as a remedy for urban school segregation are not held exclusively by bigots, and a reasonable man's opposition to this device will not be effectively countered by pronouncements that such a remedy is necessary or the schools will remain racially imbalanced. In the era of "Black is Beautiful", not a few Negroes will find such an argument condescending and even demeaning.

Moreover, not every fair-minded white person necessarily believe, that lack of integration in fact is equivalent to a denial of equal opportunity.

The Supreme Court has, as of the time of writing, ruled on the constitutional obligation to bus pupils only in a group of cases involving southern cities. The grounds on which the Court approved such busing are revealing. In the leading case, Swann v. Board of Education of Charlotte, N.C., the Supreme Court, in an opinion by Chief Justice Burger, held that transportation of students to promote integration was one of several appropriate remedies, not because racial imbalance as such was unlawful, but because racial separation in Charlotte was the result of a dual system of schools which state authorities had deliberately created, and which they therefore had an affirmative obligation to dismantle. Where a system has racially discriminatory origins, it is most unlikely to work out fairly in practice. If busing is necessary to correct that condition, so be it.

Senator John Stennis of Mississippi and Senator Abraham Ribicoff of Connecticut, whose views on the desirability of desegregation as a matter of social policy are poles apart, have both forcefully advocated in recent years that the same degree of desegregation should be required of school districts in the north and in the south. They have an obvious point, particularly now that a greater percentage of black pupils south of the Mason-Dixon Line are enrolled in predominantly white schools than is the case in the north. The reason for the difference in judicial treatment of the north and the south, however, is that no northern case has yet reached the Supreme Court in which it was proved that what masquerades as de facto segregation was really deliberately imposed. There has been no scarcity of such evidence in recent cases before the lower courts, however, and experienced civil rights lawyers will have little difficulty in demonstrating in many northern cities that predominantly black schools have been short-changed in terms of per pupil expenditures and quality of education. If a compelling case is ever made for busing as a remedy outside the south, it will consist of proof that, as long as schools remain disproportionately black, they are likely to continue to be denied their fair share of the pie. If that point is established, the fact of some additional transportation of pupils will not be controlling, north or south. Children have been bused so extensively to promote segregation that school boards which have ordered that this be done are in no position to claim that the transportation of students is intolerable when used to create a unitary system.

Obviously, all other things being equal, it is better for a child to go to the nearest school. In his opinion in the Charlotte case, Chief Justice Burger made it clear that children would not be ordered bused to a degree which would imperil

health or safety. No perfect racial balance is required. With the law as flexible as that, plaintiffs will obtain extensive integration in fact, whether by busing or otherwise, only if they put on a strong showing that justice requires it because existing conditions are unfair, and because their proposal will help. In my opinion, there is no other way.

The conclusion to be drawn from the experiences of the past few years with respect to jobs, housing and schools is that establishing in detail the justice of one's cause remains an indispensable element of progress in civil rights in the context of the urban crisis of the 1970s. This is not to gainsay the effectiveness of the constructive uses of black power or of its brown and red and Asian counterparts. The more non-white citizens organize to secure the necessary political and economic muscle to control their destinies, primarily by effective use of the ballot and the buck, the greater will be their impact on decision-making. But the rhetoric of black liberation will accomplish little unless it comes to terms with the basic reality that the decisions that count in the United States are made on a pragmatic basis by persons who are not civil rights zealots. The political base established by energetic black politicians, particularly since the Voting Rights Act, is one of the realities of national life in the 1970s, but it is ineffective to bring about policies which the nation as a whole opposes. Persuasion therefore remains the key. To a lawyer who claims no expertise in the Machiavellian political arts, it seems as simple as that.

A contention of which one hears much is that rioting and violence are the only techniques that work. It is said that changes designed to better the lives of the citizens of Watts came after, not before, much of the place was put to the torch by some of its inhabitants. That thesis is not altogether inconsistent with what has been said in this book. Just as the evidence in our voting rights cases dramatized the plight of blacks in rural Mississippi and led to its alleviation, so the urban conflagrations establish, at least, that the level of black dissatisfaction in urban ghettoes is high and may bring about a reform or two. A white lawyer in Mississippi – he later became a judge – told me after Watts that this just represented the way “niggers” behave when left to their own devices, and perhaps he believed it. I think that most reasonably objective people would agree, however, that his prejudiced and demeaning comment did not provide a plausible explanation of the urban riots. If people in a community feel so excluded from the good things in life that thousands of them are prepared to participate in a destructive rampage, it is a reasonable assumption that they have something to be very dissatisfied about. Their ancestors were brought here as slaves, and life in the segregated ghetto is a vivid and sometimes unbearable stepchild of slavery.

But even apart from the moral indefensibility of wanton destruction and looting, from which the innocent suffer as much as the guilty, or more, violence is surely no substitute for more conventional methods as an instrument of social change. From a purely pragmatic standpoint, riots accelerate white exodus from the cities and deprive the blacks who remain of the tax base needed for improvement of their lot. To a considerable degree, a pro-violence ideology tends to justify crime by blacks as some kind of legitimate protest against oppression, so that the claim is made that armed robbers behind bars are political prisoners. But most crimes by blacks are committed against black victims, and most people killed or made homeless during the course of the urban riots have been black. Finally, a policy of securing concessions by threats of violence –"give us what we want or we'll burn the town down" – seems to me likely to result in a repressive response rather than a constructive one. The "establishment" in this country is powerful enough not to have to allow itself to be pushed around. Riots and acts of violence may sometimes net some short-term gains, but few black leaders see them as an effective instrument for securing social justice, and they are right.

But if these outpourings of urban frustration and rage are no substitute for progress in civil rights, they do show that the legal advances of the sixties have not made enough of a difference in the lives of urban blacks. Greater progress is needed at a faster rate. It is trite but true to say that laws and court decisions are of little use to their intended beneficiaries unless they are implemented. They must be made to filter through from the law books to the daily lives of ordinary citizens victimized by racial discrimination, or the whole thing is a charade.

This brings us back to the problem of resources with which this book began. In spite of the striking contrast between what America spends for civil rights enforcement and for a single warplane, there has been some progress in this area in recent years. Both the Johnson and Nixon Administrations have pressed Congress for more money (translatable into more lawyers, lawsuits, precedents and righted wrongs) and the Civil Rights Division now has more than 150 attorneys, compared with one fifth of that number ten years ago. The Housing Section has almost doubled in size in the first two years following its formation in October 1969. Two dozen or so lawyers still cannot deal with every pattern or practice of housing discrimination in fifty states, but they can do a good deal more than one dozen could.

In the Justice Department, it used to be traditional for the lawyers in the Civil Rights Division to handle virtually all of the enforcement of the civil rights

laws, with the United States Attorneys' offices in the various judicial districts participating in a major way in only a few of the cases. While the specialized character of civil rights suits, and their initial concentration in the deep South during the early 1960s, may perhaps have made this the most practicable solution in earlier times, that is no longer true. Consequently, under both Attorney General Ramsey Clark and his successor, John Mitchell, the Department of Justice has attempted to expand the role of United States Attorneys in civil rights enforcement, and some offices have provided substantial assistance. Predictably, within the next few years, United States Attorneys throughout the country will be routinely handling at least some civil rights cases as a major part of their everyday responsibilities. I certainly hope so.

It is not only the Justice Department that can allocate a greater portion of its resources into civil rights enforcement. Numerous other federal agencies have civil rights responsibilities, and the United States Commission on Civil Rights, to which Congress has assigned the responsibility of appraising their performance, has consistently found it deficient. Title VI of the Civil Rights Act of 1964, for example, prohibits discrimination by recipients of federal financial assistance, and the federal dollar finds its way into almost every nook and cranny of American life. If comprehensive and imaginative enforcement of Title VI is given a high level of priority by every federal agency, the impact must be substantial. The Civil Rights Division, seeking to carry out the Justice Department's responsibilities in this area more effectively, recently created a new section to coordinate Title VI enforcement by the various federal agencies. The Civil Rights Commission is watching our performance closely. There is room for improvement and improvement there must and will be.

If the budgetary contrast between F-111's and the Civil Rights Division is stark, what is to be said about state and local agencies with civil rights responsibilities? Their budgets are generally tiny. Many state agencies do not have a single lawyer on their staff. Those that do generally pay so little that it is almost impossible to secure qualified, experienced personnel. Many agencies lack the power to do anything very effective if they do uncover discrimination, and few have the authority to take on broad patterns of discrimination, as distinguished from securing relief for individual complainants. Moreover – and this is a personal opinion, but based on firsthand experience – there are simply too many such agencies staffed by old party hacks of limited competence and bureaucratic tendencies. There is not a single major urban area in the United States in which a couple of resourceful civil rights lawyers employed by a state or local civil rights agency and armed with a modest investigative staff and a reasonable state law or

local ordinance, could not have a tremendous impact on housing and employment patterns. So little could accomplish so much!

Finally, there is the private sector. All of the civil rights laws allow not only the government but also the individual victims of discrimination to sue, to complain to administrative agencies, or both, and Congress in fact obviously contemplated that most suits would be brought by private plaintiffs. In the old days, when the big issue was voting in the deep South, the condition of the disfranchised Negro was such that this was, for all practical purposes, only a theoretical remedy. This is no longer so. Most of the civil rights laws provide that the court may appoint a lawyer for a plaintiff who cannot afford one. Under controlling Supreme Court decisions, successful plaintiffs in many discrimination cases are entitled to recover reasonable attorney's fees almost as a matter of course. Several of the statutes provide for damages as well as for injunctions, and in some cases the court is authorized not only to compensate the plaintiff but also to order the payment of punitive damages – a kind of fine designed to deter the defendant from doing it again. A growing number of such suits are being brought, especially in housing, but neither the volume of court cases nor the number of complaints to administrative agencies is commensurate with the number of violations. In the pattern or practice suits brought by the Housing Section, only a very small fraction of the individual victims of discrimination had taken any action against the landlords and others who had denied them housing, and many did not know that they had the right to do so. The federal government is attempting to educate the public about people's rights and responsibilities, and this is a major priority in the operation of the Housing Section, but there are still so few of us. The press and other media can be extremely helpful in this respect. I know from personal experience that articles about the Justice Department's activities often result in people providing us with important information about incidents of housing discrimination which we have been able to use to carry out our responsibilities. Perhaps this book will lead to the same kind of thing.

Momentum is very important. President Nixon was elected with comparatively little black support, and his "middle of the road" rhetoric is different from President Kennedy's denunciation of segregation as morally wrong and President Johnson's emotional "We Shall Overcome." Consequently, the present administration's civil rights image is, in my opinion, a good deal more conservative than the facts warrant. With the possible exception of school desegregation, in which relatively conservative contentions put forward by the Administration have been rejected by the Supreme Court (as in the 1969 Alexander case relating to school desegregation in Mississippi), I believe that the positions taken by our

Division on most issues under Attorney General John Mitchell have not been significantly different from what we would have done under his Democratic predecessors, and we now have 50% more lawyers to carry out our responsibilities. Even with respect to schools, Mr. Nixon has presided over more actual desegregation than any other President, though the dispositive law was established before he came into office, so that his options have been limited.

One problem is that Attorney General Mitchell, whose background is in municipal bonds rather than chitterlings, has less rapport with poor blacks than, say, Robert F. Kennedy had. In 1969, Mr. Mitchell addressed a group of southern blacks in the Great Hall of the Justice Department, and when those whom I knew personally later came to my office, they all thought that the Attorney General had deliberately rebuffed them. I was present at his talk, and I know that his intention was altogether different. But there was a serious communication gap.

Partly because of the administration's image, and partly because of the emergence of the peace, ecology and consumer protection movements as outlets for idealist urges, the enforcement of civil rights no longer has quite the glamor that it had before. But it has not become less important. With the civil rights laws on the books, and with organizations like the Civil Rights Division an established force in the setting of national policy, progress towards equality of opportunity is dependent more on the vigor and enthusiasm with which its adherents pitch in than on the party affiliation of the President or Attorney General.

There are many things which people to whom progress in civil rights is important can do to promote their ideals. In many cities there are responsible private organizations which assist non-white persons to obtain jobs or housing. When they encounter possible discrimination, they investigate the allegations and, if the complaint has merit, they negotiate or bring suit on behalf of the victim, or report the facts to the appropriate federal, state or local agencies. Many of these private organizations need more members, especially non-white members – not only blacks but also Chicanos, Puerto Ricans, Asian Americans and American Indians. Additional organizations can be formed. If they act vigorously on behalf of home seekers and job seekers, and fairly with landlords and employers, they can help a great many victims of discrimination and, at the same time, keep government agencies “honest.” It is often easier and less embarrassing for a bureaucrat to do what he is supposed to do than to try to explain why he didn't.

For lawyers and those who would like to become lawyers, the opportunities are unlimited. This is an era of Neighborhood Legal Services, of VISTA, of public

interest law firms, of Legal Aid. Moreover, interested faculty members and students at every law school in America could do much, directly and by cooperation with government agencies and civil rights lawyers, to assure that violations of the civil rights laws in their communities are remedied promptly and effectively. There are lots of law schools in this country, and this could make a tremendous difference.

A walk through any inner city in the United States will quickly reveal the gap that still remains in this country between the constitutional promise of equal opportunity and the facts of daily existence. Nevertheless, one can be too pessimistic as well as over-optimistic. Non-white citizens are now doing things in large numbers in places where this was almost unimaginable only a few years ago. Many have better jobs and housing, and their children attend better schools. Change can come and has come. What remains is to make that proposition universal. A resourceful young lawyer who makes civil rights his specialty can help to give shape and direction to the Fair Housing Act, which is still in its infancy in an America which remains, today, residentially segregated. He – or for that matter she – can contribute to the expansion of equal employment opportunities, an area in which major pressures to end discrimination based on sex are still only beginning, and where the consequences of racial discrimination, past and present, continue to be a major factor. Civil rights lawyers are needed to assure that the law is fairly applied to city dweller and police officer, prisoner and guard, southern black and rural sheriff. The day must come when the city child whose skin is black or brown or red or Asian has educational opportunities equal in fact to those of his white suburban counterpart, and many years will pass before the lawyer's role in bringing this about will have been completed. For the foreseeable future, any talented civil rights practitioner, whether private or governmental, will have more than enough to do.

There are many ways in which a lawyer can do rewarding work. For those who respond to the challenge of combat in the courtroom, any kind of trial work is exciting, especially if you win. But I doubt if any practitioner, no matter what his field, can experience satisfaction greater than seeing rural Mississippi blacks troop proudly to the polls, or enabling Negro electricians work to at their trade in a Northern city in which that right was long denied them, or making it possible for children of all races to play together on the playground of what was once a segregated school, or for a black or Latino family to move into an attractive home in what used to be an all-white suburb. Moreover, in the years that I have practiced civil rights law, I have not encountered a single colleague with any ability who did not think it was rewarding, as well as fun.

There must be other ways for a young lawyer to make a living. But not for me.*

*Author's 2012 note: I remained with the Civil Rights Division for approximately eight years after this final chapter was written. On December 20, 1979, I began my career as a judge.