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DAN SMOOT

The Harlem Vote

In the late summer of 1956, Brigadier General Bonner Fellers — one of the most articulate and best informed men in America — remarked to me:

"The democratic and republican national conventions this year were not national conventions at all: they were gatherings of politicians jockeying for the vote in Harlem."

The truth of that remark becomes more apparent each day.

For years, Republicans condemned Franklin D. Roosevelt's new dealism — accurately labeling it the front and cover for a communist-socialist revolution in America. Actually, however, the Republicans, by and large, were not opposed to new dealism. The only thing they disliked about Roosevelt was that he was a Democrat instead of a Republican — just as liberal Democrats have nothing against Eisenhower except that Eisenhower is a Republican instead of a Democrat.

It is now apparent that Republicans — during all the years when they were acquiring the reputation of being anti-socialist, American constitutionalists — were not really trying to check the onward rush of the socialist revolution in America: they were merely trying to learn and perfect the techniques which accounted for Roosevelt's political success.

One Roosevelt technique — which modern Republicans are trying to steal and which liberal Democrats are hysterically clinging to as their very own — is that of creating and then capturing the negro vote.

Creating a negro vote was simple.

Since the middle 1920's, the communists have worked to stir up hatred between negroes and whites in America. One theme runs through all communist agitation and activity directed toward this end. The theme is presented with various disguises and sugar-coatings, but it is always, at bottom, the same: namely, that the south is a decaying part of the United States, under the control of degenerate whites whose chief pastime is to insult, oppress, beat,

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terrorize, and murder negroes. The negroes, on the other hand, are a noble race of men who yearn for nothing but peace and equality of opportunity, and brotherly love for all mankind.

In the middle 1930's, Roosevelt's new deal Democrats in the north and west adopted this communist propaganda theme as their own. With the help of preachers, and teachers, and professors, and writers, and Mrs. Roosevelt (and miscellaneous other uplifting reformers who hadn't the slightest notion what they were talking about) the new dealers and communists managed to convince not only negroes, but millions of whites as well, that this communist picture of the south was an accurate portrayal of conditions.

If some conscientious northerner, who went south and saw for himself, reported the truth that negroes and whites were doing rather well down there, that northerner would be tarred-and-feathered, figuratively if not literally, in his own liberal home town.

Consider a recent case:

In February, 1957, Mr. Milton Rosen, Commissioner of Public Utilities in St. Paul, Minnesota, made a trip to Alabama. Nowhere in the south did Mr. Rosen find dead negroes hanging from tree limbs. But he did see quite a few live ones — none of whom appeared to be cowed victims of lashes and broadax blows.

Mr. Rosen thereupon concluded that people in the north are not thoroughly well informed about the condition of negroes in Dixie; and Mr. Rosen permitted the press to quote him to that effect.

Back home in St. Paul, Mr. Rosen's remarks created quite a stir. Officers of the Dining Car Employees Union, Local 516, publicly demanded Mr. Rosen's resignation.

Mr. Ernest C. Cooper, acting executive secretary of the St. Paul Urban League, called Mr. Rosen's remarks —

"A distinct slap in the face to those individuals in the north and south, who are valiantly striving for the realization of the principle of our democratic society, equality of opportunity for all."

Poor Mr. Rosen — never having intended to slap anybody — made another statement to the press.

He said:

"Many thoughtful white people in the south *are* trying to help the negroes. Progress *is* being made.

"What I said *is* true: we do *not* at all times get the complete picture of conditions in the south."

This St. Paul story is an illustrative aside.

The point is that communist propaganda about race-conditions in the south created for Mr. Roosevelt a "negro vote" — which consisted not only of negroes, but of other racial minority groups (plus a large and influential group of professional bleeding hearts) who had been convinced that the condition of negroes in the south was a hideous sore on the fair body of our nation.

Mr. Roosevelt captured this negro vote by promising federal "civil rights" legislation which would keep blood-thirsty southern whites from kicking negroes around.

The negro vote is important. Many political analysts believe that the negro vote (broadly defined, as I have defined the phrase above) can be the determining factor in presidential elections.

In New York, for example, the vote-getting strength of Republicans and Democrats is about equal. Hence, the party which can capture the negro vote in New York City has an excellent chance to get all of the electoral votes for the entire state — the biggest bloc of electoral votes in the nation.

Capturing the negro vote by promising

federal civil rights legislation was a splendid political technique for Roosevelt and Truman — primarily because they were Democrats. Roosevelt and Truman, being Democrats, could get northern votes by insulting the south — without losing southern votes, because the south was solidly democratic.

I don't believe that one northerner or westerner out of 10,000 really understands this idiotic situation: an entire generation of southerners voting almost solidly for politicians who insulted and threatened the south.

But it isn't hard to understand.

Remember that after every major war the United States ever fought and won, we immediately embraced our fallen foe, pouring out our wealth and friendship to help him get back on his feet — in every war, except one: the Civil War.

After the Civil War, the Republicans in control of Congress offered no aid or friendship to a fallen foe. Republicans in Congress imposed upon their fellow-Americans in the south as harsh a vengeance as history records in modern times. Such a thing sinks deep into the subconscious, and lasts for generations. Time can heal such wounds; and the Reconstruction Era wounds would all have been healed by now if the miscellaneous agitators (communist, political, and social) had permitted; but they didn't; and there are many rank-and-file voters in the south who still instinctively think of the word *Republican* as meaning something evil.

Add to this hangover the considerations of "practical" politics and you have the reasons for the solid south.

With northern politicians threatening legislation that frightened the south, southern democrat politicians could present powerful arguments for their own reelection to Congress; the south had to send to Congress democrats with seniority who, because of their seniority, could get important committee assignments and block civil rights legislation.

These strange bedfellows — the white vote in the solid south and the negro vote in populous northern cities — gave the Democrats a powerful advantage in presidential elections.

The Republicans were quite willing to pander to the negro vote, but what could they do about the south?

The Republicans never did find the answer: the answer just emerged.

The Alger Hiss case in 1948 and Joe McCarthy's crusade beginning two years later, revealed to millions of Americans an awful truth: for fifteen years, under democratic administrations, agents of the Soviet Union had had easy access to practically all federal agencies and had, indeed, been in virtual control of some of the most important policy-making offices in the executive branch of government.

The Republicans made political capital of this situation.

There was a time (from about 1950 to 1953 or 1954) when *Republican* was a respected word among American constitutionalists all over the United States — even in the solid south. *Republican* was a political label for someone who respected the great principles of government embedded in the Constitution and the Declaration of Independence. *Republican* meant someone who was opposed to communism-socialism-new dealism.

It was during this period that the Republicans evolved the political strategy which outdealed the new deal and the fair deal. Republicans stole the whole new-fair deal program, in full, and made it even worse than it was under the democrats, but all the while they advertised themselves as conservative constitutionalists, damning the extravagance and

waste and pro-socialism-communism of the Democrats.

This Republican strategy worked in two presidential elections, making cracks in the solid south; but it may not, God willing, work again.

I believe the voters of America are learning to recognize a new-deal socialist regardless of what he calls himself.

I think the south's silly brass-collar loyalty to the Democratic Party is just about gone; and I do not think the Republicans can win another national election by enlarging the internationalist-socialist programs which they criticize the Democrats for starting.

Why such optimism?

I think the current struggle in Congress over civil rights legislation will, ultimately, awaken many people.

Consider, at random, a few interesting incidents.

On February 26, 1957, Senator William F. Knowland (Republican leader in the Senate) and Congressman Joseph W. Martin, Jr. (Republican leader in the House) were interviewed by the press, following their regular weekly meeting with President Eisenhower. Both expressed hope that Congress would enact President Eisenhower's civil rights program.

Now, the President's civil rights legislation was actually written and introduced into the House by a left-wing new deal Democrat — Congressman Emanuel Celler of New York. The President's civil rights program is something that the extreme left-wing in America — the communist party, all branches and splinters of the socialist party, the Americans for Democratic Action, Walter Reuther, Mrs. Eleanor Roosevelt, former Senator Herbert Lehman, Senator Hubert Humphrey — have been supporting for years.

Yet here are Senator Knowland and Congressman Martin — both known as ultra-conservatives—supporting the same program, and being careful to call it the program of *their* president.

On February 20, 1957, the Senate Constitutional Rights Subcommittee was holding hearings on civil rights legislation. The committee's schedule was interrupted to accommodate a surprise witness: Senator Everett M. Dirksen (Republican, Illinois). Senator Dirksen urged that the proposed civil rights legislation be strengthened to give the Attorney General even more power than the Democrats are planning to give him.

Senator Dirksen was for years one of the most eloquent leaders of the ultra-conservative Taft Republicans.

The President's Civil Rights Bill is being sponsored in the House by two New Yorkers: Congressman Emanuel Celler (Democrat) and Congressman Kenneth B. Keating (Republican).

These two Congressmen are in complete agreement on the terms and provisions of the bill. The only quarrel they have had this year occurred on March 5, 1957, when Congressman Celler postponed for one week a scheduled Judiciary-Committee vote on the Civil Rights Bill. Celler (the new deal democrat) ordered the postponement as a courtesy to witnesses who wanted to testify against the civil rights legislation and had not yet had an opportunity. Keating (the Eisenhower republican) said that opponents of the bill had nothing more to say that was worth hearing.

On February 17, 1957, the Democratic Advisory Council of the National Democratic Party, meeting in San Francisco, passed a formal resolution urging Democratic congressional leaders to take the lead in the new Congress to enact civil rights legislation. The Democratic Advisory Council did not criticize the Republicans' civil rights program; it criti-

cized the Republicans for stealing their program from the Democrats.

In a *whereas* reeking with partisan bitterness, the Democratic Advisory Council's resolution said:

"Republicans are attempting to create the false impression that they originated civil rights proposals, which they have belatedly copied from Democratic measures."

What does all this mean?

It means that the embittered struggle between modern Republicans and new deal Democrats over civil rights legislation is merely a continuation of that "jockeying for the vote in Harlem" which General Bonner Fellers spoke of.

Modern Republicans and new deal Democrats agree on the civil rights legislation they want. They are fighting only to see who can get "credit" with the organized minorities — credit for the most dangerous, sinister, and scurrilously motivated legislation ever proposed by a President and supported by leaders of both major parties.

Throughout this article, I have used *Democrat* and *Republican* as if I include every politician in both those parties. I do not. In both parties there are dedicated patriots who are Americans first and last, and party members only incidentally.

These men are now carrying on a determined fight against civil rights legislation.

And they are not fighting on emotional, or sectional, or racial grounds. They are fighting on constitutional grounds, trying to save what is left of the American constitutional republic — knowing that if the Eisenhower civil rights legislation is enacted, we will have taken another long leap toward a dictatorship in the United States.

Or, as Congressman Walter Rogers (Democrat, Texas) put it on March 12, 1957:

"If the administration's civil rights bill passes Congress, we will have a police state in this country."

* * * * *

Civil Rights Act of 1957

In 1956, the Eisenhower Civil Rights Bill was known as H. R. 627. Originally introduced in January, 1955, by Congressman Emanuel Celler (Democrat, New York), H. R. 627 was accepted by the Eisenhower administration and was jointly sponsored in the House by New York Republican, Kenneth B. Keating.

On July 23, 1956, the House passed the Celler-Eisenhower-Keating Civil Rights Bill by a vote of 279 to 126. In the Senate, Senator James O. Eastland (Democrat, Mississippi) managed to stop the thing in the Senate Judiciary Committee; and the Eisenhower Civil Rights Program died in 1956 with adjournment of Congress.

In the 1956 election, Eisenhower captured most of the negro vote in the United States. Of the 10 major negro newspapers in the United States, for example, nine were for Eisenhower; and the other one was neutral.

This political success made all modern Republicans and new deal Democrats hot to get on the bandwagon.

In the opening days of the 85th Congress in 1957, hundreds of civil rights bills were introduced in both houses.

In the House of Representatives, all of these bills were referred to the Judiciary Committee, whose chairman is Emanuel Celler.

The bill which Celler chose to steer through committee was known as H. R. 2145 — which bore Democrat Celler's name as author, but which was actually written in large part by Republican Keating.

On February 27, 1957, a subcommittee of Celler's House Judiciary Committee approved a slightly amended version of H. R. 2145, by a vote of 6-0.

On March 18, 1957, the full Judiciary Committee approved the bill with amendments.

On March 19, 1957, Celler reintroduced the bill as amended. The new Celler bill is known as H. R. 6127.

On that same day (March 19, 1957) the Senate Subcommittee on Constitutional Rights (whose chairman is Senator Thomas C. Hennings, Missouri Democrat) approved the Senate version of H. R. 6127.

Thus, H. R. 6127 is the civil rights bill which Congress and the nation are concerned with in 1957.

Here are the essential provisions of H. R. 6127:

Part I: Establishment of the Commission on Civil Rights

There is created in the executive branch of the Government a Commission on Civil Rights, composed of six members appointed by the President. Not more than three of the members shall at any one time be of the same political party.

Four members of the Commission shall constitute a quorum.

The Commission (or any two-man subcommittee of the Commission) may hold hearings at any time or place which they deem advisable.

The Commission may subpoena witnesses to appear and produce records at any hearing; but the Commission may not subpoena a witness to attend or produce records at a hearing held outside the U. S. judicial circuit wherein the witness is found or resides or transacts business.

Witnesses at hearings of the Commission may be accompanied by their own counsel.

The Commission may permit witnesses to submit sworn statements in writing for inclusion in the record — if the Commission considers the statements pertinent. The Commission will be the sole judge of pertinency.

If a witness refuses to obey the terms of a subpoena, the U. S. Attorney General can request a U. S. District Court to order the witness to obey. Then, any refusal to obey will be punishable as contempt of court (that is, on the sole authority of the federal judge, without a jury trial).

Witnesses subpoenaed to attend any session of the Commission will be paid a fee of $4.00 a day, plus $12.00 a day for living expenses, and 8c a mile for travel.

The Commissioners themselves will receive $50.00 a day compensation, plus travel and living expense.

The Commission may hire a full-time staff director and any other personnel it wants — paying them up to $50.00 a day each.

The Commission may also accept the services of voluntary and uncompensated personnel, paying such personnel travel and living expenses.

This voluntary personnel will enjoy the same special protections of, and exemptions from, the United States Criminal Code that all regular federal employees enjoy.

The Commission may set up whatever advisory committees it wants, wherever it wants them.

The duties of the Commission shall be:

(1) to investigate allegations that United States citizens are being deprived of their right to vote, by reason of their color, race, religion, or national origin;

(2) to collect information concerning state or local laws (or any other legal developments) which constitute a denial of equal protection of the laws under the Constitution.

Part II: To Provide for An Additional Assistant Attorney General

There shall be in the Department of Justice one additional Assistant Attorney General. His duties will be to handle civil rights matters, exclusively.

Parts III and IV: To Strengthen the Civil Rights Statutes, and To Provide Means of Further Securing and Protecting the Right to Vote

Whenever any persons have engaged, or there are reasonable grounds to believe that any persons are about to engage, in any acts or practices forbidden by civil rights statutes, the Attorney General may institute in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary court injunction, restraining order, or other order. Then, if anyone disobeys the court order, he can be punished for contempt of court — fined or jailed, without a jury trial.

When someone claims that his civil rights have been violated, the U. S. District Court shall have jurisdiction in the matter, regardless of whether the person has, or has not, tried to get justice in state courts.

This Act may be cited as the "Civil Rights Act of 1957."

* * * * *

The Police State

Arthur Krock, columnist for the *New York Times*, on March 1, 1957, reported that opposition to the Eisenhower civil rights bill this year is not "an emotional resistance to change in the sensitive area of southern negro-caucasian relations." The opposition is being led by constitutional lawyers (like Senator Sam J. Ervin, Jr., former member of the Supreme Court in North Carolina) who know that the civil rights legislation can destroy basic constitutional rights of all Americans.

Here are a few of the things which America's foremost authorities on the Constitution say *could* happen if the Civil Rights Act of 1957 is enacted into law:

The Constitution leaves to the states the power to determine qualifications for voters. Some states require that voters be able to read and write.

Let us assume that the Attorney General of the United States, a Republican, believes that all negroes in a southern state want to vote for Republican candidates in an important election. He knows that state has a literacy test for voters. He imagines that many negroes in the state cannot pass the literacy test, and he guesses that election officials of the state will therefore disqualify those negroes as voters.

Having reason to believe all of these things, the Attorney General of the United States can get a federal court order enjoining all election officials in that state from giving a literacy test. Any election official who tries to obey the provisions of state election laws can then be sent to jail, without a trial, for being in contempt of court.

Or, let us assume that the Attorney General of the United States is a Democrat. In a presidential election year, he calculates that California will go Republican. On the eve of the election, he could arrange to have every election official in California subpoenaed to testify at a civil rights hearing. He could require them to produce and surrender all of the state's official election records. He could, in fact, use a federal court order to impound all official records and documents of the State of California and make it thus impossible for an election to be held in California.

Let's say you live in Maine. You have a little business in which you employ ten people. Someone complains that you have "discriminated" against, or hurt the feelings of, some negro — or some Presbyterian, or some Catholic, or some Mohammedan, or some Jew, or some Irishman, or some Mexican — because of his "color, race, religion, or national origin."

The President's Civil Rights Commission can deputize ("accept the voluntary services of") some official of the National Association for the Advancement of Colored People to come into your office and examine all of your books, papers, and records. The NAACP official could impose such demands on you as would make it impossible for you to carry on your business.

WHO IS DAN SMOOT?

Dan Smoot was born in Missouri. Reared in Texas, he attended SMU in Dallas, taking BA and MA degrees from that university in 1938 and 1940.

In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for the degree of Doctor of Philosophy in the field of American Civilization.

In 1942, he took a leave of absence from Harvard in order to join the FBI. At the close of the war, he stayed in the FBI, rather than return to Harvard.

He served as an FBI Agent in all parts of the nation, handling all kinds of assignments. But for three and a half years, he worked exclusively on communist investigations in the industrial midwest. For two years following that, he was on FBI headquarters staff in Washington, as an Administrative Assistant to J. Edgar Hoover.

After nine and a half years in the FBI, Smoot resigned to help start the Facts Forum movement in Dallas. As the radio and television commentator for Facts Forum, Smoot, for almost four years, spoke to a national audience giving both sides of great controversial issues.

In July, 1955, he resigned and started his own independent program, in order to give only one side — the side that uses fundamental American principles as a yardstick for measuring all important issues. Smoot now has no support from, or connections with, any other person or organization. His program is financed entirely from sales of his weekly publication, *The Dan Smoot Report*.

If you believe that Dan Smoot is providing effective tools for those who want to think and talk and write on the side of freedom, you can help immensely by subscribing, and encouraging others to subscribe, to *The Dan Smoot Report*.

You (perhaps knowing that 41% of the officers of the NAACP are either communists or members of communist fronts) may not want to let this NAACP official violate your constitutional right to be secure in your papers and effects — and put you out of business.

If you don't comply, however, the NAACP official can cause a court order to be issued. Then, if you don't obey the NAACP official, you can be put in jail for contempt of court.

Or, perhaps the NAACP official doesn't want to bother to come to your office. He'd rather subpoena you to bring all of your records to him.

Suppose he is working for a subcommittee of the Civil Rights Commission which is holding hearings in Puerto Rico. You live in Maine. The Civil Rights Act of 1957 says you can't be subpoenaed to go outside the judicial circuit where you reside or do business.

But that's all right, because Puerto Rico and Maine are in the same Judicial Circuit. Hence, you have an option: (1) you can either go to jail without a jury trial (which the Constitution is supposed to guarantee you); or, (2) you can pack up a truck load of your papers and effects and haul them from Maine to Puerto Rico to be examined by an official of the National Association for the Advancement of Colored People.

The United States and *all* of its territorial possessions, you see, are divided into only 11 judicial circuits.

Suppose you are a California banker, accused of "discriminating" against some oriental, because you refused to grant him a loan.

California is in the Ninth Judicial Circuit — which also includes Guam, Alaska, Hawaii, Montana and a few other western states.

See the possibilities?

And these are only a few of the possibilities under the Civil Rights Act of 1957.

Was Congressman Walter Rogers of Pampa, Texas, exaggerating when he said the Eisenhower civil rights program would create a police state in America?

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DAN SMOOT

An American Tragedy

In 1928, the Workers Library Publishers, 35 East 125th Street, New York (official publishing company of the Communist Party, USA) published a 16-page booklet entitled *American Negro Problems* — written by John Pepper.

John Pepper (whose real name was Joseph Pogany, but who used numerous aliases, such as John Pepper, John Schwartz, John Swift, and so on) was the communist official specially designated by Moscow to direct the American communist party's program of racial agitation in the United States.

John Pepper's *American Negro Problems* was written primarily as a guide for communist agitation activity in the presidential election campaign of 1928.

As early as 1913, Lenin had urged American communists to use the "negro problem" as a means of creating the disorder and strife necessary for revolution in the United States. After Stalin seized power, he urged the same thing. In 1928, the Kremlin decided to take advantage of the national political elections in America to launch the communist racial agitation campaign.

In selecting the year 1928 as the time to begin their all-out campaign to tear the American union apart with racial agitation, the communists were motivated by three main considerations:

(1) It was expedient to launch such a program under the cover of a "political" campaign. Communists could cry "political persecution" when their activities ran afoul of law.

Americans — somewhat accustomed to exaggerations and inflammatory charges during national political campaigns, and sensitive about preserving their important tradition of freedom of speech to avoid the dangerous possibility that someone *might* be persecuted and silenced because of his legitimate political views — would be more inclined to tolerate license on the part of communists during a presidential campaign year than at any other time.

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(2) Passions and emotions are nearly always inflamed (and rational thought usually at low ebb) during national political campaigns. Hence, a presidential election year is an appropriate time to launch a foreign-directed campaign of subversive agitation.

(3) In 1928, the communists were spurred by a sense of urgency. They realized that they were rapidly losing the chance to capitalize on the most delicate and dangerous situation ever to burden a civilized and peaceful nation. If the communists waited another four or eight years, their golden opportunity might be gone forever.

From the communists' point-of-view, this third consideration was the most important of all, because the "negro problem" in America was, indeed, being solved with miraculous speed.

Consider the situation.

Negroes whom New England and British slave traders brought to the new world were not a civilized people captured and sold into bondage. They were uncivilized barbarians — many of them cannibalistic — with no civilization or cultural attainments of their own. The evil bondage to the white man — to which they were subjected in America — was, physically speaking, an actual improvement upon the life which they had made for themselves in Africa.

These were the people — illiterate, propertyless, with no racial traditions of freedom, of culture or of self-government — who, at the close of the civil war, after three centuries of slavery in the new world, were abruptly freed without any training or preparation to bear the burdens and privileges of freedom.

In one violent step, they who had never developed a civilization of their own, were declared equal heirs of a civilization which it had taken the white man thousands of years to develop.

In addition to this, the southern white people who had the main task of helping the negroes assimilate an ancient and alien culture were pauperized, demoralized, and embittered by war — a people whose own way of life had been shattered by military action.

Americans in the north were also hurt and embittered by four years of savage warfare.

Hurt and bitterness were the guiding motives of policy during the ten years that followed Lee's surrender at Appomatox.

The guns and cannon of northern occupation armies forced southern whites to accept provisional state governments run by illiterate negroes and villainous white carpetbaggers — governments which, under the cover of "law" despoiled southerners of their homes and other property, for the benefit of greedy manipulators behind the governments.

It is pointless to revive old arguments about which side was "right" and which "wrong."

It was northern slave-traders who brought the negroes here. It was southern plantation owners who bought and used them.

It was not that southerners were above engaging in the slave trade or that northerners were above owning and working slaves. The economics of the time assigned the north and south their respective roles.

Slavery was a national sin. The horrible conditions following the civil war were part of the wages of that sin.

Add to these postwar conditions, the undeniable fact that there are wide and essential native differences between the black and white races — differences which make relationships at close range delicate under the most ideal circumstances — and it is easy to see what a monumental problem the southern states had at the close of the civil war.

It was a problem that only the chemistry of time and tolerance and patience and Christian love could solve. Yet, the problem was being solved with miraculous speed until alien

agitators, aided and abetted by venal domestic politicians, entered the picture.

Every American — north and south, black and white — should be proud of the record of what happened between the end of the Reconstruction Era (about 1875) and 1928 —the beginning of the all-out communist campaign of racial agitation.

In those 53 years, the American negro made more progress than the black man had ever made anywhere else in the entire history of the human race.

Large numbers of negroes were still on plantations and were not living as "first-class citizens" in the same sense that their white employers were living.

But the same could be said (in any nation at any period of time) of large numbers of people — whatever their color or whatever section of the nation they may occupy.

It is simple truth that no individual (particularly in a free society) is a "first class" citizen unless he possesses the qualities of one — and behaves like one.

It is also truth that in the south during the 53 years between 1875 and 1928 American negroes made miraculous progress toward full integration into the white man's culture — not integration in the contemporary sense of losing their racial identity by full amalgamation with the white race, but integration in the sense that they began to develop a pride in their own race and, with the white man's help, began to build their own cultural and educational institutions, establish their own businesses, build their own homes, own their own land.

With marvelous speed, the American negroes — thanks to the understanding and sympathetic aid of southern whites — were becoming a proud and distinctive part of the total American population.

The communists were keenly aware that the "negro problem" was vanishing when they launched their program of racial agitation in 1928.

Examine these passages from John Pepper's communist booklet published in 1928:

"The two major capitalist parties, the Republican and Democratic, and their small brother, the Socialist Party, have an unwritten 'gentleman's agreement' on the Negro question. According to this sacred 'gentleman's agreement,' which no capitalist politician has dared to violate in the present election campaign, there is no Negro question in the United States, there are no problems of social and political equality, no questions of discrimination against the Negro masses. During the whole course of the election campaign there has been only one political party which has had the courage to violate this 'gentleman's agreement' to keep a deathly silence on the Negro question. The Workers (Communist) Party of America has come out in its election platform and in its whole election struggle as the fearless champion of the Negro masses.

"The southern states are stirred up by the political struggle of the communist speakers and organizers for the Negro masses. Communist anti-lynching leaflets are being distributed everywhere.

"The candidates of the Communist Party are everywhere putting up a courageous fight for the full social and political equality of the Negro race."

To anyone familiar with American politics, it goes without saying that if there had been any real "negro problem" in the United States in 1928, one or the other of the major parties would have seized upon it to gain political advantage.

This communist handbook is full of communist cliches about the "oppressed negro masses" in the United States, but the following passages from the book reveal that the communists knew what the actual situation was:

"The Negroes of the United States are the most advanced section of the Negro population of the world. . . .

"A sharp class differentiation has taken place in the Negro population in recent years. Formerly the Negro was in the main the cotton farmer in the south and the domestic help in the north. . . . (But now) in the big cities and industrial centres of the north there is concentrated to a growing degree a Negro working-class population. . . . At the same time there is a rapid development of a Negro petit-bourgeoisie, a Negro intelligentsia, and even a Negro bourgeoisie. The very fact of segregation of the Negro masses creates the basis for the development of a stratum of small merchants, lawyers, physicians, preachers, brokers, who try to attract the Negro workers and farmers as consumers. . . .

"It would be a major mistake to overlook the existence

of class differences among the Negroes, especially the crystallization of a Negro bourgeoisie. There were in 1924, 73 Negro banks, carrying an annual volume of business of over 100,000,000 dollars. There are 25 Negro insurance companies; 14 of these have assets totalling 6,000,000 dollars and during 1926 alone paid over 3,000,000 dollars in claims. This Negro bourgeoisie is closely tied up with the white bourgeoisie; is often the agent of white capitalists. Economically the Negro banks are often part of the Federal Reserve System of banking.

"Politically the Negro bourgeoisie is participating, to a growing degree, in the so-called 'commissions for interracial cooperation.' These committees exist in eight hundred counties of the south and are spreading all through the black belt."

The constructive negro leaders whom the communists in 1928 were referring to as the petit-bourgeoisie and the bourgeoisie were the same type of good ("first-class") negro citizens whom the NAACP today refers to as "Uncle Toms." They were negroes who, with pride in their own race, were becoming leaders of their own people — leading them not in hatred and strife, but toward full-scale participation in the free American economic system.

Note that the communists were particularly disturbed because the "Negro bourgeoisie" was participating with southern whites in voluntary commissions for inter-racial cooperation.

Negro progress in the United States was so fast and so solid — and harmonious relations between black and white races were being so effectively developed—that communists alone could not have done serious harm.

The "race problem" did not become a major American tragedy until the Democratic party, under the leadership of Roosevelt and Truman, adopted the communist program of racial agitation.

The problem did not become a major national disaster —transforming law-abiding citizens into hysterical mobs, converting peaceful communities into cauldrons of violence, and threatening to establish a military dictatorship in the southern states — until modern Republicans under the leadership of Eisenhower launched an all-out political struggle to win organized negro support away from the Democrats.

Both major parties, which were silent on the negro question in 1928, as shown in the communist quotation above, have now adopted the *total communist platform* for racial agitation which is designed to destroy constitutional government and shatter the American union.

If you don't believe it, read the 1928 communist platform, set out on page 5 of *American Negro Problems:*

"1. Abolition of the whole system of race discrimination. Full racial, political, and social equality for the Negro race.

"2. Abolition of all laws which result in segregation of Negroes. Abolition of all Jim Crow laws. The law shall forbid all discrimination against Negroes in selling or renting houses.

"3. Abolition of all laws which disfranchise the Negroes.

"4. Abolition of laws forbidding intermarriage of persons of different races.

"5. Abolition of all laws and public administration measures which prohibit, or in practice prevent, Negro children or youth from attending general public schools or universities.

"6. Full and equal admittance of Negroes to all railway station waiting rooms, restaurants, hotels, and theatres.

"7. Federal law against lynching and the protection of the Negro masses in their right of self-defense.

"8. Abolition of discriminatory practices in courts against Negroes. No discrimination in jury service.

"9. Abolition of the convict lease system and of the chain-gang.

"10. Abolition of all Jim Crow distinction in the army, navy, and civil service.

"11. Immediate removal of all restrictions in all trade unions against the membership of Negro workers.

"12. Equal opportunity for employment, wages, hours, and working conditions for Negro and white workers. Equal pay for equal work for Negro and white workers."

* * * * *

Terror

There is no longer much serious doubt about racial agitation in the United States being a communist program. All well informed people know that it is.

On March 7, 8 and 9, 1957, the Joint Legislative Committee of the Louisiana legislature held hearings in Baton Rouge, Louisiana. Testimony and evidence presented to that committee prove that Supreme Court decisions in

the "segregation" cases, the administration's forcing integration in the armed forces, the administration's using government contracts to force integration in private industry, and the activities of leaders of both political parties in agitating for force bills known as "civil rights legislation," are recklessly carrying out well-laid schemes of the communist international.

One specific important item of information publicized by the Louisiana committee was that ten top leaders of the National Association for the Advancement of Colored People have extensive communist front records. The ten are:

- Algernon D. Black, NAACP Board of Directors
- Hubert T. Delany, NAACP Board of Directors
- Earl B. Dickerson, NAACP Board of Directors
- Oscar Hammerstein II, Vice President of NAACP
- S. Ralph Harlow, NAACP Board of Directors
- William Lloyd Imes, Vice President of NAACP
- Benjamine E. Mays, NAACP Board of Directors
- Eleanor Roosevelt, NAACP Board of Directors
- Channing H. Tobias, Chairman of the Board, NAACP
- W. J. Walls, Vice President of NAACP.

None of this is being reported to prove a southern contention that integration of the races is "bad" or "undesirable." It is being reported to underscore an obvious truth: that whenever force is injected into a problem as delicate as race-relations, nothing but evil can result.

This would be so, even if the force were legal. When it is patently illegal, unconstitutional, and immoral — as the federal government's activities in this field have been — the probable end results are quite terrible to contemplate.

Every thinking person has known this from the beginning; yet, the foremost leaders of our land have blindly followed a communist plot to the point where our nation borders on revolutionary violence and civil war.

Why do you suppose that smiling, peaceful housewives standing on the lawn at Central High School in Little Rock, Arkansas, suddenly became hysterical at the news that eight negro children had entered the building?

These are Americans who know that the Supreme Court's school-segregation decision was based on the writings and philosophies of alien communists and socialists and not on American constitutional law. They know that the federal government has no shade of constitutional authority to tell the sovereign states how they must run their schools. These Little Rock citizens are, moreover, parents who have read the record of what has happened in such places as Washington, D. C., where integration in the schools was hastily enforced.

Believing that they are American citizens who have not only a right but a responsibility to protest illegal and tyrannical acts on the part of their own government, they assemble for that purpose. When they are abruptly confronted with the realization that they are helpless to direct the lives of their own children in their own way; when they see that the efforts of mere citizens are vain and fruitless against the naked power of a police state — they are scared.

Every thoughtful citizen in the south today is scared — as he anxiously anticipates the horrible effects of a police state coming into his own peaceful community, catching him and his children up in a maelstrom of violence and hate.

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DAN SMOOT

UNFAIR HOUSING

On December 30, 1960, President-elect John F. Kennedy announced the appointment of Dr. Robert Weaver as Administrator of the Housing and Home Finance Agency — which means that he will direct the federal government's multi-billion dollar housing programs.

Dr. Weaver, a negro, has been chairman of the National Association for the Advancement of Colored People, and also Vice Chairman of the Housing and Redevelopment Board of New York City.

The really significant fact about Dr. Weaver is not that he is a negro, but that he was chairman of the NAACP. This outfit, dominated for years by persons who have long records of association with communist causes, has done, and is doing, more harm in creating strife, fear, mutual distrust, and mutual hatred among racial groups in America than all of the so-called "hate-groups" which 'liberals,' in and out of the NAACP, are always talking about. The fact is that the NAACP is the major, organized "hate-group" in America today.

It poses as an organization of and for negroes, existing for the purpose of helping negroes advance. In fact, it is dominated by whites and mulattoes who have no real love for, or understanding of, American negroes.

Prior to the late 1920's and early 1930's (when the communist party and the NAACP began their parallel programs of racial-hatred agitation) American whites and negroes were solving their "racial problems" with miraculous speed. American negroes were developing pride in their own race, were helping to build their own cultural and educational institutions, and were establishing their own businesses. With marvelous speed, American negroes were becoming a proud and distinctive part of the total American population.

The pockets of undesirable conditions that did still exist were unfortunate but inevitable hangovers from the Civil War and the Reconstruction Era. They were being eliminated in the only way

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possible — gradually, by the chemistry of time and tolerance and patience and Christian love.

When the NAACP and the communist party attacked these isolated cases of racial abuse, they dishonestly portrayed them as typical of all negro-white relations in America. The NAACP and communist agitation was not intended to eliminate racial feelings and attitudes which were prolonging undesirable race-relations in isolated cases. The agitation was intended to inflame those feelings into hatred, and spread them to the total population.

The motivation of the communists is obvious: to create chaos in our society. The motivation of the NAACP, where different from that of the communists, is fascinating. The racial agitation of the NAACP—which is supposed to be an organization for the *advancement* of colored people —reflects a hatred and contempt of colored people.

Consider the awful developments in Little Rock, 1957.

The NAACP in the Little Rock affair displayed far more disregard for the needs and desires of colored people than was displayed by whites who tried to keep negroes out of the white high school. The colored people of Little Rock wanted a school for themselves as good as the one white folks had; and they already had that. The very colored parents who did send their children out of their own district in order to enroll them in the white high school and cause turmoil, were not motivated by any desire to provide a better education for their own children. They were either bribed, or high-pressured into using their own children as pawns which the NAACP could manipulate to serve its own ends of creating racial strife and hatred.

This practice of the NAACP—of using negroes as tools to stir up hatred which hurts negroes more than it hurts anyone else—can be clearly seen in controversies over public housing.

We will ignore for a moment the real fact—that public housing is unconstitutional and should not therefore exist for any reason whatever. All officials, members, and supporters of the NAACP call themselves 'liberals'—which means that they are socialists who believe in public housing.

This being understood, it would make a great deal of sense if the NAACP (which is supposed to be interested in advancement for colored people) were constantly pushing for more and better housing for more negroes. But the NAACP does just the opposite. The NAACP does not push for public housing for negroes. On the contrary, the NAACP makes the most determined opposition to public housing for negroes!

In the past few years, the NAACP has strongly opposed every proposal for a public housing project for negroes. The NAACP even opposes the building of public housing projects in colored neighborhoods. Indeed, there have been many cases in New York, Pennsylvania, and adjoining states where the NAACP put pressure on a housing authority to keep it from renting, to negroes, public housing that already existed.

Why? The NAACP does not want negroes to have the freedom to live in their own communities. NAACP wants to force negroes to live in intimacy with whites.

The NAACP—the National Accociation for the *Advancement* of Colored People—is ashamed and contemptuous of colored people. The NAACP agitators do not want our negro citizens to be proud and *distinctive* parts of the total American population. The NAACP does not want the black man to preserve his God-given identity as a black man. The NAACP wants to eliminate the negroes as distinctive human beings: to stir negroes into the white population until they will be unnoticed.

This is why the NAACP is constantly agitating (and in recent years, with frightful success) for laws which make it illegal to show a human being's race on a birth certificate or death certificate; which make it illegal for employers even to ask prospective employees what race they belong

to; which make it illegal for employment agencies to mention race when advertising jobs available; which make it illegal for insurance companies to mention race when writing policies; or for banks to mention or consider race when considering loan applications; or for individuals to consider race in the use and management of their own homes and other property.

Such laws as these — which are destructive of every basic principle of our society — are being pressed by the NAACP and other 'liberal' race-hating agitators at the community, county, state, and federal levels all over America.

Non-Segregated Housing

The major push in recent years has been in the field of housing—and for an obvious reason.

Since the racial agitation of NAACP-liberals is motivated by contempt for colored people and is designed ultimately to eliminate colored people as a distinctive part of our population, liberals know that their ultimate objective can never be reached until black and white races are submerged in each other—until they intermarry and procreate a racially blended population of light brown people.

So, NAACP-liberals are determined to force colored and white people to live together in the same neighborhoods and same houses, hoping that this intimacy of living will finally lead to the real and final intimacy of inter-marriage.

Most of the widely publicized controversies over 'segregated' housing have involed the federal government's housing programs. Every year, when new housing legislation is proposed in Washington (or old legislation must be renewed) 'liberals' try to insert "anti-segregation" riders — providing that no federal money of any kind can be used to promote housing that is or will be segregated.

The housing industry in America would be almost totally socialized today if it were not for the annual squabbles in Washington between "segregationists" and "non-segregationists."

We can expect this aspect of the NAACP "brotherhood" program—that is, the use of federal tax money to enforce racial togetherness in housing — to be expanded and intensified, now that Dr. Robert Weaver, the NAACP's own director, is in charge of the federal government's "housing" programs.

"Fair" Housing

Dr. Weaver's prestige and power will also be felt in the stimulation of "Fair Housing" programs at community and state levels.

"Fair Housing" is not intended to make more or better, or any, housing available for more people. In fact, wherever "Fair Housing" laws are enacted they make less housing available for the population. And "Fair Housing" laws do not encourage "fairness" in the building, renting, or selling of houses: they do the opposite. They enable members of a minority racial group (who are under constant incitation and brainwashing by sinister organizations) to force themselves into intimate living with majority racial groups; and in the process, they destroy the most important and sacred (which means God-given) rights of all members of society, including the rights of members of the minority group: that is, Fair Housing laws eliminate an American individual's right to free use of his own real estate.

In 1959, "Fair Housing" laws were proposed to 13 different state legislatures, and adopted by four of them: Colorado, Massachusetts, Oregon, and Connecticut.

In addition to that, some kind of "Fair Housing" laws have been written into the municipal codes of several big northern and eastern cities, including New York. They are not all alike. Some are worse than others. But they all, generally, intend to outlaw "racial discrimination" in the financing, building, renting, and selling of private residences—residences that are built entirely with private capital, for private use.

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DAN SMOOT

THE MISSISSIPPI TRAGEDY

In a television speech to the nation on Sunday night, September 30, 1962, President Kennedy explained his actions in Mississippi: he repeated practically the same things that former President Eisenhower had said on September 24, 1957, when explaining the troops in Little Rock. Like Eisenhower before him, Kennedy said he was enforcing *the law of the land.*

What law?

Only Congress can constitutionally make laws for the nation, and Congress has never made a law concerning integration in schools or colleges.

In fact, the Constitution of the United States prohibits the Congress from making any such law. The Tenth Amendment says:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Constitution does not delegate any power to the federal government to interfere, in any way, with the operation of schools and colleges in the individual states.

Obviously, then, when the Supreme Court, or any other federal court, tells the state governments how to operate schools or colleges, that court is usurping power not delegated by the Constitution. It follows that all federal court edicts, injunctions, decisions, and orders concerning the enrollment of James H. Meredith in the University of Mississippi (or dealing with any educational matter in any state) are illegal.

In the Meredith case, Kennedy could not even honestly claim legality by saying that he was enforcing a Supreme Court decision. There has been no Supreme Court decision with regard to Meredith.

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Facts of the Meredith Case

James H. Meredith, a 29-year old negro, served nine years in the United States Air Force, being discharged in 1960 with the rank of sergeant. Upon discharge, he enrolled at Jackson State College, a Mississippi school for negroes.

The National Association for the Advancement of Colored People encouraged Meredith to leave Jackson State and to enroll at the University of Mississippi, an all-white school at Oxford. The laws of Mississippi prohibit the enrollment of negroes in the all-white University. The NAACP financed Meredith's court fight to force enrollment, in defiance of the laws.[1]

The NAACP lost the first round of its fight. Federal District Judge Sidney C. Mize upheld University officials in denying Meredith admission.

The NAACP appealed to a three-judge U.S. Circuit Court of Appeals in New Orleans which, in a 2 to 1 decision, reversed the District Court decision. Judge Dozier DeVane, the Circuit Court Judge who dissented, said:

"In my opinion, Judge Mize was correct in finding and holding that appellant bore all the characteristics of becoming a trouble-maker if permitted to enter the University of Mississippi, and his entry therein may be nothing short of a catastrophe."

United States Circuit Court Judge Ben Cameron, of Meridian, Mississippi, issued an order staying execution of the New Orleans Circuit Court order that Meredith be enrolled. The NAACP appealed to the Supreme Court.

The Supreme Court was not in session; but on September 10, 1962, Supreme Court Justice Hugo Black, acting alone, set aside Judge Cameron's stay-order and ordered the University of Mississippi to admit James H. Meredith as a student.

Justice Black said that execution of the Circuit Court's order to enroll Meredith "can only work further delay and injury" to Meredith, while immediate enforcement of the order to enroll Meredith "can do no appreciable harm to the University" or to others.

Justice Black's order to enroll Meredith could not possibly be legal, because (among other things) one Supreme Court Justice cannot decide for the whole Court. Indeed, Black's own labored explanation indicates that he was uncertain of his authority to issue the order. The Associated Press dispatch from Washington, reporting on Justice Black's action (published in the *Shreveport Journal*, September 11, 1962) contains these significant paragraphs:

"Black said he was convinced he had the authority to act as he did today. But he said he had submitted to all of the justices of the Supreme Court the question of his authority to act.

" 'I am authorized to state,' said Black, 'that each of them (the other Supreme Court Justices) agrees that this case is properly before this court, that I have power to act, and that under the circumstances I should exercise that power as I have done here.' "

This then, is the "law of the land" which Kennedy enforced in Mississippi with federal troops and marshals: an illegal order by one Supreme Court Justice, in a case which Mississippi State officials did not even have a chance to argue before the Supreme Court — a case which was never even presented to the whole Supreme Court.

On September 13, 1962, Ross Barnett, Governor of Mississippi, interposed the authority of the State of Mississippi to protect the citizens and officials of that state against the operation of illegal and unconstitutional orders and actions by agencies of the federal government: that is, the Governor issued a proclamation telling appropriate state officials not to obey court orders to enroll Meredith.

On September 20, 1962, James Meredith was tried in a Mississippi State Court on the misdemeanor charge of falsifying official records, when he registered to vote. Meredith was convicted and sentenced to serve one year in

jail and to pay a five-hundred-dollar fine. State officials also obtained a criminal indictment against Meredith, for perjury in connection with his alleged falsification of official records.

Attorney General Robert Kennedy got a court order prohibiting state officials from arresting Meredith.

On September 25, 1962, the Fifth U. S. Circuit Court of Appeals in New Orleans ordered Governor Barnett and other officials in Mississippi not to bar Meredith's admission to the University.

On September 28, 1962, the Circuit Court declared Governor Barnett in contempt and ordered his arrest and the imposition of a fine of $10,000 a day, beginning October 2, if the Governor did not "purge" himself of his contempt before that time — by admitting Meredith to the University.

On Sunday night, September 30, 1962, federal officials put Meredith on the University campus by helicopter; and Kennedy's marshals and troops closed in on the hapless little college town of Oxford.

Blood on Kennedy Hands

John F. Kennedy and Robert Kennedy are fully accountable for the blood that has been shed — and may be shed — in Mississippi.

Although Mississippi had already been surrounded and invaded with enough federal military force to crush the state, Kennedy, in his September 30 television speech, said that integration was achieved at the University of Mississippi without the use of National Guard or other troops. Why this ridiculous emphasis on a technicality?

At the Democrat National Convention in 1960, Kennedy promised that he would never use federal troops to force integration in the South.[2]

Kennedy's cynical effort to keep the letter of this promise, while violating its obvious meaning, is responsible for the bloodshed in Mississippi.

One thing that makes Kennedy's action in Mississippi even uglier than Eisenhower's action in Little Rock in 1957, is that Eisenhower did at least send seasoned troops, ably commanded, to force his tyrannical will upon the people of Little Rock. Kennedy had even greater military force in Mississippi; but in the forefront of the action, he had an army of federal marshals — so that he could later say, as he is saying, that he had not "used federal troops to force integration."

Kennedy's marshals were, as Governor Barnett called them, nervous and trigger-happy. Before the marshals fired tear gas into the crowd of unarmed students at Oxford, Mississippi, not one act of violence had occurred. The students had not thrown anything at the marshals or even threatened violence against them.

An astute and seasoned observer, representing this *Report* at the scene, confirms the account of a WFAA-TV newsman that the students were not really ill-tempered. They were,

> "...kids laughing and hollering, booing and hissing, and throwing lighted matches into military trucks which the marshals used for transportation."[3]

It was into this gathering of students that Kennedy's marshals — ruthless, ready, and apparently by design — started firing tear gas shells.

The tragedy of Mississippi in 1962 is, in miniature, very similar to the tragedy of Hungary in 1956. The students who gathered in the streets of Budapest in the fall of 1956 did not intend to rebel, commit vandalism, or perform any act of violence at all. They were merely trying to make a demonstration against the communist tyranny oppressing their land. In Budapest in 1956, as in Oxford in 1962, the heavily armed and organized "authorities" were trigger-happy: they fired into the gathering of unarmed students and touched off a holocaust which bathed the city in blood, and left it writhing helplessly in the iron grip of the organized "authorities."

Walker

Edwin A. Walker (former Major General, U. S. Army), who commanded the troops which Eisenhower sent into Little Rock in 1957, was in Oxford, Mississippi, when violence occurred on Sunday night, September 30, 1962.

Walker went to Mississippi to let the world know that he, who (as a soldier) had reluctantly carried out Eisenhower's illegal orders in Little Rock five years before, is, as a civilian, still opposed to such tyranny.

He hoped, by his presence, to dramatize the fact that dictatorship already prevails in the United States — whenever there is serious opposition to the illegal actions and political ambitions of the men in power. He hoped that he would be joined in Mississippi by enough other patriots from all over the country to demonstrate that the people of Mississippi were not standing alone in their fight for constitutional principles.

General Walker did not go to Oxford to lead a mob against the armed forces of the United States. He sought, by his presence there, to encourage massive, peaceful protest against federal tyranny.

This *Report's* experienced investigator, on the scene, emphasizes that press accounts of Walker's actions in Oxford are erroneous, if not designed, distortions. Walker actually advised the students against violence; and he took no part in the violence which Kennedy's marshals touched off.

Nonetheless, on Monday, October 1, 1962, General Walker was arrested on charges of seditious conspiracy and insurrection against the United States. He was incarcerated in a federal mental hospital at Springfield, Missouri, when he was unable to post a $100,000 bond. The Constitution prohibits excessive bail — and this is clearly excessive.

General Clyde Watts, Oklahoma City attorney, flew to Springfield the night of Walker's incarceration, to serve as legal counsel. Dr. Robert A. Morris will also serve as counsel.

General Walker has no formal staff or headquarters, but his friends in Texas are being swamped with offers of help. Patriots all over the United States are beginning to show their support by wiring and calling their Senators and Representatives, protesting the "political arrest" of General Walker. Many are sending contributions for Walker's defense, to his Dallas mailing address, P. O. Box 2428, Dallas 21, Texas.

Robert Kennedy (who is responsible for Walker's arrest on charges of insurrection) was responsible in 1961 for giving official encouragement and protection to communist-supported "freedom-riders," who went into Mississippi for the specific purpose of inciting insurrection against *the law of the land.*

Posse Comitatus

Claiming the color of law and constitutionality, John F. Kennedy, in his September 30 television speech, said he acted in compliance with his "obligation, under the Constitution and statutes of the United States."

As pointed out before, there is no statute of the United States (and there could not constitutionally be one) concerning the operation of educational institutions in the states.

The Posse Comitatus Act of 1878 (20 Stat. 152) provides that:

"... it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

An Attorney General's ruling holds that the effects of this Statute have largely been nullified by Sections 5298 and 5300 of the Revised Statutes, which authorize the President to use military force to assist U.S. marshals.

It should be obvious, however, that the Revised Statutes of Congress can not authorize what the Constitution forbids. Article 4, Section 4, of the Constitution clearly provides that the President can act against domestic violence in a State *only* when requested to do so by the government of that State.

Kennedy violated the Constitution. It is possible that he committed a felony under the laws of the United States.

Kennedy and the Constitution

In his September 30 television speech, Kennedy said that we have "a government of laws, and not of men"; and he said he had acted as he did in Mississippi, to uphold the Constitution.

Kennedy's pretense of respect for the Constitution is galling to all American patriots who have watched him violate the principles and clear provisions of that noble document — especially galling to all who have read the President's speech to "student internes" at the White House on August 28, 1962. "Student internes" are students who had government jobs in Washington during the summer of 1962. President Kennedy said:

"Well, the American Constitution is an extraordinary document . . . but it has required men to make it work, and it still does today. After all, the Constitution was written for an entirely different period in our nation's history. It was written under entirely different conditions. It was written during a period of isolation. It was written at a time when there were thirteen different units which had to be joined together and which, of course, were extremely desirous of limiting the central power of the government.

"That Constitution has served us extremely well, but all of its clauses, the general welfare and due process and all the rest, had to be interpreted by man and had to be made to work by men, and it has to be made to work today in an entirely different world from the day in which it was written."

Kennedy's remark about "government of laws, and not of men," in his September 30 television speech, directly contradicts his remarks of August 28 to the "student internes." Obviously, he has no respect for the Constitution as a contract of government — but thinks it is something to be stretched and reinterpreted at will to serve his own ambitions and lust for power.

Honor and Patriotism

In his September 30 television speech, Kennedy spoke of honor. His real concept of honor was revealed by his action in April, 1961: calling off air-cover, which he had promised, for Cuban patriots on the beaches at the Bay of Pigs, thus leaving them to be slaughtered.

In his speech, Kennedy spoke of patriotism. His real concept of patriotism was revealed by his behavior on December 16, 1961, when he was publicly welcomed to Venezuela by Romulo Betancourt, the communist president of that nation. Betancourt's welcoming speech was an insulting tirade against the United States (but filled with personal praise for Kennedy and Franklin D. Roosevelt). Kennedy listened to these insults against his nation with solemn approval, and then spoke (on that occasion and on other public occasions while he was in Venezuela) of Betancourt in terms of extravagant praise.

Interposition

It is almost universally (and inaccurately) reported that Governor Barnett was trying to make the State of Mississippi superior to the federal government, by "nullifying" a *law of the land*.

As pointed out before, there is no *law of the land* involved. Furthermore, Governor Barnett was not invoking the doctrine of nullification — the doctrine that a state can nullify a law of Congress. Barnett was invoking the doctrine of interposition, enunciated by James Madison and Thomas Jefferson, when they wrote the Virginia and Kentucky Resolutions early in the 19th Century.

The Father of our Constitution — James Madison — believed that the final arbiter of the meaning of the Constitution is not the Supreme Court or any other branch of the federal government: it is the people in the states. The federal government did not form

the union and create the states. It was vice versa. The states formed the union and created the federal government.

Final authority in a vitally important constitutional question must rest in the creator — not in the creature.

James Madison and Thomas Jefferson held that the Constitution is a compact, or contract, between sovereign states.

What can be done if the federal government violates the contract? Jefferson and Madison held that when the federal government, in a case of palpable importance, violates the Constitution (breaks the contract which created the federal government), the states have the right and the duty to interpose their sovereign authority to protect their citizens against the unconstitutional power of the federal government.

This causes a direct clash of authority: federal government versus state governments.

Who is to be the arbiter?

It is silly to say that the Supreme Court should be the arbiter, because the Supreme Court is a branch of the federal government. If you thought you had a legal claim against someone, would you think it sensible or just if that person's lawyer had absolute power to determine the validity of your claim?

Are the nine Supreme Court justices superhuman and infallible? What if they make a mistake, or willfully distort the meaning of our Constitution? Are we without recourse, except to beg their reconsideration?

Must we, a nation of 186 million people, be irrevocably bound by the dictates of nine appointed men, even when their dictates clearly violate our basic document of government?

According to the doctrine of the Father of our Constitution, state governments should interpose — should refuse to obey the court decrees which are manifestly unconstitutional.

If the federal government insists on enforcing the decrees and state governments insist on not enforcing them, can we resolve the clash of authority legally, without calling out the army and settling it by brute force?

Yes; we should submit the question to the people themselves.

Congress should submit a proposed constitutional amendment saying, in effect, that the Supreme Court, in all matters affecting race relations, shall be an oligarchy with absolute power — and that whatever the Court orders must be done.

This would legally dispose of the clash of authority over the question of racial segregation. If the people (through three-fourths of the state governments) ratified an amendment giving the federal government the power it has assumed, the state governments would be obliged to back down.

If the people rejected the amendment, the federal government would have to back down.

Kennedy could have taken the lead in demonstrating that we have "a government of laws, and not of men." He could have shown the world that America can settle grave constitutional questions, involving emotionally-surcharged issues, by due constitutional process. He chose instead to show the world that an American President can be as tough as Khrushchev: if the people do not humbly obey an illicit decree, he will cram it down their throats with army bayonets.

Our Race Relations

In his September 30 television speech, President Kennedy spoke of the "accumulated wrongs of the last 100 years of race relations" in the United States.

This is the sensitive point that has divided even constitutional conservatives in the United States. Many conservatives in the West and North privately admit that the federal government is acting unconstitutionally and tyrannically in racial-segregation matters. They know the President is acting, not because of any tender concern for alleged suppressed

minorities, but for the political objective of commanding for his party the negro votes in key northern states. But these same northern and western conservatives are ashamed to speak out against these evils, because they think southern whites are "morally" wrong in their race relations.

To such constitutionalists outside of the old South, I offer a word of warning: if Kennedy, under the pretext of protecting minority rights, can impose an illegal military dictatorship on the State of Mississippi, he (or some other President), under some other pretext, can impose the same dictatorship on any other state, where the people do not behave politically as the President wishes.

Actually every American, North and South, President or private citizen, should cite race relations in the United States with pride.

Look at the facts.

The negroes, whom New England and British slave traders brought to the new world, were not a civilized people captured and sold into bondage. They were barbarians. The evil bondage to the white man (to which they were subjected in America) was, physically, an actual improvement upon the life which they had made for themselves in Africa.

These were the people — illiterate, propertyless, with no racial traditions of freedom, of culture or of self-government — who, at the close of the Civil War were abruptly freed without any training or preparation to bear the burdens of freedom.

In one violent step, they, who had never developed a civilization of their own, were declared equal heirs of a civilization which it had taken the white man thousands of years to develop.

The southern white people, who had the main task of helping the negroes assimilate an ancient and alien culture, were pauperized, demoralized, and embittered by war — a people whose own way of life had been shattered by military action.

Americans in the North were also hurt and embittered by four years of savage warfare.

Hurt and bitterness were the guiding motives of policy during the ten years that followed Lee's surrender at Appomattox.

Northern occupation armies forced southern whites to accept state governments run by illiterate negroes and villainous white carpetbaggers — governments which, under the cover of "law," despoiled southerners of their property, for the benefit of greedy manipulators behind the governments.

Slavery was a national sin. The Civil War and the conditions following it were part of the wages of that sin.

Here was a problem that only the chemistry of time and tolerance and patience and Christian love could solve. Yet, it was being solved with miraculous speed until alien agitators, aided and abetted by venal domestic politicians, entered the picture.

Between the 1870's (end of the Reconstruction Era) and 1928 (formal beginning of the communist program of racial agitation in the United States) the American negro made more progress than any other people had ever made anywhere else in the entire history of the human race. They were miraculously advancing toward integration into the white man's culture — not integration in the contemporary sense of losing their racial identity by full amalgamation with the white race, but integration in the sense that they began to develop a pride in their own race, and (with the white man's help) began to build their own cultural and educational institutions, establish their own businesses, build their own homes, own their own land.

American negroes — thanks to the understanding and sympathetic aid of southern whites — were becoming a proud and distinctive part of the total American population.

The "race problem" did not become a major American tragedy until the Democrat

party, under the leadership of Roosevelt and Truman, adopted the communist program of racial agitation.

The problem did not become a major national disaster — converting peaceful communities into cauldrons of violence, and threatening to establish a military dictatorship in the southern states — until modern Republicans, under the leadership of Eisenhower, launched an all-out political struggle to win organized negro support away from the Democrats.

Now, both parties are vying for leadership in this awful contest for the organized negro vote.

What to Do

Effective legal action must be initiated by Congress. Congress will do nothing until the people elect a Congress filled with men who have the patriotism to respect, the sense to understand, and the courage to support, the Constitution of the United States.

Such a Congress could bring a bill of impeachment against John F. Kennedy, and also could impeach Robert F. Kennedy so that he could be removed from office and indicted for the crimes now being charged against General Walker: seditious conspiracy and inciting insurrection in the State of Mississippi.

Such a Congress would declare the Fourteenth Amendment null and void, because it was never legally ratified, and then, to discover the will of the people in this matter, would resubmit the Fourteenth Amendment for legal ratification or rejection, through due constitutional process.

Such a Congress would enact a law prohibiting the Supreme Court or any other federal court from exercising appellate jurisdiction in any matter affecting education.

FOOTNOTES

(1) *U. S. News & World Report*, October 8, 1962, pp. 57-58
(2) *Dallas Morning News*, 10/1/62, p. 1
(3) Bill Folsom, newsman for WFAA-TV, Dallas, Texas, quoted in *Dallas Morning News*, 10/2/62

STATEMENT REQUIRED BY THE ACT OF AUGUST 21, 1912, AS AMENDED BY THE ACTS OF MARCH 3, 1933, AND JULY 2, 1946 (Title 39, United States Code, Section 233) SHOWING OWNERSHIP, MANAGEMENT, AND CIRCULATION OF *THE DAN SMOOT REPORT, INC.*, published weekly, at Dallas, Texas, as of October 1, 1962.

The names and addresses of the publisher, editor, managing editor and business managers are: Publisher, *The Dan Smoot Report, Inc.*; Editor, Dan Smoot; Managing Editor, none; Business Manager, Mabeth E. Smoot, Dallas, Texas.

The owner is: The Dan Smoot Report, Inc.

There are no bondholders, mortgages, or other security holders.

Stockholders owning or holding 1 percent or more of total amount of stock are: Dan Smoot, Dallas, Texas; Mabeth E. Smoot, Dallas, Texas; Virginia C. Erwin, Dallas, Texas.

The average number of copies of each issue of this publication sold or distributed through the mails or otherwise, to paid subscribers, during the 12 months preceding the date shown above was 21,892.

Signed by Mabeth E. Smoot, Business Manager.

Sworn to and subscribed before me, this 2nd day of October, 1962, C. Herbert Davis, Jr., Notary Public, County of Dallas, Texas. Commission expires June 30, 1963.

WHO IS DAN SMOOT?

Dan Smoot was born in Missouri. Reared in Texas, he attended SMU in Dallas, taking BA and MA degrees from that university in 1938 and 1940.

In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for the degree of Doctor of Philosophy in the field of American Civilization.

In 1942, he took leave of absence from Harvard in order to join the FBI. At the close of the war, he stayed in the FBI, rather than return to Harvard.

He worked as an FBI Agent in all parts of the nation, handling all kinds of assignments. But for three and a half years, he worked exclusively on communist investigations in the industrial midwest. For two years following that, he was on FBI headquarters staff in Washington, as an Administrative Assistant to J. Edgar Hoover.

After nine and a half years in the FBI, Smoot resigned to help start the Facts Forum movement in Dallas. As the radio and television commentator for Facts Forum, Smoot, for almost four years spoke to a national audience giving both sides of great controversial issues.

In July, 1955, he resigned and started his own independent program, in order to give only one side — the side that uses fundamental American principles as a yardstick for measuring all important issues.

If you believe that Dan Smoot is providing effective tools for those who want to think and talk and write on the side of freedom, you can help immensely by subscribing, and encouraging others to subscribe, to *The Dan Smoot Report*.

THE
Dan Smoot Report

Vol. 9, No. 22 (Broadcast 407) June 3, 1963 Dallas, Texas

DAN SMOOT

PLANNED DICTATORSHIP

"The way to have good and safe government is not to trust it all to one; but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the National government be entrusted with the defense of the nation, and its foreign and federal relations; the State government with the civil rights, laws, police and administration of what concerns the State generally; the counties with the local concerns of the counties and each ward direct the interests within itself. It is by dividing and subdividing these republics, from the great national one down through all its subordinations, until it ends in the administration of every man's farm and affairs by himself; ... that all will be done for the best. What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or France or of the aristocrats of a Venetian Senate."

—Thomas Jefferson

In June, 1955, the Federal Civil Defense Administration staged Operation Alert, a nation-wide rehearsal of what civil defense would do in the event of a nuclear bombing raid on the United States which killed around 10 million people. Operation Alert revealed that sudden disaster could cause drastic confusion in the civil defense system. It also revealed that absolute dictatorship would emerge before the casualties could be counted.

After receiving reports of the mock casualties in the mock nuclear air raid, in connection with Operation Alert, President Eisenhower, on June 16, 1955 (without waiting for reports to see whether normal civil authorities could maintain order) used his Executive Power to issue a mock declaration of martial law for the whole nation.

Comments in the press and in Congress were, generally, unfavorable. To some, it was chilling to see how readily a President of the United States would proclaim a military dictatorship in time of emergency and disaster. To others, Eisenhower's haste to issue a mock declaration of martial law revealed only that the Administration had no adequate plan of action — that Eisenhower reached for the weapon of martial law because he did not know what else to do.[1]

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Hence, the Operation Alert exercise of 1955 helped create demand for a better plan of national action to be followed if the United States were suddenly struck a devastating blow.

In 1958, President Eisenhower reorganized the civil defense system. He merged the Civil Defense Administration with the old Office of Defense Mobilization, creating a new agency called the Office of Civil and Defense Mobilization.

President Kennedy scrapped the Eisenhower system and established something entirely new. Kennedy says that civil defense should not be handled by a separate agency of government, but that the multiple activities of civil defense should be handled by the regular departments and agencies of government — all of their activities to be planned and coordinated by a small presidential staff.

Kennedy's Executive Orders

On July 20, 1961, Kennedy (by Executive Order No. 10952) abolished the Office of Civil and Defense Mobilization, immediately transferring most civil defense functions to the Department of Defense. On August 1, 1961, Secretary of Defense McNamara put Adam Yarmolinsky temporarily in charge of all civil defense activities in the Department of Defense. Yarmolinsky (whose parents are notorious communist-fronters) has a record of participating in communist activities since his undergraduate days at Harvard.[2] Since the Kennedy Administration apparently considers Yarmolinsky indispensable for other duties in the Defense Department, Yarmolinsky was soon replaced as head of civil defense activities. The present Assistant Secretary of Defense for Civil Defense is Steuart L. Pittman.

On August 14, 1961, Kennedy issued Executive Order No. 10958, giving the Secretary of Health, Education, and Welfare the civil defense responsibility of stockpiling medical supplies; giving to the Secretary of Agriculture the civil defense responsibility of stockpiling food.

On February 16, 1962, Kennedy issued *ten* Executive Orders (10995 and 10997 through 11005) delegating other civil defense responsibilities to heads of other departments and agencies — Interior Department, Commerce Department, Labor Department, Post Office Department, Federal Aviation Agency, Housing and Home Finance Agency, Interstate Commerce Commission, and so on.

The small presidential staff, which has the responsibility of planning and co-ordinating the civil defense activities of the regular agencies and departments of government, is called the Office of Emergency Planning. Oddly enough, President Kennedy did not issue an Executive Order "creating" the Office of Emergency Planning and outlining its duties until September, 1962 — more than a year after the OEP had been actively in existence.

On September 27, 1962, Kennedy issued Executive Order 11051, "Prescribing Responsibilities of the Office of Emergency Planning in the Executive Office of the President." The most notable thing about this Executive Order, however, is that it amended 15 previous Executive Orders (5 issued by Truman; 8, by Eisenhower; 2, by Kennedy himself) by deleting references to "Civil and Defense Mobilization" and replacing those references with "Office of Emergency Planning."

The significance of this change in language is subtle. In November, 1962, the Eighth NATO Parliamentarians' Conference met in Paris, attended by delegates from the parliaments of the 15 countries belonging to the North Atlantic Treaty Organization. Thirteen United States Senators (under the chairmanship of J. William Fulbright, extreme leftwing Democrat from Arkansas); and eight United States Representatives (under

the chairmanship of Wayne L. Hays, extreme leftwing Democrat from Ohio) made up the delegation from the American "parliament" to the Eighth NATO Parliamentarians' Conference.

Senator Fulbright's official report to the Senate on the Eighth NATO Parliamentarians' Conference contains a brief section on Civil Defense, from which the following is quoted:

"Civil emergency planning is much wider in its implications than civil defense.

"Whereas civil defense can be considered as a purely national responsibility, civil emergency planning requires close cooperation between the NATO Allies. . . .

"Although civil emergency planning does not directly encroach on the responsibilities of national authorities, nevertheless on a number of points the organization of the latter will have to take account of the former's planning and preparations."[3]

Here appears to be a reason for changing "civil defense" and "defense mobilization" to "emergency planning." It takes our civil defense preparations out of the "purely national" realm, and makes them part of an over-all international plan.

On February 26, 1963, President Kennedy issued nine more Executive Orders (11087 through 11095) delegating "emergency planning" activities to heads of governmental agencies not mentioned in previous Executive Orders on the subject: Federal Communications Commission, Civil Service Commission, Atomic Energy Commission, General Services Administration, Federal Reserve System, Tennessee Valley Authority, Federal Power Commission, National Science Foundation, and so on.

In all, Kennedy has issued 23 Executive Orders, dealing with emergency planning, which prescribe the lines of authority for a total dictatorship to be controlled and coordinated at the top by a small group of emergency planners in the executive office of the President.

The national police state thus planned would be a tighter, more complete dictatorship than any which has ever existed in modern times, in communist countries or elsewhere. Kennedy's executive orders outline a plan, not for protecting the American people from suffering and death in the event of disaster, but for seizing absolute control of every aspect of human life in the United States.

The Executive Orders, which formally proclaimed the plan, have been published in the *Federal Register*. This is the modern way of giving executive proclamations the force of law. In the formulation of such "executive law," Congress does not deliberate and legislate, in response to the desires of the people and in conformity with grants of power in the Constitution. Indeed, Congress has no role at all. The President proclaims a law, then gives it statutory force by merely publishing it in the *Federal Register*.

Thus, President Kennedy, by Executive Orders which bypass Congress, has already created a body of "laws" to transform our Republic into a dictatorship — at the discretion of the President. The extraordinary principle (that the President can do anything he pleases in time of dire emergency, and that the President alone can determine what is a dire emergency) was proclaimed by Franklin D. Roosevelt in November, 1933, and reaffirmed by the Attorney General — and has never been challenged by the Courts or the Congress of the United States.[4]

Can We Trust Our Leaders?

It is a dangerous delusion to feel that we can trust our President to tell us the truth; trust him not to exercise authority unnecessarily; trust him to act only in the best interest of the American nation.

Let us not forget what happened on October 29, 1962. On that day, Arthur Sylvester (Kennedy's Assistant Secretary of Defense for Public Affairs) admitted that the Kennedy Administration was giving the public false information about Cuba. Sylvester defended official falsification of the news as proper "management" and "control," saying that the "generation of news" by officialdom is "part of the weaponry that a President has" in the "solution of political problems" — and that the end of creating, in the minds of the people, the correct attitude about governmental programs, justifies the means.[5]

Let us remember also President Kennedy's statement on May 12, 1963, concerning the dispatch of Federal troops to Alabama. The President said:

"This Government will do whatever must be done to . . . uphold the law of the land. . . . The Birmingham agreement was and is a fair and just accord. . . . The Federal Government will not permit it to be sabotaged by a few extremists on either side who think they can defy both the law and the wishes of responsible citizens by inciting or inviting violence."[6]

Unless there is obvious and significant violation of legitimate federal authority, the President (under the Constitution) has no right to send troops into a state to maintain order, except on invitation of the government of that state. In Alabama, the Governor had asked the President *not* to send troops. No federal authority was being violated. The "law of the land" which the President mentioned was a figment of his own mind — because no federal law, or even federal court order, was involved. The "Birmingham agreement" which the President said he would enforce with federal troops, was a private agreement between whites and negroes, dealing, primarily, with the question of job opportunities for negroes.

As to "inciting or inviting violence" in Alabama, the President himself was guilty of that, by continual agitation of the delicate situation, specifically by calling Mrs. Martin Luther King to express concern when her husband (a professional agitator, with a communist front and jail record) was behind bars for inciting civil disturbance.

As to the *need* for federal troops to suppress violence: the total of human suffering which the race riots have caused in Birmingham is hardly worthy of notice in comparison with the continual savage depradations upon white people, by negro hoodlums, in the city of Washington, D. C.

In the Alabama affair, the President *proves* that he *does* misrepresent facts to the people and *does* use illegal and unnecessary power to serve his own political ends.

As to whether the President can be trusted to act only in the best interests of the nation — note two cases which indicate otherwise: El Chamizal and Panama.

EL CHAMIZAL — The Treaty of Guadalupe, February 2, 1848, established the Rio Grande River as the boundary between Texas and Mexico. Between 1864 and 1868, the Rio Grande eroded a large portion of the high Mexican south bank and formed an alluvial deposit (about 630 acres in size) on the United States side of the river. This occurred just south of El Paso, then a small border town. As El Paso grew, it took in the great alluvial deposit which came to be called *El Chamizal*. In 1895, the Mexican government made a formal claim to El Chamizal. The American government maintained, in effect, that the middle of the River was the boundary line, and that all soil north of that boundary line was American soil, regardless of how it got there.

On June 24, 1910, the Mexican and United States governments agreed to let an Arbitration Commission (composed of one Mexican,

one American, one Canadian) decide whether El Chamizal belonged to the United States or to Mexico. The Arbitration Commission refused to decide the question. Instead, the Commission decided, on June 15, 1911, that El Chamizal should be divided between Mexico and the United States. The United States government would not accept that decision, which the Arbitration Commission had not been empowered to make.

The issue became dormant for more than fifty years, except for an occasional political speech by some Mexican demagogue who whipped up hatred for the United States and gathered votes for himself by denouncing the El Chamizal "land grab."

President Kennedy reopened the old El Chamizal sore. Trying to win Mexican support for his Alliance for Progress, Kennedy quietly opened negotiations with the Mexican government, to work out a means of giving Mexico the 630 acres of United States territory, which, meanwhile, had become part of the downtown section of modern El Paso. Kennedy got support from the city government of El Paso and from certain business interests there, by promising tremendous outlays of taxpayers' money to "compensate" the city for the loss of territory.[7]

An article in *The Dallas Morning News*, May 28, 1963, reported information, from "authoritative sources," that the United States and Mexico would announce within the next few days a settlement of the El Chamizal dispute.

PANAMA — Many events and circumstances (too numerous to review at this time) indicate that Kennedy is also planning to surrender American control of the Panama Canal, either to the government of Panama or to a United Nations agency. Following the example set by Eisenhower, Kennedy has already weakened the American position by permitting the flying of the Panama flag alongside the Stars and Stripes in the Canal Zone, thus showing a Panamanian "titular" sovereignty over our territory.

As to the question (if there be a question) of whether the Kennedy Administration *wants* a socialist dictatorship in the United States — we need only to read one publication of the U. S. Arms Control and Disarmament Agency.

United Nations officials — realizing that the massive outpouring of American tax dollars (in the United States and abroad) is rapidly building a one-world socialist system; realizing that most of that spending is done under the guise of *arming to resist communism;* and realizing that the Kennedy Administration is determined to disarm the United States — grew concerned about the reduction of American governmental spending which disarmament might bring.

On September 22, 1961, the UN Secretariat requested that the United States furnish information on "the economic and social consequences of disarmament in the U.S." Kennedy's U.S. Arms Control and Disarmament Agency prepared a report to reassure the United Nations officials. The report, published in July, 1962, says, in essence, that disarmament will not substantially reduce the spending of American tax dollars, but will deflect those dollars into such programs as social security, federal aid to education, urban renewal, financing mass transit systems, expanding public health and mental health activities, and increasing foreign aid channelled through United Nations agencies.[8]

Only An Emergency Is Needed

Any thoughtful person who has watched the arrogant and lawless behavior of the Kennedy Administration; its studied efforts to deceive the people and the Congress; its habit of appeasing foreign powers (particularly communist and pro-communist powers) by sacrificing American national interests; and

its relentless drive toward the total socialist state — reasonably fears that Kennedy might take advantage of some emergency to make himself a dictator, in accordance with the plan which his Executive Orders have already outlined.

The May, 1963, Wheat Referendum (when farmers repudiated Kennedy's farm program, in the face of Kennedy's threats and promises) is only one of many indications of a growing political revolt against the Kennedy Administration. Kennedy has enough cunning to see this. If his prestige and influence continue to sink, what will he do in 1964 if he feels he cannot win re-election? Will he accept the verdict of elections and surrender the power so dear to him? Or will he make himself a dictator, by creating an "emergency"?

What kind of emergency could he create? Since the temperament and disposition of the President became apparent, in the first months of his Administration, there has been anxiety that he might arrange a war for the United States in 1964, if he felt that necessary for his own re-election. This anxiety is by no means unfounded. It deepened in late 1962 when Kennedy made war-like gestures about Cuba for the purpose of getting New Frontier supporters elected to Congress.

There is another possible emergency — already building up under the senseless and ceaseless prodding of the President and his brother, the Attorney General: an emergency involving racial conflict in the United States.

Note this grim paragraph from the May, 1963, issue of *H. du B. Reports*, a newsletter written in Paris, France, by the extremely well-informed Hilaire du Berrier:

"The governments of Western Europe are receiving alarming reports which touch on America's internal stability. Their informants put it bluntly: A development has taken place within the past few weeks which can shake America, and a crisis in America can endanger the West. The NAACP has consistently expressed embarrassment at the violence and anti-White declarations of another group, the Black Muslims, who preach a distorted mohammedanism under the leadership of a former factory hand, Elijah Poole, now known as Elijah Muhammad. The NAACP's moderate leaders have acquired both sympathy and support by repudiating Black Muslim advocacy of terrorism and black supremacy. However, according to reliable reports reaching governments around the world (though not the American public), the NAACP and Elijah Muhammad's followers have formed a common front, which means that the more violent leaders have assumed direction. The focal points for a sudden, brutal outbreak are now New York, Detroit and Chicago, Black Muslim strongholds where for five years Elijah Muhammad's lieutenants have been organizing an elite militia and stocking arms."

The Black Muslims want negro supremacy, and openly advocate murder of white people until all whites in the United States are either exterminated or reduced to bondage. The NAACP has made an elaborate pretense of "repudiating" the Black Muslims movement, but there are many indications that the NAACP and the Black Muslims are working hand-in-glove: the NAACP warning that if their particular brand of violence is not fully supported, the bloodier violence of the Black Muslims is inevitable.

United States Representative Adam Clayton Powell (Democrat, New York), negro Chairman of the House Education and Labor Committee, is a life-member of the NAACP. Yet he has openly associated himself with the Black Muslims movement. He recently spoke gloatingly on a national television program about how the negro "has the white man running scared."[9]

The head of the NAACP in Washington, D. C. (where negro criminal violence against white people is creating something akin to a reign of terror) said, on a national television program in early May, 1963, that negro

violence is coming and that the NAACP will promote the violence if whites do not immediately give the negro what he demands.

What does he demand? Absolute legal equality with whites? Not at all! The most explosive racial situation in America is not in the South, but in New York City — where the white man's right to own and dispose of private property and his right to choose his own associates have been violated to grant negroes so-called "anti-discrimination" laws. In New York, negroes have no trouble exercising their voting rights. There are no legal barriers to school integration. Housing laws make it illegal for private realtors to refuse rental or sale on racial grounds. And "fair employment" laws make it illegal for private employers to refuse employment to negroes because of race.

Yet, the negroes of New York City, prodded by Black Muslim and NAACP leaders and by men like Adam Clayton Powell, are more restless than ever before. Now they are demanding *enforced social and economic equality* with white people — which means nothing less than confiscation of the property and earnings of white people (whose superior abilities give them superior earning power) in order to give negroes what they lack innate ability to earn.

In New Rochelle, New York; in Berkeley, California; in Englewood, New Jersey; in Nashville, Tennessee; in Baltimore, Maryland; in Birmingham, Alabama; in Detroit, Michigan; in Greenwood, Mississippi; in Chicago, Illinois; in Washington, D. C. — all across the land, racial tensions are growing every day. Everywhere, they are being prodded by the whole pack of liberal politicians, both

WHAT YOU CAN DO

Washington officialdom uses your taxes for programs that are creating vast cesspools of waste and corruption — and dragging our Republic into the quicksands of socialism. But what can you do about it?

You can help educate and arouse the people who elect men responsible for harmful programs of government. When enough other Americans know and care as you do, political action to restore our Republic will come.

If *The Dan Smoot Report* was instrumental in bringing you to the point of asking what *you* can do about saving the country from mushrooming big government, here is a checklist for you: Have you urged others to subscribe to the *Report*? Have you sent them reprints of a particular issue of the *Report*? Have you shown them a Dan Smoot film? Have you ever suggested a Bound Volume of *The Dan Smoot Report* for use by speakers, debaters, students, writers? Have you read and passed on to others any of the Dan Smoot books — *The Invisible Government, The Hope Of The World, America's Promise*?

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Republican and Democrat, who are jockeying for the organized negro vote in 1964.

This situation could become the "emergency" which projects John F. Kennedy into absolute dictatorship.

What To Do

It may very well be that President Kennedy will never try to make himself a dictator, or involve the nation in war just to get himself re-elected. Despite the blueprint for dictatorship already prepared by Kennedy's Executive Orders; and despite abundant indications that Kennedy is capable of creating a pretext for seizing power if he fears defeat at the polls in 1964, it is quite likely that none of this will happen. But the very *possibility* — however remote — should be removed. Congress could remove it, and probably would, if there were sufficient public demand.

Congress should abolish (by withholding funds, if necessary) the whole federal civil defense, and "emergency planning," setup. In time of emergency or disaster, individuals and communities would be infinitely better off in looking after themselves, than in waiting for direction and dictation from federal bureaucrats.

Beyond that, Congress should submit an amendment to repeal the income tax amendment. The corrupt, oppressive income tax system feeds all the plans for socialist dictatorship in the United States. Cut off the excess tax money, and the evil plans will wither and die.

The public could demand that Congress enact a law providing that *all* appropriations will be withheld from *any* agency of government trying to initiate *any* program which has not been authorized by Congress through formal, constitutional, legislative process.

A Congress which would do that would go further, and reverse the settled trend toward dictatorship in the United States.

FOOTNOTES

(1) *The Powers of the President as Commander in Chief of the Army and Navy of the United States*, House Document No. 443, 84th Congress, June 14, 1956, pp. 14, 137-45
(2) *Military Cold War Education and Speech Review Policies*, Hearings before the Special Preparedness Subcommittee of the Senate Armed Services Committee, 1962, Part IV, pp. 1491-2
(3) *Eighth NATO Parliamentarians' Conference*, Report to the Senate Committee on Foreign Relations, April 8, 1963, p. 23
(4) "Between the Lines — Emergency Planners," by Edith Kermit Roosevelt, *The Shreveport Journal*, November 17, 1962, p. 2
(5) "Free Press Maintains Confidence of Public," AP story by J. M. Roberts, *The Dallas Morning News*, November 1, 1962, Section 1, p. 8
(6) *Congressional Quarterly Weekly Report*, May 17, 1963, p. 783
(7) "Mexico Seems Sure to Win 'Chamizal'," by Walter B. Moore, *The Dallas Morning News*, March 9, 1963, Section 4, p. 2; "35 Million Indemnity For 'Chamizal' Seen," UPI dispatch from El Paso, Texas, *The Dallas Times Herald*, July 18, 1962, p. A-6; *Congressional Record*, January 29, 1963, pp. 1243 ff.; UPI dispatch from Laredo, Texas, *The Dallas Morning News*, February 24, 1963, Section 1, p. 16
(8) *The Economic and Social Consequences of Disarmament*, U.S. Arms Control and Disarmament Agency Publication No. 6, July, 1962; "Would Disarmament Mean a Depression"? by Emile Benoit, *The New York Times Magazine*, April 28, 1963, pp. 16 ff.
(9) "Two Ways: Black Muslim and N.A.A.C.P.," by Gertrude Samuels, *The New York Times Magazine*, May 12, 1963, pp. 26 ff.

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DAN SMOOT

WASHINGTON: THE MODEL CITY

On January 18, 1963, President Kennedy said of Washington, D. C.:

"Let us make it a city of which the nation may be proud — an example and a show place for the rest of the world."

The remark was strangely reminiscent of one made by President Eisenhower nine years before. When the Supreme Court handed down its school desegregation decision in May, 1954, President Eisenhower, praising the Court, urged Washington, D. C., officials to hasten integration of public schools, in order to make the capital city a model for the nation. District school officials complied immediately.

At the time of integration, the District of Columbia school system was rated among the best in the nation. Twenty-nine months later — in September, 1956 — a Congressional subcommittee began an investigation to find out how racial integration of public schools was working out. United States Representative James C. Davis (Democrat, Georgia) was Chairman of the subcommittee. Mr. William Gerber served as counsel.

The following are excerpts from the subcommittee's transcript of hearings on September 19, 1956.

TESTIMONY OF MR. C. MELVIN SHARPE, PRESIDENT OF THE DISTRICT OF COLUMBIA BOARD OF EDUCATION:

MR. GERBER: Mr. Sharpe, prior to September of 1954 under what system were the District of Columbia schools operated?

MR. SHARPE: They were operated on what we call the dual system of schools. We had Division 1, which was to designate the white schools, and Division No. 2, designated for colored.

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MR. GERBER: . . . did the two school systems . . . have access to the same curriculum?

MR. SHARPE: They did.

MR. GERBER: Did they have access to the same textbooks?

MR. SHARPE: . . . I had every reason to believe that there had been no discrimination whatsoever in the textbooks, the schools, buildings, teachers and whatnot. We had a very eminent man in charge of Division 2 . . . a colored man. . . . I thought he did an admirable job.

MR. GERBER: How long after . . . [the Supreme Court decision of May 17, 1954] was handed down did the Board of Education vote to integrate the District of Columbia schools?

MR. SHARPE: . . . within two weeks.

MR. GERBER: Mr. Sharpe, do you find that, after the schools were integrated, a great many white children . . . withdrew from the public schools?

MR. SHARPE: I did.

MR. GERBER: Where did they go? . . .

MR. SHARPE: . . . to Virginia and Maryland, and . . . private schools. . . .

MR. GERBER: . . . Was it the contention of the proponents of integration . . . that integration would reduce the cost of operation of the schools?

MR. SHARPE: Yes, sir; that was the professional advice we received.

MR. GERBER: That professional advice, you found, was all wrong?

MR. SHARPE: That is right.

DEPOSITION OF MR. JOHN PAUL COLLINS WHO WAS TOO ILL TO APPEAR BEFORE THE COMMITTEE:

My name is John Paul Collins. After 34 years in the District of Columbia school system, I retired last year as a result of ill health directly attributable to the conditions that developed in Eastern High School after the integration of the District Schools. During my tenure in the District school system I served as principal at Anacostia High School and Eastern High School.

After integration of the schools in 1954, . . . the problem of discipline was tremendous. . . .

At times, I heard colored girls at the school use language that was far worse than I have ever heard, even in the Marine Corps.

White children manifested a spirit of cooperation to help the colored children become acclimated, but these efforts were not particularly successful.

Fighting, including several knifings, went on continuously. . . .

There have been more thefts at Eastern in the last two years than I had known in all my 30-odd years in the school system. A teacher, still active at Eastern, told me recently that stealing is now so rife at the school that it is no longer practical to attempt to report all stealing incidents.

There were many sex problems during the year following integration. . . . I overhead two colored boys making obscene remarks about white girls who were passing in the hall. I promptly suspended the boys, until such time as I could get satisfactory assurances from their parents that they would discontinue such conduct. My authority to do this was questioned by the administration, but I stuck to my guns.

White girls complained of being touched by colored boys in a suggestive manner when passing them in the halls. One white girl left school one afternoon and was surrounded by a group of colored boys and girls. One of the colored boys put a knife at her back, marched her down an alley and backed her up against a wall. While the group debated as to whether they should make her take her clothes off, she broke away and ran home. . . .

On another occasion a colored girl complained to me that a colored boy had exposed himself to her in the classroom. I got hold of the boy and found him to have a record of sex offenses, and recommended that he be re-

moved from Eastern. This recommendation was accepted.

Never in all of my experience have I observed such filthy and revolting habits in the lavatories. Some of the urinals were completely torn away from the walls. Nothing like this had ever occurred prior to integration. . . .

Colored children have been known to forge names at the school bank.

There were a dozen or more colored girls who became pregnant during my last year at Eastern. Pregnancy among white girls was very rare, and had occurred only in isolated instances.

Superintendent Corning ordered all school records to be kept without regard to race. This order was repeated several times during the school year.

The colored students dominated the failing groups, which were much larger than any year before integration. . . .

The average colored student cannot keep up with the average white students academically. . . .

I can say from experience that integration has brought about a lowering of public-school standards and student academic achievement in the District public schools. It has created problems of discipline that have disrupted educational processes. It has created grave social problems that cannot be solved under existing circumstances. . . .

TESTIMONY OF MR. HUGH STEWART SMITH, WHO HAD BEEN PRINCIPAL OF JEFFERSON JUNIOR HIGH SCHOOL, WASHINGTON, D. C., FOR 26 YEARS:

MR. GERBER: Prior to integration, was this an all-white school?

MR. SMITH: Yes.

MR. GERBER: Mr. Smith, what was the percentage of white and colored in your school last year?

MR. SMITH: About 55 per cent Negro; 45 per cent white. . . .

MR. GERBER: Mr. Smith, after the integration of the school systems here in the District of Columbia, did you encounter any unusual disciplinary problems?

MR. SMITH: . . . you get many of these [colored] children who thought that you got what you wanted by fighting. We had a great deal of attempting to get, let us say, small bits of money from children at lunchtime. . . . I think we had threats for the first time, to both the person and property of teachers. . . .

MR. GERBER: Does the disciplinary problem . . . have any effect on the teachers' being able to teach?

MR. SMITH: Any time you have discipline problems, that happens. That is one of the areas that I think we have been unable to entirely cope with in our public schools. We have no way to put these children who are vicious out of the school, for any reason at all. The law says they are to be in school until they are 16 years old.

MR. GERBER: Mr. Smith, did you find that the Negro pupils that came to your junior high school from the colored schools were properly graded?

MR. SMITH: I can't tell how they were graded in the elementary school, but the children who came to me were very much retarded, far more than our white children had been. Also, many of them had been passed when they hadn't gone to school. . . .

We had a few children who were in our top group, but had I gone completely on the records of achievement, even those few colored children in that top group would probably not have been able to be there. . . .

MR. GERBER: Mr. Smith, has there been a difference in the I.Q. of the students that you had previous to integration, and what you have got now?

MR. SMITH: Yes, sir; that has fallen every year. I think that I would like to have you realize that I am in a part of our city which has always been a low economic area. It has always been that. But 10 years ago we had an

average I.Q. for the school of 96, and this year it has dropped down to 85. With the incoming seventh grade, the average is 82, so it is still going down.

MR. GERBER: . . . Don't you think that the . . . upper-grade students have suffered educationally as a result of being mixed with these lower-achievement students?

MR. SMITH: Not in the junior high school. We . . . group children according to their achievements. In the top group, even when we began integration, we had frankly only a few Negro children who achieved what the white children were achieving, and they went into the group, but the bottom groups were almost entirely Negro children. . . .

CONGRESSMAN WILLIAMS: Do you notice a difference in white children's rate of achievement coming from those same neighborhoods, with the same economic status as their colored neighbors?

MR. SMITH: Yes.

CONGRESSMAN WILLIAMS: Then, on the basis of that, could you say that environment and economic status are not the sole contributing factors to that condition?

MR. SMITH: Yes, sir.

TESTIMONY OF MRS. HELEN R. MAGUIRE, PRINCIPAL OF DAVIS ELEMENTARY SCHOOL, WASHINGTON, D. C.:

MR. GERBER: Mrs. Maguire . . . what [is] your school population?

MRS. MAGUIRE: . . . about 775. . . . It is about 90 [per cent] colored and 10 per cent white. . . . And two years ago it was a white neighborhood.

MR. GERBER: What is it now?

MRS. MAGUIRE: Well, it is mostly a colored neighborhood. And it will be, as soon as the people can sell their houses. They are all for sale. All the white people's houses. . . .

MR. GERBER: Mrs. Maguire, did you have any trouble about the demotion of a child in your school last year?

MRS. MAGUIRE: Not last year, but the first year I had one little boy who was a disturbance. He was an emotional problem. He did absolutely nothing in the classroom but upset the classroom. And I put him from a first grade to a kindergarten, simply to study him. I didn't know what to do with him. He upset everybody in the classroom. And I said to the kindergarten teacher, "Let's put him here and let him come three hours a day, and maybe we can find the best place for him."

MR. GERBER: And what happened about that? Did you get a call from anybody about it?

MRS. MAGUIRE: I got a call from the mother first, asking me about it, and I wrote her a note and explained why we were doing it. And at 3 o'clock in the afternoon, after school was dismissed, I got a call from a Dr. Knox, I think it is, from Howard University. And he was head of the — he told me that he was head of the educational committee for the NAACP and that he wanted to know why I had put this child back. And the mother had called him, he said, and he was very adamant as to why I had put the child back to the kindergarten. The child was old enough to be in the first grade, and "that is where he should be."

And I said, "Well," — I tried to explain to him the conditions.

But I said, "Dr. Knox, I have been in the school system 35 years, and you are the first person from any organization that has ever questioned what we do to children when we are trying to do the best we can."

And so he talked on, and he said, "Still, that child should be in the first grade. He is old enough to be in the first grade, so you put him there."

He said, "I will give you three days, and then you will hear from me again."

Well, you can imagine the condition I was in. . . . It was the first time anything like that had ever happened to me, and I really was very upset. I didn't do it. I studied the child. And

when I made my study, I put him where he should be. . . . And I didn't hear any more of it.

CONGRESSMAN WILLIAMS: Mrs. Maguire, would you . . . venture an opinion as to whether the level of school achievement, on the average, is as good today among the students as it was two years ago?

MRS. MAGUIRE: Oh, no. It isn't. It is way down. And the teachers are saying to me, "We have just got to lower everything we do." And the spark is gone. . . .

TESTIMONY OF MRS. KATHERINE REID, TEACHER AT TYLER SCHOOL, WASHINGTON, D. C.:

MR. GERBER: Do you remember approximately how many children you had to teach last year?

MRS. REID: I had 41 children, 31 colored.

MR. GERBER: And 10 white?

MRS. REID: Yes.

MR. GERBER: Mrs. Reid, did you find any disciplinary problem in your class and in your school, after the schools were integrated, that you didn't have prior to integration?

MRS. REID: I found it very difficult. White teachers are not supposed to use corporal punishment, and I found it very hard to make the colored children do what I told them. And one day I was talking to a little colored girl, and one of the colored boys said, "Miss Reid, why don't you stop talking to her and bat her over the head, the way her last teacher did?" . . . I did find them hard to control.

MR. GERBER: Did you have any sex problems in your third and fourth grades in that elementary school? . . .

MRS. REID: Well, I had a colored boy who was very fresh with a little white girl. And I spoke to the little white girl and told her to go back to her seat and told the colored boy to take his seat, and he said, "Don't you want us to be friends?" And I said, "Yes, I want you to be friends, but right now I want you to work and do your school work, and this has nothing to do with what you have been doing."

And then I had a colored boy who exposed himself to a white girl. He did it several times.

Finally, in exasperation, I said to the white girl, "Just don't look."

CONGRESSMAN DAVIS: Is that a constant thing, then, this sex situation? . . .

MRS. REID: Well, I wouldn't say it was constant. . . . I had these two incidents which stand out in my mind. There were plenty of others in the bathrooms, in the lavatories. I mean, teachers were constantly on guard. But I wouldn't want to use the word "constant."

CONGRESSMAN DAVIS: Was last year the first year those conditions had existed?

MRS. REID: Well, last year was the first year I had colored children. I don't remember any particular ones with white children, of that particular kind.

MR. GERBER: Did you have any destruction of property there in the school that you didn't have prior to integration?

MRS. REID: Yes. Books, pencils; the books were terrible. I mean, their misuse of books.

MR. GERBER: You mean the students would steal books?

MRS. REID: I mean they would bat each other over the heads with the books.

TESTIMONY OF MR. ARTHUR STOREY, PRINCIPAL OF THE McFARLAND JUNIOR HIGH SCHOOL, WASHINGTON, D. C.:

MR. GERBER: Mr. Storey, what was the school population at McFarland last year, do you recall?

MR. STOREY: Our maximum enrollment last year was about 1,300. . . . I would estimate it is between 60 and 70 per cent [colored]. . . .

MR. GERBER: Mr. Storey, can you tell us about some of the disciplinary problems you had last year?

MR. STOREY: Yes. They would be such things as stealing, boys feeling girls . . . disobedience in the class room, failure to obey teachers, carrying knives, and that type of thing.

MR. GERBER: I will ask you if during last year it was necessary for you to have the police at the school?

MR. STOREY: Oh, yes. . . .

CONGRESSMAN WILLIAMS: Did you find it necessary during your entire tenure as principal to request police assistance . . . to keep order, prior to . . . integrating the schools?

MR. STOREY: No, sir.

CONGRESSMAN WILLIAMS: Could you tell us from . . . memory how many times in 1955 . . . you found it necessary to request police assistance?

MR. STOREY: . . . I imagine around 50 times.[1]

The Horror Spreads

The Supreme Court's Mallory Case decision in 1957 made matters even worse. Andrew R. Mallory, a 19-year-old-negro, confessed to raping a woman in the cellar of her apartment house (where he caught her while she was doing the family washing). Mallory was tried and convicted in a Washington District Court. His conviction was upheld by the Court of Appeals.

The conviction was reversed by the Supreme Court in a unanimous opinion written by Justice Frankfurter, who referred to the confessed rapist as a "19-year-old lad." The Supreme Court did not suggest that there was any doubt about Mallory's guilt. There was no question of police brutality or third-degree treatment. The Supreme Court caused Mallory to be set free and go unpunished for his crime, merely because the police had questioned him before his formal arraignment. The decision means that Washington police cannot question a suspect before he is formally arrested and arraigned unless the suspect agrees. If he is arrested, he cannot be questioned at all, without his consent.[2]

When police are prohibited from *questioning* suspects — particularly in such crimes as rape, where material evidence of guilt is often non-existent or extremely difficult to obtain — police are almost helpless to afford society adequate protection. Since the Mallory case decision, hideous incidents have become commonplace in our nation's capital.

A congressional secretary was stabbed and robbed by a negro while she knelt to pray in St. Peter's Catholic Church on Capitol Hill. The wife of a general was attacked in her bathtub, by a negro who had broken into her home. Two negroes broke into an apartment at midday and attacked the granddaughter of a Washington official. A retired minister's wife was criminally assaulted in her own home. Mrs. Brooks Hays, wife of a Special Assistant to the President, was robbed and injured by a 17-year-old negro who forced his way into her bedroom.

A 79-year-old colored Baptist preacher, living in retirement in Washington, took a stroll in his neighborhood one Saturday evening after dinner. Four young negroes robbed him and beat him to death. The killers got $1.29 — which they spent on cakes and soft drinks immediately after leaving the old man dying on the street. There were several witnesses to the murder, but none offered the old man any help, and none would offer the police any help in identifying the murderers. Whether the witnesses were afraid or indifferent, no one really knows.[3]

These are typical of recent incidents which came to public attention.

On Thanksgiving Day last year, 48,000 spectators attended a high school championship football game at District of Columbia Stadium. The rival teams were from St. John's Catholic High School (practically all-white) and Eastern High School (practically all-

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A negro arrested for robbing liquor stores in daylight explained he prefers daytime operations because he is afraid to carry money on the streets at night.[6]

Venereal disease is reaching epidemic proportions among Washington teenagers. Practically all of those infected are negroes. One out of every 5 children born in the nation's capital is illegitimate: 92% of the illegitimates are negroes. In 1961, Washington's crime rate was up 41% over the 1958-1960 average; the national increase for that period was 14%.[5]

Negroes constitute 85% of the public school population in Washington. Hence almost total segregation is again in effect, nine years after Eisenhower ordered immediate, compulsory integration as a means of making the Washington school system a model for the nation. Schools that were all white are now all negro. A few predominantly-white schools remain — in expensive neighborhoods where high-salaried governmental officials and wealthy persons live. The few white children who remain in predominantly-negro schools belong to families who cannot afford to move or send their children to private schools, or elsewhere.

Apologists for the situation claim that the negroes behave as they do, because they have been mistreated in the South and have never had a chance; but the truth is that policies of the federal government — in the hands of politicians, both Republican and Democrat, who degrade the whole nation by bidding for negro votes — have created the ugly sore in Washington, D. C. And the sore is rapidly spreading, through cities all across the land — with the President of the United States himself encouraging a lawless minority to insurrection and civil disturbance which threaten to become bloody revolution.

NEXT WEEK: More on the racial problem.

FOOTNOTES

(1) "Congress Hears — How Mixed Schools Are Working In Washington," *U. S. News & World Report*, September 26, 1956, pp. 98-107
(2) Statement by U. S. Senator William E. Jenner (Republican, Indiana) to the Senate Internal Security Subcommittee, August 7, 1957
(3) *The Evening Star*, Washington, D. C., April 19, 1963
(4) Remarks of U. S. Representative William B. Widnall (Republican, New Jersey), *Congressional Record*, March 18, 1963, pp. 4209-11
(5) "The Blight in the Nation's Capital," *U. S. News & World Report*, February 18, 1963, pp. 37-9
(6) "Washington, D. C. — Portrait of a Sick City," by Fletcher Knebel, *Look Magazine*, June 4, 1963

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WHO IS DAN SMOOT?

Born in Missouri, reared in Texas, Dan Smoot went to SMU in Dallas, getting BA and MA degrees in 1938 and 1940. In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for a doctorate in American Civilization.

In 1942, he left Harvard and joined the FBI. As an FBI Agent, he worked for three and a half years on communist investigations in the industrial Midwest; two years as an administrative assistant to J. Edgar Hoover on FBI headquarters staff in Washington; and almost four years on general FBI cases in various parts of the nation.

In 1951, Smoot resigned from the FBI and helped start Facts Forum. On Facts Forum radio and television programs, Smoot spoke to a national audience, giving *both sides* of controversial issues.

In July, 1955, he resigned and started his present independent publishing and broadcasting business — a free-enterprise operation financed entirely by profits from sales: sales of *The Dan Smoot Report*, a weekly magazine; and sales of a weekly news-analysis broadcast, to business firms, for use on radio and television as an advertising vehicle. The *Report* and the broadcast give only *one* side in presenting documented truth about important issues — the side that uses the American Constitution as a yardstick. The *Report* is available by subscription; and the broadcasts are available for commercial sponsorship, anywhere in the United States.

If you think Dan Smoot is providing effective tools for Americans fighting socialism and communism, you can help immensely — by helping him get more customers for his *Report* and broadcasts.

THE
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DAN SMOOT

CIVIL RIGHTS ACT OF 1963

On February 28, 1963, President Kennedy asked Congress for legislation in the field of civil rights which would:

(1) provide federal referees to supervise voting in areas where any colored person had brought suit claiming he had been denied the right to vote;

(2) require such suits to be given preferential treatment in the federal courts;

(3) prohibit, in elections involving federal offices, the application of different tests and standards to different voter applicants;

(4) eliminate state literacy qualifications for voting, by providing that completion of the sixth grade must be taken as presumption of literacy;

(5) expand the authority of the Civil Rights Commission and extend its life beyond November 30, 1963, when, under present law, it is due to go out of existence;

(6) give special federal technical and financial assistance to school districts in the process of desegregation.[1]

One of the most important powers of state governments is that of setting voter qualifications. No subject was more thoroughly debated during the Constitutional Convention of 1787.[2]

When an illiterate, shiftless, propertyless, irresponsible individual (of any race) has as much voice in selecting national rulers and in changing the organic law of the nation (amending the Constitution) as an industrious, thrifty, productive individual, what is to prevent the dregs and drones of society from plundering hard-working and productive citizens? Politicians can fan

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hatred in low-income groups for middle and upper-income groups, telling the "masses" they are poor because they are oppressed; making them believe that everyone who has something somehow acquired it by evil means; promising to soak the well-to-do with taxes for "benefits" to the poor in order to redistribute the national wealth and guarantee that everyone has his "fair share."

The Founding Fathers were aware of this danger in "democracy." They had studied the record of how it had destroyed ancient civilizations — just as anyone today can see how a similar situation creates poverty, wild disorder, and tyranny in many Latin American nations where unscrupulous politicians go into the squatters' slums, buying votes with promises to pull down the high and mighty and to provide free and easy living for the masses.

The Founding Fathers wanted a constitutional system in which all — high and low, rich and poor, good and bad, lazy and hard-working, thrifty and profligate, weak and strong, educated and illiterate, stupid and intelligent — all would be equal before the law; all equally free to lead their own kind of life, as long as they did not infringe on the rights of others; all enjoying the same guarantees against tyrannical oppression by their own government. But the Founding Fathers felt that the *vote* — which, in final analysis, is the power to set the policies and direct the affairs of the nation — should be restricted to mature individuals who could understand, and have some vested interest in, the necessity of maintaining a constitutional system of government.

Hence, there was demand in the Constitutional Convention of 1787 that the right to vote be somehow restricted to responsible citizens. There were proposals that the federal government be assigned the role of establishing voter qualifications throughout the union. All such proposals were based on the fear that individual states might grant the voting right to people not qualified to exercise it.[2]

The proposals were defeated, however, because of a greater fear that pervaded the thinking of the Founding Fathers: fear of creating a federal government so strong that it could destroy state governments and eliminate God-given rights of individuals. Admitting the *need* for voter qualifications which would keep the power of the ballot out of the hands of irresponsible people, the Founding Fathers felt that there was a greater need to leave this basic attribute of sovereignty in the individual states. They rejected all proposals for constitutional provisions which would give the federal government *any* authority in this field.

Hence, the President's proposals for federal intervention in elections violate the intent, the spirit, and the provisions of the Constitution.

As to the need for action to guarantee qualified negroes the right to vote — there is no need. Throughout the South, voter qualifications (whether they be poll tax or literacy requirements) apply equally to whites and negroes.

The President's proposal for a law requiring that civil rights "voting" suits be given preferential treatment in the federal courts nullifies the constitutional concept of equality-before-the-law. Why should litigation by one class or color of citizens be given preference over litigation by other citizens?

The President's proposal for special federal financial aid to school districts "in the process of desegregation" is unconstitutional in the sense that all federal aid to education is: namely, there is no delegation of power in the Constitution to the federal government for *any* kind of educational activity; and the Tenth Amendment specifically *prohibits* the federal government from engaging in activity for which there is no constitutional grant of power. Beyond that, the President's proposal would authorize the very kind of discrimination and unequal treatment which he says violates the Constitution: disbursement of federal funds which all taxpayers pay, not to all

alike, but to arbitrarily selected groups or communities.

The Civil Rights Commission was created by the Civil Rights Act of 1957. It was to go out of existence in three years; but Congress, in 1960, extended its life for another three years. It is now scheduled to go out of existence in November, 1963; and President Kennedy wants Congress to extend it again. In the six years of its existence, the Civil Rights Commission has recommended one constitutional amendment to institute what virtually amounts to universal suffrage.[3] This would eliminate the old constitutional provisions which leave the establishment of voter qualifications as one of the reserved rights of states. The Commission has made a large number of widely publicized proposals which have had the effect of further agitating and inflaming the already inflammatory racial situation in the United States.

The Omnibus Bill

On June 19, 1963, President Kennedy submitted to Congress a message proposing the Civil Rights Act of 1963. This Act would incorporate all the proposals of his February 28 message, discussed above, plus new proposals which the President groups under five general headings: (1) Equal Accommodations in Public Facilities, (2) Desegregation of Schools, (3) Fair and Full Employment, (4) Community Relations Service, and (5) Federal Programs.[4]

In one proposal under "Federal Programs," the President asks for authority to withhold federal funds, at his discretion, where racial discrimination exists. This has been widely interpreted as a reversal of the stand he took on April 24, when he rejected a Civil Rights Commission proposal that federal funds be withheld from states and communities where discrimination exists. Apparently, the President did not like the Civil Rights Commission proposal because it might have *required* him to withhold all federal aid to "offending" states or communities. The President wants a free hand, and absolute authority, to *grant* or *withhold* aid as *he* pleases — whether racial discrimination is practiced or not; and that is the broad authority he demands in his Civil Rights Act of 1963.

Under the Community Relations Service of his civil rights message, President Kennedy asks Congress to authorize a federal board or commission (in addition to the Civil Rights Commission) which will be formally organized and authorized to do what he and Robert F. Kennedy have been doing for months — that is, to meet with local and state officials, businessmen, leading individuals, and private organizations, explaining to them the kind of action the administration wants and putting pressure on them to comply with official policies before conflict erupts into public view.

In his civil rights message, the President boasts that officials of his administration have already been doing what he now asks Congress to authorize; and he announces that, pending congressional action, he will go ahead and create, by Executive Order, the very organization he is asking legislation for.

Under the Fair and Full Employment section of his civil rights message, the President proposes nothing really new. Rather, he uses the racial crisis as an excuse for urging passage of New Frontier legislation, and for demanding enlargement of programs already in existence.

MANPOWER DEVELOPMENT AND TRAINING PROGRAM: Early in 1962, Congress passed the Manpower Development and Training Act, authorizing the Secretary of Labor to determine the number of Americans who should be working in any specific industry at

any given time and place; and authorizing allocation of tax money for training American youth in fields which the *Secretary of Labor* thinks they should be trained in. In his civil rights message of June 19, 1963, President Kennedy urges overall expansion of this program.

YOUTH EMPLOYMENT PROGRAM: On April 10, 1963, the Senate passed Kennedy's Youth Employment Act of 1963. This Act could create an American counterpart of government youth organizations which are essential tools of dictatorship in all communist countries, as they were in nazi Germany and in fascist Italy before World War II. There are strong indications that the House of Representatives will kill this Youth Employment Act. In his civil rights message, Kennedy argues that enlargement and passage of the Act would help relieve racial tensions.

VOCATIONAL EDUCATION: A program of federal aid for vocational education in high schools has been in existence since 1917, and has been enlarged and expanded many times, particularly in recent years. In his civil rights message, Kennedy asks for federal funds to provide part-time employment for students in federally-supported vocational education schools.

ADULT EDUCATION: Among Kennedy's federal-aid-to-education proposals for 1963 (not yet acted on by Congress) is a request for an elaborate adult education program. In his civil rights message, the President requests that his adult education program be enacted and enlarged beyond his original proposals.

PUBLIC WELFARE WORK-RELIEF: In his civil rights message, the President requests additional federal aid to states for the employment of welfare recipients on local public works projects.

FAIR EMPLOYMENT PRACTICES LAW: In his civil rights message, the President renews his request for a federal Fair Employment Practices Act, applicable to both employers and unions, which would outlaw racial discrimination in private employment and in union membership.

In making this proposal, the President admits that two-thirds of the nation's labor force is already covered by federal, state, and local fair employment practices measures of the very kind he requests. Such measures have done nothing to relieve racial tensions or solve racial problems. Indeed, the racial problem is at its worst in areas that already have fair employment practices laws —Washington, D.C., and New York City, for example. Yet the President would violate the Constitution to impose upon the entire nation a type of legislation which will do infinite harm, and no good at all.

In the Desegregation of Schools section of his civil rights proposal, President Kennedy asks congressional authority for the Attorney General to initiate, in federal district courts, legal proceedings against school boards and tax-supported colleges — or to intervene in existing cases — whenever the Attorney General receives a written complaint from any parent or student who says he is being denied "equal protection of the laws" because of segregation.

What could be more "unequal" and "discriminatory" than to give one particular class of citizen the special privilege of by-passing the normal channels of justice which ordinary citizens must follow? An agitator or trouble-maker or crank who happens to be a negro can bring public school and college officials into federal court, by merely writing a letter to the Attorney General; and the agitator will be represented, at no cost to himself, by officials and attorneys of the federal government.

The Equal Accommodations in Public Facilities section of the President's proposed Civil Rights Act of 1963 is the most dangerous of all. Here, in the President's language, is the essence

of this section:

"I am today proposing, as part of the Civil Rights Act of 1963, a provision to guarantee all citizens equal access to the services and facilities of hotels, restaurants, places of amusement, and retail establishments . . . . The proposal could give the persons aggrieved the right to obtain a court order against the offending establishment or persons.

"Upon receiving a complaint in a case sufficiently important to warrant his conclusion that a suit would materially further the purposes of the act, the Attorney General (if he finds that the aggrieved party is unable to undertake or otherwise arrange for a suit on his own, for lack of financial means or effective representation, or for fear of economic or other injury) will first refer the case for voluntary settlement to the community relations service . . . give the establishment involved time to correct its practices, permit state and local equal access laws (if any) to operate first, and then, and only then, initiate a suit for compliance."[1]

The President is not clear about the authority for such legislation. He hints that the Interstate Commerce clause of the Constitution gives the federal government authority to eliminate the right of a private businessman to select his own customers. At another point, the President suggests that the Fourteenth Amendment may provide the constitutional authority. But here is the President's key sentence concerning the "authority" for federal officialdom to eliminate the private property rights of businessmen:

"The argument that such measures constitute an unconstitutional interference with property rights has consistently been rejected by the courts in upholding laws . . . designed to make certain that the use of private property is consistent with the public interest."

In Kennedy's view, an American citizen has no right to own and use private property, unless he uses it in a way that officialdom considers to be consistent with the public interest.

Today, it is the demands of racial-agitation groups which fix official notions of what is consistent with the public interest. Tomorrow, it could be something else: President Kennedy recently announced that we must adopt a friendlier attitude toward the Soviet Union and other communist countries.[1] It would show a friendly national attitude toward communists if all private merchants in the United States were compelled to sell merchandise imported from communist countries. The Civil Rights Act of 1963 would give the President ample authority to order such a thing if he should decide that any merchant who refuses to handle communist goods is not using his private property in a way that is consistent with the public interest.

Under authority which he requests in the proposed Civil Rights Act of 1963, the President could order all private employers to hire communists, if the President should decide that this would promote his program of proving to the Soviets that America has no ill will for communists. The President could order employers to hire, or not hire, Catholics, Jews, Presbyterians, Methodists, Mormons, Christian Scientists, atheists, black muslims, Buddhists: the President could compel private businessmen to do anything the President wants, on the simple pretext that he is requiring the use of private property in a way that is "consistent with the public interest."

Why Now?

The President used almost 7,000 words to present the five-point Civil Rights Message which is summarized and discussed above. It is a badly composed, hastily written, ill-at-ease document — replete with inaccurate statements; contradictions; repetitions; flimsy arguments; demagogic appeals to the emotions of hate, fear, and shame.

Why the haste? Some feel that the President, after playing a major role in stirring race feeling to the danger point, cynically used the dan-

ger as a pretext for throwing Congress a civil rights bill which he knew Congress would not pass — but which would monopolize the attention of Congress and thus give the President an excuse for the failure of his legislative program in 1963. Of 25 Bills listed by *Congressional Quarterly* as major legislation, Congress, by June 21, had passed only 3: extension of the draft law; extension of the "emergency" feed grains bill; and raising of the national debt limit. The latter two major bills passed in the House by very close votes, and only after extreme pressures had been exerted by the administration.

Another theory is that Kennedy's proposal of the civil rights legislation in mid-June, 1963, was part of a calculated effort to keep the public so preoccupied with a dangerous domestic issue that it would pay little attention to foreign policy decisions which might, otherwise, cause a storm of protest.

In early 1962, President Kennedy and his Secretary of Defense made public statements to the effect that the American moratorium on nuclear testing (from 1958 through 1961) had left us behind the Soviets in weapons research and development.[5] The President said that nuclear testing was essential to research, vital to our defenses, and that self-interest would compel us to resume and continue nuclear testing until, or unless, we could negotiate with the Soviets a safe, guaranteed test ban, binding on both sides. Throughout 1962 and the first half of 1963, Kennedy officials engaged the Soviets in fruitless negotiations for a test ban treaty. And then, on June 10, 1963, the President announced that he had ordered a halt to American nuclear tests in the atmosphere, without any agreement or commitment at all from the Soviets.[6]

This announcement — involving a life-or-death matter for the nation — made little impression on the public: the media of mass communication were preoccupied with news about the racial crisis.

Kennedy could not have been elected in 1960 without the negro vote, which was promised and delivered by leaders of racial agitation organizations. The President now knows that he has no chance of re-election without the support of these same agitators. Hence, a plausible explanation for the President's sudden decision in mid-June to demand a civil rights bill is that negro leaders virtually ordered him to do so.

Note Adam Clayton Powell's boast that he wrote major portions of Kennedy's June 19 civil rights message. Speaking in Long Beach, California, on June 21, 1963, Powell said:

"The President had no intention of including many of the points that he did in his message. I rewrote half of his speech for him the night before it was delivered before Congress."[6]

In all of American history, it would be hard to find anything more shameful than this. Adam Clayton Powell has been associated with many communist front organizations; he has been criminally indicted for income tax frauds; his tours of foreign nightclubs with his "secretaries," at taxpayers expense, have scandalized the nation; and his hatred for the white man has been openly expressed and broadcast to the nation. This is the man who says he told Kennedy what to put in his civil rights message of June 19, 1963.

The Congress of Racial Equality (CORE) and the National Association for the Advancement of Colored People (NAACP) are both heavily infiltrated, at the top, with communist

fronters.[7] Directorates of the two organizations are interlocked (officials of one organization being officials in the other);[8] and they are interlocked with the directorate of the National Urban League and with the directorate of the Southern Christian Leadership Conference — the agitation group of Martin Luther King, who also has a record of pro-communist activities. The Student Non-Violent Coordinating Committee is another organization militantly active in racial agitation.

These outfits (indirectly interlocked with the Council on Foreign Relations) have learned that racial agitation is a profitable activity. Appealing for funds to support their "struggle for racial equality," they raise huge sums of money. Hence, they have developed an intense intra-family rivalry — each one trying to demonstrate, by militant activity, that it is more effective and more deserving of financial support than others.

Adam Clayton Powell appears to be striving for the role of over-all leader and spokesman; and it is Powell who is bringing the policies of all the negro racial agitation groups into line with the policies of the black muslims — a group which advocates black supremacy and violence against whites.[9]

John F. Kennedy, catering to this crowd, is sowing the seeds of hate and violence: the nation will reap a bloody harvest.

It is obvious that President Kennedy's June 19 civil rights proposal *was* an act of kowtowing to radical negro leaders; but astute observers think there was a deeper motive behind the proposal.

President Kennedy, under the pretext of preparing the nation for civil defense in time of emergency, has already, by executive orders, established a plan for total dictatorship. The racial crisis could become the necessary emergency.[10]

After a series of public statements which were

bound to encourage mob action and violence on the part of negro groups, the President suddenly proposed a civil rights program which Congress (if it has any regard at all for the Republic) cannot pass; and then the President, in effect (not directly, but in an oblique way), told the negro agitators not to engage in any more violence *unless* Congress fails to pass the civil rights legislation.

Could there be a more effective means of fanning what Kennedy himself calls the "fires of frustration" into a raging inferno?

What To Do

Americans who value liberty — however they may feel about the racial problem — should *storm* the Congress with demands that the President's Civil Rights Act of 1963 be rejected, in entirety. This Bill *must* be defeated.

NEXT WEEK: More on the racial problem.

FOOTNOTES

(1) Text of President Kennedy's Civil Rights Message, AP dispatch from Washington, *The Dallas Times Herald*, June 19, 1963, pp. 23-4 B

(2) "Debates in the Federal Convention of 1787 as Reported by James Madison," *Documents Illustrative Of The Formation Of The Union Of The American States*, published as House Document No. 398, 69th Congress, Government Printing Office, 1927

(3) "Civil-Rights Report on Schools . . . Voting . . . Housing," *U. S. News & World Report*, September 21, 1959, p. 123

(4) President Kennedy's June 10 address On World Peace," *Congressional Quarterly Weekly Report*, June 14, 1963, pp. 976-8

(5) *The Test Ban: An American Strategy of Gradual Self-Mutilation*, by Stefan T. Possony, *Congressional Record*, March 21, 1963, pp. 4358-70

(6) "Credit For Rights Message Rewrite Claimed By Powell," UPI dispatch from Long Beach, California, *The Dallas Times Herald*, June 23, 1963, p. 17A

(7) "Activities in the Southern States," speech by U. S. Senator James O. Eastland (Democrat, Mississippi), containing official records from the House Committee on Un-American Activities, and Senate Internal Security Subcommittee, *Congressional Record*, May 25, 1961, pp. 8349-63

(8) *Activities of "The Nation of Islam" or the Muslim Cult of Islam, in Louisiana*, Report No. 3, The Joint Legislative Committee on Un-American Activities, State of Louisiana, January 9, 1963

(9) See this *Report*, "Planned Dictatorship," June 3, 1963, for a complete discussion of the Executive Orders issued by President Kennedy.

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DAN SMOOT

MORE EQUAL THAN EQUAL

Here is the civil rights platform announced by the communist party in 1928, when communists formally launched their program to create social disorder in the United States by agitating the racial situation:

"1. Abolition of the whole system of race discrimination. Full racial, political, and social equality for the Negro race.

"2. Abolition of all laws which result in segregation of Negroes. Abolition of all Jim Crow laws. The law shall forbid all discrimination against Negroes in selling or renting houses.

"3. Abolition of all laws which disfranchise the Negroes.

"4. Abolition of laws forbidding intermarriage of persons of different races.

"5. Abolition of all laws and public administration measures which prohibit, or in practice prevent, Negro children or youth from attending general public schools or universities.

"6. Full and equal admittance of Negroes to all railway station waiting rooms, restaurants, hotels, and theatres.

"7. Federal law against lynching and the protection of the Negro masses in their right of self-defense.

"8. Abolition of discriminatory practices in courts against Negroes. No discrimination in jury service.

"9. Abolition of the convict lease system and of the chain-gang.

"10. Abolition of all Jim Crow distinction in the army, navy, and civil service.

"11. Immediate removal of all restrictions in all trade unions against the membership of Negro workers.

"12. Equal opportunity for employment, wages, hours, and working conditions for Negro and white workers. Equal pay for equal work for Negro and white workers."[1]

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In 1946, President Truman created a President's Committee on Civil Rights. In October, 1947, this Committee published a report, recommending federal legislation to outlaw all discrimination and segregation based on race, color, creed, or national origin. In February, 1948, President Truman requested of Congress civil rights legislation based on the 1947 Report. Congress refused. The Democrat Party put strong civil rights provisions in its political platform for the 1948 elections, and so did the Republican Party.[2]

Thus, twenty years after communists initiated their program to create racial strife, the two major political parties made the race question a primary issue in a presidential election. Kennedy's civil rights proposals in 1963 go beyond the original communist program.[3]

Enforcing Equality

On August 13, 1953, President Eisenhower issued an Executive Order creating the Government Contract Committee (with Vice President Nixon as chairman). This Committee had the responsibility of seeing that business firms with government contracts did not permit racial discrimination in their employment practices.

On January 18, 1955, President Eisenhower issued an Executive Order creating the Committee on Government Employment Policy, to guarantee that all considerations of race be eliminated in the hiring of persons to work for the federal government.

On March 6, 1961, President Kennedy issued an Executive Order abolishing the two Eisenhower committees, and substituting for them the President's Committee on Equal Employment Opportunity, with Vice President Johnson as chairman. The responsibility of this Committee is to eliminate racial discrimination in every activity that has any connection, direct or indirect, with the spending or lending of federal tax money. Private builders who get FHA, or other, loans must not permit any racial discrimination in their own employment practices or in the employment practices of their contractors. They must sell, rent, or lease their real estate without regard to race. Federal agencies must eliminate all kinds of racial discrimination or segregation; and any state or private agencies receiving federal funds, and any private firm contracting, or subcontracting, work for the federal government, must do the same.

The fact is, of course, that the federal government has no constitutional authority to lend money or guarantee private loans, through FHA or otherwise, to individuals or business firms. It has no constitutional authority to give tax money to state governments for schools, welfare, unemployment compensation, employment activities, and so on.

Individuals and state governments — in the South and elsewhere — who take illegal federal handouts and then complain about illegal federal controls have no logic to support their position. The way to end this particular aspect of federal domination of private and state affairs is to eliminate the federal subsidies which give some color of justification for the domination. It is interesting to note, in this connection, that advocates of all federal aid programs (particularly federal aid to education) incessantly repeat the tired old argument that federal help does not mean federal control, although every one knows better, and can see in the record of current events that a primary reason for federal aid is to create a pretext for federal control.

Federal requirements against discrimination in the employment practices of private business firms working on contracts or subcontracts for the government have no basis in the spirit or provisions of American constitutional law. When the government buys goods from private individuals, or contracts with them to produce goods, it has a right and responsibility to require honest

and efficient contract fulfillment. It has no right to force on the private contractors the social or political ideology of reigning Washington officialdom. Yet, from 1953 to 1961, Eisenhower and Nixon (through Eisenhower's Government Contract Committee); and since 1961, Kennedy and Johnson (through Kennedy's Committee on Equal Employment Opportunity) have used government contracts as a club to promote their own political ends.

It is a big club. Federal government spending amounts to more than 20% of the Gross National Product of the United States.[4]

State and Local Action

In addition to federal efforts, at least 20 states (and many municipalities) have laws against racial discrimination in private employment, in public employment, in housing, in schools, and in the use of public facilities.[5]

Most state laws against racial discrimination go to extraordinary extremes. The California Fair Employment Practice Act, for example, makes it illegal for a private employer to ask a job applicant whether he is a citizen of the United States — or even to ask him how long he has been a resident in this country.

Since the California Fair Employment Practices Commission was created in 1959, over 425 cases against private employers have been handled. One typical case involved Lennie L. Andrews, a negro, employed as a coach cleaner in the Barstow, California, yards of the Santa Fe Railroad Company. Andrews did not like the job of cleaning coaches. He asked for promotion to the job of carman. The railroad refused to promote him because he had no aptitude for the job he wanted. Shortly thereafter (in March, 1960), Andrews was found asleep during working hours in a coach he was supposed to be cleaning. He was fired. He complained to the California FEPC that he had been denied the promotion and had been fired because he was a negro. The FEPC, ignoring the facts supplied by the railroad (facts strongly buttressed by the circumstances that the company has a large number of negro employees who have been promoted on merit and who have not been fired), ruled that the company had discriminated against Andrews. The FEPC ordered Santa Fe to reinstate Andrews in his old job, to give him 10 months' back pay, and to promote him at the first opportunity.[6]

Another typical California FEPC case involved Clarence B. Ramsey. In January, 1961, Ramsey, a negro, applied for a job as shipping clerk with the T. H. Wilson Company, a photographic supply firm in San Francisco. The company, considering him unqualified, refused to hire him. Ramsey complained to the FEPC — which ruled that refusal to hire Ramsey was an act of racial discrimination. In August, 1961, the FEPC ordered the company to give Ramsey $2175.50 — which represented the amount of money Ramsey would have earned in wages from January to August, 1961, if he had been hired.[7]

These two California cases are typical of outrageous injustices and violations of individual rights which are commonplace, not only in California, but in all states which have "FEPC" laws.

Consequences

Existing civil rights programs (of federal, state, and local governments) already cover at least two-thirds of the total population in the United States, according to statements which President Kennedy made in his civil rights message of June 19, 1963. The ostensible purpose of the programs is to eliminate racial tensions by abolishing racial discrimination. Yet, racial tensions are infinitely worse now than before any of the programs were initiated. The odd distortions of "liberal" reason on the race question have had incredible consequences.

On September 24, 1957, President Eisenhower sent a Division of airborne troops to Little

Rock, because, he said, "disorderly mobs" in that city were "defying the law." No law was involved, however. The "disorderly mobs" consisted of about 200 housewives and workers, congregated on the lawn at Central High School, jeering, or standing in silent protest against a Supreme Court order that nine negro children should be enrolled in Central High (even though a more modern and commodious public high school was available to the children in their own neighborhood). President Eisenhower interrupted a vacation in Rhode Island and returned to Washington for a radio-television speech to the nation about the Little Rock affair which, because of his action, was emblazoned in banner headlines all over the world.

About midnight on September 23, 1957 (just a few hours before Eisenhower's military action against the "disorderly mobs" in Little Rock) some real mob violence erupted in Lone Star, Texas. Approximately 1000 strikers (United Steel Workers-CIO) jammed entrance gates at the Lone Star Steel Company, preventing employees who wanted to work from entering the plant. They threw rocks at cars and non-strikers, and shouted insults and obscenities at workers who approached the gates. It was an "illegal" strike — in the sense that the union had not authorized it, and management was not certain what it was all about. The company obtained a court injunction against mass picketing, but the strike continued anyway. Company cars were stoned, windows were broken. One company truckdriver said he was followed by two carloads of strikers who fired on him, puncturing a tire on his truck. The wife of one non-striker said the lives of her children were endangered. A sales representative said one hundred strikers mobbed his car, trying to turn it over.

In Little Rock, Arkansas — 200 housewives and workers milling around Central High School; in Lone Star, Texas, 1000 CIO strikers armed with rocks, clubs, and guns doing violence to the life, liberty, and property of innocent citizens!

President Eisenhower did nothing, said nothing, about the Lone Star, Texas, affair.

President Kennedy has displayed the same bias. Washington, D. C., has become a place where people are not safe on the streets at night, or even in church or in their own homes, unless carefully guarded. Last Thanksgiving Day, a small minority of white people in a predominantly negro crowd at a high school football game were savagely mauled by negro spectators, after the white football team had defeated the negro team. Police were powerless to protect the white minority, just as police in Washington are generally unable to give the minority white population adequate protection against negro hoodlums.[5] The President could, with constitutional authority, use federal troops to protect the people of Washington against lawless violence, since the city is in a federal district; but the President has never done it.

In May, 1963, however, President Kennedy was quick to send federal troops to protect rioting negroes in Birmingham — where authorities had the situation well in hand and were impartially enforcing the law; where no federal law or federal court order had been violated or even threatened; where there was no constitutional authority for federal intervention.

It is safe to say that less damage to the persons and property of innocent people has occurred in all racial strife in the State of Alabama during the past ten years, than occurred in thirty minutes on Thanksgiving Day, 1962, at Washington, D. C.

On June 12, 1963, Medgar Evers, negro field representative for the National Association for the Advancement of Colored People in Mississippi, was murdered in Jackson. The FBI investigated the crime as a federal case. FBI agents identified a suspect and arrested him under authority of federal civil rights laws, later turning him over to state authorities for prosecution on a murder charge.

On June 12, 1963, a white man was killed by a negro during a race riot in Lexington, North Carolina. Federal authorities showed no interest in this case.

On June 12, 1963, two white men were injured by shotgun blasts fired into their private places of business, during a race riot at Cambridge, Maryland. Federal authorities showed no interest in this case.

On the night of June 12, 1963, 6 negroes stabbed an 18-year-old white boy and raped his 15-year-old companion in Cleveland, Ohio. Federal authorities showed no interest in this case.

On June 19, 1963, Medgar Evers, the slain NAACP leader (an ex-serviceman) was buried in Arlington National Cemetery, with all the solemn ceremony customary at the burial of a national hero.

On June 19, 1963, three white soldiers were dragged out of their car in Washington, D. C., and beaten by a gang of negroes. One of the white soldiers — Edward Betcher — was killed. The negroes ran over his body with their car, as they were leaving the scene.[9] The FBI did not enter this case; and the funeral of Betcher, a murdered white soldier, was not even reported in the press.

On June 19, 1963, a homemade bomb, thrown or placed by unknown assailants, damaged a negro church near Gillett, Arkansas. Newspaper accounts indicate that the FBI did enter this case.[10]

On the night of June 26, 1963, dynamite bombs blasted the homes of two white police officers in Minneapolis. Prior to the bombings, both white men had received numerous threatening telephone calls from negroes. Federal authorities did not enter this case.

On June 5, 1963, the Dallas Post Office announced the promotion of 3 negroes to supervisory positions. On the basis of merit, 53 white men ranked higher than the highest ranking negro on the promotion list.

On July 5, 1963, a *San Antonio Evening News* columnist quoted local federal officials as saying they had been told to "fill vacancies with nothing but Negroes." The order was given verbally.[11] On July 6, various regional federal officials denied the San Antonio story, by saying that the San Antonio officials had "exaggerated what we've asked them to do."[12]

Concerning negroes in government service, United States Representative Bruce Alger (Republican, Texas) says:

> "While the negroes comprise only 10 percent of the population . . . they already hold jobs, especially in government, far beyond this percentage. In Washington, in such agencies as the Post Office Department, General Services Administration, etc., employment for negroes runs as high as 40 to 50 percent."[13]

In sum: civil rights for negroes, in the eyes of politicians hungry for negro votes, means that harming a negro is a national disaster which requires federal action even when such action violates the Constitution; but negro violence against whites is a routine matter beneath the notice of federal authorities. Civil rights for negroes in federal employment means that they must be promoted above white men who outrank them on the basis of personal merit, and must be given preference as applicants for employment, even though they already hold a disproportionate share of all government jobs.[14]

Overt Demands for Preference

Agitators of the racial problem have long contended that they merely want to abolish discrimination *against* negroes — to eliminate racial consciousness so that negroes will be treated as individuals, without regard to their race. Now, however, these same agitators are frankly demanding that negroes be given preferential treatment *because of their race.*

In northern cities, taxpayers are burdened with the expense of transportation services to haul

negro children miles from their neighborhoods so that they can be enrolled in schools with white children.

On June 30, 1963, Martin Luther King (notorious negro agitator) demanded "discrimination in reverse." That is, he wants preferential treatment of negroes in the form of financial aid from the federal government to provide negroes special advantages in employment, education, housing, and so on.[158] On July 1, 1963, Lincoln Lynch, an official of The Congress of Racial Equality, went one step further in demanding that negroes be given preferential treatment, not only by government but by private organizations.[159]

These negro agitators threaten the nation with violence if they do not get the preferential treatment they demand.

Negro leaders are now saying that the absence of white children from all-negro schools "means a shortage of ambitious, education-minded models for negro children to copy."[160] This does coincide with the findings of scientific research.

Dr. Audrey M. Shuey, Chairman of the Department of Psychology at Randolph-Macon Woman's College, Lynchburg, Virginia, wrote a book, *The Testing of Negro Intelligence* (1958). Dr. Shuey reviewed all extensive psychological testing of negroes done in the United States during this century. Her conclusion is that, on the whole, negroes have lower IQ's than whites, *regardless* of environmental factors, and that there are definite intelligence differences between white and negro races.

Dr. Henry E. Garrett, former President of the American Psychological Association and Professor Emeritus of Psychology at Columbia University, says in the introduction to Dr. Shuey's book:

"Dr. Shuey concludes that the regularity and consistency of the results strongly imply a racial basis for these differences. I believe that the weight of evidence supports her conclusion."

Impartial foreign observers have come to the same conclusion. Peregrine Worsthorne, an editor of the London *Sunday Telegraph*, says:

"To be brutally frank, the most serious and ineradicable obstacle to a genuine multi-racial society in the United States may be less the Southern white man's privileges than the Northern black man's inadequacies."[161]

Only God can evaluate the worth of human individuals or races. It is quite beyond the province of man to know whether any individual or race is "superior" to another. Only God knows whether negroes have contributed more or less than whites to fulfillment of God's plan for humanity. Only God knows whether "civilization," as we know it, is better or worse than the primitive society of negroes in the jungles of Africa.

In evaluating human accomplishments, the best we can do is to use standards known to us. All of us who are heirs of Western civilization (which includes negroes among us) use such words as "progress" and "accomplishment" in conformity with the standards of our civilization — even when we acknowledge that God's concept of "progress" and "accomplishment" may differ from ours.

In this context, certain things are obvious.

It is obvious that Western civilization was produced by whites. For primitive living under harsh physical conditions, the black man is obviously better adapted than whites; but for living in the white man's civilization, whites are obviously better adapted than negroes.

When left alone, the negro has never advanced beyond a primitive culture. When left alone after taking over an advanced white civilization (as in Haiti), the negro has retrograded rather than progressed.[162] Nowhere else on earth has the negro made such substantial progress as in the United States, where he has received extraordinary assistance from whites.

In demanding enforced racial mixing so that negroes will benefit from association with whites, negro leaders inadvertently admit negro inferior-

ity; but to justify their demands for preferential treatment, they claim that negroes are now entitled to preference because they always before have been oppressed; they claim that negroes are backward in our civilization because they have never been given a chance.

This simply is not so.

Before negro agitation became a major issue in American politics, whites (in southern states, especially) voluntarily gave negroes preferential treatment of the kind that was most beneficial to negroes. The prevailing attitude in the South was that whites had a responsibility to help negroes. White employers would put up with laziness, dishonesty, and irresponsibility on the part of negro employees that they would not for a moment tolerate in whites. White families voluntarily assumed a responsibility for negroes that they would never assume for other whites. Whites would take financial risks to help a negro which they would not think of taking to help a white man with comparable resources and credit rating. This is why there are more independent, prosperous negro businesses in the southern part of the United States than in any other part of the world: white men, understanding the negro and feeling responsibility for him, gave him special help that was not available to anyone else.

It is true that for generations following the Civil War, great numbers of southern negroes were treated like children, because they behaved like children. But, generally, since the end of the Civil War, the negro has been treated on the basis of individual merit. Those who have the ability to rise in our society have risen, many to great heights, where they enjoy all the advantages of wealth, fame, and public acclaim that whites with comparable accomplishments enjoy.

The arrogance of contemporary negro leaders, the wide-spread violence against whites and mass defiance of local laws by negroes who are supported, encouraged, and defended by Washington officials so greedy for power that they are willing to destroy the Constitution and abolish the most fundamental rights of all the people in order to get the votes of organized negroes in key northern cities; the preferential treatment of negroes in government employment, and the governmentally-enforced, preferential treatment of negro job applicants in private industry, in a time of unemployment — these are creating a general resentment of whites against negroes that did not exist before. The negro in America will soon realize that liberal politicians and agitators have led him into disaster. The whole nation will suffer.

What To Do

The most obvious thing that we ought to do

about the race problem is to demand that the federal government quit meddling with it. Congress should reject President Kennedy's civil rights program entirely; and it should repeal all existing civil rights legislation in order to return to the ideal of equality-before-the-law for all persons in our nation.

If this could be done; and if all the federal government's unconstitutional programs of aiding and meddling in state and local affairs could be stopped, we would return to a free and voluntary society in which each community or state could handle its own race problem, if any, in its own way. This is a slow and long-range approach; but it is the only approach that offers any hope of solution for the most dangerous domestic problem in the United States since the outbreak of the Civil War.

Whites, outnumbering negroes by about 10 to 1, could vote out of office every politician who is ruining the country by bidding for negro votes with civil rights proposals. If whites continue submitting to the dictation of the radical leaders of a small minority, they will deserve what they get.

FOOTNOTES

(1) *American Negro Problems*, by John Pepper, Workers Library Publishers, New York City, 1928
(2) "Perspective: Time for Statesmanship," by Raymond Moley, *Newsweek*, March 15, 1948; "Perspective: Toward a Civil Rights Solution," by Raymond Moley, *Newsweek*, November 22, 1948
(3) For additional information on President Kennedy's 1963 Civil Rights proposals, see this *Report*, "Civil Rights Act of 1963," July 1, 1963.
(4) *The Budget in Brief for 1964 Fiscal Year*, Bureau of the Budget, January 17, 1963, pp. 17-20
(5) *The Book of the States*, 1960-1961, *Volume XIII*, The Council of State Governments, 1960, p. 458
(6) "FEPC Orders Rail Worker's Reinstatement," *The Los Angeles Times*, March 1, 1961
(7) AP dispatch from San Francisco, *The Los Angeles Times*, August 24, 1961
(8) For a discussion of conditions in Washington, D.C., see this *Report*, "Washington: The Model City," June 24, 1963.
(9) "Five Negroes Held In Soldier's Death," AP story from Washington, *The Dallas Morning News*, June 20, 1963, Section 1, p. 3
(10) UPI dispatch from Gillett, Arkansas, *The New York Times*, June 20, 1963, p. 19
(11) "Hire Negroes Only, Reported U.S. Order," *The Dallas Times Herald*, July 6, 1963, p. 1
(12) "Official Denies SS Units Told to Hire Only Negroes," by Carl Harris, *The Dallas Morning News*, July 7, 1963, Section 1, p. 21
(13) "Washington Report," by U.S. Representative Bruce Alger (Republican, Texas), June 22, 1963
(14) "What New Turn In Negro Drive Means," *U.S. News & World Report*, June 17, 1963, pp. 40-7
(15) "Dr. King Urges Negro 'G.I. Bill'; Calls for 'Preferential' Plan to Meet Education Needs," *The New York Times*, July 1, 1963, p. 21
(16) "CORE to Intensify Militancy On L.I.," by Ronald Maiorana, *The New York Times*, July 2, 1963, p. 14
(17) "Should All Northern Schools Be Integrated?" *Time*, September 7, 1962 p. 33
(18) "'Black And White Reality'—A British Observer's View," by Peregrine Worsthorne, *U.S. News & World Report*, July 1, 1963, pp. 62-3
(19) For a discussion of Haiti, see this *Report*, "The American Tragedy," July 8, 1963, pp. 213-4.

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This is the answer to Mr. Smoot

STATEMENT
BY
MRS. MARY TINGLOF, MEMBER
BOARD OF EDUCATION

PRESENTED AT THE REGULAR BOARD MEETING
MONDAY, AUGUST 12, 1963

In response to the personal attack made upon me last Thursday by Mr. Smoot, I should like to make a statement not only to him but to the Board and the Administration. This response could be made in several ways, but I choose not to answer in kind to the insinuations or innuendoes.

I was elected to this Board in July, 1957, and re-elected in 1961 due to the tremendous efforts of teachers, city-wide community organizations, labor representatives, professional associations (including those in which I have personal associations, such as legal, medical, art, and music), welfare and social agencies, and personal friends--all of whom contributed individually or collectively some money, but most of all blood, sweat, and shoe leather to the success of those campaigns. In both instances, it was what one would term a "grass roots" endeavor in support of my avowed principles dealing with excellence in curricula, adequate recognition of the teaching profession, academic freedom, programs for both youth and adults, and a firm belief that education and sociological changes in our metropolitan Los Angeles had to move hand in hand. This has been and will continue to be my goal, not only during my term of office, but whenever I might return to private life.

Some of these avowed goals of mine have annihilated long-standing friendships for it is human nature not to upset the status quo or to leave peaceful pastures for stormy seas. If this personal attitude should be called "Rebel", I accept the title for I refuse to adhere to any policy which is not for the good of all--according to the way I view it after considerable inner debate with my own conscience.

I have long since determined that because the pattern of society is to become institutionalized, reforms must stem from individuals--and I also believe that when a crisis is faced there are superhuman efforts that can be brought to bear because the magnitude of the problem demands it.

On December 7, 1941, this country was faced with a national emergency and intermediate steps were taken to avert disaster. Many of these first steps were wrong and most inadequate, but those first attempts got this country off dead center--and intermediate steps in a relatively short period of time helped through those perilous months--though in time they were discarded for others which brought our nation ultimate victory. The point is, in that crisis, immediate positive steps were taken by our government; the problem of the minorities in this country today is no less a crisis.

I hold no special brief for the transporting of students as suggested in my motion of July 18th as the perfect solution, but I reiterate it was one method of moving in a situation which will wait for no moderate clime. Nor was that motion offered in a dictatorial form--inasmuch as it was a suggestion presented in the due process of democratic procedure to this Board for acceptance in whole or in part or for rejection.

From May 20th, when the Ad Hoc Committee's recommendations were adopted by this Board, to June 6th, when the proposals of the NAACP were heard, I, as President, hoped the initiative for solving this dilemma would stem from other members of this Board in recognition of our collective awareness of this acute national situation. This, to my dismay, was not forthcoming; hence, one week after I had again been returned to regular Board membership, I submitted my motion knowing full well its obvious shortcomings, but indicating a positive willingness to make some moves in six high schools on the perimeter of the heart of the Negro ghetto. No one would deny that housing evils are at the core of this cancer, but waiting for this to straighten its course only passes the buck

while children, both black and white, continue to grow older with their short-changed knowledge about the ways, attitudes, and behavioral characteristics of a different culture and heritage.

Mr. Smoot, you may sail your small boat in a happy sea, but I choose to cast mine into an angry foam for I find it more challenging. This wave of indignation sweeping our land has been brought about by our own shortsightedness, whether in Birmingham or Los Angeles, and I shall ride that crest so long as some Americans continue to wear blinders on Justice for all.

These, my people, have just and reasonable demands; they ask not for miracles but for action--both immediate and of longer duration. They are keenly aware of our limitations, but there is no problem so involved that there can be no temporary alleviation until greater strides are culminated. We are so steeped in tradition that some school boundaries have become as rigid as Berlin walls. Someday a novelist will write a book whose title could be "The Sacredness of Alameda Street." The role of principal or administrator to place personnel and set individual school procedures has been held in many instances so inviolate that small kingdoms have been built, authoritarian to a degree which annihilates the democratic education which we profess to teach. Traditional ways of conducting education in many schools have made life so sterile that creativity--the quality so badly needed for strengthening our country--has been lost in the multitudinous rules and regulations of the "system."

My response to you, Mr. Smoot, is in an appeal to you who profess to believe in Christianity. This is not a movement by these people to seek special privileges, but it probes the depth of your true humanitarian beliefs. A portion of God's children who, by no fault of their own, have been here, as in other states, prevented from achieving a full citizenship immediately upon birth because the bonds and stigma of the past adhere to them by those of us who say "Prove Yourself" before we accept you.

In these past few days the question has been asked frequently whether during my terms of office a Board member has been so severely castigated by a colleague. To my knowledge, I think not, but though in my mind your facts and conclusions are grossly erroneous, I would be the first to defend vigorously your right and privilege to disagree with me and my viewpoint. This is not a personal feud, but it is a soul-searching depth finder to ascertain whether a majority of this Board can speedily relieve a tension before the patient goes into shock.

My words and actions are no payment for any political favors, but an obligation to a personal promise I made to myself some twenty years ago when I joined the NAACP. If my position as a member of this Board has thrust me into a place of responsibility, I shall make every attempt to pay off that promise to a cause in which I believe. That same principle and devotion has been given to my other dedications--better relations between our students and those of Japan, between the teachers of foreign language and our professional staff, between the public librarians and their counterparts in schools, between the people of the Mexican community and our school district--a community whose cause is similar and for whom I work in other civic agencies, and in addition, my city and county affiliations on behalf of senior citizens. As in the past, I will continue in the future to pressure this Board and administration into creative programs to achieve the greatest possible educational opportunity for every child and adult which this district must serve. The present Negro problem is not only one of equal educational opportunity, but it must be a massive attempt to fill in the back-log of inequalities that have existed over this past century.

One way to help shorten this gap, Mr. Smoot, would be to reanalyze your personal commitments to the principles of your religious belief.

MEMORANDUM ON "THE DAN SMOOT REPORT"

The truth of the following statements made in reference to the NAACP in "The Dan Smoot Report" is questionable:

1. Vol. 3, No. 16, Monday, April 22, 1957, page 8:

> You (perhaps knowing that 41% of the officers of the NAACP are either communists or members of communist fronts) may not want to let this NAACP official violate your constitutional right to be secure in your papers and effects--and put you out of business.

2. Vol. 3, No. 39, Monday, September 30, 1957, page 5:

> One specific important item of information publicized by the Louisiana committee was that ten top leaders of the National Association for the Advancement of Colored People have extensive communist front records. The ten are:
>
> Algernon D. Black, NAACP Board of Directors
> Hubert T. Delany, NAACP Board of Directors
> Earl B. Dickerson, NAACP Board of Directors
> Oscar Hammerstein II, Vice President of NAACP
> S. Ralph Harlow, NAACP Board of Directors
> William Lloyd Imes, Vice President of NAACP
> Benjamine E. Mays, NAACP Board of Directors
> Eleanor Roosevelt, NAACP Board of Directors
> Channing H. Tobias, Chairman of the Board, NAACP
> W. J. Walls, Vice President of NAACP

3. Vol. 7, No. 4 (Broadcast 286), January 23, 1961:

A. The really significant fact about Dr. Weaver is not that he is a negro, but that he was chairman of the NAACP. This outfit, dominated for years by persons who have long records of association with communist causes, has done, and is doing, more harm in creating strife, fear, mutual distrust, and mutual hatred among racial groups in America than all of the so-called "hate groups" which 'liberals', in and out of the NAACP, are always talking about. The fact is that the NAACP is the major, organized 'hate group' in America today.

B. Prior to the late 1920's and early 1930's (when the communist party and the NAACP began their parallel

programs of racial-hatred agitation) American whites and negroes were solving their "racial problems" with miraculous speed.

C. When the NAACP and the communist party attacked these isolated cases of racial abuse, they dishonestly portrayed them as typical of all negro-white relations in America. The NAACP and communist agitation was not intended to eliminate racial feelings and attitudes which were prolonging undersirable race-relations in isolated cases. The agitation was intended to inflame those feelings into hatred, and spread them to the total population.

D. The racial agitation of the NAACP...reflects a hatred and contempt of colored people.

E. Parents who enrolled their children in the white high school in the Little Rock affair were "either bribed or high-pressured into using their own children as pawns which the NAACP could manipulate to serve its own end of creating racial strife and hatred."

F. It is a practice of the NAACP to use Negroes as tools to stir up hatred which hurts Negroes more than it hurts anyone else.

For example, the NAACP does not push for public housing for Negroes but determinedly opposes such a measure. It has strong opposed every proposal for a public housing project for Negroes...The NAACP does not want Negroes to have the freedom to live in their own communities. NACCP wants to force Negroes to live in intimacy with whites...

G. The NAACP is ashamed and contemptous of colored people. The NAACP wants to eliminate the Negroes as distinctive human beings: to stir negroes into the white population until they will be unnoticed.

H. This [the reference is to paragraph G] is why the NAACP is constantly agitating (and in recent years, with frightful success) for laws which make it illegal to show a human being's race on a birth certificate or death certificate; which make it illegal for employees even to ask prospective employees what race they belong to; which make it illegal for employment agencies to mention race when advertising jobs available; which make it illegal for insurance

companies to mention race when writing policies; or for banks to mention or consider race when considering loan applications; or for individuals to consider race in the use and management of their own homes and other property.

So, NAACP-liberals are determined to force colored and white people to live together in the same neighborhoods and same houses, hoping that this intimacy of living will finally lead to the real and final intimacy of inter-marriage.

OK. +. The NAACP advocates the use of federal tax money to enforce racial togetherness in housing...

4. Vol. 8, No. 41, October 8, 1962, page 322, paragraph 2:

The NAACP financed Meredith's court fight to force enrollment, in defiance of the laws. [This statement was made in reference to James H. Meredith when he sought to enroll in the University of Mississippi, contrary to the segregation laws of Mississippi.

5. Vol. 9, No. 22, June 3, 1963:

A. Page 174, paragraph 6:

The Black Muslims want negro supremacy, and openly advocate murder of white people until all whites in the United States are either exterminated or reduced to bondage. The NAACP has made an elaborate pretense of 'repudiating' the Black Muslims movement, but there are many indications that the NAACP and the Black Muslims are working hand-in-glove: the NAACP warning that if their particular brand of violence is not fully supported, the bloodier violence of the Black Muslims is inevitable.

[In the next paragraph it is asserted that Adam Clayton Powell is a life member of the NAACP and has openly associated with the Black Muslims.]

B. Page 174-175, paragraph 7:

+ The head of the NAACP in Washington, D.C. (where negro criminal violence against white people is creating something akin to a reign of terror) said, on a national television program in early May, 1963, that negro violence is coming and that the NAACP will promote the violence if whites do not immediately give the negro what he demands.

6. Vol. 9, No. 26, July 1, 1963, page 206, paragraph 8:

The NAACP is heavily infiltrated, at the top, with communist fronters 7/. (Footnote: "Activities in the Southern States," speech by U.S. Senator James O. Eastland (Democrat, Mississippi), containing official records from the House Committee on Un-American Activities, and Senate Internal Security Subcommittee, Congressional Record, May 25, 1961, pp. 8349-63).

THE
Dan Smoot Report

Vol. 10, No. 22 (Broadcast 458) June 1, 1964 Dallas, Texas

DAN SMOOT

COMMUNISM IN THE CIVIL RIGHTS MOVEMENT

On May 20, 1964, Leo Pfeffer (general counsel of the American Jewish Congress) announced in New York that civil rights and religious organizations have arranged for 60 volunteer lawyers to spend at least two weeks without pay in southern states this summer, to defend civil rights demonstrators who may be charged with violations of local and state laws. The other "civil rights and religious organizations" joining the American Jewish Congress are the National Council of Churches, the Congress of Racial Equality, the National Association for the Advancement of Colored People, the American Civil Liberties Union, the American Jewish Committee, and the Student Non-Violent Coordinating Committee.(1)

What motivates these people who stir cauldrons of violence and issue calls for lawless insurrection? Some of them, no doubt, think they are doing what is right, though it is difficult to understand how anyone could think so. It is obvious, however, that some are being manipulated by sinister forces to do the job of the communist party: to tear American society apart and destroy constitutional government.

On August 25, 1963, Attorney General Robert F. Kennedy, testifying before the Senate Commerce Committee, denied that there is significant communist influence in the civil rights movement. He said FBI investigations had produced "no evidence that any . . . leaders of major civil rights groups are communists or communist-controlled."(2) On January 29, 1964, FBI Director J. Edgar Hoover, testifying before the House Appropriations Subcommittee, said that communist influence in the civil rights movement is "vitally important."(3) Who is telling the truth: FBI Director J. Edgar Hoover, or Attorney General Robert F. Kennedy? One of them is bound to be wrong, since they contradict each other.

Most of Mr. Hoover's important testimony — in which, obviously, he gave names and other specifics about communists who control, or manipulate, civil rights groups — was "off the record," and may never be made public, certainly not as long as Robert F. Kennedy or anyone like him is

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Attorney General (the Attorney General being above Mr. Hoover in the chain of command). There is enough evidence from other sources, however, to prove that the major civil rights groups are virtually controlled by communists or by persons so closely associated with communist activities and so thoroughly sympathetic with the objectives of communism, that their non-membership in the communist party is of no importance.

NAACP

The National Association for the Advancement of Colored People is the primary civil rights group — connected with all the others through interlocking directorates. The NAACP was founded in New York City, May 30, 1909, at a meeting of 55 prominent "liberals and socialists," mostly white.[1] The first five top officials of the NAACP were well-known socialists: Dr. Henry Moskowitz, Oswald Garrison Villard, Mary Ovington White, William English Walling, and Dr. W. E. B. DuBois. DuBois was the only negro in the group.[2,3] He later became a militant communist, but remained an official of the NAACP until his death (when he was mourned by communists everywhere).[2a]

In 1920, the New York State Legislative Committee Investigating Seditious Activities, branded the NAACP a subversive organization, interlocked with several other socialist organizations, including the socialist party.[6]

In 1922, several communists (William Z. Foster, Scott Nearing, Robert W. Dunn, Benjamin Gitlow, Clarina Michelson) participated with socialists (Norman M. Thomas, Roger N. Baldwin, Morris L. Ernst, Freda Kirchwey, Lewis S. Gannett) in founding and staffing the American Fund for Public Service (commonly called the Garland Fund).[7, 8] This tax-exempt foundation was a major source of money for communist organizations, publications, and fronts.[9] Throughout the 1920's and 1930's, the Garland Fund gave and lent huge sums of money to the NAACP;[7, 8] but communists did not initiate efforts to infiltrate and control the NAACP until 1936.[5] By 1956, at least 77 top officials of the NAACP were known to agencies of the federal government as persons who participated in communist or pro-communist activities.[10] Here are a few NAACP officials known to have communist-front records:

Roy Wilkins (national administrator of NAACP)

Arthur B. Spingarn (president of NAACP)

Allan Knight Chalmers (listed in 1956 as national treasurer of NAACP)

Channing Tobias (head of the department of international justice and goodwill of the National Council of Churches)

A. Philip Randolph (vice president of the AFL-CIO, leader of the August, 1963, March on Washington)

Eric Johnston (deceased, former motion picture Czar, member of the Council on Foreign Relations)

Dr. Robert C. Weaver (vice president of NAACP, now Administrator of the Federal Housing and Home Finance Agency)

Lewis S. Gannett (retired editor of *The New York Herald-Tribune*)

Norman Cousins (editor of *The Saturday Review*, member of the Council on Foreign Relations)

Dr. Ralph Bunche (Under Secretary General of the United Nations)

Alfred Baker Lewis (insurance executive, former official of the socialist party, Committee on Political Education of the AFL-CIO)

Earl B. Dickerson (founder of the American Legion, past president of the American Bar Association and of the National Lawyers Guild)

Lloyd K. Garrison (vice-chairman of the American Civil Liberties Union, past president of the National Urban League, various government positions in the Roosevelt administration)

Morris L. Ernst (member of the Board of Directors of the American Civil Liberties Union, various positions in the Roosevelt and Truman administrations)

Thurgood Marshall (chief counsel of NAACP

until appointed a federal judge by President Kennedy)"[10]

For many years, Walter White held the top position in the NAACP that Roy Wilkins now holds. White (who had a communist-front record)[11] often made anti-communist statements, for public relations purposes. Manning Johnson (a negro who was for years a communist party official) testified in 1957 concerning Walter White and the NAACP. Johnson said:

"Basically, Walter White was never against the Communists, because he joined with them in numerous Communist front movements . . . . while at the same time the Communists were actively infiltrating the organization from below . . . .

"Let us examine . . . some of these people who have been in the driver's seat in the NAACP. You have this peculiar combination. You have Negroes. You have white philanthropists. You have Communists, fellow-travelers, some eggheads, and Realists, and people who do not know what they want, combined with Socialists, and Trotskyites. The people most influential are the Socialistic elements inside the Executive Board of the NAACP. They are the ones who are screaming against the Communists, because they want to control the Negro movement for themselves . . . . So, it is a family quarrel between the Socialists, the Social-Democrats, the Trotskyites and the Communists — all of whom are concentrated in the organization itself . . . .

"But there is one thing they all have in common, and that is that their programs and policies are based upon the teachings of Karl Marx. The only difference between the Social-Democrats, the Communists and the Trotskyites, basically, is the question of strategy and tactics. The Socialists believe it can be done one way; the Communists believe it can be done another. So there is a conflict, and all of them are fighting over the poor Negro. They want to use him in their political plans . . . .

"I don't care whether it's the Socialism of the Socialists or the Social-Democrats, or the Socialism of the Trotskyites, or the Socialism of the Communists—they are all anti-American. They are basically anti-capitalism; they all seek in one form or another the destruction of the government of the United States . . . ."[8]

Personalities

The foremost personality in the civil rights movement is Dr. Martin Luther King. King is pastor of a Baptist Church in Montgomery, Alabama. He frequently speaks at important meetings of the National Council of Churches (of which he is a member), and at Protestant churches affiliated with the National Council. His associations with communists, communist-fronters, communist organizations, and moral degenerates are, however, notorious.

For about five years (approximately 1955 to 1960) Bayard Rustin was Martin Luther King's secretary. Bayard Rustin joined the Young Communist League at the City College of New York in 1936.[11] In the early 1940's, he was field secretary of the Congress of Racial Equality (CORE) and was race relations director of the Fellowship of Reconciliation[11] (an extremist pacifist organization). During World War II, Bayard Rustin was arrested, tried, and convicted as a draft-dodger. For this offense, he was sent to federal prison on March 7, 1944; discharged, June 11, 1946.[12]

On January 21, 1953, Rustin spoke to the American Association of University Women in Pasadena, California, on the subject of world peace. He was scheduled to speak on the same subject that evening to a group at the First Methodist Church in Pasadena, but went to jail instead. That night, Pasadena police arrested Rustin in a car with two other men, and charged him with "sex perversion" and "lewd vagrancy."[13] The next day (January 22, 1953), Rustin pleaded guilty to the charges and was sentenced to 60 days in the Los Angeles County jail.[14]

In February, 1957, Rustin was one of 11 "impartial observers" invited by communists to attend the 16th national convention of the communist party, USA. At the conclusion of the convention (February 12, 1957), Rustin joined communist officials in a communist-party policy statement which condemned the Senate Internal Security Subcommittee for subpoenaing Eugene Dennis (then communist party national secretary) to testify.[15]

In early 1958, Rustin went to the Soviet Union.[12] Shortly after his return, he organized Martin Luther King's 1958 "march on Washington"—which *The Worker* (communist party newspaper) called a communist party project.[12] Rustin was second in command of the bigger March on Washington, August 28, 1963, which Martin Luther King helped organize and direct.[11]

This ex-convict, bed-fellow of communists, and moral degenerate was Martin Luther King's right-hand man for about five years during the late 1950's, helping King organize, during that time, the Southern Christian Leadership Conference — which King has used as a front for staging many notorious activities, including the infamous boycotts and demonstrations in Alabama.

When King and Rustin separated (about 1960), King replaced Rustin with Hunter Pitts O'Dell, alias Jack H. O'Dell. As recently as June, 1963, O'Dell was in charge of Martin Luther King's SCLC office in New York. In 1961, O'Dell was elected to the national committee of the communist party, USA — a position given only to important communists who have served the party a long time.[16, 17]

Martin Luther King is a close friend, supporter, and associate of Anne Braden,[18] Carl Braden,[19] Aubrey W. Williams,[19] and Dr. James A. Dombrowski[19]— all identified members of the communist party;[18, 19] all serve (or have served) as officials of the Southern Conference Educational Fund, Inc.[19, 20] Concerning the Southern Conference Educational Fund (and Martin Luther King's connection with it), the Joint Legislative Committee on Un-American Activities of the State of Louisiana concluded (in a report published April 13, 1964):

"The evidence presented to us in the two hearings recorded in this report solidly confirms our prior findings that the Southern Conference Educational Fund is in fact a Communist Front and a Subversive Organization. The Southern Conference Educational Fund is managed and operated by Communists and has obvious multiple connections with other Communist Front organizations. It has openly supported many well-identified Communists and Communist causes. It has published and distributed Communist political propaganda written by and about well-identified Communists setting forth the Communist propaganda line. We reaffirm our previous findings regarding the Southern Conference Educational Fund and our conclusion that James A. Dombrowski, Executive Director of the SCEF, is and has long been, a 'concealed Communist.'

"The infiltration of the Communist Party into the so-called 'civil rights' movement through the SCEF is shocking and highly dangerous to this State and the nation. We do not suggest, nor do we believe, that everyone connected with the civil rights movement is a Comanunist. There are many sincere and well-meaning people involved in this cause. We do suggest and the evidence before us is quite conclusive, that the civil rights movement has been grossly and solidly infiltrated by the Communist Party . . . .

"The evidence before us shows clearly, that Martin Luther King has very closely connected his organization, the Southern Christian Leadership Conference, with the SCEF and the Communist personalities managing the SCEF. This has been going on for some four and a half years. By thus connecting himself with the Communists, Martin Luther King has cynically betrayed his responsibilities as a Christian Minister and the political leader of a large number of people . . . .

"The Student Non-violent Coordinating Committee . . . is substantially under the influence of the Communist Party through the support and management given it by the Communists in the SCEF . . . . [and] is now getting strong financial aid from the SCEF . . . .

"The . . . Southern Christian Leadership Conference [Martin Luther King's organization] and the Student Non-violent Coordinating Committee are substantially under the control of the Comanunist Party through the influence of the Southern Conference Educational Fund and the Communists who manage it . . . ."[20]

The Southern Conference Educational Fund, Inc., also contributes money, and other support to (and has overlapping membership with) the Fair Play For Cuba Committee — the communist-front organization to which Lee Harvey Oswald belonged.[20] The Fair Play For Cuba Committee has similar interlocking connections with CORE (Congress of Racial Equality),[20, 21] which, in turn, has an interlock with NAACP.[22]

Martin Luther King is closely connected with

the notorious Highlander Folk School (now called Highlander Center). Myles Horton (district director of the communist party in Tennessee)[19] and Don West (district director of the communist party in North Carolina)[20] founded the Highlander Folk School at Monteagle, Tennessee.[20] In 1943, Horton and communist James Dombrowski incorporated the school under the laws of Tennessee.[20] The school served as an important meeting place and training ground for communist leaders. One significant communist meeting at Highlander Folk School was held on Labor Day, 1957. Five persons organized and directed the meeting: Myles Horton, Don West, Abner W. Berry, James Dombrowski (all officials of the communist party), and Martin Luther King.[21] The purpose of the meeting was to recruit new members for the National Association for the Advancement of Colored People (of which Martin Luther King is a life member[20]) and to lay plans for racial agitation and violent demonstrations throughout the South.[21]

After investigation by a committee of the Tennessee Legislature, the State of Tennessee (in 1961) revoked Highlander Folk School's charter of incorporation.[25] Communists changed the name to Highlander Center, and continued to operate the school as before (though now not incorporated), under management of Myles Horton.[26]

In March, 1963, the Internal Revenue Service gave this communist center federal tax exemption as an educational institution.[26] About the same time, it was revealed that the American Association of University Women had given a $3000.00 fellowship to Mrs. Myles Horton to complete her study on the Highlander Folk School as a "regional adult education center in the South."[26] The complex interlock between the communist party, church groups, unions, the American Civil Liberties Union, major civil rights agitation groups, and others is indicated by the following list of names of persons who are connected with the communist Highlander Center:

James L. Adams, Roger N. Baldwin, Dr. Viola W. Vernard, Dr. Algernon D. Black, Lloyd K. Garrison, Martin Luther King, Freda Kirchwey, Max Lerner, Reinhold Neibuhr, A. Philip Randolph, Jackie Robinson.[27]

Other Organizations

The Congress of Racial Equality (CORE) has, perhaps, directly instigated more racial violence and civil disobedience than any other civil rights group. Martin Luther King and his communist friends who held the Labor Day, 1957, meeting at the Highlander Folk School originated the idea of "freedom riders" — busloads of agitators traveling through southern states to violate local laws and provoke violence. Martin Luther King first tested the idea in Alabama; but the Congress of Racial Equality was in the forefront of the freedom riders' lawlessness and violence which plagued southern states during 1961. Many of the demonstrators whom CORE recruited for freedom-rider operations were arrested, and identified as communists.[27] Many were recruited from the Fair Play For Cuba Committee (Lee Harvey Oswald's outfit).[27] CORE was the leading agitation group which organized the riots that led to the death of a white Presbyterian minister in Cleveland, Ohio, on April 7, 1964 (and to a great deal more bloodshed and violence).[27] CORE also tried to organize a "stall-in" to cripple New York City on the opening day of the World's Fair this year.[29]

On May 25, 1961, United States Senator James O. Eastland (Democrat, Mississippi), Chairman of the Senate Judiciary Committee and the Internal Security Subcommittee, presented impressive documentation concerning the communist conspiracy and its relationship to the Congress of Racial Equality and the National Association for the Advancement of Colored People. His documentation was from files of the Senate Internal Security Subcommittee and the House Committee on Un-American Activities.[22] Senator Eastland concluded:

"From investigation and examination of the facts and records there can be little doubt, in my judgment, but that this group [CORE] is an arm of the Communist conspiracy. They are agents of worldwide communism, who sow strife and discord in this country . . . ."[22]

The interlock between communism, CORE, and

NAACP is indicated by the following list of names. All persons listed below are official members of CORE and of NAACP and also have communist-front records:

Roger N. Baldwin, Dr. Algernon D. Black, Allan Knight Chalmers, Earl B. Dickerson, Rabbi Roland B. Gittelsohn, Martin Luther King, A. Philip Randolph, Professor Ira DeA. Reid, Walter P. Reuther, Lillian Smith, Charles S. Zimmerman.[22, 40]

The National Council of Churches has become one of the most militant racial-agitation groups in the United States. Officials (or prominent members) of the National Council of Churches have been identified with most violent race riots and demonstrations in recent years. Officials of the National Council have been arrested for law violation in connection with racial demonstrations. The National Council of Churches lobbies for the pending Civil Rights Act of 1964 (in violation of federal tax laws which prohibit tax-exempt organizations from trying "to influence legislation") It even urges organized churches and individual church members to boycott business firms whose employment practices displease the National Council.[30]

At least 658 officials of the National Council of Churches have communist-front records — according to a 310-page book (listing names and records) published by Circuit Riders, Inc., 110 Government Place, Cincinnati 2, Ohio ($4.00). The interlock between communism, the National Council of Churches, and all other groups active in the civil rights movement can be seen in overlapping memberships. Some officials, or prominent members, of the National Council of Churches who have communist-front records, are also members of The National Association for the Advancement of Colored People, the American Civil Liberties Union, the Southern Christian Leadership Conference, the Southern Conference Educational Fund, the Student Non-Violent Coordinating Committee, the Congress of Racial Equality, the Southern Regional Council, or the Urban League. The interlock is intricate and multiple, but it is obvious.

The National Urban League was founded in 1910, incorporated in the State of New York in 1913. Among officials of the Urban League who are also officials of the NAACP with communist front records are Lloyd K. Garrison, Ira DeA. Reid, Walter P. Reuther, and Charles S. Zimmerman.[10, 22]

The American Civil Liberties Union (very influential in the civil rights movement) was founded in 1920 by Felix Frankfurter (member of the Council on Foreign Relations), by Dr. Harry F. Ward (notorious communist-fronter),[31] by Roger Baldwin (socialist with a communist-front record,[31] and by two well-known communists: William Z. Foster and Elizabeth Gurley Flynn.[32] Aubrey Williams, presently an official of the ACLU, has been identified as a communist.[19] Among other present ACLU officials whose names have been linked with communist-fronts or communist activities are:

Morris L. Ernst,[10] Lloyd K. Garrison,[10] Roger N. Baldwin,[31] Allan Knight Chalmers,[16] Melvyn Douglas,[31] Harry Emerson Fosdick,[31] J. Robert Oppenheimer,[33] A. Philip Randolph.[10]

I have no list of members and officials of the American Jewish Congress (another powerful force in the civil rights movement). Hence, I cannot say whether it is infiltrated by communists. The record shows, however, that Rabbi Stephen Wise was head of the American Jewish Congress for years. Before his death, he was associated with approximately 40 communist-fronts.[34] Israel Goldstein (head of the AJC for a brief period after Wise) had a communist-front record.[34] Rabbi Joachim Prinz,[34] present head of the AJC, has a communist-front record, and so does Will Maslow,[34] executive director of the American Jewish Congress. Maslow is also an official of CORE.[40]

Financing The Civil Rights Movement

All organizations participating in racial agitation which is called the civil rights movement

rely on contributions. In late 1962, Governor Nelson A. Rockefeller gave $10,000.00 to Martin Luther King's Southern Christian Leadership Conference.[35] The Southern Conference Educational Fund, the Garland Fund, and many other tax-exempt foundations pour money into the racial-agitation groups. For example, the Center for the Study of Democratic Institutions of the Fund for the Republic (founded on a multi-million dollar grant by the Ford Foundation) has given more than 2 million dollars to the NAACP, the National Urban League, the National Council of Churches, the Anti-Defamation League of B'nai B'rith, and the Southern Regional Council — for work in the field of "race relations."[36]

On May 14, 1964, the NAACP raised an estimated one million dollars in contributions, through a closed-circuit television program broadcast to theaters across the nation. Among Hollywood and TV personalities contributing their talents to the show:

Ed Sullivan, Sammy Davis, Jr., Lena Horn, Steve Allen, Elizabeth Taylor, Richard Burton, Duke Ellington, Harry Belafonte, Fredric March, Burt Lancaster, Gene Kelly, Edward G. Robinson, Agnes Moorehead, Nat "King" Cole, Richard Widmark, Tony Bennett.[37]

What To Do

Propaganda and pressures for civil rights legislation which will destroy constitutional government (while protecting no civil rights for anyone) can be offset by counterpressures on Congress. Before the people can take action which will sway Congress to save the Republic, they must know the truth about the so-called civil rights movement. This *Report* of last week ("Discrimination in Reverse") and others mentioned therein would be useful in the public education job that must be done.

With whatever tools you choose, by whatever means available, do your utmost to inform and activate other Americans. Otherwise, there is no hope.

FOOTNOTES

(1) AP dispatch from New York City, *The Dallas Morning News*, May 21, 1964, Section 1, p. 12

(2) AP story from Washington, *The Dallas Times Herald*, July 25, 1963, p. 6A

(3) AP story from Washington, *The Dallas Morning News*, April 22, 1964, Section 1, p. 2; *Strom Thurmond Reports to the People*, Vol. X, No. 15, April 27, 1964

(4) *The Negro People in American History*, by William Z. Foster, International Publishers, New York City, 1948, pp. 422-9

WHO IS DAN SMOOT?

Born in Missouri, reared in Texas, Dan Smoot went to SMU getting BA and MA degrees, 1938 and 1940. In 1941, he joined the faculty at Harvard as a Teaching Fellow, doing graduate work for a doctorate in American civilization. From 1942 to 1951, he was an FBI agent: three and a half years on communist investigations; two years on FBI headquarters staff; almost four years on general FBI cases in various places. He resigned from the FBI and, from 1951 to 1955, was commentator on national radio and television programs, giving *both* sides of controversial issues. In July, 1955, he started his present profit-supported, free-enterprise business: publishing *The Dan Smoot Report*, a weekly magazine available by subscription; and producing a weekly news-analysis radio and television broadcast, available for sponsorship by reputable business firms, as an advertising vehicle. The *Report* and broadcast give *one* side of important issues: the side that presents documented truth using the American Constitution as a yardstick. If you think Smoot's materials are effective against socialism and communism, you can help immensely—help get subscribers for the *Report*, commercial sponsors for the broadcast.

You can help educate and arouse the people who elect men responsible for harmful programs of government. When enough other Americans know and care as you do, political action to restore our Republic will come.

If *The Dan Smoot Report* was instrumental in bringing you to the point of asking what *you* can do about saving the country from mushrooming big government, here is a checklist for you: Have you urged others to subscribe to the *Report*? Have you sent them reprints of a particular issue of the *Report*? Have you shown them a Dan Smoot film? Have you ever suggested a Bound Volume of *The Dan Smoot Report* for use by speakers, debaters, students, writers? Have you read and passed on to others any of the Dan Smoot books — *The Invisible Government, The Hope Of The World, America's Promise?*

(5) "The Ugly Truth About The NAACP," speech by Attorney General Eugene Cook of Georgia, 1955

(6) "Chapter V: Propaganda Among Negroes," *Revolutionary Radicalism. Part One: Subversive Movements,* Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, J. B. Lyon Company, Albany, 1920, pp. 1476-1522

(7) *The American Fund for Public Service, Inc., Report for Four Years, 1930-1934, Summary of Twelve Years,* November, 1934

(8) *Subversion In Racial Unrest,* Public Hearings of the Joint Legislative Committee of the State of Louisiana, March, 1957, 370 pp., including testimony by former communist officials Joseph Z. Kornfeder, Manning Johnson, and Leonard Patterson

(9) *Guide to Subversive Organizations and Publications,* U. S. House of Representatives Document No. 398, 1962, pp. 21-2

(10) *Congressional Record,* February 23, 1956, pp. 2796-2849 (daily), containing House Committee on Un-American Activities documents on NAACP officials

(11) Article by Susanna McBee, *The Washington Post,* August 11, 1963

(12) Series of syndicated articles by Frank van der Linden, *The Nashville Banner,* July 26, 27, 28, 1963

(13) *The Los Angeles Times,* January 22, 1953

(14) *The Los Angeles Times,* January 23, 1953

(15) "Statement of Observers," *Proceedings (abridged) of the 16th National Convention of the Communist Party, U. S. A.,* 1957, pp. 349-50

(16) "Dr. King's United Front," *The Richmond News Leader,* September 27, 1963

(17) *Structure and Organization of the Communist Party of the United States: Part I,* U. S. House Committee on Un-American Activities, 1962, pp. 575-6

(18) *The National Program Letter,* National Education Program, Searcy, Ark., February, 1955

(19) *Southern Conference Educational Fund, Inc.,* Hearings and Report, U. S. Senate Internal Security Subcommittee of the Judiciary Committee, March, 1954, 168 pp.

(20) *Report No. 4* and *Report No. 5,* "Activities of the Southern Conference Educational Fund, Inc. in Louisiana," The Joint Legislative Committee on Un-American Activities, State of Louisiana, November, 1963, and April, 1964

(21) "Communists Identified Among Freedom Riders," by Fulton Lewis, Jr., *Human Events,* September 22, 1961, p. 633

(22) "Activities in the Southern States," speech by U. S. Senator James O. Eastland (Dem., Miss.) containing official documents from the Senate Internal Security Subcommittee and House Committee on Un-American Activities, *Congressional Record,* May 25, 1961, pp. 8349-63 (daily) 8956-70 (bound)

(23) *Testimony of Paul Crouch,* Hearings before the U. S. House Committee on Un-American Activities, May 6, 1949, pp. 181-220

(24) *Highlander Folk School,* Georgia Commission on Education, Governor Marvin Griffin, chairman, 1957

(25) Special from Washington, *The News and Courier,* Charleston, S.C., October 10, 1961, p. 7A

(26) "IRS Labels Highlander Tax Exempt," *The Knoxville Journal,* April 2, 1963, p. 11

(27) List of officials from letterhead of Highlander Center, 1625 Riverside Drive, Knoxville 15, Tenn., dated May 15, 1963

(28) UPI story from Cleveland, *The Dallas Times Herald,* April 21, 1964, p. 4A; UPI story from Cleveland, *The Dallas Morning News,* April 8, 1964, Section 1, p. 1

(29) "Five Angry Men Speak Their Minds," by Gertrude Samuels, *The New York Times Magazine,* May 17, 1964, pp. 14, 110-1

(30) For a discussion of the National Council of Churches, see this *Report,* "National Council of Churches," January 15, 1964.

(31) *Investigation of Un-American Propaganda Activities in the United States: Appendix—Part IX: Communist Front Organizations, Special House Committee on Un-American Activities, 1944.* This old HCUA 3-volume, 1895-page publication is now reprinted and available from Poor Richard's Book Shop, 5403 Hollywood Blvd., Los Angeles, Calif. 90027, price: $29.90.

(32) *Revolutionary Radicalism, Part One: Subversive Movements,* Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, J. B. Lyon Company, Albany, 1920, pp. 1085-1102, 1979-90

(33) "The Oppenheimer Security Case of 1954 and the Oppenheimer Fermi Award of 1963," speech by U. S. Representative Craig Hosmer (Rep., Calif.), including findings of the Gray Board and Atomic Energy Commission, *Congressional Record,* July 11, 1963, pp. A4346-7 (daily)

(34) *32% of the Unitarian Clergymen and 450 Rabbis, A Compilation of Public Records,* Circuit Riders, Inc., 110 Government Place, Cincinnati 2, Ohio, January, 1961, 310 pp., price: $5.00

(35) "We're Ready to Build," by Jackie Robinson, *SCLC Newsletter,* Vol. 1, No. 8, December, 1962, pp. 1, 3

(36) "The Record, the Program, and the Prospects of the Fund for the Republic and its Center for the Study of Democratic Institutions," *Bulletin, Center for the Study of Democratic Institutions,* November, 1963

(37) *The Dallas Times Herald,* May 15, 1964, p. 3C

(38) "Senator Hails Communist," by Fulton Lewis, Jr., *The Shreveport Journal,* March 4, 1964; *The Worker,* February 16, 1964, p. 12

(39) "Fighting Pastor, Martin Luther King," by Ted Poston, *The New York Post,* April 10, 1957, pp. 4, 65

(40) Letterhead, Congress of Racial Equality, 38 Park Row, New York 38, New York, signed by Harry Belafonte, circa 1961

Legal
NAACP
vs. Attacks

September 24, 1964

MEMORANDUM TO: Bishop Spottswood
Mr. Wilkins

FROM: John Morsell
COPIES: Messrs. Current, Mitchell, Moon

As you know, we have from time to time discussed the possibilities and prospects of some kind of legal action in defense of the Association against defamatory attacks such as those widely broadcast on radio, television and printed media by Dan Smoot, Billy James Hargis and others. We are now presented with an opportunity to accomplish some measure of this needed rebuttal in a court of law.

On August 21, 1964, the Grand Rapids law firm of Warner, Norcross and Judd wrote to ask our assistance in a libel action which has been brought by Dan Smoot against the League of Women Voters (Grand Traverse Area) in Michigan. Apparently the bulletin of the League last December contained observations that the Dan Smoot television programs were, among other things, based on "slanted information," "half truths," and "innuendoes." Among the statements so characterized by the League of Women Voters were a number directed against the NAACP and accusing it and its officers of communist domination and of troublemaking.

Smoot has brought suit against the League of Women Voters and the law firm expects to base its defense upon establishment of the truth of the article in question.

The trial will be set for sometime in October in the United States District Court for the Western District of Michigan. I asked Barbara Morris to communicate with Warner, Norcross and Judd in order to determine what kind of help they wanted from us and, if this seemed feasible, to proceed with whatever work was needed in order for us to be of help. Essentially it will require the submission of certain statements and the oral testimony of an officer of the Association, preferably the executive director. In view of the uncertainty of the trial date and of the executive director's heavy commitments during October, I have indicated that I would be available for this purpose if needed. It is our understanding, incidentally, that counsel for the League of Women Voters

will, as is customary, cover the expenses of its witnesses at the trial.

It seems to me, as noted above, that we have here excellent opportunity at little or no expense to the Association to establish the facts on the record in an unprejudiced courtroom.

Attached is a copy of Barbara Morris' memorandum citing the specified references in the Dan Smoot Report which are relevant to the NAACP. Several other organizations are similarly participating in the defense in the libel action.

JAM:erb
Attachment

memo from **mildred bond**

to Barbara Morris

November 6, 1964

Attached is a copy of a letter, under the date of November 2, from Joseph F. Hennessey to John de J. Pemberton, Jr., Executive Director of the American Civil Liberties Union, which I am forwarding to you for your information inasmuch as it concerns the ACLU inquiry relating to the Dan Smoot Report.

MB/eb
Attachment

National Association for the Advancement of Colored People
20 West 40th Street, New York 18, N. Y. BRyant 9-1400

LAW OFFICES OF
BOOTH & LOVETT
BROADCASTING BUILDING
1735 DE SALES STREET, N.W.
WASHINGTON, D. C. 20036

ELIOT C. LOVETT (1963)
ROBERT M. BOOTH, JR.
LEE G. LOVETT
JOSEPH F. HENNESSEY
JOHN N. PAPAJOHN

TELEPHONE
RE 7 - 9600

CABLE ADDRESS
"BOLO"

November 2, 1964

Gentlemen:

This office, as counsel for Television Station KTVA, Anchorage, Alaska, is in receipt of a letter, dated October 19, 1964, on the letterhead of the American Civil Liberties Union, containing an inquiry relating to the Dan Smoot Report of June 1, 1964 (Broadcast # 458).

Please be advised that the questions raised in your letter are under consideration and will beanswered at the earliest possible date.

Very truly yours,

Joseph F. Hennessey

Joseph F. Hennessey
Counsel for
NORTHERN TELEVISION, INCORPORATED

John de J. Pemberton, Jr.
Executive Director
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

James Farmer
National Director
Congress Of Racial Equality
38 Park Row
New York, New York 10038

Will Maslow
Executive Director
American Jewish Congress
15 East 84th Street
New York, New York 10028

Roy Wilkins
Executive Director
National Association for the Advancement of Colored People
20 West 40th Street
New York, New York

Whitney Young, Jr.
Executive Director
National Urban League
14 East 48th Street
New York, New York

No. 16207

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAN SMOOT,
Petitioner,
v.
HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

ON PETITION for Writ of Prohibition and Mandamus.

Decided December 30, 1964.

Before: WEICK, Chief Judge, CECIL, Circuit Judge, and BOYD, District Judge.

PER CURIAM. This cause is before the Court on petition of Dan Smoot for a writ of Prohibition and Mandamus against the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan. The petition is filed under authority of Section 1631, Title 28, U. S. C. The action arises from the pendency of two cases in the District Court. These cases are numbers 4708 and 4709, on the docket of the court, in which the petitioner herein is plaintiff and The League of Women Voters of the Grand Traverse Area of Michigan, an association affiliated with the League of Women Voters of Michigan, a Michigan Corporation, and certain individuals are defendants. We will refer to the parties as plaintiff and defendants.

The plaintiff is a resident of the state of Texas and is engaged in television and radio broadcasting in Texas and other areas of the United States, including the state of

Michigan. The subject of the actions in the District Court is an alleged charge of libel growing out of a letter published in a column of the Traverse City Record Eagle, under the heading of "Voice of the People," and a monthly bulletin known as "The Bulletin—League of Women Voters—Grand Traverse Area of Michigan."

The actions were filed on March 9, 1964, and were set for trial on October 14, 1964. A pre-trial was held on September 25, 1964. At this time, counsel for the plaintiff, who had filed his petitions, moved for a continuance on the ground that he was going on an extended vacation. The trial judge denied the motion. Thereupon counsel withdrew as counsel but prepared a motion to dismiss the cases which was presented to the court by counsel's sister, also a member of the Michigan Bar. She represented that counsel's health precluded his further participation in the cases.

Subsequently, after interim counsel failed to get a continuance, present counsel came into the case and on October 12, 1964, moved to dismiss the cases with prejudice to the filing of new actions. This motion was denied and on October 14th the petition now before us was filed in our Court. The petitioner sought a continuance from the immediate trial date and an order requiring the District Judge to sustain the motion to dismiss the actions with prejudice. We granted a stay of further proceedings and issued an order to the District Judge to show cause why a writ of mandamus should not issue. An answer and brief were filed by the respondent. The petitioner filed a reply brief and to this the respondent filed a brief in reply and an amicus curiae brief was filed on behalf of the defendants.

The cases in the District Court have undoubtedly created a great deal of public interest and have generated considerable heat between the parties. We are here concerned with the legal right of plaintiff to have the actions dismissed and with the right or duty of this Court to intervene in the matter.

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides, "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This rule contemplates the dismissal by plaintiff of an action without prejudice and is clearly discretionary with

the court. All of the cases [1] cited by respondent, supporting the discretionary right of the court to dismiss cases on motion of the plaintiff, concern the dismissal without prejudice.

No case has been cited to us, nor have we found any, where a plaintiff, upon his own motion, was denied the right to dismiss his case with prejudice. New counsel for the plaintiff said that he advised his client that on authority of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, he would have to show malice on the part of the defendants in order to succeed in his litigation. It was counsel's view that this could not be shown, or, at least, it could not be developed in the limited time available for preparation. We know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he considers he has no cause of action or for any reason wishes to dismiss his action with prejudice, the client being agreeable. A plaintiff should have the same right to refuse to offer evidence in support of his claim that a defendant has.

Of course, if he declines to offer evidence, he must suffer the consequences, which in this case would be judgment against him and a judgment in favor of the defendants. Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this. *Panza* v. *Armco Steel Corp.*, 316 F.2d 69, C.A. 3, cert. den. 375 U.S. 897; *Creek Indians Nat. Council* v. *Sinclair Prairie Oil Co.*, 142 F.2d 842, 845, CA. 10, cert. den. 323 U.S. 781; *Olsen* v. *Muskegon Piston Ring Co.*, 117 F.2d 163, 165, C.A. 6; *D.A.C. Uranium Co.* v. *Benton*, 149 F.Supp. 667, 673; *Daley* v. *Sears, Roebuck & Co.*, 90 F.

[1] *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212; *Grivas* v. *Parmalee Transp. Co.*, 207 F.2d 334, C.A. 7, reversing *Bolten* v. *General Motors Corp.*, 180 F.2d 379, holding that a plaintiff could dismiss without prejudice as a matter of right; *Adney* v. *Mississippi Lime Co. of Missouri*, 241 F.2d 43, 44, C.A. 7; *Barnett* v. *Terminal R. Ass'n of St. Louis*, 200 F.2d 893, 894, C.A. 8; *Moore* v. *C. R. Anthony Co.*, 198 F.2d 607, 608, C.A. 10; *Westinghouse Electric Corp.* v. *United Electrical Radio and Machine Workers of America*, 194 F.2d 770, 771, C.A. 3; *Ockert* v. *Union Barge Line Corp.*, 190 F.2d 303, 304, C.A. 3; *Larsen* v. *Switzer*, 183 F.2d 850, 851, C.A. 8; *New York, C. & St. L. R. Co.* v. *Vardaman*, 181 F.2d 769, 770, C.A. 8; *Churchward International Steel Co.* v. *Carnegie Steel Co.*, 286 Fed. 158; *Lunn* v. *United Aircraft Corp.*, 26 F.R.D. 12; *Mott* v. *Connecticut General Life Ins. Co.*, 2 F.R.D. 523, 524.

Supp. 562, 563. See also, *Rose* v. *Bourne, Inc.*, 172 F.Supp. 536, 538.

We are loathe to grant petitions for writs of mandamus and refrain from doing so where mandamus is resorted to as a substitute for appeal. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953); *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Hoffa* v. *Gray*, 323 F.2d 178, 179, cert. den. 375 U.S. 907; *Aday* v. *United States District Court*, 318 F.2d 588, 591, cert. den. 374 U.S. 823; *Beneke* v. *Weick*, 275 F.2d 38, 39.

In this case a two- or three-week trial is contemplated. Witnesses are to be subpoenaed from distant parts of the United States. Such a trial with an unwilling plaintiff, even if it could be enforced, would be an expensive luxury. Our District Courts are over-crowded with pending cases and the Western District of Michigan is no exception. Our district judges have no time to conduct useless trials.

We find that it was an abuse of discretion on the part of the respondent to deny the plaintiff's motion for dismissal of the actions with prejudice to bringing new actions. In the interest of justice and in order to prevent the conduct of an unnecessary trial, with its attendant accumulation of costs and inconvenience to witnesses, we grant the petition and order the respondent to dismiss the actions with prejudice, subject to the payment of all court costs by the plaintiff.

Lewis A. Engman

1

NO. 16207

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAN SMOOT,

Petitioner,

vs.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,

Respondent.

PETITION FOR REHEARING AND CLARIFICATION

Respondent and Petitioner respectfully petitions for rehearing and clarification of the order of this Court entered on December 30, 1965, which directed Petitioner to dismiss Civil Actions No. 4708 and No. 4709 on the docket of the United States District Court for the Western District of Michigan. The dismissals were ordered to be "with prejudice, subject to the payment of all court costs by the plaintiff."

Before Petitioner can proceed to comply with the order to dismiss, he must resolve an uncertainty created by the Court's use of the above-quoted language in the context of the earlier proceedings before Petitioner and before this Court.

Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs shall be allowed as of course to the pre-

vailing party, unless the court otherwise directs • • •." Commentators seem to agree that Rule 54(d) vests a broad discretion in the trial court in the awarding of costs. This Court's order, however, speaks of "court costs" rather than simply "costs," the term used by Rule 54(d). In light of earlier proceedings before Petitioner and before this Court, Petitioner is uncertain whether this Court's use of the term "court costs" was intended to circumscribe Petitioner's discretion in the awarding of costs.

The earlier proceedings which give rise to Petitioner's uncertainty center on defendants' efforts to have attorneys' fees awarded as costs. The issue of attorneys' fees was raised at the earliest possible stage in these actions, in defendants' Answers. Later, defendants moved that plaintiff be ordered to give security for costs. At that time, defendants urged that the nature of the two actions made attorneys' fees properly includible as costs. Petitioner granted defendants' motion and ordered plaintiff to post a substantial bond. Plaintiff failed to post the bond, but instead moved to dismiss both actions with prejudice. In that motion plaintiff offered to pay "court costs," but argued that such costs did not include attorneys' fees. Petitioner's denial of this motion was the basis of the Court's order of December 30, 1964, and the Court's use of the same language suggests that this Court may have adopted plaintiff's position.

The parties' contentions with respect to the allowance of attorneys' fees as costs are set out in their respective memoranda of law submitted relative to defendants' Motion for Security for Costs. Copies of these memoranda are attached hereto as appendices. Defendants' arguments may be summarized as follows: Courts of equity have long exercised the power to award attorneys' fees as costs to a defendant when an action has been shown to have been brought in bad faith, vexatiously, and for an oppressive purpose. Following the merger of law and equity in federal practice, and pursuant to Rule 54(d), a district court has discretionary power to award attorneys' fees in a law action of such a character. Furthermore, when a libel action is brought maliciously and without foundation, and when the allegedly libelous publication consists of criticism

of the utterances of a public figure on matters of public concern, the constitutionally guaranteed right to freedom of expression requires that the economic burden of the suit be shifted to the plaintiff. Otherwise, the mere institution of malicious and groundless actions would serve to stifle such criticism because of the high cost of defense. In connection with their legal arguments, defendants claimed that they would show at the trial that the actions had been brought in bad faith, vexatiously, and for an oppressive purpose. Plaintiff's postion, simply stated, is that it is settled law that only nominal costs may be awarded, regardless of a plaintiff's bad faith in bringing the actions.

In granting defendants' Motion for Security for Costs, Petitioner in effect made two decisions. First, he decided that in a proper case attorneys' fees could be awarded as costs. Second, he found that defendants had shown probable cause to believe these action to be proper ones for such an award. Petitioner is aware that, before awarding attorneys' fees as costs, he must make the determination whether plaintiff did in fact bring these actions in bad faith, vexatiously, and for an oppressive purpose. However, such a factual determination, which would require the taking of proof, would be an "expensive luxury" if this Court intended, when it said "subject to the payment of all court costs," to indicate that attorneys' fees could not be awarded. The inevitable expenditure of time and effort in making such a determination would then have been contrary to the spirit of the Court's order. Thus, Petitioner hesitates to proceed without clarification by this Court of its order.

Petitioner also calls to the attention of this Court certain factual errors which are contained in its opinion:

(a) March 9, 1964 is not the date on which the actions were filed, but is the date the United States Supreme Court issued its opinion in *New York Times Co. vs. Sullivan*, 376 U.S. 254 (1964). The actions were filed by plaintiff on March 21, 1964, nearly two weeks thereafter.

(b) Secondly, this Court states in its opinion that plaintiff's new counsel said that he advised plaintiff that on authority of *New York Times Co. vs. Sullivan, supra,* plaintiff would have to show malice on the part of defendants to succeed in his litigation. However, the opinion does not take account of plaintiff's verified complaint which specifically alleges malice on the part of the defendants and was filed after the *New York Times* holding.

(c) In addition, the intimation in the opinion of this Court that Petitioner attempted to require plaintiff's counsel to submit evidence is incorrect and without basis.* On October 12, after denying plaintiff's motion to dismiss, Petitioner did advise plaintiff's counsel that he would have a full opportunity to present his case at the trial and that if plaintiff did not proceed, the Court would be obligated to permit defendants to present their proofs. At no time did Petitioner order or otherwise require plaintiff to submit evidence.

Finally, Petitioner reasserts the arguments raised in his briefs and memorandum of facts and law, and urges this Court to reconsider the conclusions of law upon which its order is based, specifically including, but not limited to, its decisions as to the scope of Rule 41(a) of the Federal Rules of Civil Procedure.

For the reasons set out above, Petitioner respectfully requests a rehearing of this matter, and asks this Court to correct its opinion as above set forth and to clarify its order by indicating whether or not attorneys' fees may be allowed as costs if the actions are found to have been

* The statement "We know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he considers he has no cause of action or for any reason wishes to dismiss his action with prejudice, the client being agreeable" on page 3 of the Opinion of this Court implies a result which the District Court did not intend and a result not contemplated by the District Court Opinion denying plaintiff's motion to dismiss. Page 5 of the transcript of the October 12, 1964 hearing on plaintiff's motion to dismiss, which transcript has been forwarded to this Court, contains the following statements by the District Court: "Then, Mr. Watts, you will have a full opportunity to present your case. If you do not proceed with your case, then the Court is obligated under the facts of this case and the law as the Court sees it, to permit the defendants to proceed with defendants' case."

brought in bad faith, vexatiously, and for an oppressive purpose.

Dated: January 14, 1965.

Respectfully submitted,

(s) Noel P. Fox
Noel P. Fox

I concur in the above Petition.

Respectfully submitted,

(s) Raymond W. Starr
Raymond W. Starr

Harold S. Sawyer,
Lewis A. Engman,
Charles E. McCallum,
Attorneys for Petitioner.
Business Address:
300 Michigan Trust Building,
Grand Rapids, Michigan 49502

STATE OF MICHIGAN
SS.
COUNTY OF KENT

Harold S. Sawyer, Lewis A. Engman and Charles E. McCallum, being duly sworn, depose and say that they make this affidavit in support of the foregoing Petition for Rehearing and Clarification, and do further say that said Petition is presented in good faith and not for purposes of

delay, and that the facts contained therein are true to the best of their knowledge.

(s) Harold S. Sawyer

(s) Lewis A. Engman

(s) Charles E. McCallum

Subscribed and sworn to before me this 13th day of January, A.D. 1965.

(s) Wanda M. Niven
Notary Public, Kent County, Michigan.
My commission expires Oct. 7, 1966.

APPENDICES

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SECURITY FOR COSTS

Summary

It is within the discretionary power of a federal district court to allow attorney's fees as costs in a proper case. The instant case, involving an action brought and maintained in bad faith, vexatiously, and for an oppressive reason, will be a proper one for the exercise of the court's discretionary power to award attorney's fees as costs.

It is within the discretionary power of a federal district court to require of a non-resident plaintiff security for the costs he may have to pay if his action fails. The instant case is a proper one for the exercise of the court's discretionary power to require security for costs, including attorney's fees.

I.

It is within the discretionary power of a Federal District Court to allow attorney's fees as costs in a proper case.

Historically, courts of equity have long had full discretion in the award of costs. This power is said to run from the statute 17 Rich. II, c. 6, authorizing the chancellor to award damages "for bringing of vexatious and unfounded suits." Federal equity courts were early held to possess the same powers as English courts of chancery, including discretion as to costs. See *10 Cyc. Fed. Proc.* § 38.01. Within the scope of this discretion is the power to award attorney's fees as costs. In the recent case of *Vaughan v. Atkinson,* 369 U.S. 527, 530 (1962), the Supreme Court stated that "allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.' "

In actions of an equitable nature, such fees are often allowed. For example, in cases of interpleader the court may allow an attorney's fee. *John Hancock Mutual Life Ins. Co. v. Lloyd,* 194 F. Supp. 816 (N.D. N.Y. 1961); *Lockridge v. Brockman,* 137 F. Supp. 383 (N.D. Ind. 1956). Again, where a few plaintiffs sue on behalf of a number, they may be allowed their counsel fees as costs. In the case of *Taussig v. Wellington Fund, Inc.,* 187 F. Supp. 179 (D. Del. 1960), minority shareholders brought an action for a judgment declaring their corporation to have the exclusive right to the use of a name. Attorney's fees were awarded to the plaintiffs, the court stating that:

> "Before attorney's fees can be assessed as an element of damages against the perpetrators of the unfair competition, the court is required to find the wrongdoer's actions were unconscionable, fraudulent, in bad faith, vexatious, or exceptional. Absent a statutory provision, and equity court is not deprived of its inherent power to award attorney's fees to the prevailing party where the circumstances warrant." *Id.* at 222-23.

See also *Milone v. English,* 306 F. 2d 814 (D. C. Cir. 1962).

In the leading case of *Rolax v. Atlantic Coast Line R. Co.,* 186 F. 2d 473 (4th Cir. 1951), Negro firemen brought an action under the Railway Labor Act against the railroad and their union to have declared void an agreement between the railroad and the union which deprived plaintiff and other Negro firemen of seniority and employment rights. Reversing and remanding a judgment for the defendant, the Fourth Circuit spoke to the issue of attorney's fees:

> "We think that the allowance of attorney's fees as a part of the costs is a matter resting in the sound discretion of the trial judge. Ordinarily, of course, attorney's fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small needs have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests." *Id.* at 481.

Even in cases where counsel fees are disallowed, the courts recognize the existence of the power to allow them. In *Universal Oil Products v. Root,* 328 U.S. 575 (1946), a patent infringement suit, certain attorneys served as *amici curiae* but also represented private interests which were not parties to the suit. The lower court awarded attorney's fees. Although it reversed on this point, the Supreme Court said that:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where for dominating reasons of justice a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

And in *United Furniture Workers of America v. Fort Smith Couch and Bedding Co.,* 214 F. Supp. 164 (W.D. Ark. 1963), a suit by a union to obtain specific performance of an arbitration provision in a collective bargaining agreement, a motion for summary judgment was sustained but counsel fees disallowed. The court said:

> "Whether an attorney's fee should be allowed turns on the historical equity powers of federal courts, since no statute authorizes attorney's fees in the instant case. Such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* at 173.

In *American Automobile Ass'n v. Spiegel,* 128 F. Supp. 794, 795 (E.D. N.Y. 1955), a suit in trade mark infringement, defendants were not allowed attorney's fees, but the court said "the law is well settled that the granting of counsel

fees and expenses in appropriate situations is part of the historic equity jurisdiction of the federal courts." However, the court continued, here there was a basis for plaintiff's belief that he had a good cause of action.

It has been stated that "by virtue of Rule 54(d) * * * the trial court now has discretion in the awarding of costs in all cases, whether the issues are of a legal or of an equitable nature." *10 Cyc. Fed. Proc.* § 38.01. In the case of *Prashker v. Beech Aircraft Corp.*, 24 F.R.D. 305 (D. Del. 1959), an action for wrongful death, it was held that the costs of the preparation of models by the defendant were not taxable as costs. However, the court stated that "the Rules of Civil Procedure being applicable to all civil actions, it is generally held that *there is now no distinction between equitable or legal considerations as to the discretion of the court as to costs.*" *Id.* at 312. (Emphasis added). Again, in *Euler v. Waller*, 295 F. 2d 765 (10th Cir. 1961), a *personal injury* action, the costs of charts and expert witnesses were disallowed. However, the court said that "for compelling reasons of justice in exceptional cases allowances may be made of items of cost not authorized by the statutes." *Id.* at 766. See also *Barron & Holtzoff, Federal Practice and Procedure*, § 1195, where it is stated that "the district court has power to establish by rule what expenditures may be taxed as costs, and may allow additional costs as exceptional or extraordinary circumstances may require * * *."

With particular reference to attorney's fees, a leading treatise states:

> "* * * A Federal District Court may award attorney's fees in favor of one party and against another where an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly or for oppressive reasons." *Moore, Federal Practice*, Vol. 6, § 1352.

And in the case of *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F. Supp. 383 (D. Md. 1963), an action for damages for infringement of trademark and misappropriation of trade secrets, attorney's fees were requested and

awarded. The award of counsel fees in the trademark phase of the case was covered by federal statute. Said the court:

> "There is no similar statute with respect to the trade secret issues. And such award must be based on the inherent power of a federal court to award attorney's fees in certain types of cases * * * unnecessary, groundless, vexatious and oppressive petitions and motions have been held to constitute appropriate reason for the exercise of the equitable power to award attorney's fees against the offending party * * *. This court reaffirms its findings that the misappropriation of plaintiff's trade secrets * * * was unconscionable, wilful, and in bad faith, the equivalent of fraud * * *. Plaintiffs are, therefore, entitled to an allowance of reasonable attorney's fees and disbursements incurred in connection with the trade secret issues as well as the patent issues." *Id.* at 414.

Indeed, this very Court awarded counsel fees to a successful defendant in a recent action for damages for trademark infringement. *General Motors Corp. v. Cadillac Marine and Boat Co.*, 226 F. Supp. 716 (W.D. Mich. 1964). In support of its decision, the Court cited *Vaughan v. Atkinson, supra,* and the passage set out above from *Moore, Federal Practice,* and concluded that "the law is clear that this court has the power to award attorney fees." 226 F. Supp. at 744.

The federal court's discretion in the award of costs cannot be diminished by state law. The award of costs is a protection against abuse of the judicial machinery, and clearly presents a "procedural" question for purposes of the *Erie* rule. The ruling on costs cannot affect the outcome of Plaintiff's action; instead, such costs will be imposed because the failure of Plaintiff's action reveals that it was groundless and brought in bad faith.

In Kellems v. California C. I. O. Council, 6 F. R. D. 358 (N. D. Cal. 1946), a libel action in which jurisdiction was based on diversity of citizenship, the court allowed attorney's fees as costs pursuant to a state statute. However,

the court did not allow the full amount authorized by state law, stating that "Rule 54(d) of the Federal Rules of Civil Procedure vests a discretionary power in the court with respect to the allowance of costs, the exercise of which cannot be curtailed by state legislation." *Id.* at 361. And in *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 209 F. 2d 467 (9th Cir. 1953), the court said in an interpleader action that the state rule forbidding allowance of attorney's fees to the stakeholder was not determinative: "This rule is not determinative in diversity actions * * *. The allowance of costs, including attorney's fees, is a matter within the discretion of the trial court and will not be disturbed unless an abuse of that discretion is clearly shown." *Id.* at 476. On this point, *Barron & Holtzoff, Federal Practice and Procedure* § 1195 conclude that "the award of costs is governed solely by federal law."

II.

The instant case, involving an action brought and maintained in bad faith, vexatiously, and for an oppressive reason, will be a proper one for the exercise of the Court's discretionary power to allow attorney's fees as costs.

Of course, there can be no final determination as to the award of counsel fees as costs until after trial. However, several factors already indicate that the instant action has been brought and maintained in bad faith, vexatiously, and for an oppressive reason. Plaintiff has never made any real contention that he suffered any actual damage as a result of Defendants' statements. Plaintiff has obstructed Defendants in their preparation of this case. The action itself is manifestly groundless and the defenses to it indisputable. Finally, the bringing of a groundless libel action is not inconsistent with "mean and dirty" schemes used by so-called "superpatriot" groups to "expose communists" and to stifle criticism. In addition, another factor weighs in favor of the exercise of the court's discretion. If Defendants could not obtain attorney's fees

as costs in such an action, their constitutional right to freedom of expression would be seriously threatened.

Damages. Plaintiff alleges in his verified complaints in these actions that he "has suffered financial loss, in that certain of his business associates and sponsors have been persuaded by said libelous article to cease to have any business dealings with said Plaintiff." But in answer to Defendants' Interrogatories, Plaintiff could not substantiate these claims.

Number 68 of Defendants' Interrogatories reads as follows: "What is the name and address of each business associate, sponsor or other person who has been prejudiced by the statement claimed to have been made by any of the Defendants not to have any business dealings with you?". In answer, Plaintiff said: "I have no list of the business associates, sponsors or other persons who have been prejudiced by Defendants not to have any business dealings with me. Any information of this kind is in the hands of my attorney." Number 69 of Defendants' Interrogatories reads as follows: "State how and in what manner your reputation has been injured, including the name and address of each person in whose opinion your good name, credit, fame and reputation has been damaged as a result of the acts claimed of." In answer, Plaintiff replied, "I have no way of assessing, in detail, the harm that Defendants' published statements about me have done." Number 70 of Defendants' Interrogatories reads as follows: "Itemize all special damages you claim to have sustained as a result of any statements made by Defendants." In answer to that question, Plaintiff said: "I have no way of making such an itemization at this time." Number 71 of Defendants' Interrogatories is: "State the name and address of each person who has knowledge of the relevant facts, information or circumstances of this case, including those persons who have special knowledge concerning the special damages you claim to have suffered." In answer Plaintiff said: "I have no list of persons who know the circumstances and details of this case, or have knowledge of the damage done me." Number 72 of Defendants' Interrogatories reads

as follows: "List all the names and addresses of the sponsors of your television program on WPBN-TV, Traverse City, Michigan." In answer Plaintiff said: "I do not know who is presented as official sponsor of my broadcast in Traverse City. That information might be obtained from my attorney, or Mr. L. F. Hunter (Route #2, Box 340, Traverse City), or Mr. Vincent J. Ryan (542½ West 10th Street, Traverse City), or Mr. Roger Follansbee (7537 North Clark Street, Chicago 26, Illinois)."

Thus, while Plaintiff swore in his complaint that certain business associates had ceased business dealings with him as a result of the alleged libel, he did not know, when asked in Defendants' Interrogatories, the names of any such business associates. Indeed, he did not even know the local sponsors of his program in Traverse City. He could not have known if that sponsor had ceased to have business dealings with him.

The fictitious nature of Plaintiff's special damage claim is further revealed in later proceedings. On May 18, 1964, the Court on its own motion ordered that not later than June 25, 1964, the attorneys for the parties appearing in this case should meet for the purpose, in part, of exhibition to opposing counsel of a written itemized statement of Plaintiff's special damage claims together with documentary evidence in support thereof. By consent the meeting date was changed to July 2, 1964. At that meeting Plaintiff's counsel exhibited no evidence of special damages and stated that Plaintiff was unable to then provide an itemized statement of his special damages. To date, no such statement has been received.

Thus, despite specific order by the Court, Plaintiff has failed to present any evidence or indeed any statement of special damages. It is clear that his broad claim of special damages was entirely groundless and that he cannot now support it.

Obstruction. On May 8, 1964, Defendants moved the Court for an order requiring Plaintiff to produce certain documents and things for inspection, including the Dan Smoot Reports. Plaintiff offered to sell these documents for about $980, but Defendants' Motion was granted by

the Court on June 1, 1964. On July 6, 1964, Defendants' attorney received from the Clerk of the Court a box which the Clerk had received from the Plaintiff and which purportedly contained the articles, pamphlets and books which Plaintiff had been ordered to produce. Upon examination of the contents of the box, Defendants' attorney discovered that some 184 copies had not been produced, and an Affidavit to that effect was filed with the Court. In a letter of July 9, 1964, Defendants' attorney informed the Plaintiff's attorney that he was filing an Affidavit as to the contents of the box, and advised Plaintiff's attorney of what at that time was termed an "oversight." On July 15, 1964, Plaintiff's attorney furnished the Clerk of the Court with 42 additional copies of the Dan Smoot Report. Upon inspection, Defendants' attorney discovered that each of the 42 issues had already been filed, and that there were still some 184 issues of the Dan Smoot Report not included; an Affidavit to this effect was filed with the Court. As of the date of this Motion, this defect has not yet been remedied.

Defendant has taken a reasonable position with respect to these defects in the production of documents and things. However, it is clear from the length of time involved and the specificity with which defects in production were pointed out to the Plaintiff that Plaintiff has made no effort at all to remedy the defects. This willful obstruction has hindered Defendants' counsel in preparation of the defense to this action and has cost time and effort. This obstruction is clear evidence of Plaintiff's lack of good faith in bringing this action and of the vexatious nature of the suit.

Manifest Groundlessness. Viewing all elements of the instant case most favorably to Plaintiff, it is manifestly clear that his action is groundless in fact and baseless in law. Examination of the films and documents on file with the Clerk of the Court reveals that the defense of truth is justified. It is readily apparent that the Plaintiff's program is based on "slanted information, half truths, innuendoes, and sometimes, worse."

For the moment ignoring the defense of truth, however, the circumstances of the case as admitted by Plaintiff in his pleadings reveal that the action is baseless in law. Plaintiff's Complaint states that "Defendants hold themselves out to the public as being engaged in 'to promote political responsibility through informed and active participation of citizens in government.'" Thus, Defendants' organization is one devoted to informing the public on matters of public interest. Dan Smoot, by taking a strong position on public matters, has invited public controversy and is to be regarded as having invited public judgment. He is in no position to complain if that judgment, opinion, comment or criticism is adverse. Defendants' comment on the Dan Smoot program was "fair". It represented the commentator's honest opinion and was published with the bona fide purpose of giving the public the benefit of comment which it is entitled to have. See *Prosser, Torts* § 95, at 619-23 (2d ed. 1955).

Indeed, there is a matter of constitutional concern involved in this case. In the recent decision in *New York Times v. Sullivan,* 84 S. St. 710 (1964), the Supreme Court of the United States stated that there was "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The same principle must apply to comments and attacks on those who, by their public utterances, invite such comments and attacks.

In his program Dan Smoot takes positions on a number of issues of national concern. Defendants, and perhaps others, disagree with his positions and believes his remarks to be misleading. The articles complained of in these two actions are at their worst no more than statements by the Defendants that the utterances of Dan Smoot are misleading — that he is a "Pied Piper." There has been no hint of malice. In light of the circumstances, the defense of privilege, constitutionally buttressed, is clearly sound. Such an action by such a person against such a group is without legal basis. Settled principles of the

law of defamation, together with high traditions of constitutional guarantee, make this action patently baseless.

Oppressive Plan. The bringing of baseless litigation is not inconsistent with devices used by so-called "superpatriot" groups to stifle honest criticism. For example, the John Birch Society Blue Book (which recommends "The Dan Smoot Report" for reading at page 80) provides as follows:

> "6. Another thing we should do, and one badly needed, would be *to start shocking the American People* — or an increasing percentage of the more literate and more intelligent who have not yet been completely brain-washed — into a realization of what is happening; into a dawning realization of how far and how completely Communists and Communist influences have crept right into communities, institutions, and activities where the general public does not have the slightest suspicion of such infiltration. *The best way to do this is by exposure,* which is why the Communists just had to get rid of McCarthy, and went to such extreme lengths to do so * * *." (Emphasis added) p. 94.

> "But *it is to be remembered that libel suits also necessarily give added publicity to the charges,* which is one thing we would be seeking and which the Left would be most anxious to avoid." (Emphasis added) p. 103.

Viewed in the light of such statements, we are provided with a possible reason for Plaintiff's filing of these libel actions and for his obstructive and delaying tactics, and the threat to Defendants' constitutional liberties is brought sharply into focus.

Constitutional Guarantee. Related to but distinct from the above discussion, the constitutional guarantee of freedom of expression is a direct factor weighing in favor of the Court's exercising its discretion to allow attorney's fees as costs in this case. In *New York Times Co. v. Sullivan,* 84 S. Ct. 710 (1964) at pp. 720-721, the United

States Supreme Court recently stressed the importance of maintaining a political and legal climate which encouraged freedom of expression upon public questions as follows:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U. S. 476, 484, 77 S. Ct. 1304, 1308, 1 L. Ed. 1498. • • • The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' United States v. Associated Press, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375-376, 47 S. Ct. 641, 648, 71 L. Ed. 1095, gave the principle its classic formulation:
>
> > 'Those who won our independence believed • • • that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that *it is hazardous to discourage thought, hope and imagination; that fear breeds repression;* that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' " (Emphasis added).

By bringing groundless and harrassing suits against those of little means who criticize him, Plaintiff may effectively deny them the right to comment freely on his views. In the words of Justice Brandeis, he may "discourage thought, hope and imagination" on the part of countless individuals and non-profit and non-endowed groups like the League of Women Voters. Even when clearly in the right, such critics may be unable to afford the costs or risks of litigation defending their rights, and thus deterred from speaking out.

It must be stressed that it is not the Defendants alone whose constitutional rights are endangered by such suits. Plaintiff effectively serves notice upon all others who might otherwise consider publicly discussing or disagreeing with his views that they too may find themselves subjected to time-consuming and expensive litigation.

In fact, these very libel actions already have effectively denied individuals in the Traverse City area from going ahead with a television program which had been planned as an answer to the Dan Smoot television programs. Defendants intend to show at the trial that an informal group in Traverse City, consisting of a Catholic priest, Protestant clergy, and others, abandoned their plans to formally present "the other side." Plaintiff and his associates should not be permitted to smugly reap the "benefits" of libel actions which infringe so drastically on constitutionally guaranteed freedom of speech and expression. This is particularly important in this action where differing political viewpoints raising potentially emotional questions are involved in a presidential election year in which "extremism" has become an issue of national significance.

Therefore, in determining whether "dominating reasons of justice" require the allowance of attorney's fees in this action, the Court should consider that to disallow these expenses as costs threatens a basic constitutional right, not

only of Defendants, but of all citizens. As pointed out above, the economic coercion involved is not a feature of this law suit alone, it is a recognized tactic of the "super-patriot" right.

III.

It is within the discretionary power of a Federal District Court to require of a non-resident plaintiff security for the costs he may have to pay if his action fails.

Security for costs is not covered by the Federal Rules of Civil Procedure. Thus, the trial courts may in this respect "regulate their practice in any manner not inconsistent with these rules." *Fed. R. Civ. P.* 83. Some district courts have local rules which regulate the subject of security for costs. In the case of *Russell v. Cunningham*, 233 F. 2d 806 (9th Cir. 1956), involving an action for assault and battery, the court said: "Appellant contends that the requirement of the rules of the District Court of Guam that non-residents file a cost bond is 'without basis in law and discriminatory.' While no federal statute authorizes security for costs, the district courts may make their own rules not inconsistent with the Federal Rules of Civil Procedure. *F. R. C. P.* 83." *Id.* at 811. In the absence of such a rule the court has discretion in each case to do whatever it wishes. *Barron & Holtzoff, Federal Practice and Procedure* § 1198. And see *Newell v. O. A. Newton & Son Co.*, 95 F. Supp. 355 (D. Del. 1950), where, after quoting Rule 83, the court continues: "I am of the opinion that the foregoing express power as well as power emanating from the inherent nature of the court itself (if not limited by rule or statute) gives to the court a discretion with relation to security for cost." See also 10 *Cyc. Fed. Proc.* § 38.47.

IV.

The instant case is a proper one for the exercise of the Court's discretionary power to require security for costs, including attorney's fees.

To require security for costs, including attorney's fees, is not to finally determine the issue of attorney's fees as costs. Whether or not they will be allowed can only be determined after the trial. But if there presently appears a reasonable likelihood that such items will be allowed, then to require security for them would be appropriate.

The factors which indicate that this will be a proper case for the court to exercise its discretion to allow attorney's fees as costs also weigh in favor of the court's requiring security for such amounts at this time. The obviously groundless and vexatious nature of the litigation make it entirely fair that Plaintiff put up this security. Constitutional considerations also require this result. Many would be forced to knuckle under and cease and desist their fair criticism when faced with the prospect of such a suit as this. This would be true even if such persons had reason to hope that their attorney's fees would be allowed them as costs. The risk and uncertainty involved in collecting such costs constitute an effective deterrent. On the other hand, if they could be assured that such amounts would be promptly paid if and when awarded, and would not involve further long and tedious litigation, such persons would not hesitate to vigorously defend such actions.

In addition, in deciding whether or not to require security for costs, the non-residence of the Plaintiff is an important factor. Even if costs are assessed against him, Defendants may find it difficult or impossible to collect from him in a distant forum. See *Barron & Holtzoff, Federal Practice and Procedure* § 1198.

Finally, the relative economic positions of the parties may be considered in resolving this question. Plaintiff is a highly prosperous radio and television personage. Defendants are a non-profit non-partisan association and four members of the association. Defendants need every financial assurance that they may in fairness be given.

For all the reasons set out above, it is urged that the instant case appears reasonably likely to be one in which attorney's fees will be awarded as costs to the Defendants, and that consequently security for such items of costs should be required, and Defendants submit that their Motion for Security for Costs should be granted. To do otherwise would be to retreat from the "profound national commitment that debate on public issues should be uninhibited, robust, and wide open."

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR BOND FOR SECURITY FOR COSTS

I.

There is no showing of any financial inability on the part of plaintiff to pay costs in the event he should not prevail.

Not only is there no showing of financial irresponsibility on the part of the plaintiff to meet any costs taxed against him by defendants, but the affidavit of their own counsel shows positively that plaintiff is financially responsible. The language of defendants' counsel in said affidavit is: "Plaintiff's answers to Defendants' Interrogatories further indicate that plaintiff has an income well in excess of $40,000 a year." Therefore there is no need for any security for costs.

> "Where plaintiffs were solvent so that defendants and their witnesses were not endangered with respect to their legal demands, motion for security for costs would be denied." *Merriman v. Cities Service Gas Co.*, D. C. Mo. 1951, 11 F. R. D. 165.

II.

The motion for security for costs is untimely made.

These cases were started on or about March 18, 1964, and are now at issue and have been at issue for some time.

Meanwhile, interrogatories for both sides have been filed, and answers filed in relation thereto, and the cases have been set down for Pre-Trial hearing September 24, 1964. In addition, depositions have been taken, one day having been spent in taking the deposition of the plaintiff, and one-half day for the deposition of two of the defendants, and plaintiff has been put to considerable expense by reason of the taking of the depositions and the preparation of answers in reply to the interrogatories.

> "Where there has been unnecessary delay in filing motion to require plaintiff to give security for costs, and plaintiff has incurred expense, the court should not require such security." *Cary vs. Hardy*, D. C., Tenn., 1940, 1 F. R. D. 355.

III.

The amount of bond requested for security of costs is highly excessive and extremely unreasonable.

The amount of $25,000.00 bond for security for costs requested is unreasonable. The taxable costs in these cases can only be nominal. No showing has been made and no showing can be made of any extraordinary situation. Moreover, this is a case in the nature of an action at law in which only nominal costs are permitted.

IV.

The motion for security for costs is an attempt to punish plaintiff for exercising his right to start suit against those who he claims have seriously libeled him.

The only costs which defendants could obtain if they were to win the lawsuit would be nominal.

> "Costs in actions at law in federal courts are creatures of statute, and ordinarily, attorneys' fees, except as fixed by statute, should not be taxed as part of costs recovered by prevailing party, although in a suit in equity where taxation of such costs is

essential to doing of justice, they may be allowed in exceptional cases." *Ruck v. Spray Cotton Mills,* D. C. N. C. 1954, 120 F. Supp. 944.

V.

State rule to govern costs.

In view of the fact that there appears to be no local rules of the U. S. District Court for the Western Division of Michigan, concerning the taxation of costs, then the State rule should govern. *Brown v. Consolidated Fisheries,* D. C. Del. 1955, 18 F. R. D. 433.

Plaintiff respectfully asks the Court to deny the motion of defendants for security for costs, or in the alternative, to fix a bond in a nominal amount.

(117)

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD L. THORNQUIST
LAWSON E. BECKER
LEONARD C. VERDIER, JR.
PHIL R. JOHNSON
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GRAND RAPIDS, MICHIGAN 49502

TELEPHONE
459-6121
AREA CODE 616

GEORGE S. NORCROSS
1889-1960

February 5, 1965

Copy given to
SAM - 2-11-65 -
w/ incoming BMM

Mrs. Barbara Morris
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Dear Mrs. Morris:

I would like to bring you up to date on the proceedings in Smoot v. League of Women Voters, et al. since last October. You will recall that we notified you at the last minute that the League's need for the assistance of Mr. Wilkins and Mrs. Mothershed of Little Rock was delayed temporarily because of an order of the Sixth Circuit Court of Appeals.

At that time Smoot had ignored the orders of the District Judge to prepare for trial. It appeared that he had had no intention of proceeding to the trial of the libel actions. In fact, he attempted to dismiss the actions with prejudice without the setting of any terms or conditions on the dismissal by the District Judge, but this attempt was denied. On the other hand, as you know, the League necessarily had gone to great efforts to prepare its defense.

The day before trial was to begin, Smoot sought a writ from the Court of Appeals directing District Judge Fox to dismiss the actions. Smoot contended that a judge has no power to deny or condition a dismissal with prejudice. Judge Fox, as Respondent, filed a brief submitting that dismissal with prejudice in this case would be insufficient to protect the defendants' constitutional right to freedom of expression. On behalf of the League and the individual defendants, we argued that the practical effect of a dismissal without setting conditions (such as making Smoot pay the League's expenses in defending the actions) would give Smoot the

result he intended to achieve by filing the actions - the stifling of the League's criticism of him. We pointed out that the purpose and effect of Smoot's conduct was readily apparent in view of the fact that libel actions are used by the so-called "super-patriots" in our society as an acknowledged instrument of political and economic intimidation.

We argued that this is "an atmosphere in which the First Amendment freedoms cannot survive" (New York Times Co. v. Sullivan) and that the law should require that libel actions against those who criticize public figures (including news commentators) be brought in good faith. The only way to guarantee this good faith is to require those who bring such actions to suffer the consequences if they have abused the processes of the law, and to provide them with no absolute right of dismissal in such cases.

On December 30, the Court of Appeals (Circuit Judges Weick and Cecil, and District Judge Boyd), in an opinion which made no mention of the constitutional arguments, ordered Judge Fox to dismiss Smoot's actions with prejudice, "subject to the payment of all court costs by plaintiff." We thereupon filed a petition for rehearing, asking for clarification of the order. Specifically, we expressed uncertainty as to whether the Court of Appeals' use of the term "court costs" was intended to circumscribe the broad discretion customarily vested in the trial court in the awarding of "costs" by the Federal Rules of Civil Procedure. We are enclosing copies of the Order of the Court of Appeals and our Petition for Rehearing and Clarification.

On January 26, the Court of Appeals entered an order denying a rehearing, but specifically stating that the Court had "made no predetermination of the costs properly assessable against" Smoot. Accordingly, we have filed, on behalf of the League, a motion in the District Court for the assessment of costs against Smoot in the total amount of $36,906.99. In support of this motion, we will submit proofs that the statements by the League which were the basis of Smoot's libel actions are true and privileged, and that the libel actions were brought and maintained by Smoot in bad faith, vexatiously, and for oppressive

purposes. We anticipate that the hearing will be set to commence before Judge Fox during the first part of April.

At the hearing, we intend to present substantially the same proofs as we had scheduled for the trial set last October. We again would like to have Mr. Wilkins and Mrs. Mothershed testify as to the misleading or inaccurate statements and innuendoes in the Smoot Reports which we discussed with you last fall.

We, and the League, very much appreciate the invaluable assistance which you have given us on this matter. We are looking forward to working with you again.

I am enclosing an extra copy of this letter for you to give Mr. Wilkins if you desire. I am also sending a copy fo Mrs. Mothershed. I also understand that Mr. Wilkins will be in Grand Rapids on February 16th, and we very much hope that we will have an opportunity to discuss this matter with him then.

I expect to call you shortly after you receive this letter. In the event you have any questions, please feel free to contact me either by mail or by a collect telephone call. In the event I am out of the office you may talk with either Mr. Harold Sawyer or Mr. Charles McCallum of this office, both of whom are familiar with the case.

Very truly yours,

Lewis A. Engman

Lewis A. Engman

wn

Encs.

cc: Mrs. Anne L. Mothershed

DAVID A. WARNER
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AREA CODE 616

GEORGE S. NORCROSS
1889-1960

February 5, 1965

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National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

C O P Y

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Very truly yours,

Lewis A. Engman

wn

Encs.

cc: Mrs. Anne L. Mothershed

5024FEB-465

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D.C.
20554

ADDRESS ALL COMMUNICATIONS TO THE SECRETARY

FEB 2 1965

IN REPLY REFER TO:
8424
1100258

AIR MAIL

Mr. Marvin R. Steffins, Jr.
President
Williamette Family Stations, Inc.
Radio Station KWFS
Post Office Box 1122
Eugene, Oregon

Dear Mr. Steffins:

We have your letter of October 27, 1964, addressed to Chairman Henry, with which you enclose a copy of your letter of April 30, 1964 to the Commission's General Counsel and copies of various correspondence between yourself and other individuals and groups. Your letter and the enclosures have been read with considerable care and interest, and we will try to comment on all the questions you raise.

The first point you raise concerns the burdens which you feel are unreasonably imposed upon licensees in attempting to comply with the fairness doctrine. Chairman Henry gave a speech several months ago which sets forth his views on this subject. We have enclosed a copy and hope that you find it interesting.

As to the licensee's discretion and area of judgment in connection with the fairness doctrine, this is dealt with in some detail in the recently issued Fairness Primer, a copy of which is also enclosed.

You also raise a question as to your obligations under the fairness doctrine to furnish free time for the presentation of controversial issues of public importance. We are therefore enclosing a copy of the Commission's letter of September 19, 1963, to Cullman Broadcasting Co., Inc., et al. As you can see from that letter, the Commission pointed out that the obligation to furnish free time for the presentation of opposing views arises only where (1) the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, (2) has not presented and does not plan to present contrasting viewpoints in other programming, and (3) has been unable to obtain paid sponsorship for the appropriate presentation of contrasting viewpoints. In these circumstances, the Commission ruled, a licensee cannot reject a presentation otherwise suitable to him -- and thus leave the public uninformed -- on the ground that he cannot obtain paid sponsorship for the presentation. As to your question concerning the particular stations involved in the ruling, this is answered in the next to the last paragraph of the enclosed letter.

You have also inquired as to the scope of the term "personal attack." We refer you to note 6 on p. 10422 of the enclosed Fairness Primer.

This brings us to the matter which prompted your letter to the Chairman - the October 19, 1964 letter referring to the broadcast by your station of the program, "Dan Smoot Report," on June 1, 1964, entitled "Communism in the Civil Rights Movement," and requesting time to reply to the personal attack made in the program upon the signatory organizations (the Congress of Racial Equality, the American Jewish Congress, the American Civil Liberties Union, the National Association for the Advancement of Colored People, and National Urban League). You state that based upon your research, the leaders of these organizations have extensive association with "Communist Front organizations or activities" and that you "will not reply affirmatively to any requests to use our facilities by those who, by their deeds, associations or records, indicate that they are not responsible representatives of an important segment of the public in our community."

In the enclosed Cullman letter, the Commission stated that "... with the exception of the broadcast of personal attacks, there is no single group or person entitled as a matter of right to present a viewpoint differing from that previously expressed on the station"-- that rather, the choice of appropriate spokesmen is left to the good faith exercise of the licensee's best judgment. But where the licensee permits his facilities to be used for a personal attack upon an individual or group (that is to say, for an attack upon an individual's or group's integrity, character, or honesty or like personal qualities), he is under an obligation to furnish a transcript (or summary if no transcript is available) of the attack to the person or group, with an offer of a comparable opportunity to respond to the attack. See Part E, enclosed Fairness Primer, pp. 10420-21.

If, then, the June 1 Dan Smoot program contained a personal attack upon the organizations signing the October 19 letter -- e.g., accused them of being Communist or Communist-front organizations, you were under an obligation to furnish a transcript or summary of the attack portion of the program to these organizations, with an appropriate offer of time to respond. We have noted the position set forth in your letter that the organizations are, in fact, led by individuals with Communist-front associations. But that position does not mean that you need not comply with the requirements of the fairness doctrine -- nor is the position at all relevant to the Commission's review of the matter, upon complaint.

We are sure that you will agree when you analyze the matter. Suppose a radio editorial or program accuses the town mayor of stealing city funds. The mayor, if he wishes, ought to have the opportunity to dispute the charge and give his side, and the public could then decide who is right, having heard both sides. But if the station could say -- "I have investigated and the facts are right; therefore the mayor is not a responsible person who should be permitted to appear on the station" -- the public would not hear the other side. And, the last thing which this Commission should do, is to review the merits of the controversy, and decide whether the mayor gets time on the basis of whether it believes the mayor is a thief. That, of course, would be a wholly improper function for the Federal Communications Commission.

In short, it is up to you to make the programming judgment whether to present a program discussing "Communism and the Civil Rights Movement" containing personal attacks upon the above listed civil rights organizations. But these organizations, having been the subject of personal attack, have the right to give the public their side of the controversy. And that right to inform the public does not depend upon evaluation of the merits of their cause by either the licensee or the Commission.

Finally, in your letter to the General Counsel, you state that you propose to comply with the policy of furnishing transcripts to persons or groups attacked in a broadcast by offering such persons or groups an opportunity to come to the station and listen to the broadcast or to have it played on the telephone. You ask for reactions to your proposal. First, the person or group must be notified of the attack. As to the procedure in informing the person of the substance of the attack, the sending of a transcript constitutes an obvious way. But the Commission has made clear that a licensee may use "good sense" in carrying out his obligations (see Ruling 24, Fairness Primer, p. 10421). If the person attacked is informed by telephone and has no objection to stopping by the station to hear the tape, that would, of course, be permissible. So also he might be entirely satisfied to have the pertinent continuity read over the telephone. But where the person attacked does not reside in the community and the attack is a lengthy one, the foregoing procedures might be inconvenient and unacceptable to him. Again, we stress that the obligation to furnish the transcript arises only when there has been a personal attack -- an attack on individuals' or groups' integrity, character or honesty or like personal qualities -- and not when an individual or group is simply named or referred to.

In short, the licensee, after notifying the person or group of the attack, is free to suggest procedures to inform the person of the substance of the attack. Whether such procedures are reasonable could only be determined in the context of a specific factual situation.

We hope that the foregoing is fully responsive to the points in your letter and informs you as to the Commission's policies in this area. Like you, we are sending a copy to the signatory organizations in the October 19, 1964 letter.

Very truly yours,

Ben F. Waple

Ben F. Waple
Secretary

Enclosures

February 18, 1965

MEMORANDUM TO BARBARA MORRIS FROM MILDRED BOND

Attached is a copy of a letter Ben F. Waple, Secretary, FCC to Marvin R. Steffins, president, Williamette Family Station, Inc, Eugene, Oregon.

I am passing it on to you for your information inasmuch as it refers to the Dan Smoot matter.

MB:crn
attachment

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD E. THORNQUIST
LAWSON E. BECKER
LEONARD D. VERDIER, JR.
PHIL R. JOHNSON
PLATT W. DOCKERY
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GRAND RAPIDS, MICHIGAN 49502

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AREA CODE 616

GEORGE S. NORCROSS
1889-1960

March 9, 1965

Mrs. Anne L. Mothershed
1302 W. 28th Street
Little Rock, Arkansas

Dear Mrs. Mothershed:

This will advise you that the hearing about which I wrote you on February 5 in Smoot v. League of Women Voters, et al. has been set to commence on Monday, April 19, and will probably continue at least through the rest of that month.

We have been in contact with Dr. Morsell in New York and Mr. Wilkins has agreed to come to Grand Rapids to testify on Friday, April 23rd. We would very much like to have you available as a witness during the afternoon of Thursday, April 22, if that time is at all convenient for you. If this date is acceptable to you, it probably would be best if you could arrange to leave Little Rock sometime in the afternoon or evening of Wednesday, April 21.

Could you please let us know if this date is a good one for you? If it is, we can arrange to obtain your air lines tickets and forward them to you. We will also be contacting you with respect to the details of your testimony, but we would prefer to wait on this until after we have received the material which the NAACP office in New York will be sending us in this regard.

In the event you have any questions at any time, please feel free to contact me either by mail or by a collect

telephone call. Our number in Grand Rapids, Michigan is 459-6121, Area Code 616.

Sincerely yours,

Lewis A. Engman

wn

cc: Dr. John Morsell

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD E. THORNQUIST
LAWSON E. BECKER
LEONARD D. VERDIER, JR.
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CHARLES E. McCALLUM
THOMAS J. McNAMARA
WILLIAM S. MOODY

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AREA CODE 616

GEORGE S. NORCROSS
1869-1960

March 24, 1965

Dr. John Morsell
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Dear Dr. Morsell:

As you may know, Mrs. Mothershed from Little Rock has indicated that she will be able to be a witness in the Smoot v. League of Women Voters hearing on Thursday, April 22. I assume that Mr. Wilkins will be coming into Grand Rapids sometime on that afternoon or evening, and we would appreciate being advised as soon as conveniently possible of his travel plans and the number of persons, if any, who will be coming with him from your office so that we may make the necessary hotel reservations.

In addition, it may be advisable that we meet with you, Mr. Wilkins or Mrs. Morris in New York prior to the hearing on April 19 to discuss the testimony. In any event, this is a decision which we can hold open now, although I would appreciate your comments on this.

We are particularly anxious to look at the analysis which your office has made with respect to the Smoot Reports which we sent you last summer. Would it be possible for the analysis to be sent us sometime during the next week or ten days?

As I told you before, if you have any questions, please feel free to call me collect at Grand Rapids 459-6121, Area Code 616.

Sincerely,

Lewis A. Engman

wn

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD E. THORNQUIST
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GEORGE S. NORCROSS
1869-1960

March 24, 1965

Mrs. Anne L. Mothershed
1302 W. 28th Street
Little Rock, Arkansas

C

O

P

Y

Dear Mrs. Mothershed:

Thank you for your letter advising us that you will be able to come to Grand Rapids as a witness in the Smoot - League of Women Voters litigation for April 22, 1965. We will arrange for plane tickets for you so that you can arrive in Grand Rapids on the afternoon or evening of Wednesday, April 21, and will forward them to you as soon as details are completed, together with your hotel reservations.

As I told you last fall, Smoot contends that the parents of the children sent to Little Rock High School in 1957 were bribed or otherwise coerced by the NAACP, and your testimony will principally revolve around this point. In addition, it may be that you can be of some assistance on some related matters, and we will write you concerning the testimony in more detail as soon as we have received the analysis which the NAACP office in New York will be sending us.

Again, thank you for your cooperation.

Sincerely,

Lewis A. Engman

wn

cc: Dr. John Morsell

No. 16,565

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAN SMOOT,

Petitioner,

vs.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Harold S. Sawyer,

Lewis A. Engman,

Charles E. McCallum,

Warner, Norcross & Judd,

Attorneys for Defendants.
300 Michigan Trust Building,
Grand Rapids, Michigan 49502

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS 2, MICHIGAN — PHONE GL 8-5326

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Does the protection of rights guaranteed by the First Amendment of the United States Constitution require a court to assess counsel fees as costs against one who brings a libel action in bad faith, vexatiously, and for an oppressive purpose?

2. As a matter of federal courts law, may counsel fees be allowed as costs in a suit found to have been brought in bad faith, vexatiously, and for an oppressive purpose?

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CASES (Continued)

MISCELLANEOUS

No. 16,565

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

STATEMENT OF PROCEEDINGS

This brief in opposition to the Petition for Writ of Prohibition is respectfully submitted by the Defendants in Civil Actions No. 4708 and 4709 now pending in the United States District Court for the Western District of Michigan, the League of Women Voters of the Grand Traverse Area of Michigan, Florabelle Grosvenor, Mary Force, Margot Power and Sara Hardy (herein called "Defendants"), the real parties in interest in this case.

This cause is before the Court on the petition of Dan Smoot ("Plaintiff") for a writ of prohibition against the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan. It is

the third such petition by Plaintiff arising out of two libel actions which Plaintiff filed against Defendants in the United States District Court for the Western District of Michigan on March 21, 1964, seeking one million dollars in damages. The actions were based on Plaintiff's allegations that Defendants' published criticism of his public utterances was defamatory of him. Defendants in their answer requested their attorneys' fees as costs.

As a result of Plaintiff's conduct during discovery, on August 28, 1964, Defendants moved to require of Plaintiff security for costs (including attorneys' fees). The question whether a district judge has power to allow attorneys' fees as costs in an action at law which is brought in bad faith, vexatiously, and for an oppressive purpose was briefed and argued. The District Court granted the motion, and required Plaintiff to post a substantial bond, stating:

> "If the proofs show, as defendants' counsel claimed at the hearing on the motion, that this suit was instituted for a vexatious purpose and defendants have been inhibited from speaking out since the date of the filing of the complaint in this action, then defendants will not be put to the additional burden of going to a foreign state to collect this obligation."

Implicit in the District Court's opinion was the proposition that if the suits are vexatious, then Defendants are entitled to their attorneys' fees. Explicit in the opinion was the proposition that the District Court would require the submission of proofs of the vexatious nature of the suits.

Shortly before trial, Plaintiff moved that his actions be dismissed with prejudice. After the District Court denied this motion, Plaintiff petitioned for and obtained an order from this Court directing the District Court to dismiss the actions with prejudice, "subject to the payment of all court costs by the Plaintiff." *Smoot v. Fox,* 340 F. 2d 301 (1964).

A petition for rehearing and clarification was filed in which it was pointed out that Judge Fox had previously

decided that attorneys' fees were allowable in a proper case. The petition continued:

> "Petitioner is aware that, before awarding attorneys' fees as costs, he must make the determination whether plaintiff did in fact bring these actions in bad faith, vexatiously, and for an oppressive purpose. However, such a factual determination, which would require the taking of proof, would be an 'expensive luxury' if this Court intended, when it said 'subject to the payment of all court costs,' to indicate that attorneys' fees could not be awarded. The inevitable expenditure of time and effort in making such a determination would then have been contrary to the spirit of the Court's order."

This Court denied the petition for rehearing, but stated that in using the term "court costs" it had made no ruling on the question whether these were proper cases for the award of attorneys' fees.

On February 2, 1965, Defendants filed a Motion for Assessment of Costs in the District Court. Defendants alleged, and offered to prove, that Plaintiff's actions were brought in bad faith, vexatiously, and for an oppressive purpose. They asked that Plaintiff be ordered to pay their attorneys' fees. Thereafter Plaintiff filed a motion to dismiss Defendants' motion for assessment of costs.

Prior to the hearing date on April 19, 1965, Plaintiff again petitioned this Court for a writ of prohibition directing the District Judge to allow no hearing on Defendants' motion for costs insofar as claims made for the allowance of attorneys' fees and miscellaneous costs in the preparation for trial are concerned. On April 9, 1965, this Court entered an order in Cause No. 16,501 dismissing Plaintiff's petition for a writ of prohibition, stating, "The District Court has jurisdiction to hear and determine *both* of the motions which were filed in these actions." (Emphasis added.)

On April 19, 1965, Plaintiff's motion to dismiss Defendants' motion for assessment of costs was heard and denied by District Judge Fox. The opinion was concurred in by

Chief Judge Kent and Senior Judge Starr. The hearing on Defendants' motion for assessment of costs was set to commence on May 17, 1965.

Plaintiff again petitioned this Court for a writ prohibiting the District Judge from holding a hearing for the purpose of fixing extraordinary costs. On May 12, 1965, this Court entered an order requiring the respondent to show cause why the prayer of the Plaintiff's petition should not be granted.

ARGUMENT

I.

AS A MATTER OF CONSTITUTIONAL LAW, A COURT MUST ASSESS COUNSEL FEES AS COSTS AGAINST ONE WHO BRINGS A LIBEL ACTION IN BAD FAITH, VEXATIOUSLY, AND FOR AN OPPRESSIVE PURPOSE.

This case is controlled by *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Unless the federal courts may award Defendants as costs the counsel fees and other expenses incurred in defending a baseless libel action filed by Plaintiff in bad faith and for oppressive purposes, "would-be critics" of Plaintiff and others of his ilk would be "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279. If, as Plaintiff would have us believe, the courts are powerless to tax the costs of defense in *any* case, no matter how groundless or vexatious the action, then the machinery of the courts is a potent and frightening weapon in the hands of those who would intimidate and silence the voices that disagree with them. Such an intrusion on the "exercise of precious First Amendments rights" (*Lamont v. Postmaster General*, 33 U.S.L. Week 4489, 4491 (May 24, 1965) (concurring opinion)), cannot, and will not, be permitted.

By bringing baseless libel actions in which his carefully worded and sworn complaints alleged malice (Complaints,

No. 4708, para. 8; No. 4709, para. 7), Plaintiff raised a factual issue which gave Defendants no choice but to incur heavy expenses in preparing a defense. Their alternative was to risk a million dollar judgment. The fear of such a damage award "may be markedly more inhibiting than the fear of prosecution under a criminal statute," yet "ordinary criminal-law safeguards such as the requirements of indictment and of proof beyond a reasonable doubt * * * are not available to the defendant in a civil action." *New York Times Co. v. Sullivan, supra* at 277. Thus, at the very minimum, adequate protection of the First Amendment freedom of expression requires that harassed defendants have some meaningful recourse against those who would intimidate them by means of groundless and vexatious libel actions.

A. The Bringing of a Libel Suit in Bad Faith and for an Oppressive Purpose Deprives the Defendant of His Constitutional Right to Freedom of Expression Unless the Court Awards Counsel Fees as Costs.

The baseless libel action is peculiarly well suited to serve the purpose of those who wish to intimidate a defendant by forcing him to incur the expense of retaining counsel and preparing a defense. If he wishes, the party bringing a libel action merely has to show the fact of publication and rest his case. The burden of proof is then shifted to the defendant, and unless he can show truth, or privilege, or some other defense, judgment will follow for the plaintiff. Judge Yankwich, a perceptive analyst of the law of defamation, has articulately expressed this unique character of the libel action:

> "By reason of the fictions which enshroud the law of libel, the plaintiff in any action for libel is in a more advantageous position than the plaintiff in any other civil action.
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> "In every other branch of the law, the plaintiff is required not only to allege but also to prove the essential facts which go to constitute his cause of action.
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> "Not so in libel.

"Once the plaintiff has proved the publication of a charge which is libelous *per se*, he has a *prima facie* case * * *."

"Damages are assumed as the consequences of the fictions of malice and falsity.

"So that, instead of the plaintiff being required to prove his good reputation, the defendant, if he grounds his defense upon an attack on plaintiff's reputation — must prove the plaintiff's bad reputation.

"Again, while the plaintiff's right of action in libel is based upon the falsity of the accusations made against him, he is not required to prove such falsity. The defendant must prove their truth. The same is true of the plea of privilege.

"This anomaly makes the task of him who defends an action for libel an arduous one." — Yankwich, *It's Libel or Contempt if You Print It* 355-56 (1950).

Thus, for the cost of the filing fee, a plaintiff in a libel action can impose heavy expense on his opponent. The defendant cannot, especially if his defense is truth, rely as he would in other cases on his opponent's inability to prove a case. Even if every indication is that the plaintiff intends to dismiss prior to trial, the defendant cannot afford to take the risk but must make full and complete preparation.

These characteristics, which make libel actions particularly susceptible to use as extra-legal instruments of harassment, intimidation, and publicity have not gone unnoticed. In his concurring opinion in *New York Times Co. v. Sullivan, supra* at 295, Mr. Justice Black points out that:

> "* * * this technique for harassing and punishing a free press — now that it has been shown to be possible — is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers."

In this respect it is significant that at least 17 libel actions, seeking total damages in excess of 288 million dollars and brought by public officials in three southern states against newspapers, magazines and a television network, were pending in state and federal courts in April 1964. *The New York Times*, April 4, 1964, p. 12.

Although most libel actions may be brought in good faith and on firm legal grounds, the baseless libel actions which do inhibit First Amendment rights cannot be dismissed as only minor aberrations in our legal system. Mr. Justice Brennan stated it succinctly in the recent case of *Lamont v. Postmaster General, supra* at 4491:

> "In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one. As the Court said in *Boyd v. United States*. 116 U.S. 616, 635:
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> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' " (concurring opinion).

If this Plaintiff cannot be required to reimburse these Defendants for the heavy expense he has wrongfully imposed on them, the effects will be widespread and dangerous. All, and especially those of little means, who would criticize Plaintiff, or others like him, will hesitate to voice their criticism. The ease with which they will have seen the courts used to penalize Defendants for their boldness in presuming to speak freely on public questions will

effectively still the "multitude of tongues." *U. S. v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd,* 326 U.S. 1 (1945). The "prized American privilege to speak one's mind" (*Bridges v. California,* 314 U.S. 252, 270 (1941)) will have become a privilege restricted to the wealthy American — the only American who can afford the costs of defending vexatious actions.

B. One Who Uses the Courts to Deprive Another of Constitutional Rights Will be Assessed for the Fees and Expenses Incurred by That Other.

The obvious answer is that the courts must have the power to tax the costs of defense against one who uses a vexatious lawsuit to deprive another of a constitutional right. Not only must the courts have this power, originating in the United States Constitution, but it must be freely exercised in appropriate circumstances.

The existence of such a rule of law is not without precedent. In the case of *Bell v. School Board of Powhatan County,* 321 F. 2d 494 (4th Cir. 1963), defendant school board, in the face of recent and controlling Supreme Court opinions, followed a plan of obstruction and delay which forced the parents of Negro children into the courts to enforce their rights. The District Judge did not charge defendant with plaintiff's counsel fees. Reversing, the Fourth Circuit Court of Appeals said:

> "The general rule is that the award of counsel fees lies within the sound discretion of the trial court but, like other exercises of judicial discretion, it is subject to review. The matter must be judged in the perspective of all the surrounding circumstances. * * * Here we must take into account the long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education. To put it plainly, such tactics would in any other context be instantly recognized as discreditable. The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme." *Id.* at 500.

In the present case, as in the *Bell* case, one party (the Plaintiff), acting vexatiously and in bad faith, has placed upon the others (the Defendants) such a heavy burden of litigation that, unless they can be reimbursed, they will be forced to avoid such litigation and thereby lose constitutionally protected rights.

Indeed, the logic and sense of the *New York Times* case requires this result. In that case the substantive law of libel was used in an attempt to curtail freedom of the press. Here the procedural aspects of libel are brought into play in a similar attempt. But the law of costs, like the substantive law of libel, "can claim no talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan, supra* at 269. The Court expressed the stifling effect of the libel suit and referred specifically to the expense incurred by a defendant:

> "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C.A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' Speiser v. Randall, supra, 357 U.S., at 526." *Id.* at 279.

And, as pointed out by the court, that the Defendants will ultimately "win" is somewhat beside the point.

Whether or not they can survive a succession of libel suits, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

Nor can Plaintiff restrict the broadly stated principles of the *New York Times* case to cases where public officials are involved. In the case of *Pauling v. News Syndicate Co.*, 335 F. 2d 659 (2d Cir. 1964) (Friendly, J.), the court said:

> "We realize that the sole point actually determined by the decision was that the First Amendment requires a state to recognize a 'privilege for criticism of official conduct,' * * * extending to misstatements of fact, this being regarded as in some way the reciprocal of the privilege of federal officials against liability for defamatory statements 'within the outer perimeter' of their duties. * * * Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; * * *." *Id.* at 671.

Other cases have viewed the *New York Times* rationale equally broadly. See *Application of Levine*, 97 Ariz. 88, 397 P. 2d 205 (1965) (en banc); *State v. Browne*, 86 N.J. Super. 217, 206 A. 2d 591 (1965); *Gilberg v. Goffi*, 251 N.Y.S 2d 823 (App. Div. 1964).

This case must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan, supra* at

270. The simple essence of this case is that unless Defendants can be awarded their expenses as costs, Plaintiff will be able to use the courts to deprive them of their constitutional rights. Defendants urge that such perversion of judicial machinery cannot be allo[redacted]

II.

AS A MATTER OF FEDERAL COURTS LAW, COUNSEL FEES MAY BE ALLOWED AS COSTS IN A SUIT FOUND TO HAVE BEEN BROUGHT IN BAD FAITH, VEXATIOUSLY, AND FOR AN OPPRESSIVE PURPOSE.

A. The Power to Allow Counsel Fees as Costs in Vexatious Actions May be Exercised in Actions at Law As Well As Suits in Equity.

The United States Supreme Court has recently reaffirmed its adherence to the rule that the "allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the Federal courts.'" *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962), quoting *Sprague v. Ticonic National Bank*, 302 U.S. 161, 164 (1939). This power to allow counsel fees as extraordinary costs is broad and flexible, to be exercised whenever called for by "dominating reasons of justice." *Universal Oil Products v. Root*, 328 U.S. 575, 580 (1946). And dominating reasons of justice do call for the allowance of counsel fees as costs whenever, as in the case at hand, a suit is shown to be "false, unjust, vexatious, unwarranted, or oppressive." *Guardian Trust Co. v. Kansas City So. Ry.*, 28 F. 2d 233, 241 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). Decisions of this Circuit follow these principles. *Cleveland v. Second National Bank & Trust Co.*, 149 F. 2d 466 (6th Cir. 1945), *cert. denied*, 326 U.S. 775 (1945); *Swan Carburetor Co. v. Chrysler Corp.*, 149 F. 2d 476 (6th Cir. 1945).

Plaintiff has not sought to challenge such a well-settled principle of law. Instead, conceding that a district court

may allow counsel fees as costs in an appropriate case, he contends that this power is limited to cases of "equitable cognizance" and cannot be exercised "against an unsuccessful plaintiff in an action at law for damages." Plaintiff's Brief, p. 11. His reasoning is that since Defendants have not produced a reported decision allowing counsel fees as costs in an action at law, therefore the courts are powerless to allow counsel fees as costs in actions at law. That his conclusion does not follow from his premise is patently obvious.

Defendants submit that neither history nor logic support the distinction urged by Plaintiff. Defendants further submit that in any event the merger of law and equity in federal practice vested federal district courts with the power to allow counsel fees as costs in all civil actions when the suit is shown to be vexatious.

1. History does not support the distinction urged by Plaintiff.

The principle of awarding counsel fees as costs when a suit has been brought in bad faith and vexatiously is one of considerable antiquity. Its roots have been traced to the law of ancient Athens. "Distribution of Legal Expense Among Litigants," 49 *Yale L. J.* 699, 704 (1940). It has appeared in legal systems other than the Anglo-American:

> "Although many procedural penalties were employed in the earliest German and French procedures, the best medieval example of the survival of the Roman law policy that judges should have discretionary power to award costs as a penalty is the Thirteenth Century Spanish Code *Las Siete Partidas*, which declared that costs might be awarded as a punishment for bad faith in prosecuting or defending an action. The procedural aspects of *Las Siete Partidas* are thought to have been borrowed from the canonists, who were influenced by the Roman system, and this may be the link between the costs power given in the Spanish Code and the analagous discretionary power claimed by the English Chancellors who were usually clerics during the formative era. The Code declared that those who instituted any suit 'actuated by malice and knowing they have no right to the property which they claimed' should 'pay the costs incurred by the other party by reason of the suit.' But 'when the judge thinks that the defeated party was actuated by any just motive in bringing the suit or in making the defense, he has no reason to order him to pay the costs.' This procedure was used in the civil law of Spain and is incorporated in the codes of civil procedure of most of the Latin American Republics and Puerto Rico." *Id.* at 705.

And in Germanic tribal law, the precursor of Anglo-Saxon law, a "party-fine" was assessed against one who brought a suit in bad faith. "Deterring Unjustifiable Litigation by Imposing Substantial Costs," 44 *Ill. L. Rev.* 507, 509 (1949).

More importantly for present purposes, however, the common law early adopted an even broader rule:

> "According to Pollock and Maitland it is probable that before the time of Edward I, in many actions for damages, 'a successful plaintiff might often under the name of "damages" obtain a compensation which would cover the costs of litigation as well as all other harm that he had sustained.' This rule allowing plaintiff his 'costs' was brought in 1275 by the Statute of Gloucester to cover also actions for the recovery of land, then an all-important type of litigation. A series of statutes, beginning in the reign of Henry VIII and ending in that of Anne, extended finally the same advantage to successful defendants. Thus, in the common law courts, the rule became established in England long before the American Revolution that except in some cases where the plaintiff recovers only trivial damages, the party who wins a law suit is entitled to recover from the losing adversary the 'costs' of the litigation." McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 *Minn. L. Rev.* 619 (1931).

Early American legislatures, hostile to the attorney, generally altered this aspect of the common law by statute. But any statutory restriction is in derogation of the com-

mon law. And no federal statute has specifically excluded the award of counsel fees as costs in actions at law.

However, regardless of the strong argument that can be made for it (see Abbey, "Taxation of Costs in New Hampshire," 5 *N. H. Bar J.* 114, 129 (1963)), Defendants do not suggest the adoption of the common-law practice of allowing substantial costs to the prevailing party in every action. This would be contrary to long-standing American tradition. Defendants do urge, however, that the common-law rule is not precluded by local tradition in cases where a suit has been brought in bad faith and vexatiously. Indeed, the widespread appearance of such a rule in other legal systems indicates that the power to penalize one who, by bringing an unfounded suit, perverts the processes of the court, is inherent in the concept of a judicial institution. See Dayton, "Costs, Fees, and Expenses in Litigation," 167 *Annals of the American Academy of Political and Social Science* 32, 48 (1933); "Use of Taxable Costs to Regulate the Conduct of Litigants," 53 *Colum. L. Rev.* 78 (1953).

Defendants submit that the power to allow counsel fees as costs in vexatious suits is consistent with the history of the common law and is indicated by the history of the judicial process. No federal statute limits this power to suits in equity, and the passage quoted from Professor McCormick's article indicates it was not so limited in English legal history.

2. Logic does not support the distinction urged by Plaintiff.

Even assuming that the power to allow counsel fees as costs in vexatious suits was originally limited to courts of equity, there can be no reason for so limiting it now. The genius of recent American legal growth has been the victory of substance over form. And there is no substantial reason why a vexatious plaintiff should be differently treated if he brings his suit at law than if he brings it asking equitable relief.

The purpose of allowing counsel fees as costs in vexatious suits is two-fold. First, and foremost, it is to prevent the courts from being used as instruments of oppression. Second, it is to compensate the party wrongfully brought into court. Surely both these purposes are as pressing when the action has asked for money damages as when it has sought injunctive relief. To hold otherwise would be to tell the vexatious plaintiff that he may bring his unfounded action, but that he must be careful not to pray for equitable relief. He must not seek specific performance of a fictitious contract, but instead damages for a fictitious breach. If he falsely alleges a nuisance, he must be careful not to ask that it be enjoined. To limit the power as Plaintiff suggests would lead one to believe that the bringing of a vexatious and unfounded suit is not nearly so bad a thing as the bringing of such a suit and praying for equitable relief.

If it is argued that the power is restricted to suits in equity because only the more flexible procedures of equity make its exercise feasible, the answer is clear. Today, in the federal courts, procedures in law and equity are one and the same. And the merger of law and equity has not eliminated the power. See *Vaughan v. Atkinson*, 369 U. S. 527 (1962).

Defendants submit that the limitation urged by Plaintiff has no support in logic. In *Universal Oil Products v. Root*, 328 U. S. 575 (1946), the Supreme Court said:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where for 'dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

To use the language of the Court, it is the "temple of justice" that must be protected, not merely the "temple of justice" when sitting to hear equitable causes.

3. **The merger of law and equity in federal practice vested in federal courts the power to allow counsel fees as costs in all civil actions brought in bad faith.**

Since 1938, there has been one form of action in federal courts. All suits, whether formerly at law or in equity, are governed by the Federal Rules of Civil Procedure. The effect of the merger was discussed by the Court of Appeals for the District of Columbia Circuit in the case of *Groome v. Steward,* 142 F. 2d 756 (D.C. Cir. 1944):

> "Only in cases where a timely demand for a jury has been made and refused does the distinction between law and equity have any procedural relevance. In all other cases, the court must give the relief to which the parties are entitled on the facts, applying the rules of both law and equity as a single body of principles and precedents." *Id.* at 756.

Thus the equitable power to allow counsel fees as costs against one bringing a suit in bad faith, vexatiously, and for an oppressive purpose, may be exercised in all civil actions.

(a) Rule 54(d) vests this power in all civil actions.

Rule 54(d) of the Federal Rules of Civil Procedure vests in federal district courts the power to allow costs. It provides:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *."

The Rule makes no distinction between actions at law and suits in equity, and it has been suggested that under it the power to award counsel fees as costs is available in all

actions. 6 *Moore, Federal Practice,* para. 54.77(2); Note, 77 *Harv. L. Rev.* 1135, 1138 (1964).

The cases support the abolition of any distinction between actions at law and suits in equity as to the court's discretion in the award of costs. In *Harris v. Twentieth Century-Fox Film Corp.,* 139 F. 2d 571 (2d Cir. 1943) (Frank, Swan, and L. Hand, JJ.), the court says of Rule 54(d): "That Rule appears to have adopted for all suits covered by it, the previous Federal practice in equity, according to which the trial court had wide discretion in fixing costs * * *." *Id.* at 572 n.1.

In *Euler v. Waller,* 295 F. 2d 765 (10th Cir. 1961), the court, in a personal injury action, did not allow certain items of extraordinary costs. But the court recognized and stated the rule to be that: "For compelling reasons of justice in exceptional cases allowance may be made of items of cost not authorized by the statutes." *Id.* at 766. Again in *Prashker v. Beech Aircraft Corp.,* 24 F.R.D. 305 (D. Del. 1959), an action for wrongful death, the court refused to allow as costs to the successful defendant the cost of preparation of certain models. The court stated the rule to be:

> "Originally and before 1853, there being no federal provision as to the items of costs, the usage of the federal courts was to follow the rule as established by the respective state courts. Prior to the Rules of Civil Procedure, the discretionary power of the courts as to costs was more precisely and effectively set out in equity cases than in suits at law. So in equity cases, and especially patent cases, the instances are numerous where costs not mentioned in the statute have been allowed. Even in civil cases at law costs not embraced within the statute have been allowed when the services were rendered pursuant to some order of the court.
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> "The Rules of Civil Procedure being applicable to all civil actions, it is generally held that there is now no distinction between equitable or legal considerations as to the discretion of the court as to costs.

"Indeed, it has been held that the discretionary power of the courts as to costs under Rule 54(d) changed the pre-existing rule that at law costs in the entirety necessarily followed the judgment as set out in the Peterson case, supra, and allowed the costs to be divided.

"In Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 167, 59 S. Ct. 777, 780, 83 L. Ed. 1184 (an equity case) the court approved an allowance beyond the regular taxable costs but stated:

> 'In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice.'

"Certain cases have indicated a view that the exceptional circumstances which justify additional allowances not authorized by statute are such as exist in cases of 'fraud, oppression, or bad faith,' cases of fiduciary relationship or those in which the prevailing party has helped to create the fund upon which the costs are charged." *Id.* at 311-12.

* * *

"I am of the opinion that the Statute (28 U.S.C. §1920) furnishes the prima facie list of what costs may or should be allowed and that other costs are allowable 'only in exceptional cases and for dominating reasons of justice'. (307 U.S. 161, 59 S. Ct. 780.)" *Id.* at 312.

Angoff v. Goldfine, 270 F. 2d 185 (1st Cir. 1959), was a shareholder's derivative action. The court awarded counsel fees to the successful plaintiff, saying:

> "The facts essential for Federal jurisdiction over the main cause of action based on the diversity of the citizenship of the parties thereto and the amount in controversy between them, Title 28 U.S.C. §1332(a)(1), are clear and not in dispute. And, although we have found no case discussing the point, we think it clear that jurisdiction over the main cause of action necessarily carries with it jurisdiction, in the exercise of the 'historic equity jurisdiction of the federal courts,' *Sprague v. Ticonic Nat. Bank,* 1939, 307 U. S. 161, 164 * * * to award fees and expenses in appropriate situations to counsel for a successful plaintiff." *Id.* at 186.

And see *Deering, Milliken & Co. v. Temp-Resisto Corp.,* 169 F. Supp. 453 (S.D.N.Y. 1959), *rev'd on other grounds,* 274 F. 2d 626 (2d Cir. 1960), where the court said: "This Court has discretion in awarding costs which courts of equity possessed before the enactment of the Federal Rules." *Id.* at 455.

Finally, in the case of *Farrar v. Farrar,* 106 F. Supp. 238 (W.D. Ark. 1952), an action at law for the recovery of securities, the court was confronted with the question not of allowing extraordinary items of costs, but of possibly disallowing certain ordinary costs. The court noted that historically courts of law had no discretion in awarding costs, but that courts of equity did have discretion to deny costs when equity and fairness so required. The court said:

> "Thus the form of action brought by the plaintiff is immaterial and the question before the court must be resolved under the provisions of Rule 54(d), and before the court can direct that the plaintiff should not recover her entire costs, the facts must be such as to convince the court that in equity and fairness the plaintiff should be denied her costs or they should be apportioned." *Id.* at 242.

If for dominating reasons of justice a court may deny a party traditional costs in an action at law, as formerly at equity, surely for similar compelling reasons of justice a court may allow extraordinary costs, as formerly at equity.

To sum up this portion of the argument, then, Defendants submit that the following propositions are unchallengeable: The power of a district court to allow costs

flows from Rule 54(d). Rule 54(d) makes no distinction between actions at law and suits in equity. The cases have held that under Rule 54(d) the federal district courts have the same discretion as to the award of costs as heretofore exercised by courts of equity. And Defendants submit, to use the words of Judge Moore, that "equitable growth warrants an exercise of the power" to allow counsel fees as extraordinary costs "in all civil actions." 6 *Moore, Federal Practice,* §54.77(2), at 1354.

(b) Rule 41(a)(2) vests this power in all civil actions.

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides as follows:

> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

This Rule affords a second and distinct ground upon which the court may allow attorneys' fees as costs, for it is well-settled that such an allowance may be imposed as a condition to dismissal.

Again, Plaintiff concedes this point, but urges that terms and conditions may be imposed only in case of a dismissal without prejudice. The Rule suggests no such limitation. But once again Plaintiff points out the paucity of reported decisions setting terms for a dismissal with prejudice, and argues that the lack of case authority implies the non-existence of power. Once again the illogic of this "reasoning" is apparent.

A dismissal with prejudice in such a case as this gives Plaintiff all he ever intended to get, unless the cost of defense can be assessed against him. He will have imposed on Defendants a crushing burden of defense, at little cost to himself. Defendants' "victory" will have cost them dearly.

In such a case, surely it is within the power of the court, under the broad language of Rule 41, to inquire whether the suit was brought groundlessly and vexatiously, and, upon so finding, to tax counsel fees to the Plaintiff as a condition of the dismissal. There is authority for the exercise of this power. In the case of *Krasnow v. Sacks & Perry, Inc.,* 58 F. Supp. 828 (S.D.N.Y. 1945), a patent case, plaintiff dismissed with prejudice. The court allowed defendant his counsel fees, on the ground that the plaintiff brought the action knowing it to be "unjustified."

Thus, independently of and alternatively to Rule 54(d), Rule 41(a) permits the district judge to allow counsel fees as costs whenever the court "deems proper." In such a case as this, the allowance is clearly proper.

B. State Law Cannot Curtail the Award of Extraordinary Costs by a Federal District Court.

1. The doctrines of *Erie R.R. v. Tompkins* and *Guaranty Trust Co. v. York* are not applicable, since the award of costs is governed by the Federal Rules of Civil Procedure.

The United States Supreme Court recently has announced a principle under which it is clear that state law does not affect the discretionary power of a federal court to award counsel fees as costs in extraordinary cases pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. *Hanna v. Plumer,* 85 S. Ct. 1136 (April 26, 1965). Although Michigan courts also have this discretionary power, Michigan law is inapplicable. Neither *Erie R. R. v. Tompkins,* 304 U. S. 64 (1938), and *Guaranty Trust Co. v. York,* 326 U. S. 99 (1945), nor any of their progeny may be invoked to void the discretion of a District Judge to award extraordinary costs under Rule 54(d).

In *Hanna,* a diversity case, plaintiff had effected service of process in compliance with Federal Rule 4(d)(1), but not with the applicable Massachusetts statute. The District Court, citing *Ragan v. Merchants Transfer Co.,* 337 U. S. 530 (1949), and *Guaranty Trust Co. v. York, supra,*

held that the adequacy of service was controlled by the state statute and not by federal procedure, and granted the defendant's motion for summary judgment. The Court of Appeals for the First Circuit affirmed, concluding that a "substantive rather than procedural matter" was involved. 331 F. 2d 157, 159 (1964). "Because of the threat to the goal of uniformity of federal procedure" (85 S. Ct. at 1139) posed by the lower court decision, the Supreme Court reversed in an 8 to 1 decision.

The Supreme Court held that the *Erie* doctrine is *not* the appropriate test of the applicability of a Federal Rule of Civil Procedure, 85 S. Ct. at 1143.

> "*When a situation is covered by one of the Federal Rules,* the question facing the court is a far cry from the typical, relatively unguided Erie choice: *the court has been instructed to apply the Federal Rule,* and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.
>
> "* * * For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. Cf. M'Cullough v. Maryland, 4 Wheat. 316, 421. Neither York nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which Erie had adverted * * *.
>
> "Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules." 85 S. Ct. at 1144-45. (Emphasis added.)

Thus the Supreme Court teaches us that in a situation covered by one of the Federal Rules of Civil Procedure, the Federal Rule is not to be supplanted by state law, even though it would lead to a different "outcome" from that prescribed by state law. The discretionary power of a federal district judge under Rule 54(d) to tax extraordinary costs cannot be curtailed by state law; to hold otherwise "would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Id.* at 1145.

2. Even if the *Erie* rule did apply, the award of counsel fees as costs in vexatious suits would be controlled by federal courts law.

Assuming for purposes of argument that the Federal Rules do not cover the discretionary award of extraordinary costs, application of the *Erie* doctrine still would not require the District Court to follow Michigan law. Federal courts possess broad inherent powers in addition to the express powers conferred by the Federal Rules of Civil Procedure, particularly in the area of the regulation of court proceedings. In *Hanna v. Plumer, supra* at 1145, the Supreme Court quoted with approval from the opinion of Judge Wisdom in *Lumberman's Mutual Casualty Co. v. Wright,* 322 F. 2d 759, 764 (5th Cir. 1963):

> "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. *This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.* The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative

countervailing (federal) considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority." (Emphasis added.)

The *Erie* rule as extended in *Guaranty Trust* cannot be applied without reference to *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), and *Hanna*. In *Erie* it was decided that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. "The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law." *Hanna v. Plumer, supra* at 1141. But "as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act" *(ibid.)*, evincing

> "* * * a broader policy to the effect that the federal courts should conform as near as may be — *in the absence of other considerations* — to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. E.g., Guaranty Trust Co. of New York v. York, * * * Bernhardt v. Polygraphic Co. * * *." *Byrd v. Blue Ridge Rural Elec. Coop., supra* at 536-37. (Emphasis added.)

In *Byrd* the Supreme Court emphasized that the "outcome-determination" analysis of *Guaranty Trust* was not the only test to be applied: attention also must be given to "affirmative countervailing considerations * * *. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Id.* at 537.

Thus *Guaranty's* mechanical tendency to choose state law on the premise that a federal court in a diversity case is "in effect, only another court of the State" *(Guaranty Trust Co. v. York, supra* at 108) was replaced by *Byrd* with a more penetrating approach, requiring a balancing of the policies underlying *Erie* against other federal interests. See "The Supreme Court, 1957 Term," 72 *Harv. L. Rev.* 77, 147-50 (1958); Friendly, "In Praise of Erie — And of the New Federal Common Law," 39 *N.Y. U. L. Rev.* 383 (1964).

Subsequent cases have indicated that the "affirmative countervailing considerations" emphasized in *Byrd* are not limited to the distribution of the judge-jury function and the "influence of the Seventh Amendment." For example, in *Monarch Insurance Co. v. Spach*, 281 F. 2d 401 (5th Cir. 1960), the Court of Appeals for the Fifth Circuit gave effect to a federal rule of evidence even though in every realistic sense the application of the rule voided the effect of a Florida statute. In discussing the "affirmative countervailing considerations" under the *Byrd* approach, the Court said at 407, 408:

> "Not the least of these countervailing considerations is the indispensable necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause.
>
> * * *
>
> "An important countervailing policy consideration in the Blue Ridge sense therefore is the historic purpose of the Federal Rules and the forces which led Congress to pass the Rules Enabling Act. *The broad aim, especially in fields of practice was to reverse the philosophy of conformity to local state procedure and establish, with but few specific exceptions, an approach of uniformity within the whole federal judicial trial system.*" (Emphasis added.)

In *Odekirk v. Sears Roebuck & Co.*, 274 F. 2d 441, 445 (7th Cir.), *cert. denied*, 362 U.S. 974 (1960), the Court of Appeals for the Seventh Circuit held burden of proof to be governed by federal law rather than Illinois law, citing *Byrd* for the proposition that "although a state created

right may be enforced in a federal court because of diversity of citizenship, the federal court will proceed by its own rules of procedure, acquired from the federal government, and, therefore, not necessarily identical with those of the courts in the state in which the federal court is sitting." And see *Iovino v. Waterson*, 274 F. 2d 41 (2d Cir. 1959), *cert. denied sub nom. Carlin v. Iovino*, 362 U.S. 949 (1960) (opinion by Friendly, J., a staunch defender of the *Erie* principle (see Friendly, *op. cit.* at 384), and cited with approval by the Supreme Court in *Hanna v. Plumer, supra* at 1141, 1143, 1145). Cf. *Tracy v. Finn Equipment Co.*, 290 F. 2d 498 (6th Cir., 1961), *cert. denied*, 368 U.S. 826 (1961), (dictum by McAllister, C. J., Simons and O'Sullivan, JJ., recognizing balancing test of *Byrd* although no federal issue there involved).

Thus it is settled that the federal courts not only have inherent powers, but also must exercise them in the face of conflicting state law when "affirmative countervailing considerations" so indicate. In this case there are at least two such countervailing considerations. First, in view of the crowded dockets of federal trial courts, the trial judge must be able to penalize those who bring groundless and vexatious actions. Second, it is crucial to insure that federal jurisdiction not be invoked in bad faith and vexatiously and that federal courts not be used as instruments of oppression.

The award of extraordinary costs and counsel fees is closely related to judicial administration. Such awards will be made in accordance with the practice of the court having jurisdiction. The Court of Appeals for the Second Circuit has so held, in an opinion by Judge Friendly:

> "* * * no authority is needed for the proposition that a court will tax ordinary court costs in accordance with its own practice rather than that of the state where the the claim arose. A similar rule has been applied as to the fees of a guardian *ad litem*. Gandall v. Fidelity & Casualty Co., D.C.E.D. Wis. 1958, 158 F. Supp. 879, although there the result was to make rather than withhold the allowance. We think the same rule should govern with respect to the fees of counsel, also officers

> of the court." *Conte v. Flota Mercante Del Estado*, 277 F. 2d 664, 672 (2d Cir. 1960).

See also Barrett v. Rosecliff Realty Co., 9 F.R.D. 597 (S. D.N.Y. 1950) (Kaufman, J.).

Thus, even if we ignore the existence of an applicable Federal Rule and apply the *Erie* doctrine to this case, the District Court should follow federal practice in exercising its discretion as to whether extraordinary costs should be awarded. Any other result would destroy that "uniformity" in the "administration of legal proceedings" by the federal courts which the Supreme Court emphasized in *Hanna*.

III.

MICHIGAN LAW IS IRRELEVANT. UNDER MICHIGAN LAW, A COURT COULD ASSESS COUNSEL FEES AS COSTS IN A VEXATIOUS SUIT; IT IS UNCLEAR WHETHER AN ACTION FOR MALICIOUS PROSECUTION WOULD LIE IN THE ABSENCE OF SEIZURE OR ATTACHMENT OF PROPERTY.

In the order to show cause entered in this action on May 12, 1965, it was requested that counsel advise this Court as to Michigan law on two questions: whether the state court in Michigan, if the present actions had been filed there, would have authority to include attorneys' fees for counsel for defendants as part of the costs; and whether an action for damages for malicious prosecution of a civil action may be maintained in the absence of a writ of attachment or seizure of property.

We respectfully submit that these two questions are irrelevant to any issue in this action unless decisions of the United States Supreme Court are to be disregarded by this Court. This action is governed by *New York Times Co. v. Sullivan, supra,* and the constitutional requirements therein discussed. Furthermore, even if there were no constitutional mandate, the Supreme Court decisions in *Hanna v. Plumer, supra,* and *Byrd v. Blue Ridge Rural Elec.*

Coop., supra, make state law immaterial on the question as to whether a District Court has the discretion to award extraordinary costs in this action. Bearing this in mind, we answer the questions posed by this Court as follows:

(1) A state court in Michigan, if the present actions had been filed there, would have authority to include attorneys' fees for counsel for defendants as part of the costs.

(2) It is unclear on the present state of the law whether an action for damages for malicious prosecution of a civil action may be maintained in Michigan in the absence of a writ of attachment or seizure of property.

A. Under Michigan Law, Counsel Fees May be Awarded as Extraordinary Items of Costs in the Case of an Action Brought and Maintained in Bad Faith, Vexatiously, and for an Oppressive Purpose.

The inherent power of a court of equity to allow counsel fees as extraordinary costs when required by dominating reasons of justice has long been recognized in Michigan. *Sant v. Perronville Shingle Co.*, 179 Mich. 42, 146 N.W. 2d 212 (1914).

The power of a Michigan court to tax costs now flows from Michigan General Court Rule 526.1, which provides:

> "In any action or proceeding, costs shall be allowed as of course to the prevailing party, except when express provision therefor is made either in a statute or in these Rules, or unless the court otherwise directs, for reasons stated in writing and filed in the cause."

The similarity of this Rule to Federal Rule 54(d) is not accidental. Many of the Michigan General Court Rules are patterned on the federal model. As stated in a leading Michigan text:

> "Third, we have benefit of experience with the Federal Rules. Where the new rules depart from former practice, the movement is often in the direction of the Federal Rules." *Honigman & Hawkins, Michigan Court Rules Annotated* xi (1962).

The authors encourage the Michigan practitioner to look to federal decisions for aid in construing the Court Rules. *Ibid.*

And, as in the Federal Rule, a key objective of the General Court Rules was the merger of law and equity:

> "The fundamental philosophy underlying the new act and rules is the procedural union of law and equity, and the abolition of the arbitrary procedural technicalities resulting from the separation of legal rules from equitable principles * * *." 1 *Callaghan's Michigan Pleading and Practice* §1.01, at 2.

The inherent power of a Michigan court to tax counsel fees as extraordinary costs under the new General Court Rules and Revised Judicature Act was the subject of comment in the recent case of *Merkel v. Long*, 375 Mich. 214 (1965). The majority opinion of Justice Souris (joined in by Justices Black, Kavanagh, and Smith) said:

> "I agree with Justice Adams also that there is no statutory or rule authority for the chancellor's taxation of petitioner's attorney fees against the trusts; also that, to avoid 'an inequitable result,' equity would have inherent power to require payment of such fees out of the funds of these trusts." *Id.* at 218.

The language referred to in Justice Adams' dissenting opinion (joined in by Justices Dethmers and O'Hara) was as follows:

> "As a general rule, costs are governed by statute or court rule. * * * There is no statutory authority to support the exercise of the power which was asserted by the chancellor. Nor has provision for such action been made by this Court under its rule-making powers. * * * Courts of chancery have sometimes drawn upon

their reservoir of inherent powers to award reasonable expenses to a party in litigation." *Id.* at 220.

"See the discussion of the common-law practice as it existed in England in *Sprague v. Ticonic National Bank, supra,* pp. 164, 165. These same powers are possessed by our circuit judges in chancery except as they may be modified by the Constitution and laws of this State." *Id.* at 220 n.3.

The observations made earlier in this brief as to the federal practice have striking parallels in Michigan law: The old Michigan rule was identical to the old federal practice; Michigan Court Rule 526.1 is similar to Federal Rule 54(d); the Michigan courts, like the federal courts, have held the power to award extraordinary costs to continue under the new Rules; and the Michigan Rules, like the Federal, accomplished the merger of law and equity. Thus, the power to allow counsel fees as costs is available in the Michigan courts in actions at law as well as suits in equity; to hold otherwise would contradict the "fundamental philosophy" of the recent Michigan reforms of civil procedure.

B. It is Unclear on the Present State of the Law Whether an Action for Damages for Malicious Prosecution of a Civil Action may be Maintained in Michigan in the Absence of a Writ of Attachment or Seizure of Property.

We are unaware of any decision of the Michigan Supreme Court holding that an action for damages for malicious prosecution will lie for the institution of a civil action maliciously and without probable cause, even though there has been no writ of attachment or seizure of property. On the other hand, it apparently has been held in a majority of American jurisdictions that an action for malicious prosecution may be maintained under such circumstances. See Annot., 150 A. L. R. 897, 899 et seq. (1944).

In *Brand v. Hinchman,* 68 Mich. 590 (1888), the Michigan Supreme Court, finding a technical or constructive attachment of property, upheld a judgment for the plaintiff

in a suit for malicious prosecution of a civil action. There is clear dictum in the opinion that an action for malicious prosecution is maintainable without any arrest or seizure of property. *Id.* at 596-98. However, the opinion explicitly indicates that the dictum is the individual opinion of the writer only, "the other members of the Court not deeming it necessary in this case to express any opinion upon this matter." *Id.* at 598.

In *Chesebro v. Powers,* 78 Mich. 479 (1889), a suit for defamation of title, plaintiff sought damages by reason of allegedly false and malicious claims of the defendants which had prompted plaintiff to bring an earlier suit to remove a cloud upon his title. Plaintiff had been successful in that action and had been awarded his costs. The Supreme Court, citing *Brand v. Hinchman, supra,* held that in the action for defamation of title the plaintiff would not be limited to the taxable costs awarded in the former action if the defendants acted maliciously and under a claim which they knew to be false for the purpose of harassing the plaintiff and compelled him to settle a claim they knew to be wrongful.

Six months later, in *Antcliff v. June,* 81 Mich. 477 (1890), Mr. Justice Morse repeated his comments in the *Brand* case but continued by stating that it was not necessary to determine whether the action before it was good as an action for malicious prosecution, since it sufficiently set out a conspiracy to defraud the plaintiff as well as an abuse of process. *Id.* at 490, 492.

On the basis of the above cases it might appear that it was at least tacitly recognized in Michigan that an action for malicious prosecution of a civil action would lie in the absence of a writ of attachment or seizure of property. In the case of *Powers v. Houghton,* 159 Mich. 372 (1909), however, the Michigan Supreme Court held that a successful defendant in an action of replevin cannot maintain an action of malicious prosecution of a civil action where he had sold the property prior to its seizure in the writ of replevin. *Antcliff v. June, supra,* was cited as "authority for the proposition that a gross and fraudulent

abuse of the process of the court, resulting in damage, gives a right of action to the person sustaining the damage." *Id.* at 374.

The court went on to say:

> "But we have been unable to find a single adjudicated case (and counsel for plaintiff has called our attention to none), where it is held that the defendant in a replevin suit, having no property in the goods taken, may maintain an action for malicious prosecution against the unsuccessful plaintiff in the original action. The authorities are not harmonious upon the question, where the property of the defendant in the original action is taken, and upon that question we express no opinion." *Ibid.*

Finally, the decision in *Krzyszke v. Kamin,* 163 Mich. 290 (1910), held that an action for malicious prosecution lies for the wrongful issuance of an injunction to restrain a defendant from disposing of his personal property. We have found no more recent Michigan cases which do not deal either with malicious prosecution involving criminal actions or civil actions in which there was an attachment or seizure of property.

Thus, although there is dictum in some of the early Michigan cases which would permit an action for malicious prosecution in the circumstances posited by this Court, subsequent cases, admittedly not recent, cast some doubt as to whether such an action could be maintained in Michigan.

CONCLUSION

Defendants submit that adequate protection of the First Amendment right to freedom of expression requires that counsel fees be allowed as costs when a libel action is brought in bad faith, vexatiously, and for an oppressive purpose. Defendants also contend that the power to award counsel fees as costs in vexatious actions is inherent in the federal district courts, and may be exercised in any civil action, whether or not jurisdiction is based on diversity of citizenship. Either ground is sufficient to support a ruling in Defendants' favor.

However, Defendants urge that the controlling considerations in this case flow from the United States Constitution. Use of unfounded actions to intimidate others and deprive them of their constitutional rights merely because they cannot afford the cost of defense is contrary to the spirit of the Constitution and of recent decisions under it. It is not a "rich man's" Constitution — the right to freedom of expression cannot be permitted to depend on the financial resources of those who would speak.

Recent decisions of the United States Supreme Court have reminded us that the freedoms of the First Amendment are to be carefully safeguarded. If this Court rules that counsel fees cannot be allowed as extraordinary costs in a vexatious libel action, Defendants submit that it not only will have thwarted the intent of recent Supreme Court pronouncements, but will have dealt a crushing blow to freedom of speech. Plaintiff's petition for writ of prohibition should be dismissed.

Respectfully submitted,

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Dated: June 3, 1965.

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GEORGE S. NORCROSS
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July 26, 1965

Mrs. Barbara Morris
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Re: Smoot v. League of Women Voters, et al.

Dear Barbara:

As we advised you last May, the Court of Appeals for the Sixth Circuit decided to hear arguments on the principal legal questions involved in the Smoot - League of Women Voters case before the factual evidence is submitted in the District Court. In effect, the Court of Appeals is hearing an appeal from the legal ruling of Judge Fox, concurred in by Chief Judge Kent and Senior Judge Starr on April 19, holding that in a proper case, where a libel action is brought in bad faith, vexatiously and for an oppressive purpose, the defendants' attorneys' fees and other expenses may be awarded them.

We submitted our brief to the Court of Appeals in June, and I am enclosing a copy for your information. At our request oral argument has been granted, and the Court has set it for the October Term.

We will continue to keep you advised from time to time and I am looking forward to working with you again when the hearing to determine the factual issues is again set in the District Court.

Sincerely,

Lewis A. Engman

wn
Enc.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1069

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,
v.
DAN SMOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. _____

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,

v.

DAN SMOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, the defendants in Civil Actions No. 4708 and 4709 now pending in the United States District Court for the Western District of Michigan, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case[1] on December 13, 1965.

1 *Sub. nom. Dan Smoot v. Honorable Noel P. Fox, United States District Judge for the Western District of Michigan.* The judgment was entered granting a writ of prohibition as prayed by Smoot prohibiting the District Judge from holding a hearing on costs.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported and is printed in Appendix A hereto, *infra*, p. 9a. The opinion of the Sixth Circuit Court of Appeals, printed in Appendix A hereto, *infra*, p. 2a, is reported in 353 F.2d 830.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals, *infra*, p. 1a, was entered on December 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the protection of rights guaranteed by the First Amendment to the United States Constitution requires that a district judge have discretionary power to assess counsel fees and expenses as costs against a party who is found to have brought a libel action in bad faith, vexatiously, and for the oppressive purpose of stifling debate on public issues.

2. Whether as a matter of federal courts law a district judge has discretionary power in actions at law as well as in equity to assess counsel fees and expenses as costs against one who is found to have brought an action in bad faith, vexatiously, and for an oppressive purpose, and who seeks to dismiss the action on the eve of trial.

3. Whether under Rule 41(a)(2) of the Federal Rules of Civil Procedure a district judge may condition a dismissal with prejudice upon the payment of counsel fees and expenses, where the action is found to have been brought in bad faith, vexatiously, and for an oppressive purpose, and where the dismissal is sought on the eve of trial.

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution. It is printed in Appendix C hereto, *infra*, p. 26a. The statute involved is 28 U.S.C. Section 1920, 62 Stat. 955. It is printed in Appendix C hereto, *infra*, p. 26a. The rules involved are Rules 41(a) and 54(d) of the Federal Rules of Civil Procedure. Each is printed in Appendix C hereto, *infra*, p. 27a.

STATEMENT

On March 21, 1964, the respondent, a nationally known political commentator, filed two libel actions in the United States District Court for the Western District of Michigan against the petitioners, the League of Women Voters of the Grand Traverse Area of Michigan, an unincorporated, non-partisan political information group, and certain of its members, Florabelle Grosvenor, Mary Force, Margot Power, and Sara Hardy. The jurisdiction of the district court was invoked because of diversity of citizenship, Smoot being a citizen of Texas and petitioners citizens of Michigan.

The libel actions were based on statements published by the League critical of respondent's widely distributed series of television programs. These statements had charged that respondent relied on "slanted information, half-truths, innuendoes, and sometimes worse," had expressed concern over the atmosphere of hate surrounding the recent assassination of the President and the bombing of Negro churches, and had urged the League's members, and the public, to watch the programs critically. Smoot's verified complaints alleged malice and asked damages totaling one million dollars. (Ex. 1 to Petition for Writ of Prohibition and Mandamus in Docket No. 16,207.)[2] During dis-

2 The record was not paginated by the Court of Appeals, and references, therefore, will be made by title to individual items within the record. The records of proceedings in Docket No. 16,207 and 16,501 were incorporated by reference into the record in Docket No. 16,565 in respondent's Petition for Writ of Prohibition.

covery, Smoot relied on tactics of obstruction, harassment, and delay,[3] as a result of which the district court ordered him to put up security for costs, including petitioners' counsel fees.[4] On the eve of trial, after petitioners had incurred expenses and legal fees of over thirty thousand dollars preparing their defense,[5] Smoot moved to dismiss his actions with prejudice. The district court denied this motion,[6] whereupon Smoot obtained a writ of prohibition and mandamus from the Sixth Circuit Court of Appeals, directing the lower court to dismiss the actions with prejudice "subject to the payment of all court costs by the Plaintiff." *Smoot v. Fox,* 340 F.2d 301 (6th Cir. 1964).

On February 2, 1965, petitioners filed a Motion for Assessment of Costs, alleging and offering to prove that the libel actions had been brought in bad faith, vexatiously, and for the oppressive purpose of inhibiting and stifling petitioners' criticism, and asking that respondent be ordered to pay their counsel fees. (Exs. Nos. 1 and 2 to Petition for Writ of Prohibition in Docket No. 16,505.) A motion by Smoot to dismiss petitioners' Motion for Assessment of Costs was denied April 19, 1965, by the Honorable Noel P. Fox, District Judge, in an opinion concurred in by Chief

3 Respondent was tardy in answering interrogatories, did not answer them completely, and took over a month and a half to comply with the court's order to answer further. He failed to produce almost two hundred documents which he had been ordered to produce by the court, although they were admittedly in his possession. He objected to the taking of his deposition on specious grounds. He failed to comply with the court's order that he provide defendants with an itemization of special damages. He sought a last-minute continuance. (See 36 F.R.D. 4 (W.D. Mich. 1964), *infra* p. 21a.) He moved to disqualify the district judge on admittedly insufficient grounds. He was unable to exchange a witness list at the pre-trial, and his counsel appeared at the pre-trial lacking full authority to act for him.

4 The district court's unreported opinion is printed in Appendix B hereto, *infra* p. 18a.

5 Fees of this magnitude resulted in part from the preparation of the defense of truth. By the time dismissal was sought, counsel for petitioners had interviewed witnesses in New York, Washington, D.C., Boston, Chattanooga, Tennessee, and several cities in Michigan, sifted through and organized thousands of pages of documentary exhibits, and made final scheduling of witnesses and preparation of proofs for trial. In addition, the cost of defense was materially increased due to respondent's obstructive and delaying tactics, including his refusals to comply with the district court's discovery orders and his repeated attempts to delay the progress of the action, all of which necessitated time-consuming court appearances.

6 The district court's unreported opinion is printed in Appendix B hereto, *infra*, p. 14a.

Judge Kent and Senior Judge Starr.[7] Judge Fox proceeded to set a date for a hearing on petitioners' motion.

On May 12, 1965, before any hearing was held, the Court of Appeals for the Sixth Circuit issued an order directing Judge Fox to show cause why Smoot's petition for a second writ of prohibition should not be granted, this time prohibiting a hearing on the assessment of costs. Subsequently, on December 13, 1965, the Sixth Circuit rendered its judgment granting the writ of prohibition. The court acknowledged that counsel fees as costs were allowable in equitable actions but stated that "no authority has been found or cited holding that a district court has discretion to allow attorney's fees and expenses as part of the costs in an action at law." 353 F.2d 832, *infra*, p. 5a. The court rejected all arguments based on Rule 41(a)(2) of the Federal Rules of Civil Procedure, holding that that rule allows the setting of conditions only in the case of dismissals without prejudice. As to petitioners' contention that the threat of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in proving the truth of the alleged libelous statements, the court said: "We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The Constitution does not protect libelous statements." 353 F.2d 833, *infra*, p. 6a. The court also stated that a hearing as to whether counsel fees should be assessed as costs would be equivalent to the trial of an action for malicious prosecution of a civil action, and respondent therefore would be deprived of his right to trial by jury.[8]

7 Judge Fox invited Judges Kent and Starr to join in the consideration of the case because of its great public importance.

8 In the course of oral argument before the Court of Appeals it was established that no request had ever been made that a jury be called in for the hearing on costs, although the district court could have done so pursuant to Rule 39 of the Federal Rules of Civil Procedure, and although the district court's earlier action in granting respondent's belated motion for a jury trial, *infra*, p. 18a, indicated that such a request would have been received favorably.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the principles set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There it was held that adequate protection of First Amendment rights requires that criticism of public officials be privileged so long as not actuated by malice. Underlying that holding were the principles that the law of libel "can claim no talismanic immunity from constitutional limitations," 376 U.S. 269, that those who would speak out on matters of public concern should not be "deterred from voicing their criticism, even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so*," 376 U.S. 279 (emphasis added), and that the Constitution expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. 270.

The institution of a groundless libel action imposes a heavy economic burden on the defendant,[9] especially when he must rely on truth as his defense.[10] When the alleged libel is uttered during debate on public issues, it is clear that this debate will be inhibited[11] unless the defendant can, upon showing that the action was brought in bad faith, vexatiously, and for the oppressive purpose of stifling that debate, recover the expense he has incurred in preparing his defense.[12] In the present case, petitioners, in order to "win" the libel actions, incurred fees and expenses of over thirty thousand dollars. To call such a victory Pyrrhic is to understate the case; bluntly put, petitioners do not have the funds to pay it and cannot afford to "win" again. Unless they can be reimbursed, petitioners will remain silent in the future, having been "deterred from voicing their criticism, even though it is in fact true, because of . . . fear of the expense of having to" prove it true.

9 See Yankwich, *It's Libel or Contempt if You Print It*, 355-56 (1950).

10 Respondent's verified complaints alleged malice, thus forcing petitioners to rely on truth as their defense.

11 Following the institution of this action, respondent's program continued to be shown in Traverse City, but neither the League nor anyone else criticized or challenged it.

12 *The New York Times* decision does not, of itself, alleviate the burden of defense when malice is alleged. Defense counsel must consider the possibility of an adverse jury finding on that issue, bearing in mind that malice may be established by showing that the allegedly defamatory statements are untrue, and that the defamer had no reasonable grounds on which to believe them true. *Prosser, Law of Torts*, 795 (2d ed. 1955). In the present case, counsel for petitioners concluded that the only safe course of action was to be fully prepared to show truth. It was the preparation of this defense which caused most of petitioners' counsel fees.

The position urged by petitioners requires no sweeping revision of the law of libel. Indeed, the substantive law of libel is scarcely involved at all; at issue here are baseless libel actions brought in bad faith and for the purpose of muting criticism. Nor do petitioners contend that in every such case the district judge must allow full counsel fees and expenses as costs. Petitioners do urge, however, that the district judge must have discretion to allow such costs. Otherwise, the federal courts could be used with impunity to deprive groups and individuals such as petitioners of their constitutional rights. Proper judicial supervision of the administration of justice in the federal courts requires that those courts not permit themselves to be used so as to endanger the very constitutional rights they were created in part to protect.

The court of appeals told petitioners that they "have the right of free speech so long as their statements are not libelous."[13] This simplistic brushing aside of petitioners' serious constitutional claim suggests that the court of appeals either failed to understand or refused to follow the principles enunciated in *New York Times*. In either case, the pernicious effect of its holding, which permits courts of justice to be used as instruments for the intimidation of those who would speak out on public issues, must be extirpated. Petitioners seek only the right to enter again into active debate on public issues.

2. The decision below is in conflict with the principle underlying the decision of the Fourth Circuit Court of Appeals in *Bell v. School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963). There the defendant school board followed a pattern of evasion and obstruction, forcing plaintiffs to turn to the courts to secure rights clearly guaranteed

13 353 F.2d 833, *infra*, p. 6a.

them by the Constitution. The Fourth Circuit held that in such circumstances the defendant should be required to pay the counsel fees and expenses which its wrongful actions forced the plaintiffs to incur. Here, as there, one party, acting vexatiously and in bad faith, has placed upon others such a heavy burden of litigation that unless they can be reimbursed they will be forced to avoid such litigation and thereby lose constitutionally protected rights. The sound principle of *Bell* is that the economic burden of legal action may not be used to deprive a party of constitutional rights, and that the court therefore has the power to award vexatious costs. Although *Bell* involved the rights of Negro schoolchildren to equal protection of the laws, the right to freedom of expression under the First Amendment is no less jealously to be protected. *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (concurring opinion).

3. This is a case of great public importance. The decision below holds that those who would criticize public commentators do so at the peril of being heavily penalized by the institution of baseless libel actions. The machinery of the courts thus becomes a potent and frightening weapon in the hands of those who would intimidate and silence the voices that disagree with them. Petitioners were prepared to show that the present action is not the only instance of Smoot's use of the law of libel in attempts to silence his critics.[14] Nor is he alone in the use of libel suits for intimidation of opponents.[15] In April, 1964, for example, at least 17 libel actions, seeking total damages in excess of 288 million dollars, and brought by public officials in three southern states against newspapers, magazines, and a television network, were pending in state and federal courts.[16]

14 For example, counsel are aware of letters written by respondent in March, 1964 demanding retraction of certain statements made by a California radio announcer and charging that respondent considered those statements slanderous and defamatory in nature and that they were uttered with malicious intent.

15 The recent experience of the Santa Barbara, California, chapter of the United Nations Association is significant. The group planned a television show dealing with controversial topics. Prior to the showing they were informed that a libel action for a million dollars would be filed if the program were shown. The group withdrew the program.

16 *The New York Times*, April 4, 1964, p. 12.

The decision below, if allowed to stand, will have wide-ranging and harmful consequences. If those who speak out on public matters can inflict upon their critics a fine greater than that normally set by law for the commission of a felony merely by filing a baseless action in federal court, then such actions will find ever-increasing popularity. Large newspapers, magazines, and other such enterprises will, as Mr. Justice Black pointed out in the *New York Times* case, 376 U.S. 269, 295 (concurring opinion), be unable to afford such penalties. How much more will the League of Women Voters of the Grand Traverse Area of Michigan, and similar such groups across the country, be unable to afford them?

The timing and handling of respondent's lawsuits reveals the purpose they served. Immediately after the suits were commenced, in March of 1964, petitioners began to seek an early trial date — it was an election year, and they wanted to be free to answer respondent on election issues. But Smoot's delaying and obstructive tactics dragged the case on into autumn. During the pendency of the suit, petitioners were almost completely silenced, while Dan Smoot went on, week after week, uninterrupted and free of critical response. The threat posed by the Sixth Circuit's holding in this case to that free and open discussion which necessarily underlies the democratic process must not be left unanswered.

In considering the public importance of this case, it should not be overlooked that the court of appeals has twice granted the extraordinary writ of prohibition. Furthermore, at the district court level, Senior Judge Starr and Chief Judge Kent deemed the case so important that they joined Judge Fox in ruling that a district judge did have the power to allow counsel fees as costs. At least six judges, then, have viewed this case as one of great public impact, involving questions which must be resolved promptly and with finality.[17]

It is also significant that dozens of organizations across the country have followed the course of this litigation closely. In particular, the groups who had planned to

17 Of the six, three have ruled in petitioners' favor, and three against them.

send witnesses on the League's behalf[18] have all evidenced keen interest in the outcome of this case. The reason for their concern is apparent. If petitioners are not successful, then such organizations will be unable to answer their critics: they must remain silent in a one-sided debate. Free speech will have become a luxury available only to those who can afford to defend the baseless libel actions that will result from its exercise.

4. The decision below introduces an unwarranted law-equity distinction into federal civil procedure, which must not be allowed to stand. The court of appeals conceded,[19] in the face of overwhelming authority,[20] that counsel fees may be awarded as costs in actions in equity which are found to have been brought in bad faith, vexatiously, and for an oppressive purpose. However, it held that, despite the merger of law and equity in federal practice, such an award could not be made in actions at law. The court reasoned as follows:

> "We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit."[21]

Rule 54(d) of the Federal Rules of Civil Procedure vests the power to allow costs in federal district courts. It provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *." The Rule makes no distinction between actions at law and suits in equity, and commentators agree that under it the historic

18 The following groups, among others, had witnesses ready to appear at the trial of the libel actions, and have followed the litigation closely from its inception: Committee for Economic Development; National Education Association; Tennessee Valley Authority; N.A.A.C.P.; National Municipal League; United Nations Association.

19 353 F.2d 832, *infra*, p. 4a.

20 See cases cited in Petitioners' Brief in Opposition to Petition for Writ of Prohibition in Docket No. 16,565.

21 353 F.2d 832 n.1, *infra*, p. 5a n.1.

power to allow counsel fees as costs is available in all actions.[22]

If, as the court of appeals deems so significant, there is no appellate authority allowing counsel fees as costs in an action at law, neither is there authority denying such costs because they are requested in an action at law. And the asserted distinction flies in the face of sense and reason. In the present day and age, the allowance or disallowance of attorneys' fees should not turn on whether a litigant in the time of Henry VIII would have brought such a case to the Lord Chancellor or to the Court of Common Pleas. The need to compensate defendants wrongfully brought into court, and the desirability of penalizing vexatious plaintiffs, are just as pressing when the complaint has sought money damages as when it prays injunctive relief. In *Universal Oil Products v. Root*, 328 U.S. 575 (1946), the Court said:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceeding could justly be assessed against the guilty parties. Such is precisely a situation where for 'dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

To use the language of the Court, it is the "temple of justice" which must be protected, not the "temple of justice when sitting to hear equitable causes."

If this ill-advised and unmeritorious distinction between law actions and equity suits is permitted to stand, federal district judges will be stripped in a majority of the cases before them of an effective tool for policing their courts — the discretionary imposition of extraordinary costs. Petitioners submit that the anachronism set up by the court of appeals must be eliminated now, before it further undoes that which the Federal Rules of Civil Procedure attempted to accomplish in the merger of law and equity.

22 6 *Moore, Federal Practice*, para. 54.77(2); Note, 77 *Harv. L. Rev.* 1135, 1138 (1964).

5. The decision below unduly restricts the operation of Rule 41(a)(2) of the Federal Rules of Civil Procedure. Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This rule provides an additional ground upon which the court may allow counsel fees as costs, for it is well settled that such an allowance may be imposed as a condition of dismissal.[23] The court of appeals ruled, however, that Rule 41(a)(2) applies only to dismissals without prejudice.[24] Petitioners submit that the broad language of Rule 41(a)(2) should not be so limited, and that a district judge has the power, in an appropriate case, to tax counsel fees as a condition of a dismissal with prejudice.

6. The foregoing has demonstrated that the decision below was clearly incorrect. The conclusion of the court below that the taxation of counsel fees as costs would amount to an action for malicious prosecution, depriving respondent of his right to a jury trial, is without merit. As previously pointed out, respondent never requested a jury. Furthermore, an action for malicious prosecution seeks a wholly different measure of damages. Finally, the availability of the remedy of vexatious costs to safeguard the integrity of the federal courts and to protect constitutional rights cannot be made to turn on the vagaries of state law.[25] Nor does the court of appeals assert any grounds of policy to support its position.[26] The seriousness of the error

23 2B Barron & Holtzoff, *Federal Practice and Procedure*, section 914, at 124 (Wright ed. 1961).

24 The court misread *Laurence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963), to support its position. That case merely held that in the absence of exceptional circumstances counsel fees would not be imposed as a condition of dismissal with prejudice. In the present case, special circumstances are present.

25 It is uncertain whether an action for malicious prosecution of a civil action would lie in Michigan without the attachment of property.

26 The case of *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), lends no support to the court below. There the court upheld a district judge's taxation of costs under Rule 54(d), wherein he refused to tax the full expense of transporting witnesses

below and the burden thereby imposed on petitioners by the court of appeals' decision constitute sufficient reasons for the Court to grant this petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD S. SAWYER
LEWIS A. ENGMAN
CHARLES E. MCCALLUM
Counsel for Petitioners

Dated: February 28, 1966.

26 (Continued)—

from Arabia to New York to the unsuccessful plaintiff. The court said "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. 235. This language is not inconsistent with petitioners' position, especially when it is borne in mind that petitioners alleged bad faith and oppressive purpose. Indeed, the last sentence quoted seems to support petitioners' contention that, in a proper case, a district judge does have discretion to tax other than the ordinary costs.

APPENDICES

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APPENDIX A — OPINIONS BELOW

ORDER

No. 16,565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAN SMOOT,
Petitioner,
vs.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

Upon consideration of the petition for a writ of prohibition, the answer of respondent thereto, and the briefs and arguments of counsel, it is ORDERED that a writ of prohibition be issued prohibiting the respondent from holding a hearing for the purpose of allowing as costs attorney's fees incurred by defendants in the libel actions and expenses incurred by defendants or their counsel in said libel actions; and

That respondent be and he is hereby ORDERED to compute the costs in said libel actions pursuant to the provisions of 28 U.S.C. Sec. 1920 and Rule 54 of the Federal Rules of Civil Procedure.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

OPINION

No. 16,565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Petition for a Writ of Prohibition

Dan Smoot,
Petitioner,
vs.

Honorable Noel P. Fox, United States
District Judge for the Western District
of Michigan,
Respondent.

Decided December 13, 1965.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. This controversy was first before this Court on the petition of Smoot for a Writ of Mandamus requiring the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan, to grant petitioner's motion to dismiss with prejudice two actions for damages for libel filed by him against the League of Women Voters of the Grand Traverse Area of Michigan and certain individuals as defendants. The motion to dismiss with prejudice was filed by petitioner's present counsel after the District Judge had entered an order requiring Smoot to post $15,000 bond as security for costs. The dismissal had been resisted by the defendants in the libel actions on the theory that they were entitled to have a jury impaneled to hear their side of the case, even

though plaintiff was willing to have the actions dismissed with prejudice at his costs.

We granted the mandamus petition and ordered the District Judge to dismiss the actions with prejudice on payment of all court costs by Smoot. *Smoot v. Fox,* 340 F.2d 301 (6th Cir. 1964). Thereafter the District Judge filed an application for rehearing and clarification as to our intent in using the term "court costs", and for a ruling on whether attorney's fees and expenses could be allowed as costs in the libel actions. We denied the rehearing and declined to pass upon that question in the mandamus action.

The defendant then filed a motion in the District Court labeled "Motion For Assessment of Costs" which was for an order requiring plaintiff to pay costs to defendants in the amount of $35,000 for attorney's fees and $1,906.99 for expenses alleged to have been incurred by them during a period of about five months between the dates of the filing of the complaints in the libel actions and plaintiff's motion to dismiss with prejudice. In an affidavit in support of the motion for attorney's fees and expenses as costs, it was stated that defendants would adduce proofs—

> "to show that the statements of defendants, which are the basis of these libel actions are true and privileged and that said actions are groundless and were brought and maintained by plaintiff in bad faith vexatiously and for oppressive purposes."

The petitioner filed a motion to dismiss defendants' motion for attorney's fees and expenses on the ground that the allowance of such items as costs was not within the jurisdiction of the District Court after the dismissal with prejudice. The Court assigned both motions for hearing on the same date and requested each party to estimate the time required to present the motions. Defendants in the libel actions estimated it would take ten days' time to present evidence on their motion.

Before the hearing date petitioner filed a petition for a writ of prohibition in this Court to prevent the District Court from holding a hearing on the motion for allowance of attorney's fees and expenses. We denied that petition

on the ground that the District Court had jurisdiction to hear and determine both motions. Our denial was based on the assumption that the District Court would not order the allowance of costs which were not authorized by the Federal statutes and rules, and on the further assumption that the Court would allow petitioner adequate time to prepare for the hearing on defendants' motion to assess costs after ruling on petitioner's motion to dismiss.

The District Judge denied petitioner's motion to dismiss defendants' motion to allow attorney's fees as costs and refused to certify the question for an interlocutory appeal to this Court. In denying petitioner's motion the District Judge indicated that he had previously decided that attorney's fees could be proper items of costs in certain cases, and that they could possibly be an item of costs in this case. He set a hearing for May 17, 1965 to determine defendants' motion for the allowance of attorney's fees and expenses. The petitioner then filed the present proceeding in prohibition in this Court.

We thought our opinion in the mandamus action made it clear that the dismissal with prejudice precluded a trial on the merits of the libel actions. 340 F.2d 301. Yet this is precisely what the defendants are attempting to have in their motion to assess costs, for they propose to prove that the alleged libelous statements set forth in the complaints were true and privileged and that the actions were groundless. Such an evasion of our order cannot be tolerated.

In essence, defendants would convert a proceeding to assess costs into an action for damages for malicious prosecution of a civil action, and have the Court, instead of a jury, award the damages.

Respondent asserts that the allowance of attorney's fees and expenses for preparation for trial as costs, is a matter properly within his discretion as District Judge. In our opinion the allowance of such items is within the discretion of the District Court in equity cases where exceptional circumstances call for their allowance in order to do justice between the parties. *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951). Attorney's fees are also allowable where they are specifically authorized by statute

or provided for by agreement between the parties. *Local Union 984, Internat'l Bro. of Teamsters, etc. v. Humko Co.*, 287 F.2d 231 (6th Cir. 1961), cert. denied 366 U.S. 962.

However, no authority has been found or cited holding that a District Court has discretion to allow attorney's fees and expenses as part of the costs in an action at law.[1] On the contrary, in *Ruck v. Spray Cotton Mills, Inc.*, 120 F.Supp. 944, 947 (M.D. N.C. 1954), the Court stated:

> "Costs in actions at law in the United States Courts are creatures of the statute. There [is no] Federal Statute permitting District Courts to tax attorney fees as costs in actions at law as distinguished from suits in equity."

And in *Kramer v. Jarvis*, 86 F.Supp. 743, 744 (D. Neb. 1949), the Court stated that "except where it is otherwise provided by statute or rule, attorney's fees are not taxable as costs in actions at law pending in federal district courts." To the same effect see *United States v. Hoffman Const. Co.*, 163 F.Supp. 296 (E.D. Wash. 1958).

To hold otherwise would permit a Federal Court to allow attorney's fees and expenses as costs in a suit for damages for personal injury, assault and battery, or in any other type of action at law which the Court might feel was brought maliciously and without probable cause. This would have the effect of deterring the pursuit of legal remedies in the Federal Courts, which is contrary to the American system of jurisprudence. It would vest unnecessary and unwarranted power in the Court. It would practically dispense with actions in the Federal Courts for damages for malicious prosecution of civil actions.

Respondent contends that Rule 41(a)(2) of the Federal Rules of Civil Procedure permits a District Court to fix attorney's fees as costs. That rule provides that "an

1 We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit.

28 U.S.C. § 1920 provides for the type of costs which may be allowed by the court. See also Rule 54 Fed.R.Civ.P.

action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court may deem proper."

The cases permit allowance of attorney's fees against the dismissing party where the action is dismissed without prejudice. *E.g., Welter v. E. I. DuPont de Nemours & Co.*, 1 F.R.D. 551 (D. Minn. 1941). The reasoning behind the rule where the action is dismissed without prejudice is to compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought in another forum. See 5 Moore's §§41.05, 06. A dismissal with prejudice, however, finally terminates the cause and the defendant cannot be made to defend again. The Court in *Lawrence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963) rejected the contention that there is no requirement in the Rule that limits it to dismissals without prejudice, and held that attorney's fees are not proper where the dismissal is with prejudice.

Respondent contends that defendant's First Amendment right of free expression will be violated if attorney's fees and expenses are not allowed. Reliance was placed on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) in urging that the pendency of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in preparing to prove the truth of the alleged libelous statements. We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The constitution does not protect libelous statements. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

Although the Supreme Court held that these cases did not foreclose its inquiry into the *Sullivan case*, because they did not sustain the use of libel laws to prohibit expression critical of public officials, the Court did not repudiate the cases or the principle. The First Amendment does not require that a person who is sued for libel be guaranteed the cost of defending himself.

On the other hand, the allowance of attorney's fees and expenses here would, in our opinion, violate petitioner's

Constitutional right to a jury trial. The District Court would necessarily have to determine whether the alleged libelous statements were true and privileged and that the actions for damages were brought in bad faith, vexatiously and for oppressive purposes. This would be a hearing to determine if Smoot was liable for malicious prosecution of a civil action, and if so, to render a judgment against him for damages under the guise of fixing costs. The Seventh Amendment to the United States Constitution preserves the right to a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. Rule 38 of the Federal Rules of Civil Procedure also preserves this right. An action for malicious prosecution falls well within the recognized forms of action at common law. 5 Moore's Federal Practice 2d Ed. §38.11 [5], p. 114.

Although no question has been raised over our jurisdiction, we are of the opinion that power was conferred upon us to entertain the proceeding in prohibition by the All Writs Statute, 28 U.S.C. §1651. 6 Moore's Federal Practice 2d Ed. §54.10[2], pp. 65, 66. Whether such power should be exercised rests within the sound discretion of the Court. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943); *Ex Parte Peru*, 318 U.S. 578 (1942).

We think this is the type of extraordinary case in which an Appellate Court should exercise its discretion in favor of the granting of the writ. By so doing the parties will be saved the cost and expense of an unnecessary trial to determine an issue which does not exist in this case. It will conserve the time of the Court, which could be devoted better to other meritorious cases requiring judicial attention in the congested Districts of Michigan.

One other matter requires comment and that is the order of the District Court requiring the plaintiff in the libel actions to post bond in the amount of $15,000. The purpose of such a large bond was unquestionably to provide security for the allowance of attorney's fees and expenses.

In the present case after we had ordered the dismissal with prejudice of the libel actions, the District Court at that late date attempted to require the plaintiff in the libel actions to post the $15,000-bond as a condition prece-

dent to granting him a pretrial conference on the assessment of costs.[2]

Since the District Judge was without right in an action at law to allow attorney's fees and expenses as part of the costs, it follows that he had no authority to require the posting of a bond as security for their payment. *McClure v. Borne Chemical Co.*, 292 F.2d 824, 835 (4th Cir. 1961).

A writ of prohibition may issue as prayed for in the petition.

2 "The Court: Mr. Watts, do you intend to comply with the Court's order requiring you to post a bond of Fifteen Thousand Dollars?

Mr. Watts: No, Sir, we do not intend to comply with the bond.

The Court: When you comply with that we will move ahead with further proceedings, as far as a pretrial is concerned.

Mr. Watts: Let me understand, until and unless Smoot files a bond, — how could he file a bond in a case that has been dismissed?

The Court: Well, as a matter of curiosity, I think in the experience you have had, Mr. Watts, you can answer that yourself, the question of costs, the bond, the order requiring the posting of the bond hasn't been dismissed and the Circuit Court of Appeals has clearly recognized that the question of costs is still before the District Court and that answers itself.

Mr. Watts: Then, as I understand the Court's ruling, until and unless we post a bond, there will be nothing further in the nature of —

The Court: — of a pretrial or any conference of that kind but that doesn't change the hearing date . . ."

OPINION ON PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' MOTION FOR ASSESSMENT OF COSTS AND MOTION TO STRIKE FROM TRIAL DOCKET

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

On August 28, 1964, defendants filed a motion for security for costs, with supporting brief alleging that the plaintiff had brought and maintained these actions in bad faith and for vexatious and oppressive reasons, and offered evidence in support of that position. Defendants claimed that at the conclusion of the case these facts would be more apparent, and for that reason requested that plaintiff be ordered to post a security bond.

At a hearing on September 25, 1964, the court considered the evidence before it, found substantial basis to grant defendants' motion, and on October 2, 1964 an order was entered requiring plaintiff to post with the Clerk of the Court by October 8, 1964 a bond of $15,000.

On February 2, 1965, defendants filed a motion for assessment of costs, including attorney fees and other ex-

penses, in which they again claimed that plaintiff had commenced and maintained these actions in bad faith, vexatiously, and for the purpose of harassing defendants.

Plaintiff's motion to dismiss defendants' motion for assessment of extraordinary costs, by its nature and circumstances in this case, raises two questions:

First, does the district court have jurisdiction to entertain defendants' motion, and

Second, is there presently before the district court sufficient material to require a hearing on defendants' motion?

Each of these questions must be answered in the affirmative.

The first question is answered by the Circuit Court of Appeals in its order of April 7, 1965, when it said at page 3:

> "The District Court has jurisdiction to hear and determine both of the motions which were filed in these actions. Title 18 U.S.C. §1920 and Rule 54 of the Federal Rules of Civil Procedure provide for the allowance of costs. The District Judge will be required upon hearing to determine what items are properly allowable for costs under the statutes and rules."

The second question likewise must be answered in the affirmative. By order of the Sixth Circuit Court of Appeals dated December 30, 1964, these actions were ordered to be dismissed with prejudice, subject to the payment "of all court costs" by the plaintiff.

Uncertain as to the effect of this language on the pending motion for security for costs, a petition for rehearing and clarification was submitted to the Court of Appeals, in which it was pointed out that petitioner (District Judge Noel P. Fox) had previously decided that attorney fees could be proper items of cost in certain cases.

The petition sought a clarification of the term "court costs," recognizing that attorney fees might have been excluded as possible items of cost by the order of the Circuit Court of Appeals.

The petition for rehearing was denied, but the order so denying stated that in using the term "court costs," the Circuit Court of Appeals had made no ruling on the question of whether or not attorney fees were properly assessable in these cases.

When this court determined that defendants' motion for security for costs had sufficient merit to require posting of a bond, it decided that in this case attorney fees could possibly be items of cost. This decision was reached after considering briefs and oral argument for both parties, and at that time plaintiff presented the same arguments relating to items properly awardable as costs.

The cases cited in plaintiff's brief on this motion are either distinguishable or unopposed to the proposition that attorney fees are proper items of costs in certain extraordinary cases.

Fleischer v. Paramount Pictures Corporation, 329 F. 2d 424 (CCA 2, 1964), in the excerpt quoted in plaintiff's brief (page 426 of 329 F. 2d) recognizes that attorney fees may be awarded in the exceptional case.

Apple Growers Ass'n. v. Pelletti Fruit Co., 153 F.Supp. 948, held that in exceptional cases the trial judge has discretion to award attorney fees as costs.

Rolax v. Atl. Coast R. Line, 186 F. 2d 473, holds that attorney fees are not *ordinarily* items of assessment, but are more commonly so in equity actions.

Warner v. Florida Bank & Trust Co., 160 F. 2d 766, involved trust remaindermen attempting to recover attorney fees as a matter of course in a case in which they were litigating their interests in the trust fund. The court merely stated that as a general rule adverse parties to litigation are required to pay their own attorney fees. The general rule is not disputed. Defendants strongly urge upon the court that the instant case is an exceptional situation which calls for the assessment of extraordinary costs.

In re Joslyn, 224 F. 2d 223, was a bankruptcy case in which costs were expressly governed by statute, and in Rosden v. Leuthold, 274 F. 2d 747, attorney fees were disallowed because the action was brought under the District of Columbia Code, which explicitly prohibited them. Like-

wise in Tabis v. Joy Music, Inc., 204 F.Supp. 556, attorney fees were sought pursuant to statutory authority.

Farmer v. Arabian American Oil Co., 379 U.S. 227, 13 L.Ed. 2d 248 is distinguishable. It involves no claim of vexatious, oppressive, or bad faith conduct. It is an ordinary contract case involving questions of what is included in ordinary costs. However, it does set at rest the plaintiff's claim that before this court can exercise its jurisdiction in determining costs the Clerk must first tax the costs.

Plaintiff also argues that this hearing is equivalent to an action for malicious prosecution and that plaintiff is therefore being deprived of a trial by jury. It is true that many of the same elements as required in an action for malicious prosecution are essential to establish entitlement to an award of attorney fees. However, this does not automatically mean that plaintiff is being deprived of a right. The procedure for awarding of such items of costs is well established, and were plaintiff's argument to prevail, there would be no such thing as a motion for security for costs or for assessment of attorney fees and extraordinary costs, for in every such instance the party respondent would be able to assert that the proceedings were in fact an action for malicious prosecution and demand trial by jury. Such an argument is patently without merit, for even after a trial before a jury, in such a situation, the trial judge alone must reach a decision as to the propriety of awarding attorney fees by considering all the facts which have been presented.

Furthermore, on the facts of the present cases, this procedure is in accord with well-established principles. The motion was filed before plaintiff's first and second motions to dismiss, at a time when it was still expected that there would be a jury trial of these cases, at which proofs relied upon by defendants would presumably have developed.

The jurisdiction of this court to conduct a hearing on the matter of assessment of costs is recognized in the order of the Sixth Circuit Court of Appeals of April 9, 1965, denying plaintiff's petition for writ of prohibition.

This court, of course, is bound to follow the governing law as set forth under the United States Code and the Federal Rules of Civil Procedure, as interpreted by decided case law.

Reviewing plaintiff's motion, the briefs of the respective parties, all pleadings, all facts and circumstances in these cases, all orders and opinions of the Sixth Circuit Court of Appeals and this court, all of which have been carefully and fully considered by me, the presiding judge, before whom oral arguments were presented this morning, I can find no reason justifying a dismissal of defendants' motion for assessment of extraordinary costs.

Chief Judge W. Wallace Kent and Senior Judge Raymond W. Starr also reviewed and considered all matters in these cases prior to the oral arguments this morning, and they concur in this conclusion.

Therefore, plaintiff's motion to dismiss defendants' motion is hereby denied.

Dated: April 19, 1965.

(s) Noel P. Fox
District Judge

We have read and concur in this opinion.

(s) W. Wallace Kent
Chief Judge

(s) Raymond W. Starr
Senior Judge

APPENDIX B — RELATED DISTRICT COURT OPINIONS

OPINION ON MOTION TO DISMISS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff.
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff.
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This suit was commenced in March of 1964, and because of the constitutional issues involved, every effort has been made to bring the case to an early trial. By order of the court, pretrial preparations were to have been completed by August 25, 1964.

On October 2, 1964, after the court had set a trial date of October 14, and after counsel for defendants had gone to great expense in preparing for trial by enlisting as witnesses a number of individuals of national prominence, plaintiff moved to dismiss the case. Negotiations between counsel broke down when plaintiff refused to sign a statement of admission, apology and retraction, and plaintiff then submitted his motion to the discretion of the court.

Rule 41(a)(2), Federal Rules of Civil Procedure, provides for dismissal after service of an answer in a case *only* by order of the court.

This matter is entirely within the discretion of the court. See 2B Barron & Holtzoff, Federal Practice and Procedure, §912, pp. 111-112.

The Seventh Circuit case of Bolten v. General Motors, 180 F. 2d 379, represented the lone example of the belief that the right to dismiss was absolute, the discretion of the court going only to the terms and conditions of dismissal.

However, the Seventh Circuit subsequently reversed itself in Grivas v. Parmelee Transportation Co., 207 F. 2d 334, cert. denied 347 U.S. 913, 74 S.Ct. 477, 98 L.Ed. 1069, where the court stated that the matter of dismissal is not a right, and the discretion of the court in a motion to dismiss goes both to whether or not the motion shall be granted, as well as to the terms and conditions.

> "It is never a pleasant task for a court of review to overrule a previous decision upon which litigants and the District Courts of the Circuit have a right to rely, but we have reached the conclusion that our interpretation as announced in the Bolten case was too broad and that this is the time to modify it. The unanimous view of other courts and textbook writers is that the allowance of a motion to dismiss under Rule 41(a)(2) is not a matter of absolute right * * * *." Id. at 336.

See also Adney v. Mississippi Lime Co., 241 F. 2d 43.

Finally, the reasoning in Churchward Int'l. Steel Co. v. Carnegie Steel Co., 286 F. 158, is especially apropos. That was a patent case in which a motion to dismiss was denied. The Court said at Page 160:

> *"Then, too, it seems that the public has an interest in having the validity of a patent established where it is seriously questioned, because what is embraced within the patent belongs to the public and the patent itself is a grant by the public. The interest of the public appears to be greater in such controversies when they relate to manufactured products which are extensively used such as steel."* (Emphasis supplied).

A fortiori, the interest of the public in this case compels this court to a similar holding. To even attempt to say that public interest in freedom of expression is less important than the public interest in steel processes is a misconception of fundamental constitutionally protected rights.

The exercise of judicial discretion in granting motions to dismiss is proper "unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit." Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 91 L.Ed. 849.

Familiarity with this case shows indisputably that dismissal at this stage would greatly prejudice defendants. They have been haled into court by a national figure, accused of besmirching his name and professional reputation, and made the subject of much publicity, since the complained of writing is an integral part of the public purpose for which defendants assert they are organized.

Plaintiff claims that he wishes only to vindicate his name (despite the fact that the suit was instituted for $1,000,000 in March of 1964, and has been desultorily prosecuted since then, neither of which is consistent with eagerness to cleanse one's name of undesirable association), but the circumstances of this case are such that defendants are now in the position equally of wishing to establish their good name.

Defendants, as stated, have retained able counsel, who have pursued the matter extensively and diligently, arranging for witnesses from Washington, D.C., New York, and Little Rock, Arkansas, to mention but a few — people of such importance that they have, defendants' counsel asserts, rescheduled national commitments to be able to appear at this trial. It is doubtful that this array of witnesses could be again duplicated, which means that a dismissal at this stage clearly prejudices defendants.

That such figures are willing to take part in this litigation emphasizes the public concern for the issues which plaintiff has raised by his complaint. Plaintiff has refused to settle the case on the terms requested by defendants, which amounted to a complete exoneration of their activities, and defendants now appear anxious to establish what plaintiff refuses to admit in settlement of the case.

Plaintiff has challenged defendants to a day in court, and because of the nature of this case, plaintiff's refusal to settle, and defendants' preparation, they are now entitled to that day in court.

The public interest in this case is well defined, and in the concern for that interest manifested in this court's written and oral opinions already entered in the case, I deny the motion to dismiss.

Dated: October 13, 1964.

Noel P. Fox,
District Judge.

I concur in the above opinion.

Raymond W. Starr,
Senior Judge.

Certified as a true copy:
Howard T. Ziel, Clerk,
By: G. E. Laxink,
Deputy Clerk.

OCT. 13, 1964.

OPINION ON MOTION FOR JURY TRIAL AND MOTION FOR SECURITY FOR COSTS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally.
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

Counsel for plaintiff in this case has failed to properly notify opposing counsel of plaintiff's demand for jury trial.

Failure to serve a demand in proper form and within the time specified constitutes a waiver of jury trial. Rule 38, Federal Rules of Civil Procedure. See 2B Barron & Holtzoff, Federal Practice and Procedure, §879. P. 54, and cases cited.

Furthermore, "the waiver is complete even though inadvertent and unintended, and regardless of explanation or excuse." See Barron & Holtzoff, supra, P. 55, and cases cited.

However, Rule 39(b) does provide for relief in situations of this sort at the discretion of the Court, upon motion by the waiving party.

Thus, in this case the Court is presented with a complete waiver of the right to jury trial and it is absolutely

within the discretion of the Court to grant or deny the motion requesting trial by jury.

The preponderance of authority is against granting such a motion in the absence of misunderstanding, Hargreaves v. Roxy Theatre, 1 F.R.D. 537, honest mistake, Supplies Inc. v. Aetna Casualty and Surety Co., 18 F.R.D. 226, or a good faith attempt to comply with the rules, Rogers v. Montgomery Ward & Co., 26 F.Supp. 707, or unfamiliarity with the rules, Universal Picture Corp. v. Marsh, 36 F.Supp. 241.

None of these is present here; this was simple inadvertence on the part of counsel, which has been held to be insufficient for relief from waiver. Polak v. Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland, 19 F.R.D. 87 (D.C. N.Y. 1956), and Wilson & Co. v. Ward, 1 F.R.D. 691.

Finally, long delay in applying for relief from waiver of trial by jury has influenced courts in the exercise of their discretion. See Barron & Holtzoff, supra, P. 75, and cases cited.

Despite this mass of authority which would support a holding to the contrary, this Court, acting solely in its discretion, and fully aware of the lack of support in the authorities cited, feels that the plaintiff should have the privilege of a jury, in view of the nature of the constitutional issues to be decided in the case. A jury composed of twelve members of the community at large should decide whether or not the comments at issue in this suit are of a libelous nature, not a single trial judge.

I, therefore, exercise my discretion in favor of the plaintiff and grant the motion for jury trial.

This Court at this time grants defendants' motion requesting security for costs, and sets the amount at $15,000.

If the proofs show, as defendants' counsel claimed at the hearing on the motion, that this suit was instituted for a vexatious purpose and defendants have been inhibited from speaking out since the date of the filing of the complaint in this action, then defendants will not be put to the additional burden of going to a foreign state to collect this obligation.

If the proofs do not support this claim, the only loss to plaintiff will be the costs of the bond, or the interest on the cash amount for a short period of time, either of which would be offset many times by a recovery of any magnitude.

Under these circumstances, and for the further reason that it is desirable that all matters in this case be finally resolved in this forum, I feel that the granting of this motion is well justified.

Dated: October 6, 1964.

(s) Noel P. Fox,
District Judge.

OPINION

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This is a libel action brought by plaintiff, the featured commentator on a series of television programs dedicated to informing the public on topics of national concern, against defendant League, a non-profit organization, and some of its officers and members, devoted essentially to the same purposes. The subject matter of this action consists of material contained in the December 1963 Bulletin of defendant League and in a letter of the same date to the editor of the local newspaper, each of which contained allegedly libelous remarks on plaintiff's presentation and the content of his program.

At this time the Court is presented with the difficult task of setting a time for the trial of the case, in the face of burdens and obligations on the side of both parties, which must be balanced in arriving at the decision.

The action was commenced in March of 1964, claiming $500,000 damages. The Court issued an order on May 18,

1964, directing the parties to complete all preparations for a pretrial conference by August 25, 1964. On July 15, 1964, a hearing was held on objections to interrogatories, and on September 25, 1964, a hearing was held on defendants' motion for security for costs and to deny a jury trial because of failure to give notice of the demand therefor. Immediately following these matters, the pretrial was conducted, at which plaintiff's counsel notified the Court for the first time of arrangements for a vacation commencing in mid-October and terminating in late November. At the same time, he suggested to the Court that the case be tried some time after January 1, 1965.

The dominating concern for defendants in this matter is the effect which this action has on their exercise of freedom of speech. The pendency of this suit effectively stills the voice of the defendant League of Women Voters and its individual members, and this quite conceivably prevents the free interchange of ideas in the public marketplace. Not only is the Traverse City Branch of the League silenced pro tempore, but branches of the League all over the country will doubtless proceed haltingly in speaking out on political thories advanced by those of differing political persuasions, not to mention all those who are opposed to Mr. Smoot and his particular philosophy of government. The fact that this may or may not be occasioned unintentionally is of no import, for the practical result is that he and those of like mind are free to continue speaking out, while those opposed to that line of thought are not so at liberty until the question of libel here presented is settled.

The dangers inherent in this situation have long been recognized by the courts in this land. In the case of City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N.E. 86, 90 (1923) it was said:

> "While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution."

In the recent and widely publicized case of New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, attention was once more focused on the commitment of the courts to the protection of the right to freedom of expression, no matter what form the suppression assumes. It is noteworthy that at Page 269, 11 L. Ed. 2d, at 700, the Court said:

> ". . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

And in discussing the effect of libel actions in this area the Court said at Page 278, 11 L. Ed. 2d, at 705:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."(1)

Thus, this problem must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, . . ." New York Times Co. v. Sullivan, supra, at 270, 11 L. Ed. 2d, at 701.

In the mind of this Court, the case before it presents a striking example of the importance of this freedom and calls into play the very essence of the underlying reasons supporting it. Both parties here believe that they are disseminating the political opinion so essential to a functional democracy. The need for such uninhibited opportunity of conflicting opinion has been given expression since the debates which led to the creation of our Federal Constitution.

> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more

(1) It is worth noting at this point that the judgment in the state court in the Times case was $500,000, the same amount requested in the complaint in this action. How much more telling is the above quote in light of the fact that here we have not a prosperous newspaper corporation, but rather an impecunious organization which could not survive *one*, never mind a "succession of such judgments."

particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and *on the equal freedom, consequently, of examining and discussing these merits and demerits* of the candidates respectively." Madison's Report on the Virginia Resolutions, Elliot's Debates, Vol. IV, 585. (Emphasis supplied).

The language quoted in the concurring opinion of Mr. Justice Goldberg in New York Times Co. v. Sullivan, supra, is a contemporary account to the same effect, 376 U.S. 254, 297, at 302, 11 L.Ed. 2d 686, 718, at 721:

> " '[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, the Right of the People (1958), p. 41".

The extent to which this need is given deference is shown by the following:

> "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved . . ." Coleman v. MacLennan, 78 Kan. 711, at 724, 98 P. 281, at 286 (1908).

Arrayed against these compelling reasons for an early trial, made more so by the approaching national elections and the need for an informed electorate, is the inconvenience which will be caused to plaintiff's counsel by forestalling a long-planned vacation.

While it is the custom of the courts to accommodate attorneys at every opportunity in matters of this kind, as

indeed the Court has done on several occasions in this very case, the facts before me regrettably do not admit of such an accommodation.

Plaintiff's counsel indicates that he had no notion that the case would be placed in the docket so quickly. However, an examination of the transcript of the hearing on July 15 clearly reveals that this Court indicated to both counsel that its docket contained a number of open dates and that it was eager to get this case into a trial posture as soon as possible.

Despite this, and despite the order of this Court that the parties be prepared for pretrial by August 25, the case being subject to call at any time subsequent to pretrial, the first notice to this Court of a rather extended vacation was given at pretrial. Considered in this light, plaintiff's counsel had a duty at the time of the July 15, hearing to give notice to the Court of his plans, and failure to do so now bars objection on that ground.

Even absent these clear evidences of intent to move the case on at any early date, the subject matter itself provides reason enough for this decision. The convenience of attorneys is always subject to their role as representatives of the individuals whose rights are at issue. In the instant case, where the determination of those rights involves a question of such paramount importance as freedom of expression, and where its exercise is effectively stifled until the outcome of the suit, this Court reluctantly denies the request to postpone the trial date, and hereby orders that this case come on for trial on October 14, 1964.

While there is a quantity of exhibits to be examined by the plaintiff, this should not present too great a burden, since it must be presumed that any commentator who speaks with authority, as Mr. Smoot does, has already investigated his topics somewhat thoroughly, and should be able to give able assistance to his counsel on these exhibits.

For the reasons stated, I am issuing an order for trial pursuant to and concurrent with this opinion.

Dated: September 28, 1964.

(s) Noel P. Fox,
District Judge.

APPENDIX C — CONSTITUTIONAL PROVISION. STATUTE. AND RULES INVOLVED

Constitutional Provision Involved

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statute Involved

28 U.S.C., Section 1920, 62 Stat. 955:

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case:

(5) Docket fees under section 1923 of this Title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Rules Involved

Federal Rules of Civil Procedure, Rule 41(a):

"(1) Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Federal Rules of Civil Procedure, Rule 54(d):

"(d) Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD E. THORNQUIST
LAWSON E. BECKER
LEONARD D. VERDIER, JR.
PHIL R. JOHNSON
PLATT W. DOCKERY
HAROLD S. SAWYER
CONRAD A. BRADSHAW
HAROLD F. SCHUMACHER
PETER VAN DOMELEN
J. M. NEATH, JR.
CHARLES C. LUNDSTROM
THOMAS R. WINQUIST
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JACK R. CLARY
LEWIS A. ENGMAN
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MICHIGAN TRUST BUILDING
GRAND RAPIDS, MICHIGAN 49502

TELEPHONE
459-6121
AREA CODE 616

GEORGE S. NORCROSS
1891-1960

March 14, 1966

Mrs. Barbara Morris
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Re: Smoot v. League of Women Voters, et al.

Dear Barbara:

Since I last corresponded with you in July, the Smoot v. League of Women Voters case was argued in the Court of Appeals for the Sixth Circuit. The Court of Appeals ruled against us, in effect ruling that a district judge does not, in a proper case, have the discretionary power to assess counsel fees and expenses as costs against a party who was found to have brought a libel action in bad faith, vexatiously and for an oppressive purpose.

We are now seeking a final review of this question before the United States Supreme Court, having filed a petition for certiorari on February 28. I am enclosing a copy of the petition for your information.

I must reiterate that we and the League appreciate the assistance which you gave us and your interest in the case. We do anticipate a successful outcome in the long run, and I will continue to keep you advised.

Sincerely,

Lewis A. Engman

Lewis A. Engman

wn
Enc.

April 28, 1964

Honorable Howard W. Cannon
United States Senate
Washington, D. C. 20515

Dear Senator Cannon:

Your letter of April 22, 1964, addressed to the Congressional Liaison Officer, has been referred to me for reply. You have requested verification of the affidavit attached to your letter.

I am enclosing a copy of a letter directed last summer to Senator Monroney, in which the Attorney General commented on some similar charges made at that time.

Mr. Prussion was a confidential informant of the FBI from 1949 to 1958 during which time he supplied information of a security nature which remains as part of the Department's confidential files and may not be publicly disclosed. He was discontinued in 1958 by the FBI as an informant and any opinions, comments, and activities on his part since that time have been undertaken on his own initiative and without the sanction of this Department.

Very truly yours,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

...ates Senate

..., D. C., April 22, 1964

Respectfully referred to

Congressional Liaison Officer
Department of Justice
Washington 25, D.C.

I would appreciate having a verification of the enclosed affidavit as soon as possible.

Thank you very much.

146-1-7742

Enc

...NTERNAL SECURITY DIV.
...Records Section

Howard W. Cannon
HOWARD W. CANNON U. S. S.

U. S. GOVERNMENT PRINTING OFFICE 16—45102-2

AFFIDAVIT

I, Karl Prussion, a former counterspy for the Federal Bureau of Investigation from 1947 to 1960, do hereby swear under oath and under penalty of perjury, that from the years 1954 through 1958 I attended five county committee meetings of the Communist Party of Santa Clara County, California. (A county committee meeting of the Communist Party consists of one delegate representing each Communist cell in a county.) The meetings were held during the aforementioned period in the following locations:

> The residence of Robert Lindsay, Communist, in San Jose, California, 1954; the residence of Mary Field, Communist section organizer, Palo Alto, California, 1955; the residence of Isobel and Edwin Cerney, both Communists, Menlo Park, California, 1956; the residence of Gertrude Adler, Communist, Palo Alto, California, 1957; the residence of Karl Prussion, counterspy for the F.B.I., Los Altos, California, 1958; the residence of Myra White, Communist, Mountain View, California, 1959.

I hereby further solemnly state that at each and every meeting as set forth above, one Ed Beck, Communist, who is presently secretary of the National Association for the Advancement of Colored People of San Mateo County, California, and a member of the Congress on Racial Equality (CORE), presented the directive from the district office of the Communist Party in San Francisco to the effect that:

> "All Communists working within the framework of the NAACP are instructed to work for a change of the passive attitude of the NAACP toward a more militant, demonstrative, class struggle policy to be expressed by sit-ins, demonstrations, marches and protests, for the purpose of transforming the NAACP into an organization for the achievement of Communist objectives."

I further swear and attest that at each and every one of the aforementioned meetings, one Reverend Martin Luther King was always set forth as the individual to whom Communists should look and rally around in the Communist struggle on the many racial issues.

I hereby also state that Martin Luther King has either been a member of, or wittingly has accepted support from, over 60 Communist fronts, individuals, and/or organizations, which give aid to or espouse Communist causes.

Karl Prussion

Subscribed and sworn to before me this 28 day of Sept, 1963.

George L. Leader
Notary Public

My Commission Expires Sept. 17, 1964

July 31, 1963

Honorable Peter H. Dominick
United States Senate
Washington, D.C.

Dear Senator:

This is in response to your inquiry of the Federal Bureau of Investigation concerning the charges made at the hearings on S. 1732 that the racial problems in this country, particularly in the South, were created or are being exploited by the Communist Party.

Based on all available information from the FBI and other sources, we have no evidence that any of the top leaders of the major civil rights groups are Communists, or Communist controlled. This is true as to Dr. Martin Luther King, Jr., about whom particular accusations were made, as well as other leaders.

It is natural and inevitable that Communists have made efforts to infiltrate the civil rights groups and to exploit the current racial situation. In view of the real injustices that exist and the resentment against them, these efforts have been remarkably unsuccessful.

I hope that this provides the information you were seeking.

Sincerely,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

Mooney
letter?
for, for my
signature

OMINICK
ORADO

COMMITTEES:
INTERIOR AND INSULAR AFFAIRS
BANKING AND CURRENCY
DISTRICT OF COLUMBIA

United States Senate

WASHINGTON, D.C.

July 26, 1963

Mr. Burke Marshall
Civil Rights Division
Department of Justice
Washington 25, D. C.

Dear Mr. Marshall:

There have been allegations made of late that the current civil rights demonstrations, which are occurring throughout the country, are Communist inspired. The purpose of my inquiry is to ascertain the validity of these allegations.

More specifically, have there been any findings which show that any of the leaders or the organizations themselves are Communist? Have any of the leaders been associated with known Communists? And, lastly, what degree, if any, has the Communist Party infiltrated the rank and file of these organizations and demonstrations?

Your efforts in answering my inquiries will be sincerely appreciated.

Sincerely,

Peter H. Dominick
United States Senator

PHD:lmh

22 August 1963

Honorable Paul H. Douglas
United States Senate
Washington 25, D. C.

Dear Senator Douglas:

It was kind of you to think to send me a copy of your letter to Philip Randolph. I think it very helpful, and coming from you, it will receive full attention.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

Senatorial

22 August 1963

Honorable Paul H. Douglas
United States Senate
Washington 25, D. C.

Dear Senator Douglas:

It was kind of you to think to send me a copy of your letter to Philip Randolph. I think it very helpful, and coming from you, it will receive full attention.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

.CE

. SLIP

	BUILDING AND ROOM
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- [ ] SIGNATURE
- [ ] APPROVAL
- [ ] SEE ME
- [ ] RECOMMENDATION
- [ ] ANSWER OR ACKNOWLEDGE ON OR BEFORE ______
- [ ] PREPARE REPLY FOR THE SIGNATURE OF ______
- [ ] COMMENT
- [ ] NECESSARY ACTION
- [ ] NOTE AND RETURN
- [ ] CALL ME
- [ ] PER CONVERSATION
- [ ] AS REQUESTED
- [ ] NOTE AND FILE
- [ ] YOUR INFORMATION

REMARKS

19 August

John:

Did you see this?

BM

Dear Sarah Douglas,
It was kind of you to think to send me a copy of your letter to Ralph Pound & ph. I think it very helpful, and coming from you, it will receive full attention.
[illegible]

FROM		
NAME	BUILDING, ROOM, EXT.	DATE

United States Senate

WASHINGTON, D.C.

August 12, 1963

Dear Mr. Marshall:

I enclose a copy of a letter of details for the August 28th march, which I regard as essential, and which I sent to Mr. Randolph last Friday with eight copies to others who are assisting him.

Warmest best wishes.

Faithfully,

Paul H. Douglas

Honorable Burke Marshall
Assistant Attorney General
Department of Justice
Washington 25, D. C.

John Douglas.
Did you see this?

August 1, 1963

Mr. A. Philip Randolph, Director
March on Washington for Jobs and Freedom
170 West 130 Street
New York 27, New York

My dear Philip Randolph:

I think you did a good job in explaining the purposes and procedures of the March on August 28th and that the conference was most constructive in its conduct and results.

I hope you will forgive me if I stress certain practical necessities which must be provided for if the basic human needs of the 100,000 to 250,000 marchers are to be met. As Adjutant of the 1st Marine Division who managed most of the non-combat activities of the Division of 20,000 men, I think I know something about the problems of providing for the basic and primary needs of large numbers of men. All these will be present in acute form if you get from 100,000 to 250,000 men and women assembling and marching. The following are the most acute:

1. The vital need for an adequate number of toilet facilities, in this case at least 150 toilets plus urinals. Unless an adequate supply of toilets and urinals, properly distributed, are provided, some horrible things will inevitably happen which will bring discredit on the March and marchers. The basic human necessities require these toilets and urinals. I have consulted with experts on this question and they estimate that at least 150 toilets be furnished. The major bulk of these should be located on (1) the Mlipes, (2) the Washington Monument grounds, and (3) in front or to the side of the Lincoln Memorial. But these should be others scattered on Pennsylvania, Constitution and Independence Avenues and near the Union Station. The toilets, I am told, rent for $40 a day apiece. Urinals are also important and should be located at the three major locations: the Mlipes, Washington Monument and Lincoln Memorial. I cannot exaggerate the need for a big supply of these.

2. The need for at least 100 buses to transport people from and to the Union Station. The best figure I can obtain is that a bus can hold 50 people, and make the round trip from the Station to the Mlipes or Lincoln Memorial and back in 30 minutes. This means that one bus can transport 100 people an hour from the Station to the Mlipes, and later from the Lincoln Memorial to the Station.

Mr. [illegible] Randolph — August 5, 1963

Assuming (1) that you do not want to take more than 3 hours to move people to the mountain and an equal length of time to move them back, this means that you should have 1 bus for every 300 people arriving by train.

If you expect 30,000 by rail this means you need 100 buses; if 15,000 come, you will need 50. But it is better to be safe than sorry and probably you will have to order long in advance. I urge you to order at least 100 buses and to get your order in very soon.

3. I am glad that you will have Red Cross tents with doctors, nurses, cots, etc.

4. Police, water and loud speakers. I take it you have listed these problems.

5. We should have a cleanup squad with ample trucks, containers, etc. to clean up immediately afterwards. If we do this, it will leave a good taste in the mouths of everyone. If not, the reverse impression will be created.

I do not mention the problem of maintaining order for I think you are coping with this successfully. But great energy is needed to see that the plans go through.

I think we will need a staff of several men to carry through these responsibilities and to do so quickly. I have mentioned these things because of my great concern for the success of our effort and I enclose my check for $100 to help meet the costs of points mentioned.

With best wishes,

Faithfully,

Paul H. Douglas

PHD:pm
Enclosure
cc Mr. Roy Wilkins, Mr. Cleveland Robinson, Mr. Bayard Rustin, Mr. Ky Fossner, Mr. Roy Reuther, Mr. James Forman, Rev. Martin Luther King, Mr. Walter E. Fauntroy.

Assuming (1) that you do not want to take more than 3 hours to move people to the meeting and an equal length of time to move them back, this means that you should have 1 bus for every 300 people arriving by train.

If you expect 30,000 by rail this means you need 100 buses; if 15,000 come, you will need 50; But it is better to be safe than sorry and probably you will have to order long in advance. I [illegible] order at least 100 buses and to get your order in very [illegible].

3. I am delighted that you will have Red Cross tents with doctors, nurses, cots, etc.

4. Food, water and loud speakers. I take it you have listed these problems.

5. We should have a cleanup squad with ample trucks, containers, etc. to clean up immediately afterwards. If we do this, it will leave a good taste in the mouths of everyone. If not, the reverse impression will be created.

I do not mention the problem of maintaining order for I think you are coping with this successfully. But great energy is needed to see that the plans go through.

I think we will need a staff of several men to carry through these responsibilities and to do so quickly. I have mentioned these things because of my great concern for the success of our effort and I enclose my check for $100 to help meet the costs of points mentioned.

With best wishes,

Faithfully,

Paul H. Douglas

PHD:pmm
Enclosure
cc Mr. Roy Wilkins, Mr. Cleveland Robinson, Mr. Bayard Rustin, Mr. Sy Posner, Mr. Roy Reuther, Mr. James Forman, Rev. Martin Luther King, Mr. Walter E. Fauntroy.

August 9, 1963

Mr. A. Philip Randolph, Director
March on Washington for Jobs and Freedom
170 West 130 Street
New York 37, New York

My dear Philip Randolph:

I think you did a good job in explaining the purposes and procedures of the March on August 28th and that the conference was most constructive in its content and results.

I hope you will forgive me if I stress certain practical necessities which must be provided for if the basic human needs of the 100,000 to 250,000 marchers are to be met. As Adjutant of the 1st Marine Division the manning most of the management activities of the Division of 19,000 men, I think I know something about the problems of providing for the basic and primary needs of large numbers of men. All these will be present in acute form if you get from 100,000 to 250,000 men and women assembling and marching. The following are the most acute:

1. The vital need for an adequate number of toilet facilities, in this case at least 150 toilets plus urinals. Unless an adequate supply of toilets and urinals, properly distributed, are provided, some horrible things will inevitably happen which will bring discredit on the March and marchers. The basic human necessities require these toilets and urinals. I have consulted with experts on this question and they estimate that at least 150 toilets be furnished. The major bulk of these should be located on (1) the Ellipse, (2) the Washington Monument grounds, and (3) in front or to the side of the Lincoln Memorial. But there should be others scattered on Pennsylvania, Constitution and Independence Avenues and near the Union Station. The toilets, I am told, rent for $10 a day apiece. Urinals are also important and should be located at the three major locations: the Ellipse, Washington Monument and Lincoln Memorial. I cannot overemphasize the need for adequate facilities.

2. The need for at least 100 buses to transport people from and to the Union Station. The best figure I can obtain is that a bus can hold 50 people, and make the round trip from the Station to the Ellipse or Lincoln Memorial and back in 30 minutes. This means that one bus can transport 100 people an hour from the Station to the Ellipse, and later from the Lincoln Memorial to the Station.

Assuming (1) that you do not want to take more than 3 hours to move people to the meeting and an equal length of time to move them back, this means that you should have 1 bus for every 300 people arriving by train.

If you expect 30,000 by rail this means you need 100 buses; if 15,000 come, you will need 50; But it is better to be safe than sorry and probably you will have to order long in advance. I would [illegible] order at least 100 buses and to get your order in very soon.

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I do not mention the problem of maintaining order for I think you are coping with this successfully. But great energy is needed to see that the plans go through.

I think we will need a staff of several men to carry through these responsibilities and to do so quickly. I have mentioned these things because of my great concern for the success of our effort and I enclose my check for $100 to help meet the costs of points mentioned.

With best wishes,

Faithfully,

Paul H. Douglas

PHD:yam
Enclosure
cc Mr. Roy Wilkins, Mr. Cleveland Robinson, Mr. Bayard Rustin, Mr. Sy Posner, Mr. Roy Reuther, Mr. James Farmer, Rev. Martin Luther King, Mr. Walter E. Fauntroy.

T-4/12

Congressional

BM:ILB:mep 11,801
144-40-2<4

Honorable J. Howard Edmondson
United States Senate
Washington 25, D.C.

Attention: John M. Keeb, Assistant

Dear Senator Edmondson:

This is in reply to your referral of a letter from Mr. A. D. Lester of Westville, Oklahoma, regarding alleged misconduct of United States Marshals at Oxford, Mississippi.

The Department has made every effort to determine whether there is any semblance of truth in the charges of brutality by the Marshals, but we have been unable to find any evidence to substantiate them.

As you have requested, Mr. Lester's letter is herewith returned.

Sincerely,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

Enclosure

cc: Records
Chrono.
Greene (2)
Blair
Mr. Marshall
Mr. Dolan, Rm. 4208

30 April 1964

Honorable Spessard L. Holland
United States Senate
Washington 25, D. C.

Dear Senator:

This responds to your letter of April 25, 1964, and your recent inquiry as to the reasons five Florida counties were listed in my statement to the House Subcommittee on Appropriations last January.

There are two factors which have prompted the inclusion of these counties in the list given to the Committee. The first was statistical. The following were the most recent registration statistics available to us at the time the list was compiled. The registration statistics are as of October 5, 1963 by the Florida Secretary of State and the population statistics are from the 1960 Census report.

		Persons of Voting Age	Persons Registered	Percentage
Flagler	W	1789	1718	96.0 %
	N	846	182	21.5
		(5 additional persons registered whose race is not designated)		
Gadsden	W	11713	6964	59.5 %
	N	12261	450	3.6
		(30 additional persons registered whose race is not designated)		

		Persons of Voting Age	Persons Registered	Percentage
Lafayette	W	1536	1751	114.0[1] %
	N	152	0	0.0
		(3 additional persons registered whose race is not designated)		
Liberty	W	1525	1979	129.8[1] %
	N	240	0	0.0
		(2 additional persons registered whose race is not designated)		
Union	W	2880	1901	66.0 %
	N	1082	5	0.004

In two of these counties no Negroes are registered to vote. The letter which you transmitted to me from officials in Flagler County indicated that the statistical picture there has substantially improved, with an additional 112 Negroes registered.

The second reason that the counties were included in my report to the Committee was that the United States Commission on Civil Rights listed all five counties as among the one-hundred counties in which the Commission found voting denials.

For these reasons these five counties were included in my report. I am glad to be informed of the substantial increase in Negro registration in Flagler County, but I regret that the officials of that county did not have the benefit of reading the full statement which I gave the House Subcommittee on

---

1/ One possible explanation of this discrepancy is that the census statistics are 1960 figures and the registration statistics are 1963 figures.

Appropriations. I believe the explanatory portions of that statement clear up the matter. This statement reads as follows:

COUNTIES ALLEGED TO DENY
VOTING RIGHTS TO NEGROES

> Statistical and other information available to this Division indicated that there was reason to believe that in the counties and parishes listed below, Negroes may have been denied their voting rights because of discrimination by private individuals or public officials. In some of the counties listed, no investigation has yet been made by the Department to determine whether this is so, or whether, if so, the discriminatory practices have ceased. In others, action has been taken, either by investigation, records analysis, negotiation, or litigation. Included are the 100 counties and parishes listed in table A of the report of the Civil Rights Commission, Civil Rights 1963, in which denials of voting rights were found....

While the Department of Justice has made no formal investigation in any of these five counties, with the exception of a preliminary records inspection in Union County, the information which we had at the time the report was compiled suggested that investigation might be needed. With the exception of Flagler County, the statistics still indicate that, in the absence of some other explanation for the very low Negro registration, some inquiry into its causes may be appropriate and necessary in the future.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

April 23, 1963

Honorable Lister Hill
United States Senate
Washington, D. C.

Dear Senator Hill:

Your letter of April 5 to the Attorney General and the enclosure from Governor Wallace complaining about the conduct of United States Attorney Vernol R. Jansen, Jr. of the Southern District of Alabama, have been referred to me.

We are unable to find any violation of law or legal ethics, or any other improprieties in the allegations contained in the telegram from Governor Wallace.

Sincerely,

Nicholas deB. Katzenbach
Deputy Attorney General

cc Mr. Burke Marshall ✓

JRR:cgc

Signed + mailed 4/24/63 cgc

---:ls
T. 3/21/64
144-100-41-0

21 March 1964

Honorable Hubert H. Humphrey
United States Senate
Washington 25, D. C.

Dear Senator:

Mr. Katzenbach sent to me your letter of March 16 with which you enclosed an inquiry from Professor Mills at Beloit College concerning Tougaloo College in Mississippi.

The facts in Professor Mills's letter are accurate. There is presently pending before the Mississippi Legislature a bill to revoke the charter of Tougaloo. I have no doubt that it was introduced and was backed for the reasons suggested in Professor Mills's letter, that is, because Tougaloo is integrated and because some of its students and a few of its faculty members have been involved in civil rights demonstrations.

There is nothing at present that the Department of Justice can do about this.

We will follow this matter very closely. Tougaloo is connected with the United Churches of Christ, which has a good many resources. They are being advised by competent counsel.

cc: Records
Chrono
Deputy Attorney General
Burke Marshall

At this time it is my information that there is at least a chance that the efforts to harass Tougaloo will die out by themselves. I think therefore that the dangers of focusing attention on the matter outweigh the advantages. If it appears that the Mississippi Legislature is going through with this, their action will be contested in court.

If there are any definite developments on this, I will let you know.

I am returning the letter to you from Professor Mills.

Very truly yours,

Burke Marshall
Assistant Attorney General
Civil Rights Division

Enclosure

United States Senate

COMMITTEE ON FOREIGN RELATIONS

March 16, 1964

Mr. Nicholas deB. Katzenbach
Deputy Attorney General
Department of Justice
Washington, D. C.

Dear Nick:

Is there anything which I might do in this situation? Were you aware of these developments? Let me know if there is anything which I might do or how I might appropriately reply to Professor Mills.

Many thanks.

Sincerely yours,

Hubert H.

Hubert H. Humphrey

Enclosure

F W W.

BELOIT COLLEGE

BELOIT, WISCONSIN

March 5, 1964

Senator Hubert Humphrey
Senate Office Building
Washington, D. C.

My Dear Senator:

I should like to call your attention to a situation which is very distressing to me and to a number of my colleagues here at Beloit College. According to word received from Mississippi a determined effort is being launched in the Mississippi State Legislature to destroy Tougaloo College. A bill has been introduced into the Legislature which would revoke the institution's charter "in the public interest."

Perhaps I should explain my interest and my source of information. First, the President of Tougaloo College is Dr. A. D. Beittel. Dr. Beittel was for a number of years connected with Beloit College and was the Dean of its Chapel. Dr. Beittel resigned his post as Dean of the Chapel to take the Presidency of Tougaloo. Second, Tougaloo is an accredited four year liberal arts college connected with the United Churches of Christ. Third, Beloit and Tougaloo are connected in no way but through ties of friendship and through common educational aims. In this regard at least two of our staff members, upon reaching retirement, have gone to Tougaloo to teach.

The threat of charter revocation, which is more than a threat, stems from the fact that Tougaloo is the only integrated college in the State.

As I understand this last development it is but a step in a whole series of events all of which have had as their object the harassment of the school and its staff and students. Just before this repealer was introduced, a resolution authorizing an investigation of the institution was introduced in the State Legislature. Before that shots have been fired on to the campus at night. Personnel of the college driving into Jackson have been stopped by cars in which at least some of the persons were hooded. And there are other instances of harassment. I understand that Dr. Beittel and the Corporation have been under injuction for some time not to engage in any activities, which would be permissible in any other part of the United States, tending to promote integration of school or other facilities.

That Tougaloo seems to be a threat to the public officials of the State of Mississippi is evidenced by a remark Lt. Gov. Carroll Gartin made to the Jackson Exchange Club on Monday, February 17th, last. Gov. Gartin decried Tougaloo as a place of "queers, quirks and quacks"

BELOIT COLLEGE

BELOIT, WISCONSIN

and insisted "something has got to be done about it." Not many days thereafter Mr. William Morphew of the White Citizens' Council of Mississippi (who was in Beloit to speak before our student body) stated —and he stated this in Beloit in the presence of members of our College staff—that the specific intent of the bill was to remove Tougaloo's Corporation charter and thereby make each Trustee personally liable for any damage or other suits brought against the College for its activity in civil rights.

As a political scientist and one who has some training in the field of constitutional law—though as a person who can not qualify as an expert in the field by any means—I feel that this move can not succeed legally. But, on the other hand, I am not sure that it is even attempted with the idea that it will succeed, legally. The object seems to be to force the institution to use up its slender financial resources in defending itself and to break the will to exist and to continue on as an educational enterprise.

I am deeply concerned about the situation both as an educator and as a Christian. And, further, I am concerned about it as an American. I know that this situation is not in the strict sense a federal matter nor one which the federal Legislature or its members can act upon directly. In writing to you I want to alert you to its existence and urge you to do what you can in any capacity to avert the consequences which seem to be implicit in it.

As for specific datum, the bill is Senate Bill no. 1672, introduced by Senators Dye, Ross and Yarbrough and was referred to the Committee on the Judiciary. It's title is An Act to Repeal Chapter CCCXVIII (318), General Laws of Mississippi 1871, same being entitled "An Act to Incorporate the Trustees of Tougaloo University."

Very truly yours,

Warner E. Mills, Jr

Warner E. Mills, Jr
Associate Professor of Government
Beloit College
City Chairman
Democratic Party of Wisconsin
Beloit, Wisconsin

T.4/16/63
BM:JD:ls
72-40-43
#11,194

16 April 1963

Honorable Kenneth B. Keating
United States Senate
Washington 25, D. C.

Dear Senator Keating:

In reply to your letter of April 15, I am happy to furnish you the following information.

During the past three years the Department has established the principle that regardless of the form which a threat or intimidation takes, the Department is authorized to act to remedy the effect of the intimidation on Negro citizens. Thus, economic sanctions such as evictions and the closing of the channels of trade have been held to be violations of Section 1971(b). In addition, we have engaged in considerable negotiation and litigation to establish the principle that the use of the state criminal processes can likewise be a violation of Section 1971(b), and the state can be restrained from proceeding with a trial or continued confinement until the matter has been thrashed out fully and finally in the federal court. This principle was most recently utilized in Greenwood, Mississippi, where we were able to obtain the release of eight persons who had been found guilty of disorderly conduct and had been sentenced to four months in jail and $200 fines each. As a result of action instituted by the United States, the City of Greenwood and Leflore County agreed to release these students pending a full hearing and final decision on the merits of the case in the United States District Court. In addition, we received assurance that there would be no further interference by the police with voter registration.

Records
Chrono
[redacted]
Putzel
Owen

In several other instances in Mississippi and Georgia, we have been able to obtain dismissals of state charges and the return of bond money after having demonstrated that the arrests and convictions were for the purpose of interfering with the rights of Negroes in the area of registering to vote.

In the Greenwood case, we have asked the court to hold that the right to register without interference includes the right peaceably to assemble and protest grievances which arise out of efforts of Negroes to register. I expect that we will have a hearing on this question in Mississippi early next fall.

At the present time there is under consideration by the Court of Appeals for the Fifth Circuit the question of whether or not a school board can refuse to rehire a school teacher apart from any question of contract arrangements or of tenure if the refusal to rehire was for the purpose of interfering with the right to register to vote. In that case, the District Court found against us and we took the appeal. If we are successful, we maintain that an integral part of the relief includes re-employment and back pay.

In every single instance that has been reported to me, we have investigated the matter as rapidly as humanly possible. These cases are difficult, however, for the reason that we are required to prove that the defendant's purpose was to interfere with registration and voting. This is not an easy burden.

So far our investigation does not show that the recent events in Birmingham are related to registration and voting.

If I can be of any further service to you, please let me know.

Sincerely yours,

Burke Marshall
Assistant Attorney General
Civil Rights Division

United States Senate

COMMITTEE ON THE JUDICIARY

April 15, 1963

Honorable Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington 25, D. C.

My dear Mr. Marshall:

A number of my constituents have written to me in protest against the tactics being used to intimidate prospective Negro voters in Alabama and Mississippi.

I am deeply concerned about this situation and believe that every necessary step should be taken by the Federal government to protect the rights and safety of these citizens. I would be grateful for a report from the Department on this matter.

You cooperation, as always, is deeply appreciated.

Very sincerely yours,

Kenneth B. Keating

John Doar:
Can we get
something on this?

K:ey

15 September 1964

Honorable John Stennis
United States Senate
Washington, D. C.

Dear Senator:

This refers to your inquiry to me about our investigation of a complaint against Sheriff Albert C. Blair of Tate County, Mississippi, arising from an episode on July 17, 1964.

We are not presently pursuing this matter beyond the preliminary investigation which has already been conducted. I think you should be aware, however, that in my view we nevertheless have a continuing obligation to follow developments closely in Tate County for three reasons: (1) none of the 2,989 Negroes over 21 is registered; (2) our information is that there exists a high level of fear as to the reaction of locals, officials, and private citizens should Negroes apply to vote; and (3) we have received complaints that Sheriff Blair and other law enforcement officers have followed voter registration workers in the county, for no apparent reason, but with the effect of intimidating local Negroes.

Very truly yours,

Burke Marshall
Assistant Attorney General
Civil Rights Division

Mr. Marshall
1145

T. 7/22/63

BM:stj

JUL 23 1963

Honorable Warren G. Magnuson
United States Senate
Washington, D.C.

Dear Senator:

This is in response to your inquiry of the Federal Bureau of Investigation concerning the charges made at the hearings on S. 1732 that the racial problems in this country, particularly in the South, were created or are being exploited by the Communist Party.

Based on all available information from the FBI and other sources, we have no evidence that any of the top leaders of the major civil rights groups are Communists, or Communist controlled. This is true as to Dr. Martin Luther King, Jr., about whom particular accusations were made, as well as other leaders.

It is natural and inevitable that Communists have made efforts to infiltrate the civil rights groups and to exploit the current racial situation. In view of the real injustices that exist and the resentment against them, these efforts have been remarkably unsuccessful.

I hope that this provides the information you were seeking.

Sincerely,

Attorney General

22 October 1964

Honorable Russell Long
United States Senate
Washington, D. C.

Dear Senator:

Your letter to the Attorney General enclosing a copy of the Dan Smoot Report concerning alleged Communist influence in the civil rights movement has been referred to me for reply. May I apologize for the delay in this reply; your letter was attached by staple to some other correspondence, and filed away. It has just been brought to my attention.

In July of 1963, the Attorney General made the following statements in answer to a similar request for information from the Honorable A. S. Mike Monroney.

> "Based on all available information from the FBI and other sources, we have no evidence that any of the top leaders of the major civil rights groups are Communists, or Communist controlled. This is true as to Dr. Martin Luther King, jr., about whom particular accusations were made, as well as other leaders.
>
> "It is natural and inevitable that Communists have made efforts to infiltrate the civil rights groups and to exploit the current racial situation. In view of the real injustices that exist and the resentment against them, these efforts have been remarkably unsuccessful."

I know of no further information to the contrary.

Again, please accept my regrets at this delay in response.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

F JUSTICE

UTING SLIP

	DIVISION	BUILDING	ROOM
all			

☐ SIGNATURE ☐ COMMENT ☐ PER CONVERSATION
☐ APPROVAL ☐ NECESSARY ACTION ☐ AS REQUESTED
☐ SEE ME ☐ NOTE AND RETURN ☐ NOTE AND FILE
☐ RECOMMENDATION ☐ CALL ME ☐ YOUR INFORMATION
☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

This was attached to the material concerning Mr. Engman's problem (the Dan Smoot suit against the League of Women Voters). Do you want me to do anything further with it?

HHG

FROM: NAME	BUILDING, ROOM, EXT.	DATE
HH Greene		

FROM

THE OFFICE OF THE DEPUTY ATTORNEY GENERAL

TO

- ☐ ATTORNEY GENERAL
  - ☐ EXECUTIVE ASSISTANT
  - ☐ OFFICE OF PUBLIC INFORMATION
- ☐ DEPUTY ATTORNEY GENERAL
  - ☐ EXECUTIVE OFFICE—U. S. ATTORNEYS
  - ☐ EXECUTIVE OFFICE—U. S. MARSHALS
- ☐ SOLICITOR GENERAL
- ☐ ADMINISTRATIVE DIVISION
  - ☐ LIBRARY
- ☐ ANTITRUST DIVISION
- ☐ CIVIL DIVISION
- ☒ CIVIL RIGHTS DIVISION
- ☐ CRIMINAL DIVISION
- ☐ INTERNAL SECURITY DIVISION
- ☐ LANDS DIVISION
- ☐ TAX DIVISION
- ☐ OFFICE OF LEGAL COUNSEL
- ☐ OFFICE OF ALIEN PROPERTY
- ☐ BUREAU OF PRISONS
- ☐ FEDERAL PRISON INDUSTRIES, INC.
- ☐ FEDERAL BUREAU OF INVESTIGATION
- ☐ IMMIGRATION AND NATURALIZATION SERVICE
- ☐ PARDON ATTORNEY
- ☐ PAROLE BOARD
- ☐ BOARD OF IMMIGRATION APPEALS
- ☐ ATTENTION: _____

REMARKS:

9/10/64

Mr. Burke Marshall
Civil Rights Division
Room 1145

Burke:

Would you rewrite for Walt's signature.

NdeBK

Aug. 21st.
Aug. 25th
or 26th.

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ YOUR INFORMATION
- ☐ NOTE AND RETURN
- ☐ SEE ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ CALL ME
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

IMPORTANT AND URGENT

GPO 16—64089-1

- [ ] ATTORNEY GENERAL
  - [ ] EXECUTIVE ASSISTANT
  - [ ] OFFICE OF PUBLIC INFORMATION
- [X] DEPUTY ATTORNEY GENERAL
  - [ ] EXECUTIVE OFFICE—U. S. ATTORNEYS
  - [ ] EXECUTIVE OFFICE—U. S. MARSHALS
- [ ] SOLICITOR GENERAL
- [ ] ADMINISTRATIVE DIVISION
  - [ ] LIBRARY
- [ ] ANTITRUST DIVISION
- [ ] CIVIL DIVISION
- [ ] CIVIL RIGHTS DIVISION
- [ ] CRIMINAL DIVISION
- [ ] INTERNAL SECURITY DIVISION
- [ ] LANDS DIVISION
- [ ] TAX DIVISION
- [ ] OFFICE OF LEGAL COUNSEL
- [ ] OFFICE OF ALIEN PROPERTY
- [ ] BUREAU OF PRISONS
- [ ] FEDERAL PRISON INDUSTRIES, INC.
- [ ] FEDERAL BUREAU OF INVESTIGATION
- [ ] IMMIGRATION AND NATURALIZATION SERVICE
- [ ] PARDON ATTORNEY
- [ ] PAROLE BOARD
- [ ] BOARD OF IMMIGRATION APPEALS
- [ ] ATTENTION: _____

- [ ] SIGNATURE
- [ ] APPROVAL
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- [ ] COMMENT
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- [ ] NOTE AND FILE
- [ ] CALL ME
- [ ] ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- [ ] PREPARE REPLY FOR THE SIGNATURE OF _____

8-3-64

Nick:

Friday we received the attached letter from Senator Long inquiring about Communist infiltration in the civil rights movement. I do not find it an easy letter to answer and believe it might better be handled by Burke Marshall's office. You will note, however, I have attached a rough draft with some language that might be useful.

Walt

Walt

Burke Marshall
Would you route for
Walt's signature
WRH

FROM ASSISTANT ATTORNEY GENERAL
INTERNAL SECURITY DIVISION

DRAFT LETTER TO SENATOR RUSSELL LONG

Dear Senator Long:

Your letter of July 28, 1964 to the Attorney General enclosing a copy of the Dan Smoot Report concerning alleged Communist influence in the civil rights movement has been referred to me for reply.

The Justice Department has for a number of years been interested in all aspects of the activities of members of the Communist Party, including their infiltration into various segments of American life. The Federal Bureau of Investigation as you know, has developed an excellent coverage of the Communist movement in this country and is continually submitting reports to this Department on the activities of the various branches of the Party.

We have undertaken criminal proceedings against the Communist Party and its two top level officers under the provisions of the Internal Security Act and these proceedings are still in the process of litigation before the Federal courts; additionally, we have instituted and successfully concluded membership proceedings before the Subversive Activities Control Board against a large number of the Party's national leaders. For further details in this regard there is attached a statement entitled, Steps Taken by the Department of Justice to Enforce the Provisions of the Internal Security Act in Accordance With the Decision of the Supreme Court in the Communist Party Case.

In keeping with our policy to take action where and when it is legally feasible to do so, I might note that several years ago two civil rights leaders, Carl Braden and Frank Wilkinson, were prosecuted for contempt of Congress and their convictions were upheld by the Supreme Court. However, there is no law preventing a Communist Party member from participating in civil rights matters or from joining such civil rights groups as he may choose.

The FBI nonetheless has in the course of its investigative work been constantly alert to developing information regarding the activities of Communists in civil rights affairs. On July 10, 1964 the Director of the Bureau announced at the opening of its Field Office in Jackson, Mississippi that fifty additional agents had been sent to that state within the prior week bringing the total number of agents investigating possible violations of Federal law within Mississippi to one hundred and fifty-three. On July 21, 1964 President Johnson announced that he had ordered the FBI to investigate the racial demonstrations in New York City to see if there is any evidence of violations of Federal law and to keep State and Municipal agencies, responsible for local law and order, apprised of pertinent developments resulting from its investigation.

The Communist Party in carrying out its program of attempting to infiltrate all segments of American life has always regarded the civil rights movement as a special target for penetration and exploitation. Although its efforts at times have had no significant effect, we nonetheless have been constantly alerted to this potential danger. The extent of Communist participation and infiltration has been a matter of unceasing concern and endeavor on our part for we recognize that the ultimate success of the civil rights movement and the effective enforcement of the recent legislation demand a complete absence of Communist influence. Accordingly, we are striving constantly to determine the degree of influence and participation on the part of Communists in civil rights affairs and to initiate appropriate action looking towards its complete eradication. This is particularly true in situations in which rioting, violence or other disorders have occurred. The FBI will continue its investigation of Communist activities in this area and will endeavor to develop evidence of possible violations of Federal law.

The enclosure to your letter is returned herewith.

Sincerely,

J. WALTER YEAGLEY
Assistant Attorney General

STEPS TAKEN BY THE DEPARTMENT OF JUSTICE TO ENFORCE THE PROVISIONS OF THE INTERNAL SECURITY ACT IN ACCORDANCE WITH THE DECISION OF THE SUPREME COURT IN THE COMMUNIST PARTY CASE

Following ten and one-half years of litigation the Supreme Court on June 5, 1961 upheld the constitutionality of an order of the Subversive Activities Control Board which found the Communist Party to be substantially directed, dominated and controlled by the Soviet Union and required to register with the Attorney General as a Communist-action organization pursuant to the provisions of the Internal Security Act of 1950. The order of the Board became final on October 20, 1961.

Under the law the Communist Party was required to register with the Attorney General within 30 days after the order became final and to file a registration statement containing the names and addresses of its officers and members at any time during the preceding year. The Party was also required to furnish a complete accounting of its finances and to list all printing presses in possession or control of the Party. When the Party refused to register by November 20, 1961, as required by the law, evidence was presented to a grand jury in the District of Columbia and on December 1, 1961, the Communist Party was indicted on 12 counts, including one count for each of the 11 days it had failed to register and a count for its failure to file a registration statement. The maximum penalty on conviction of the organization for failing to register is a fine up to $10,000 on each count of the indictment. The Party entered a not guilty plea. Trial of the case began December 11, 1962 and the jury on December 17 returned a verdict of guilty on all counts. The Court on the same day sentenced the Party to pay a fine of $120,000. The Party appealed and argument before the Court of Appeals for the District of Columbia was heard June 25, 1963. The Court on December 17, 1963 reversed this conviction on the grounds that the officers of the Party who should have signed the registration forms could avail themselves of the privilege of self-incrimination. The Court further held that the Government had the burden of proof to show that a volunteer to register the Party was available. The case was to be remanded for a new trial if the Government requests it. On January 21, 1964 the Government filed a petition seeking a reconsideration of the decision by the full bench of the Court of Appeals which was denied on February 21, 1964. The Department of Justice filed with the Supreme Court a petition for certiorari to review the decision of the Court of Appeals and the Supreme Court on June 8, 1964, denied the application for certiorari. The Department has under study proceeding with a new trial against the Party in accordance with the decision of the Court of Appeals.

The Act provides that upon failure of the organization to register, certain officers must register for the organization within ten days after such default. Thus the officers of the Party who were responsible for effecting its registration were required to comply on or before November 30 which they did not do, thereby rendering themselves subject to the criminal liability of the Act. The default of both the Party and the officers imposed a duty upon current members of the Party to register themselves on or before December 20, 1961. No member has yet registered with the Department of Justice.

On January 24, 1962 the Department of Justice began the presentation of evidence of violations under the Act to an investigative grand jury in the District of Columbia. On March 15, 1962, this grand jury returned separate indictments against Gus Hall, General Secretary, and Benjamin J. Davis, National Secretary, for failing to register with the Attorney General for and on behalf of the Com-

.st Party, USA. Each indictment contained five counts charging failure to .gister and one count charging failure to file a registration statement. Pursuant to warrants issued on these indictments, Hall and Davis were arrested in New York, New York, on March 15. Upon furnishing bail in the amount of $5,000 each as fixed by the Court they were released. They entered pleas of not guilty to the indictments on March 30, 1962 and were continued on bail. Each defendant, if convicted, would be liable to imprisonment up to five years and fines up to $10,000 on each count of the indictments. On September 25, 1963 the Court consolidated the Hall and Davis cases and postponed the date for their trial until the Court of Appeals for the District of Columbia decided the Communist Party case.

Section 10(1) of the Act makes it unlawful for any organization against which there is a final order of the Board to register, or any persons acting for or on behalf of such an organization, to disseminate through the mails or in interstate or foreign commerce any publication unless it is plainly marked as being disseminated by a Communist organization. Political Affairs, a Communist Party magazine, began to describe itself on its masthead as "A Theoretical Organ of the Communist Party, USA" as a result of testimony of a number of witnesses called before the Grand Jury in early 1962. It continues to carry that label. The Worker, the East Coast Communist Party newspaper, at the time the Grand Jury proceedings were in progress, described itself as a paper "which reflects the viewpoint of the Communist Party on the urgent and fundamental issues of the day and on fundamental socialist aims." Continuing review and evaluation of information received from the FBI is being made to determine if organizations or individuals are disseminating publications on behalf of the Party without appropriate labeling in violation of this section.

Before a criminal action against an individual member of the Communist Party for failing to register can be brought, it is necessary to obtain an order of the Subversive Activities Control Board, after a hearing, determining such individual to be a member of the Party and as such required to register. On May 21, 1962, the Attorney General filed separate petitions with the Subversive Activities Control Board against ten persons for a determination that they are Communist Party members and as such are required to register. All of these individuals were elected to the Communist Party National Committee at its last convention held December 1959. They are: William L. Patterson, Chairman of the New York State District Committee; Arnold Samuel Johnson, National Legislative Director; Betty Gannett Tormey, William Albertson, Miriam Friedlander and Louis Weinstock, New York State Committee members, all of New York City; Albert J. Lima, Oakland, California, Chairman of the Northern California District; Roscoe Quincy Proctor, Berkeley, California, member of the Northern California District Committee; Dorothy Healey, Los Angeles, California, Southern California District Chairman; and Burt Gale Nelson, Seattle, Northwest District Chairman. On December 6, 1962, four petitions were filed with the Board for orders requiring the registration of Claude Mack Lightfoot, Vice-Chairman of the National Committee of the Party; Samuel Krass Davis, National Committee member and Editor of the Mid-West edition of The Worker; Flora Hall, National Committee member and Labor Section official of Southern California District; and Samuel Kushner, National Committee member and Los Angeles Editor of the Peoples World. Hearings on these fourteen petitions have been completed and the Board issued orders in all cases requiring the respondents to register. All of these respondents filed appeals from the Board orders with the Court of Appeals for the District of Columbia. By stipulation approved by the Court, the decision

ıe cases of Albertson and Proctor which were argued before the Court would dispositive of the other appeals filed with the Court. On April 23, 1964, the Court of Appeals affirmed the order of the Board requiring Albertson and Proctor to register as members of the Communist Party.

Six additional petitions for Board orders requiring registration were filed on April 11, 1963, against Mildred McAdory Edelman; Irving Potash; William Wolf Weinstone; Mortimer Daniel Rubin; Thomas Nabried; and George Aloysius Meyers, all National Committee members. The Board, on December 4, 1963, issued orders in all of these cases requiring the registration of the respondents. The appeals from these orders filed with the Court of Appeals were by stipulation to abide the decisions in the Albertson and Proctor cases which affirmed the Board orders.

On June 13, 1963 seven petitions were filed with the Board for orders requiring the registration of the following Communist Party functionaries: John Stanford, Executive Secretary Texas Communist Party; Benjamin Dobbs, National Committeeman from Southern California District; William Cottle Taylor, Southern California District leader; Aaron Libson, District Youth Secretary Eastern Pennsylvania District; James Tormey, National Committeeman New York District; Lionel Libson, National Youth Commission; and Frances Gabow, Organizational Secretary Eastern Pennsylvania District of the Party. After hearing testimony the Board on December 20, 1963 issued orders requiring the registration of John Stanford, Benjamin Dobbs, William Cottle Taylor, Aaron Libson, and Frances Gabow. On May 21, 1964, an order was entered by the Board requiring the registration of Lionel Libson. The taking of testimony in the James Tormey hearing was completed on May 15, 1964. Appeals filed by the respondents Dobbs, Taylor, Gabow, Stanford, and Aaron Libson were by stipulation governed by the Albertson and Proctor decisions which affirmed the orders of the Board.

Section 6 of the Act, among other things, makes it unlawful for a member of the Communist Party to use or attempt to use a United States passport. The Secretary of State revoked the passports of Elizabeth Gurley Flynn, National Chairman of the Party and Herbert Aptheker, National Committeeman and former Editor of the Party's self-described theoretical organ Political Affairs. Separate actions were brought by the individuals in the District Court for the District of Columbia to test the constitutionality of Section 6 of the Act. A three-judge Court sustained the government's action and held that the travel restriction was a legitimate exercise of Congressional authority to regulate the travel of Communist Party members based on the legislative determination that such travel was inimical and dangerous to the security of the United States. The Flynn-Aptheker petition for review of this decision by the Supreme Court was granted and argument was heard by the Supreme Court on April 21, 1964. The Supreme Court on June 22, 1964 by a 6-3 vote, ruled that Section 6 of the Act was unconstitutional. The Department of Justice now has this decision under study in an effort to determine whether amendatory legislation is feasible.

Section 5 of the Act makes it unlawful for a member of the Communist Party to engage in any employment in any defense facility. On May 21, 1963 a Federal Grand Jury in Seattle, Washington, returned an indictment against Eugene Frank Robel charging him with engaging in employment in a defense facility while maintaining membership in the Communist Party. Robel was arraigned on June 7, 1963, entered a not guilty plea and was released on his own recognizance. Pre-trial motions were argued on October 21, 1963, and proceedings have been stayed by the Court

ing the decision of the Supreme Court in the Flynn-Aptheker passport case.

On October 30, 1963, Zena Druckman was indicted by a Federal Grand Jury in San Francisco, California, on a two-count indictment charging her with (1) applying for a passport while maintaining membership in the CP, USA, and (2) making a false statement in her application when she stated she was not then, nor had she been, a member of the Communist Party in the past 12 months. She was arrested the same day and is presently at liberty on $1,000 bond. No date has as yet been set for trial.

A Federal grand jury in Brooklyn, New York, indicted Hyman Seigel on February 13, 1964 on the charge that he used his passport while maintaining membership in the Communist Party. Seigel used his passport to effect his re-entry into the United States upon his return from a trip to Russia and other European countries. No date has been set for trial.

Ten additional petitions were filed with the Board on November 19, 1963, for orders requiring the registration of the following Communist Party leaders: Daniel Lieber Queen, Communist Party National Committee member and youth leader of the Northern Illinois District; Michael Saunders, Chairman of the Communist Party Teamsters' Commission; Betty Mae Smith, member of the Communist Party Minnesota-Dakotas District Board; Ralph William Taylor, Chairman of the Communist Party Minnesota-Dakotas District Committee; Marvin Joel Markman, Communist Party Youth Coordinator for New York State; Meyer Jacob Stein, member Communist Party Youth Commission of New York State; Donald Andrew Hamerquist and Milford Adolf Sutherland, members Communist Party Northwest District Committee; Norman Haaland, member Communist Party National Committee for Oregon District; and Benjamin Gerald Jacobson, member of Communist Party Oregon District Board. Hearings for the taking of testimony on the Smith and Taylor petitions were completed in St. Paul, Minnesota on March 17, 1964; and on May 1, 1964, the Board issued orders requiring that Smith and Taylor register pursuant to the Act. Hearings on the Markman and Stein petitions were completed in New York, New York on April 10, 1964; and on July 2, 1964 the Hearing Examiner recommended to the Board that orders issue requiring the registration of Markman and Stein. On April 10, 1964 the hearings on the Jacobson and Haaland petitions were completed in Portland, Oregon and on the Hamerquist and Sutherland petitions in Tacoma, Washington on April 18, 1964. The Queen hearing was concluded in Chicago, Illinois on May 27, 1964. The Board has not yet made any decision in these cases. The Saunders hearing has been continued until July 27, 1964.

July 8, 1964

From

THE ATTORNEY GENERAL

Deputy Attorney General	
Solicitor General	
Executive Assistant to the Attorney General	
Assistant Attorney General, Antitrust	
Assistant Attorney General, Tax	
Assistant Attorney General, Civil	
Assistant Attorney General, Lands	
Assistant Attorney General, Criminal	
Assistant Attorney General, Legal Counsel	
Assistant Attorney General, Internal Security	✓
Assistant Attorney General, Civil Rights	
Administrative Assistant Attorney General	
Director, FBI	
Director, Bureau of Prisons	
Director, Office of Alien Property	
Commissioner, Immigration and Naturalization	
Pardon Attorney	
Parole Board	
Board of Immigration Appeals	
Special Assistant for Public Information	
Records Administration Office	
For the attention of Mr.	

REMARKS: Mr Matthews
Please call me

United States Senate

WASHINGTON, D.C.

July 28, 1964

The Honorable Robert F. Kennedy
The Attorney General of the United States
Washington, D. C.

Dear Mr. Attorney General:

Recently, my office has been receiving a considerable amount of mail such as the enclosed copy of the Dan Smoot Report. This mail indicates a growing concern for alleged communist influence in the "civil rights" movement.

In much of this correspondence there appears to be an undercurrent of fear and resentment in the belief that the Justice Department is not concerned with this threat and that the Department's failure to speak out against communist influence in these matters has the effect, though unintended, of aiding and abetting the communist cause.

In order to assist me in corresponding with my constituents on this subject in an informed manner, I should appreciate having from you a statement of some sort indicating what efforts the Department has made and is making to undermine whatever communist or subversive influence there is in the "civil rights" movement. I shall look forward to hearing from you on this matter in the near future.

With best wishes, I am

Sincerely yours,

Russell Long

cc 7-31-64

Dan Smoot Report

Vol. 10, No. 22 (Broadcast 458) June 1, 1964 Dallas, Texas

DAN SMOOT

COMMUNISM IN THE CIVIL RIGHTS MOVEMENT

On May 20, 1964, Leo Pfeffer (general counsel of the American Jewish Congress) announced in New York that civil rights and religious organizations have arranged for 60 volunteer lawyers to spend at least two weeks without pay in southern states this summer, to defend civil rights demonstrators who may be charged with violations of local and state laws. The other "civil rights and religious organizations" joining the American Jewish Congress are the National Council of Churches, the Congress of Racial Equality, the National Association for the Advancement of Colored People, the American Civil Liberties Union, the American Jewish Committee, and the Student Non-Violent Coordinating Committee.[1]

What motivates these people who stir cauldrons of violence and issue calls for lawless insurrection? Some of them, no doubt, think they are doing what is right, though it is difficult to understand how anyone could think so. It is obvious, however, that some are being manipulated by sinister forces to do the job of the communist party: to tear American society apart and destroy constitutional government.

On August 25, 1963, Attorney General Robert F. Kennedy, testifying before the Senate Commerce Committee, denied that there is significant communist influence in the civil rights movement. He said FBI investigations had produced "no evidence that any . . . leaders of major civil rights groups are communists or communist-controlled."[2] On January 29, 1964, FBI Director J. Edgar Hoover, testifying before the House Appropriations Subcommittee, said that communist influence in the civil rights movement is "vitally important."[3] Who is telling the truth: FBI Director J. Edgar Hoover, or Attorney General Robert F. Kennedy? One of them is bound to be wrong, since they contradict each other.

Most of Mr. Hoover's important testimony — in which, obviously, he gave names and other specifics about communists who control, or manipulate, civil rights groups — was "off the record," and may never be made public, certainly not as long as Robert F. Kennedy or anyone like him is

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Attorney General (the Attorney General being above Mr. Hoover in the chain of command). There is enough evidence from other sources, however, to prove that the major civil rights groups are virtually controlled by communists or by persons so closely associated with communist activities and so thoroughly sympathetic with the objectives of communism, that their non-membership in the communist party is of no importance.

NAACP

The National Association for the Advancement of Colored People is the primary civil rights group — connected with all the others through interlocking directorates. The NAACP was founded in New York City, May 30, 1909, at a meeting of 55 prominent "liberals and socialists," mostly white.[4] The first five top officials of the NAACP were well-known socialists: Dr. Henry Moskowitz, Oswald Garrison Villard, Mary Ovington White, William English Walling, and Dr. W. E. B. DuBois. DuBois was the only negro in the group.[5,6] He later became a militant communist, but remained an official of the NAACP until his death (when he was mourned by communists everywhere).[38]

In 1920, the New York State Legislative Committee Investigating Seditious Activities, branded the NAACP a subversive organization, interlocked with several other socialist organizations, including the socialist party.[6]

In 1922, several communists (William Z. Foster, Scott Nearing, Robert W. Dunn, Benjamin Gitlow, Clarina Michelson) participated with socialists (Norman M. Thomas, Roger N. Baldwin, Morris L. Ernst, Freda Kirchwey, Lewis S. Gannett) in founding and staffing the American Fund for Public Service (commonly called the Garland Fund).[7, 8] This tax-exempt foundation was a major source of money for communist organizations, publications, and fronts.[9] Throughout the 1920's and 1930's, the Garland Fund gave and lent huge sums of money to the NAACP;[7, 8] but communists did not initiate efforts to infiltrate and control the NAACP until 1936.[8] By 1956, at least 77 top officials of the NAACP were known to agencies of the federal government as persons who participated in communist or pro-communist activities.[10] Here are a few NAACP officials known to have communist-front records:

Roy Wilkins (national administrator of NAACP)

Arthur B. Spingarn (president of NAACP)

Allan Knight Chalmers (listed in 1956 as national treasurer of NAACP)

Channing Tobias (head of the department of international justice and goodwill of the National Council of Churches)

A. Philip Randolph (vice president of the AFL-CIO, leader of the August, 1963, March on Washington)

Eric Johnston (deceased, former motion picture Czar, member of the Council on Foreign Relations)

Dr. Robert C. Weaver (vice president of NAACP, now Administrator of the Federal Housing and Home Finance Agency)

Lewis S. Gannett (retired editor of *The New York Herald-Tribune)*

Norman Cousins (editor of *The Saturday Review,* member of the Council on Foreign Relations)

Dr. Ralph Bunche (Under Secretary General of the United Nations)

Alfred Baker Lewis (insurance executive, former official of the socialist party, Committee on Political Education of the AFL-CIO)

Earl B. Dickerson (founder of the American Legion, past president of the American Bar Association and of the National Lawyers Guild)

Lloyd K. Garrison (vice-chairman of the American Civil Liberties Union, past president of the National Urban League, various government positions in the Roosevelt administration)

Morris L. Ernst (member of the Board of Directors of the American Civil Liberties Union, various positions in the Roosevelt and Truman administrations)

Thurgood Marshall (chief counsel of NAACP

until appointed a federal judge by President Kennedy)[10]

For many years, Walter White held the top position in the NAACP that Roy Wilkins now holds. White (who had a communist-front record)[8] often made anti-communist statements, for public relations purposes. Manning Johnson (a negro who was for years a communist party official) testified in 1957 concerning Walter White and the NAACP. Johnson said:

"Basically, Walter White was never against the Communists, because he joined with them in numerous Communist front movements . . . . while at the same time the Communists were actively infiltrating the organization from below . . . .

"Let us examine . . . some of these people who have been in the driver's seat in the NAACP. You have this peculiar combination. You have Negroes. You have white philanthropists. You have Communists, fellow-travelers, some eggheads, and idealists, and people who do not know what they want, combined with Socialists, and Trotskyites. The people most influential are the Socialistic elements inside the Executive Board of the NAACP. They are the ones who are screaming against the Communists, because they want to control the Negro movement for themselves . . . . So, it is a family quarrel between the Socialists, the Social-Democrats, the Trotskyites and the Communists — all of whom are concentrated in the organization itself . . . .

"But there is one thing they all have in common, and that is that their programs and policies are based upon the teachings of Karl Marx. The only difference between the Social-Democrats, the Communists and the Trotskyites, basically, is the question of strategy and tactics. The Socialists believe it can be done one way; the Communists believe it can be done another. So there is a conflict, and all of them are fighting over the poor Negro. They want to use him in their political plans . . . .

"I don't care whether it's the Socialism of the Socialists or the Social-Democrats, or the Socialism of the Trotskyites, or the Socialism of the Communists—they are all anti-American. They are basically anti-capitalism; they all seek in one form or another the destruction of the government of the United States . . . ."[8]

Personalities

The foremost personality in the civil rights movement is Dr. Martin Luther King. King is pastor of a Baptist Church in Montgomery, Alabama. He frequently speaks at important meetings of the National Council of Churches (of which he is a member), and at Protestant churches affiliated with the National Council. His associations with communists, communist-fronters, communist organizations, and moral degenerates are, however, notorious.

For about five years (approximately 1955 to 1960) Bayard Rustin was Martin Luther King's secretary. Bayard Rustin joined the Young Communist League at the City College of New York in 1936.[11] In the early 1940's, he was field secretary of the Congress of Racial Equality (CORE) and was race relations director of the Fellowship of Reconciliation[11] (an extremist pacifist organization). During World War II, Bayard Rustin was arrested, tried, and convicted as a draft-dodger. For this offense, he was sent to federal prison on March 7, 1944; discharged, June 11, 1946.[12]

On January 21, 1953, Rustin spoke to the American Association of University Women in Pasadena, California, on the subject of world peace. He was scheduled to speak on the same subject that evening to a group at the First Methodist Church in Pasadena, but went to jail instead. That night, Pasadena police arrested Rustin in a car with two other men, and charged him with "sex perversion" and "lewd vagrancy."[13] The next day (January 22, 1953), Rustin pleaded guilty to the charges and was sentenced to 60 days in the Los Angeles County jail.[14]

In February, 1957, Rustin was one of 11 "impartial observers" invited by communists to attend the 16th national convention of the communist party, USA. At the conclusion of the convention (February 12, 1957), Rustin joined communist officials in a communist-party policy statement which condemned the Senate Internal Security Subcommittee for subpoenaing Eugene Dennis (then communist party national secretary) to testify.[15]

In early 1958, Rustin went to the Soviet Union.[12] Shortly after his return, he organized Martin Luther King's 1958 "march on Washington"—which *The Worker* (communist party newspaper) called a communist party project.[12] Rustin was second in command of the bigger March on Washington, August 28, 1963, which Martin Luther King helped organize and direct.[11]

This ex-convict, bed-fellow of communists, and moral degenerate was Martin Luther King's right-hand man for about five years during the late 1950's, helping King organize, during that time, the Southern Christian Leadership Conference — which King has used as a front for staging many notorious activities, including the infamous boycotts and demonstrations in Alabama.

When King and Rustin separated (about 1960), King replaced Rustin with Hunter Pitts O'Dell, alias Jack H. O'Dell. As recently as June, 1963, O'Dell was in charge of Martin Luther King's SCLC office in New York. In 1961, O'Dell was elected to the national committee of the communist party, USA — a position given only to important communists who have served the party a long time.[16, 17]

Martin Luther King is a close friend, supporter, and associate of Anne Braden,[18] Carl Braden,[18] Aubrey W. Williams,[19] and Dr. James A. Dombrowski[19]— all identified members of the communist party;[18, 19] all serve (or have served) as officials of the Southern Conference Educational Fund, Inc.[19, 20] Concerning the Southern Conference Educational Fund (and Martin Luther King's connection with it), the Joint Legislative Committee on Un-American Activities of the State of Louisiana concluded (in a report published April 13, 1964):

"The evidence presented to us in the two hearings recorded in this report solidly confirms our prior findings that the Southern Conference Educational Fund is in fact a Communist Front and a Subversive Organization. The Southern Conference Educational Fund is managed and operated by Communists and has obvious multiple connections with other Communist Front organizations. It has openly supported many well-identified Communists and Communist causes. It has published and distributed Communist political propaganda written by and about well-identified Communists setting forth the Communist propaganda line. We reaffirm our previous findings regarding the Southern Conference Educational Fund and our conclusion that James A. Dombrowski, Executive Director of the SCEF, is and has long been, a 'concealed Communist.'

"The infiltration of the Communist Party into the so-called 'civil rights' movement through the SCEF is shocking and highly dangerous to this State and the nation. We do not suggest, nor do we believe, that everyone connected with the civil rights movement is a Communist. There are many sincere and well-meaning people involved in this cause. We do suggest and the evidence before us is quite conclusive, that the civil rights movement has been grossly and solidly infiltrated by the Communist Party . . . .

"The evidence before us shows clearly that Martin Luther King has very closely connected his organization, the Southern Christian Leadership Conference, with the SCEF and the Communist personalities managing the SCEF. This has been going on for some four and a half years. By thus connecting himself with the Communists, Martin Luther King has cynically betrayed his responsibilities as a Christian Minister and the political leader of a large number of people . . . .

"The Student Non-violent Coordinating Committee . . . is substantially under the influence of the Communist Party through the support and management given it by the Communists in the SCEF . . . . [and] is now getting strong financial aid from the SCEF . . . .

"The . . . Southern Christian Leadership Conference [Martin Luther King's organization] and the Student Non-violent Coordinating Committee are substantially under the control of the Communist Party through the influence of the Southern Conference Educational Fund and the Communists who manage it . . . ."[20]

The Southern Conference Educational Fund, Inc., also contributes money, and other support to (and has overlapping membership with) the Fair Play For Cuba Committee — the communist-front organization to which Lee Harvey Oswald belonged.[20] The Fair Play For Cuba Committee has similar interlocking connections with CORE (Congress of Racial Equality),[20, 21] which, in turn, has an interlock with NAACP.[22]

Martin Luther King is closely connected with

the notorious Highlander Folk School (now called Highlander Center). Myles Horton (district director of the communist party in Tennessee)[19] and Don West (district director of the communist party in North Carolina)[23] founded the Highlander Folk School at Monteagle, Tennessee.[20] In 1943, Horton and communist James Dombrowski incorporated the school under the laws of Tennessee.[20] The school served as an important meeting place and training ground for communist leaders. One significant communist meeting at Highlander Folk School was held on Labor Day, 1957. Five persons organized and directed the meeting: Myles Horton, Don West, Abner W. Berry, James Dombrowski (all officials of the communist party), and Martin Luther King.[24] The purpose of the meeting was to recruit new members for the National Association for the Advancement of Colored People (of which Martin Luther King is a life member[39]) and to lay plans for racial agitation and violent demonstrations throughout the South.[24]

After investigation by a committee of the Tennessee Legislature, the State of Tennessee (in 1961) revoked Highlander Folk School's charter of incorporation.[25] Communists changed the name to Highlander Center, and continued to operate the school as before (though now not incorporated), under management of Myles Horton.[26]

In March, 1963, the Internal Revenue Service gave this communist center federal tax exemption as an educational institution.[26] About the same time, it was revealed that the American Association of University Women had given a $3000.00 fellowship to Mrs. Myles Horton to complete her study on the Highlander Folk School as a "regional adult education center in the South."[26] The complex interlock between the communist party, church groups, unions, the American Civil Liberties Union, major civil rights agitation groups, and others is indicated by the following list of names of persons who are connected with the communist Highlander Center:

James L. Adams, Roger N. Baldwin, Dr. Viola W. Vernard, Dr. Algernon D. Black, Lloyd K. Garrison, Martin Luther King, Freda Kirchwey, Max Lerner, Reinhold Neibuhr, A. Philip Randolph, Jackie Robinson.[27]

Other Organizations

The Congress of Racial Equality (CORE) has, perhaps, directly instigated more racial violence and civil disobedience than any other civil rights group. Martin Luther King and his communist friends who held the Labor Day, 1957, meeting at the Highlander Folk School originated the idea of "freedom riders" — busloads of agitators traveling through southern states to violate local laws and provoke violence. Martin Luther King first tested the idea in Alabama; but the Congress of Racial Equality was in the forefront of the freedom riders' lawlessness and violence which plagued southern states during 1961. Many of the demonstrators whom CORE recruited for freedom-rider operations were arrested, and identified as communists.[21] Many were recruited from the Fair Play For Cuba Committee (Lee Harvey Oswald's outfit).[21] CORE was the leading agitation group which organized the riots that led to the death of a white Presbyterian minister in Cleveland, Ohio, on April 7, 1964 (and to a great deal more bloodshed and violence).[28] CORE also tried to organize a "stall-in" to cripple New York City on the opening day of the World's Fair this year.[29]

On May 25, 1961, United States Senator James O. Eastland (Democrat, Mississippi), Chairman of the Senate Judiciary Committee and the Internal Security Subcommittee, presented impressive documentation concerning the communist conspiracy and its relationship to the Congress of Racial Equality and the National Association for the Advancement of Colored People. His documentation was from files of the Senate Internal Security Subcommittee and the House Committee on Un-American Activities.[22] Senator Eastland concluded:

"From investigation and examination of the facts and records there can be little doubt, in my judgment, but that this group [CORE] is an arm of the Communist conspiracy. They are agents of worldwide communism, who sow strife and discord in this country . . . ."[22]

The interlock between communism, CORE, and

NAACP is indicated by the following list of names. All persons listed below are official members of CORE and of NAACP and also have communist-front records:

Roger N. Baldwin, Dr. Algernon D. Black, Allan Knight Chalmers, Earl B. Dickerson, Rabbi Roland B. Gittelsohn, Martin Luther King, A. Philip Randolph, Professor Ira DeA. Reid, Walter P. Reuther, Lillian Smith, Charles S. Zimmerman.[22, 40]

The National Council of Churches has become one of the most militant racial-agitation groups in the United States. Officials (or prominent members) of the National Council of Churches have been identified with most violent race riots and demonstrations in recent years. Officials of the National Council have been arrested for law violation in connection with racial demonstrations. The National Council of Churches lobbies for the pending Civil Rights Act of 1964 (in violation of federal tax laws which prohibit tax-exempt organizations from trying "to influence legislation") It even urges organized churches and individual church members to boycott business firms whose employment practices displease the National Council.[30]

At least 658 officials of the National Council of Churches have communist-front records — according to a 310-page book (listing names and records) published by Circuit Riders, Inc., 110 Government Place, Cincinnati 2, Ohio ($4.00). The interlock between communism, the National Council of Churches, and all other groups active in the civil rights movement can be seen in overlapping memberships. Some officials, or prominent members, of the National Council of Churches who have communist-front records, are also members of The National Association for the Advancement of Colored People, the American Civil Liberties Union, the Southern Christian Leadership Conference, the Southern Conference Educational Fund, the Student Non-Violent Coordinating Committee, the Congress of Racial Equality, the Southern Regional Council, or the Urban League. The interlock is intricate and multiple, but it is obvious.

The National Urban League was founded in 1910, incorporated in the State of New York in 1913. Among officials of the Urban League who are also officials of the NAACP with communist front records are Lloyd K. Garrison, Ira DeA. Reid, Walter P. Reuther, and Charles S. Zimmerman.[10, 22]

The American Civil Liberties Union (very influential in the civil rights movement) was founded in 1920 by Felix Frankfurter (member of the Council on Foreign Relations), by Dr. Harry F. Ward (notorious communist-fronter),[31] by Roger Baldwin (socialist with a communist-front record,[31] and by two well-known communists: William Z. Foster and Elizabeth Gurley Flynn.[32] Aubrey Williams, presently an official of the ACLU, has been identified as a communist.[19] Among other present ACLU officials whose names have been linked with communist-fronts or communist activities are:

Morris L. Ernst,[10] Lloyd K. Garrison,[10] Roger N. Baldwin,[31] Allan Knight Chalmers,[10] Melvyn Douglas,[31] Harry Emerson Fosdick,[31] J. Robert Oppenheimer,[33] A. Philip Randolph.[10]

I have no list of members and officials of the American Jewish Congress (another powerful force in the civil rights movement). Hence, I cannot say whether it is infiltrated by communists. The record shows, however, that Rabbi Stephen Wise was head of the American Jewish Congress for years. Before his death, he was associated with approximately 40 communist-fronts.[31] Israel Goldstein (head of the AJC for a brief period after Wise) had a communist-front record.[34] Rabbi Joachim Prinz,[34] present head of the AJC, has a communist-front record, and so does Will Maslow,[31] executive director of the American Jewish Congress. Maslow is also an official of CORE.[40]

Financing The Civil Rights Movement

All organizations participating in racial agitation which is called the civil rights movement

ily on contributions. In late 1962, Governor Nelson A. Rockefeller gave $10,000.00 to Martin Luther King's Southern Christian Leadership Conference.[35] The Southern Conference Educational Fund, the Garland Fund, and many other tax-exempt foundations pour money into the racial-agitation groups. For example, the Center for the Study of Democratic Institutions of the Fund for the Republic (founded on a multi-million dollar grant by the Ford Foundation) has given more than 2 million dollars to the NAACP, the National Urban League, the National Council of Churches, the Anti-Defamation League of B'nai B'rith, and the Southern Regional Council — for work in the field of "race relations."[36]

On May 14, 1964, the NAACP raised an estimated one million dollars in contributions, through a closed-circuit television program broadcast to theaters across the nation. Among Hollywood and TV personalities contributing their talents to the show:

Ed Sullivan, Sammy Davis, Jr., Lena Horn, Steve Allen, Elizabeth Taylor, Richard Burton, Duke Ellington, Harry Belafonte, Fredric March, Burt Lancaster, Gene Kelly, Edward G. Robinson, Agnes Moorehead, Nat "King" Cole, Richard Widmark, Tony Bennett.[37]

What To Do

Propaganda and pressures for civil rights legislation which will destroy constitutional government (while protecting no civil rights for anyone) can be offset by counterpressures on Congress. Before the people can take action which will sway Congress to save the Republic, they must know the truth about the so-called civil rights movement. This *Report* of last week ("Discrimination in Reverse") and others mentioned therein would be useful in the public education job that must be done.

With whatever tools you choose, by whatever means available, do your utmost to inform and activate other Americans. Otherwise, there is no hope.

FOOTNOTES

(1) AP dispatch from New York City, *The Dallas Morning News,* May 21, 1964, Section 1, p. 12

(2) AP story from Washington, *The Dallas Times Herald,* July 25, 1963, p. 6A

(3) AP story from Washington, *The Dallas Morning News,* April 22, 1964, Section 1, p. 2; *Strom Thurmond Reports to the People,* Vol. X, No. 15, April 27, 1964

(4) *The Negro People in American History,* by William Z. Foster, International Publishers, New York City, 1948, pp. 422-9

WHO IS DAN SMOOT?

Born in Missouri, reared in Texas, Dan Smoot went to SMU getting BA and MA degrees, 1938 and 1940. In 1941, he joined the faculty at Harvard as a Teaching Fellow, doing graduate work for a doctorate in American civilization. From 1942 to 1951, he was an FBI agent: three and a half years on communist investigations; two years on FBI headquarters staff; almost four years on general FBI cases in various places. He resigned from the FBI and, from 1951 to 1955, was commentator on national radio and television programs, giving *both* sides of controversial issues. In July, 1955, he started his present profit-supported, free-enterprise business: publishing *The Dan Smoot Report,* a weekly magazine available by subscription; and producing a weekly news-analysis radio and television broadcast, available for sponsorship by reputable business firms, as an advertising vehicle. The *Report* and broadcast give *one* side of important issues: the side that presents documented truth using the American Constitution as a yardstick. If you think Smoot's materials are effective against socialism and communism, you can help immensely—help get subcribers for the *Report,* commercial sponsors for the broadcast.

You can help educate and arouse the people who elect men responsible for harmful programs of government. When enough other Americans know and care as you do, political action to restore our Republic will come.

If *The Dan Smoot Report* was instrumental in bringing you to the point of asking what *you* can do about saving the country from mushrooming big government, here is a checklist for you: Have you urged others to subscribe to the *Report?* Have you sent them reprints of a particular issue of the *Report?* Have you shown them a Dan Smoot film? Have you ever suggested a Bound Volume of *The Dan Smoot Report* for use by speakers, debaters, students, writers? Have you read and passed on to others any of the Dan Smoot books — *The Invisible Government, The Hope Of The World, America's Promise?*

(5) "The Ugly Truth About The NAACP," speech by Attorney General Eugene Cook of Georgia, 1955

(6) "Chapter V: Propaganda Among Negroes," *Revolutionary Radicalism, Part One: Subversive Movements,* Report of the Joint Legislative Commitee of the State of New York Investigating Seditious Activities, J. B. Lyon Company, Albany, 1920, pp. 1476-1522

(7) *The American Fund for Public Service, Inc., Report for Four Years,* 1930-1934, *Summary of Twelve Years,* November, 1934

(8) *Subversion In Racial Unrest,* Public Hearings of the Joint Legislative Committee of the State of Louisiana, March, 1957, 370 pp., including testimony by former communist officials Joseph Z. Kornfeder, Manning Johnson, and Leonard Patterson

(9) *Guide to Subversive Organizations and Publications,* U. S. House of Representatives Document No. 398, 1962, pp. 21-2

(10) *Congressional Record,* February 23, 1956, pp. 2796-2849 (daily), containing House Committee on Un-American Activities documents on NAACP officials

(11) Article by Susanna McBee, *The Washington Post,* August 11, 1963

(12) Series of syndicated articles by Frank van der Linden, *The Nashville Banner,* July 26, 27, 28, 1963

(13) *The Los Angeles Times,* January 22, 1953

(14) *The Los Angeles Times,* January 23, 1953

(15) "Statement of Observers," *Proceedings (abridged) of the 16th National Convention of the Communist Party, U. S. A.,* 1957, pp. 349-50

(16) "Dr. King's United Front," *The Richmond News Leader,* September 27, 1963

(17) *Structure and Organization of the Communist Party of the United States: Part I,* U. S. House Committee on Un-American Activities, 1962, pp. 575-6

(18) *The National Program Letter,* National Education Program, Searcy, Ark., February, 1955

(19) *Southern Conference Educational Fund, Inc.,* Hearings and Report, U. S. Senate Internal Security Subcommittee of the Judiciary Committee, March, 1954, 168 pp.

(20) *Report No.* 4 and *Report No.* 5, "Activities of the Southern Conference Educational Fund, Inc. in Louisiana," The Joint Legislative Committee on Un-American Activities, State of Louisiana, November, 1963, and April, 1964

(21) "Communists Identified Among Freedom Riders," by Fulton Lewis, Jr., *Human Events,* September 22, 1961, p. 633

(22) "Activities in the Southern States," speech by U. S. Senator James O. Eastland (Dem., Miss.) containing official documents from the Senate Internal Security Subcommittee and House Committee on Un-American Activities, *Congressional Record,* May 25, 1961, pp. 8349-63 (daily) 8956-70 (bound)

(23) *Testimony of Paul [redacted]ch,* Hearings before the U. S. House Committee on Un-American Activities, May 6, 1949, pp. 187-220

(24) *Highlander Folk School,* Georgia Commission on Education, Governor Marvin Griffin, chairman, 1957

(25) Special from Washington, *The News and Courier,* Charleston, S.C., October 10, 1961, p. 7A

(26) "US Labels Highlander Tax Exempt," *The Knoxville Journal,* April 2, 1963, p. 11

(27) List of officials from letterhead of Highlander Center, 1625 Riverside Drive, Knoxville 15, Tenn., dated May 15, 1963

(28) UPI story from Cleveland, *The Dallas Times Herald,* April 21, 1964, p. 4A; UPI story from Cleveland, *The Dallas Morning News,* April 8, 1964, Section 1, p. 1

(29) "Five Angry Men Speak Their Minds," by Gertrude Samuels, *The New York Times Magazine,* May 17, 1964, pp. 14, 110-1

(30) For a discussion of the National Council of Churches, see this *Report,* "National Council of Churches," January 13, 1964.

(31) *Investigation of Un-American Propaganda Activities in the United States: Appendix—Part IX: Communist Front Organizations, Special House Committee on Un-American Activities, 1944.* This old HCUA 3-volume, 1895-page publication is now reprinted and available from Poor Richard's Book Shop, 5403 Hollywood Blvd., Los Angeles, Calif. 90027, price: $29.90.

(32) *Revolutionary Radicalism, Part One: Subversive Movements,* Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, J. B. Lyon Company, Albany, 1920, pp. 1083-1102, 1979-90

(33) "The Oppenheimer Security Case of 1954 and the Oppenheimer Fermi Award of 1963," speech by U. S. Representative Craig Hosmer (Rep., Calif.), including findings of the Gray Board and Atomic Energy Commission, *Congressional Record,* July 11, 1963, pp. A4346-7 (daily)

(34) *42% of the Unitarian Clergymen and 450 Rabbis, A Compilation of Public Records,* Circuit Riders, Inc., 110 Government Place, Cincinnati 2, Ohio, January, 1961, 310 pp., price: $5.00

(35) "We're Ready to Build," by Jackie Robinson, *SCLC Newsletter,* Vol. 1, No. 8, December, 1962, pp. 1, 3

(36) "The Record, the Program, and the Prospects of the Fund for the Republic and its Center for the Study of Democratic Institutions," *Bulletin, Center for the Study of Democratic Institutions,* November, 1963

(37) *The Dallas Times Herald,* May 15, 1964, p. 3C

(38) "Senator Hails Communist," by Fulton Lewis, Jr., *The Shreveport Journal,* March 4, 1964; *The Worker,* February 16, 1964, p. 12

(39) "Fighting Pastor, Martin Luther King," by Ted Poston, *The New York Post,* April 10, 1957, pp. 4, 65

(40) Letterhead, Congress of Racial Equality, 38 Park Row, New York 38, New York, signed by Harry Belafonte, circa 1961

16 September 1964

Honorable John Stennis
United States Senate
Washington, D. C.

Dear Senator:

This refers to your inquiry to me about our investigation of a complaint against Sheriff Albert C. Blair of Tate County, Mississippi, arising from an episode on July 17, 1964.

We are not presently pursuing this matter beyond the preliminary investigation which has already been conducted. I think you should be aware, however, that in my view we nevertheless have a continuing obligation to follow developments closely in Tate County for three reasons: (1) none of the 2,989 Negroes over 21 is registered; (2) our information is that there exists a high level of fear as to the reaction of local officials and private citizens should Negroes apply to vote; and (3) we have received complaints that Sheriff Blair and other law enforcement officers have followed voter registration workers in the county, for no apparent reason, but with the effect of intimidating local Negroes.

Very truly yours,

Burke Marshall
Assistant Attorney General
Civil Rights Division

OCT 22 1963

Honorable John Sparkman
United States Senate
Washington, D. C.

Dear Senator:

In response to your call concerning reports that vehicles rented by the Department of Justice were used to transport Reverend Martin Luther King, Jr., around Alabama, we have this afternoon issued the following statement. I think that it will completely answer your inquiry. Of course, any effort at all by Sheriff Clark or Governor Wallace to ascertain the true facts would have made these false reports unnecessary in the first place.

> The reports that automobiles rented by the Department of Justice were used to furnish transportation for Reverend Martin Luther King in Alabama are either a gross mistake or a deliberate attempt to mislead the people of Alabama.
>
> We are setting forth all the facts so that there can be no misunderstanding although we issued a complete denial on Wednesday.
>
> Attorneys for the Department of Justice on duty in Alabama and elsewhere in the United States frequently rent automobiles. In recent weeks, Department attorneys have rented two automobiles in Alabama -- one a 1963 blue Chevrolet Impala and the other a 1964 white Ford Galaxie.

It has been reported that the 1963 Chevrolet was used to take Reverend King from Birmingham to Selma on October 15. This car had been rented by Kenneth McIntyre, a Department attorney, but was being used by Thelton Henderson, another Justice Department attorney.

At about 5:15 p.m. on October 15, Mr. Henderson went to the Gaston Hotel to interview Reverend King at the specific direction of the Department of Justice. At that time Dr. King was at a meeting at the Gaston Hotel. When Dr. King came out of the meeting, Mr. Henderson asked to speak to him. Dr. King replied that he was late and had to go immediately to the New Pilgrim Church in Birmingham. Henderson offered to drive him there if he could interview him on the way and Dr. King agreed. Henderson left the Gaston Hotel at 5:30 p.m. and let Dr. King off at the New Pilgrim Church at 5:40 p.m. Henderson then returned to the Gaston Hotel. The Chevrolet never left Birmingham that night.

We have learned that Reverend King was driven to Selma in a Chevrolet similar to the one rented by the Department of Justice. However, it was a privately-owned vehicle and was not the one used by Mr. Henderson.

It has been reported that later on October 15, Reverend King was driven from Selma to Montgomery in the 1964 Ford which also was rented by Mr. McIntyre. Mr. McIntyre rented the Ford in Montgomery at 8:41 p.m. on October 15 and drove to Craig Air Force Base near Selma, checking into the Base at 9:35 p.m. Thereafter, neither

Mr. McIntyre nor the Ford left Craig Air Force Base that night. Mr. McIntyre does not know Reverend King and has never met him. The Ford remained overnight in Selma and the following morning John Doar, First Assistant Attorney General in charge of the Civil Rights Division, drove the Ford to Tuskegee and then back to Montgomery. We have been informed that Reverend King drove from Selma to Montgomery in a privately-owned Cadillac.

It is obvious from these facts that neither the Chevrolet nor the Ford, nor any other car rented by the Department of Justice, was used to transport Reverend King. The reports to the contrary are false. Any efforts to ascertain the truth would have revealed these facts.

Very truly yours,

ROBERT F. KENNEDY

Attorney General

Congressional

June 14, 1963

Honorable Stephen M. Young
United States Senate
Washington, D.C.

Dear Senator Young:

I have your letter of June 8, 1963, inquiring about the reported use of civil defense personnel during the recent disturbance in Birmingham, Alabama.

According to information I have received, members of a local volunteer civil defense unit participated to some extent in the quelling of the riot which resulted after the two bombings in Birmingham on the night of May 11, 1963. The members of that unit were all Negroes and, reportedly, were unarmed and participated only to the extent of trying to persuade the Negro rioters to cease the violence and go home. I have received no reports of any violence, brutality or other mistreatment on the part of the civil defense personnel who were present.

I hope this information will be helpful to you.

Sincerely,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

DEPARTMENT OF JUSTICE

ROUTE SLIP

	NAME	BUILDING AND ROOM
1.	Gerald Jones	
2.		
3.		
4.		
5.		

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

Can you prepare a draft reply?

FROM

NAME	BUILDING, ROOM, EXT.	DATE
L. Jones		6/11/63

United States Senate

COMMITTEE ON ARMED SERVICES

June 8, 1963

Hon. Burke Marshall
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Dear Mr. Marshall:

It has been reported to me that paid civil defense employees and local civil defense volunteers were deputized by the municipal authorities in Birmingham, Alabama, during the recent racial disturbances in that city. Forthermore, am told that civil defense equipment was used by local authorities at that time.

Would appreciate your looking into this matter and informing me without delay as to the basis for these reports.

It is alleged that these fellows were wearing civil defense arm bands when they participated in operations against demonstrators.

What are the facts?

With best regards.

Sincerely yours,

Stephen M. Young

Stephen M. Young

Y/l

MENT PARTMENT OF JUSTICE

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TO : Assistant Attorney General
Civil Rights Division

DATE:

FROM : John Doar
First Assistant
Civil Rights Division

SUBJECT:

As I told you this morning, there are eight cases that I would like to file before the Attorney General leaves. These eight cases are the following:

A. Voting Cases

1. U. S. v. _____, Chickasaw County, Northern District of Mississippi

2. U. S. v. Mathis, Benton County, Northern District of Mississippi

3. U. S. v. Mikel, Marion County, Southern District of Mississippi

4. U. S. v. Hosey, Jasper County, Southern District of Mississippi

Bob Owen and I have concluded that we should ask for three-judge courts in the Southern District of Mississippi. Judge Cox has made repeated statements in the case now being tried before him involving registration in Madison County, which reflect the difficulties that we are going to continue to have with him. For example, he referred to one of Schwelb's arguments as trivial and said at another time that he would never make the registrars violate state law regardless of what other courts did.

In the Holmes County case which is pending and which there are three-judges, we have moved expeditiously and have gotten more with greater ease by way of pre-trial discovery than we would have gotten from a single judge.

If you agree with this, I will have LaValle change the prayer of the complaints so that it conforms to our request in the Holmes County case and also have her prepare a request for a three-judge court similar to our request in the Holmes County case.

Attached are the justification memoranda and the complaints for your signature.

B. Public Accommodations Cases

1. U. S. v. City of King and Anderson, Inc., et al.

This is a suit against three hotel-motels in Clarksdale, as well as the restaurants located on the premises. Clarksdale will be a community where we might get help from the Community Relations Service. I agree with Mr. Barret's memorandum, that we should not ask for a three-judge court, nor should we move quickly for a preliminary injunction. The complaint and justification memorandum is attached for your signature. I have told Mr. Barrett either his name or my name should be on all complaints so that you will know that we assume the responsibility for the accuracy of the pleadings and for the conformity of the complaints to the standards both as to substance and form which we have established. After the complaints are filed, then the attorney or attorneys who handle the case will sign all the pleadings.

We also have a problem with respect to the police chief in Clarksdale as is evidenced by the memorandum of Jones to Murphy and Murphy to me, of July 30 and 31. Jones' memorandum recommends a conference with Collins regarding his unlawful arrest and I would think that this should be done by the attorney who handles the public accommodation case. I would favor Mr. Barrett being on this case with one or two of the young attorneys and taking charge of any mediation conference with Collins.

2. U. S. v. Paramount Theater in Greenwood

This complaint is being prepared but we are having difficulty establishing the exact ownership of the theater. I have a conference scheduled this afternoon on this.

3. U. S. v. _____ Restaurants, Selma, Ala.

This complaint is being prepared. I think we should ask for a three-judge court because of Judge Thomas.

C. Interference Cases

1. U. S. v. Clark

This case involves public officials' interference with both the enjoyment of rights under the public accommodation section and under the voting section.

2. U. S. v. City Officials of Greenwood

This complaint is being prepared and it may well involve some private officials too. The situation in Greenwood is very difficult because of the flagrant disrespect for law which is displayed by Beckwith and his friends and plus their potential for violence.

Form No. DJ-96a
(Rev. 7-17-63)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. Mr. Burke Marshal	Civil Rights	Main	1143
2.			
3.			
4.			

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

Letter of resignation of Deputy Marshal Thompson after the appointment of Arthur Worthy. Pass on to John Doar after reading.

To Mr. Marshall

John Doar

FROM: NAME	BUILDING, ROOM, EXT.	DATE
James J. P. McShane	Main/4217/2127	8/3/64

3328 Ridgefield Drive
Montgomery, Alabama
July 31, 1964

Mr. William M. Parker, Jr.
United States Marshal
Montgomery, Alabama

It has become increasingly obvious that the Johnson Administration, the Justice Department, and the Federal Judiciary have no regard for the rights of white Southerners in general, and Alabamians in particular. Therefore, I must in good conscience disassociate myself from them. Through every device available to man, the present administration, in collusion and conspiracy with the Federal Courts, seems determined to force ITS WILL, often inconsistent with good government, down the windpipe of every American, starting first with white Southerners and all others who believe in, and stand for, constitutional government.

I call your attention specifically to the appointment of your newest Deputy United States Marshal for the Middle District of Alabama, Arthur G. Worthy, who is a Negro. On the excuse of an Executive Order signed by President Kennedy, beyond his constitutional power, and kept in force by President Johnson, the Justice Department has taken over the historic right of the Marshal of each District and the Senators of the several states, to nominate and make appointments to the positions of Deputy United States Marshal, to a disturbing degree. They have created a double set of files for applications. One set of applications to be maintained by the Marshal (with elaborate instructions in the U. S. Marshal's manual, as to the care, handling, and the priority of these applications) and the other maintained by the Justice Department in Washington that knows no priority, obviously maintained with great secrecy, and apparently, solely for the benefit of Negroes. In so many words, while the Negroes are demonstrating, rioting, looting, and proclaiming themselves to be "second-class" citizens, they have actually become "Super-Citizens" in the eyes of the Justice Department and the present administration.

All of this, I might add, has been accomplished, without a single public word of protest from Senators Hill and Sparkman of Alabama, who have not represented Alabama, but their own interests for too many years. We have been left "hanging on the ropes" to be battered unmercifully by the Federal

Courts, in active concert with the Johnson Administration, without so much as raising a hand in our defense, much less taking a positive public stand. In this connection, the only time I have heard either Hill or Sparkman's names mentioned in the three years I have been a Deputy Marshal, was during the floor fight in Congress on the civil rights act. Even though they did participate in the filibuster, does it not seem strange that these two men, who are supposedly men of "action", "great leaders" in the Senate, and men who are supposed to head powerful committees, could not muster enough respect and reason with a minority of their colleagues to defeat cloture, particularly when only a handful more votes would have defeated the measure? These two "great men" of the Senate, for all their alleged wisdom, influence, etc., have failed to even slow up, much less halt the forced or coerced hiring of a Negro Deputy in Montgomery, at a time and in an area where his very presence in such a capacityiss a threat to peace and good will. If this sounds like an irratioanl or unwise statement, consider, if you will, the psychological impact upon a white woman convicted of a federal offense, if she is to be transported by a Negro Deputy with a Negro female guard on the two or two and one-half day trip to Alderson, West Virginia. Consider, if you will, the tremendous amount of ill-will and hatred that could be generated by arrest of or transportation of white prisoners by a Negro Deputy Marshal? Consider, if you will, the hatred that could be generated in the states we most normally travel from this district, by intrusions upon private properties as an "integrated" pair of federal officers, as is most assuredly going to be the case in the field of public accommodations.

And, while we here at home are laboring with these and a thousand other problems, our team of "Silent Senators", this valiant and courageous "first line of defense", has not uttered the first public word of protest. Senator Sparkman could not be reached; and Senator Hill was so engrossed in the wonders of the World's Fair in New York, that he proved to be almost inaccessible. Even when reached, he might as well have been lost, for all the help that he offered. Our "Silent Senators" have betrayed us in Washington by their inactivity, inaccessibility, and incapability, as surely as Judas Iscariot betrayed God's Son, and by means no less despicable and devious.

Before the question is raised of how all this effects me, since the Negro was appointed to fill an already existing vacancy, and not mine? Simply this. I cannot too strenuously object to the manner in which his application was handled (secretly, in Washington), the fact that he was hired in preference and by jumping priority over ten (10) white applicants (as far as we know), which constitutes discrimination in reverse against the white applicants, who had filed their applications in accordance with instructions

in the Marshal's manual, not knowing about the list in Washington, plus the fact that he was hired by Washington directly and assigned to this district over the sound and reasonable pleading of us all for reconsideration.

It would be grossly unfair of me to remain in the service and be a malcontent. I must fight for constitutional government the best way I can, and offer my services, however humble, to all those who fight to preserve to this country that form of government to which we have heretofore been dedicated.

There was a time when I felt that my presence within the Justice Department, the fact that there was a Deputy Marshal who shared the views of constitutional government, historically defended by our leaders, might at least serve as a bridge of understanding, and a liaison between Federal and State officials. However, it has now become apparent, even to the unpracticed eye, that the present central government in Washington, in its overwhelming quest for power wants neither liaison, nor bridges of understanding. Their only obvious interest is in power and absolute control, in a monolithic state.

I have witnessed the almost continual harassment of State, City, and County officials, as well as private citizens, endlessly bombarded with vicious and vindictive injunctions and court orders. I have been ordered out to serve such processes at unreasonable hours of the evening and night on constitutional officials and duly elected representatives of the people, despite my personal pleas for the opportunity to serve them at a more reasonable time or place. So despicable has the practice become, that Washington has in many instances gone to the length of importing deputy marshals from districts outside Alabama to execute what would be an otherwise routine duty.

For these, and other reasons too numerous to mention, I find I must, in order to keep faith with myself, my family, my state, and my country, resign from my position as Deputy United States Marshal for the Middle District of Alabama, regardless of personal sacrifice. Our heavily centralized government in Washington is now about to embark upon a new and dangerous intrusion into the field of private enterprise, and will, no doubt, enter that field with a zeal that would win the undying admiration of Khrushchev, for control of private enterprise is a key step toward absolute authority and control. I cannot willingly allow myself to further or advance such a cause, either by action, or inaction.

I must say, finally, that I have yet great faith in the American public, and no matter how dark the path may seem, at the moment, final authority and

judgment rests with the people and the power of their vote. There is a rumbling in the distance now that bespeaks of the rising tide of dissatisfaction with the present trends of our national government. It is my firm belief that this great tide will sweep away those in office who have been stripped of their wits and reason by an insane lust for power, and restore this nation to its proper balance. When that day comes, I will, with great pleasure, serve my country in an official capacity, if called upon to do so.

Charles E. Thompson

Charles E. Thompson

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C.

EXECUTIVE OFFICE FOR
UNITED STATES MARSHALS

August 3, 1964

Honorable Burke Marshall
Assistant Attorney General
Room 1145
Civil Rights Division

Dear Burke:

I thought you might find it of interest to know that Arthur G. Worthy was appointed as a deputy United States marshal for the Middle District of Alabama (Montgomery) on August 3, 1964, at 10:00 a.m.

With warmest personal regards,

Sincerely,

James J. P. McShane
Chief, Executive Office for
United States Marshals

NATIONAL BROADCASTING COMPANY, INC.
A SERVICE OF RADIO CORPORATION OF AMERICA
RCA Building, Radio City, New York 20, N.Y.
CIRCLE 7-8300

August 3, 1964

Dear Linda:

Thanks very much for giving me Mr. Diggins' name. I've got a suspicion I'll be looking for a friendly face down there, and I'm grateful to have one before I go. It was good seeing you again.

Cordially,

George

Creative Projects Division
Room 780-B

Miss Linda Stores
care of Mr. Burke Marshall
Assistant Attorney General
Department of Justice
Washington, D. C.

FROM

OFFICE OF LEGAL COUNSEL

TO

OFFICIAL INDICATED BELOW BY CHECK

The Attorney General		Memorandum
Executive Assistant		
Public Information		
The Solicitor General		
Deputy Attorney General		
Administrative Assistant Attorney General		
Assistant Attorney General, Antitrust		
Assistant Attorney General, Civil		
Assistant Attorney General, Civil Rights		
Assistant Attorney General, Criminal		
Assistant Attorney General, Internal Security.....		
Assistant Attorney General, Lands		
Assistant Attorney General, Tax		
Director, Federal Bureau of Investigation		
Commissioner, Immigration and Naturalization Service		
Board of Immigration Appeals.....		
Director, Bureau of Prisons		
Board of Parole		
Pardon Attorney		

144-016:rsn

cc: Files
Asst. Atty. Gen. Marshall
(Civil Rights)
Schlei
Marcuse
Copeland

Mr. Howard W. Rogerson
Acting Staff Director
Commission on Civil Rights
Washington, D. C. 20425

Dear Mr. Rogerson:

This is in reply to your letter of July 13, 1964, inquiring whether the Civil Rights Commission has authority to respond affirmatively to a request of Justice Thompson of the Supreme Court of Nevada to file an amicus curiae brief in a case involving, among other things, the constitutionality of Nevada legislation establishing a State Equal Rights Commission.

An examination of the Civil Rights Act of 1957, 71 Stat. 634, upon which the authority of your Commission rests, and of its legislative history discloses a Congressional purpose to restrict the jurisdiction of the Commission to the functions of investigating and reporting and to entrust to the Department of Justice the responsibility for the conduct of, and participation in, litigation. This statutory pattern is in conformity with 5 U.S.C. 306, 309, and 310 and with Executive Order No. 6166 of June 10, 1933, section 5, 5 U.S.C. 124-132, Note, pursuant to which the function of conducting litigation in which the United States is interested is primarily vested in the Attorney General. It therefore would appear that the Civil Rights Commission does not have any statutory authority to comply with Justice Thompson's request to file an amicus curiae brief.

In the light of the foregoing, we suggest that you reply to Justice Thompson substantially as indicated in the enclosed draft letter.

Sincerely,

Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel

Enclosure

LETTER TO JUSTICE GORDON THOMPSON
SUPREME COURT OF NEVADA

Dear Justice Thompson:

This is in reply to your letter of July 6, 1964, in which you invite the United States Commission on Civil Rights or the Department of Justice to file an amicus curiae brief in the case of Bailey v. Smith, No. 4766, now pending before your Court. I regret that the Commission cannot comply with your suggestion because it lacks the statutory authority to conduct, or participate in, litigation.

I have, however, transmitted your letter to Assistant Attorney General Burke Marshall, who heads the Civil Rights Division of the Department of Justice. Mr. Marshall has informed me that, if time still permits, he would appreciate it if you would be good enough to send him copies of the decision below and the briefs already filed in the Bailey case so that the Department of Justice can determine whether it would be appropriate for it to file an amicus brief in the case.

Sincerely,

LAW OFFICES OF

COBOURN, YAGER, SMITH & FALVEY

7TH FLOOR TOLEDO TRUST BUILDING

TOLEDO, OHIO 43604

FRANK M. COBOURN
JOSEPH A. YAGER (1962
FRED A. SMITH
JAMES P. FALVEY
VERNON E. ROHRBACHER
ROBERT W. GIBSON
EDWARD A. M NEILL
HENRY W. GORANSON
DAVID W. CARROLL
CAROLYN J. M NEILL
MARY K. HAMILTON
JOSEPH P. ORDAN

LELAND H. NOTNAGEL 1958)

RADIO & CABLE ADDRESS
COBOURN" TOLEDO OHIO

TELEPHONE
AREA CODE 419
243-5252

August 3, 1964

Mr. Burke Marshall
Department of Justice
Washington 25, D. C.

Dear Mr. Marshall:

The trade name may be registered in the United States Patent Office.

Yours very truly,

James P. Falvey

JPF;js
Enclosure
8000

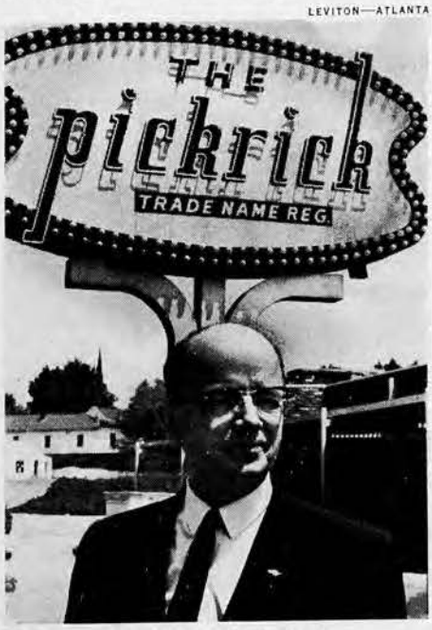
THE COURTS

The Pickrick Capers

The most vociferously disputed part of the new federal Civil Rights Act concerns the public accommodations title. It is based on the Constitution's commerce clause and says, in effect, that any public place of business that relates in any way to interstate commerce may not discriminate against Negroes. Last week the public accommodations title got its first major test in a federal court, and it passed handsomely.

The argument was heard before a three-judge panel in Atlanta, where Government attorneys sought injunctions against two local establishments,

LEVITON—ATLANTA



RESTAURATEUR MADDOX
Food is inescapably interstate.

the Heart of Atlanta Motel, and the Pickrick restaurant, a fried-chicken emporium. It was at the Pickrick, on the day after President Johnson signed the civil rights bill into law, that Owner Lester Maddox ordered three Negro ministerial students away from the place at gunpoint.

The two cases were tried at the same time, but it was the Pickrick caper that drew the greatest interest.

Surprise. Maddox's lawyers argued that it is unconstitutional to anchor the public accommodations title to the commerce clause. Furthermore, they reasoned, while Pickrick does discriminate against Negroes, the restaurant's policy legally does not have anything to do with interstate commerce, as specified in the bill. Even Pickrick's food, though it "once moved" in interstate commerce, is purchased nowadays from local wholesale brokers, the lawyers insisted, and thus is no longer an interstate transaction.

Moreover, Pickrick does not solicit business from interstate travelers, does not advertise in out-of-state publications, is not recommended by any motor associations or national groups (such as Duncan Hines). Said Pickrick Attorney William McRae: "The power of the Congress under the commerce clause has been almost as broad as the plan of Salvation. If you can compel a restaurant owner to sell to whoever calls on him, you can compel him to buy 10% of his food from a company owned by Negroes." Added McRae, in what surely must be one of the most surprising statements ever offered before a federal court: "A fellow eats some food at the Pickrick and then evacuates it, and it'll go into the Chattahoochee River [separating Georgia and Alabama] as waste, and there's no more commerce in that than there is in the food coming to the Pickrick in the first place."

Justice Department Lawyers Burke Marshall and St. John Barrett brought in 27 witnesses to testify that Pickrick is indeed involved in business on an interstate scale. Half a dozen surveys of Pickrick's parking lot showed that 2% or 3% of the cars parked there carried out-of-state plates. The Government also showed that Pickrick perforce depends on foods that flow through interstate commerce. Maddox's fish comes from Virginia's and Florida's coasts, his braunschweiger and beef ribs from Iowa, his catchup from California, his green beans from Oregon, his Tabasco sauce from Louisiana, his lettuce from Texas, his hams and bologna from Tennessee.

The Limit. His headaches will now come from Washington—wholesale. In a 15-page ruling, the judges did not decide on the constitutionality of the civil rights law itself, but granted temporary injunctions—requiring the defendants to admit Negroes within 20 days—based solely on the question of whether Congress had the right to employ the commerce clause in writing the public accommodations title. "This is the limit of the case," wrote the judges. "Congress has the right to go this far."

Predictably, the Heart of Atlanta Motel and Pickrick will take the cases to the U.S. Supreme Court. Vowed Pickrick's Maddox: "I'm not going to integrate. I've made my pledge. They won't ever get any of that chicken!"

Other legal skirmishes along the civil rights front:

▶ The FBI in Greenwood, Miss., made its first arrests on the basis of the new civil rights law. Three white men were picked up on the complaint of a Negro who accused them of beating him up after he disregarded their threats and attended a whites-only movie.

▶ The Rev. Martin Luther King's Southern Christian Leadership Conference discovered that 22 out of 25 public places in the South that had desegregated their facilities after the civil rights law was passed, have since reverted and closed their doors to Negroes.

puters and office machines and is also having difficulties, is anxious for the same sort of help. Preparing to extend it, G.E. seemed likely to accomplish more by its two bits of bargaining than it had managed in two years of independent marketing in Europe.

WEST GERMANY

The Union Banker

The Marxist origins of Germany's labor movement long made it unthinkable for unions to support or even condone capitalism. Then postwar prosperity, bulging union coffers, and "co-determination" laws—which placed union leaders on corporate boards—gradually converted labor into an eager partner in the German economy. Trade unions today own Germany's biggest housing construction company, and share with cooperatives ownership of its second-ranked deep-sea fishery and the largest cut-rate life insurance company in Europe. Labor's proudest possession is one of the world's few union-owned banks, the Frankfurt-based Bank für Gemeinwirtschaft, which lately has been engaged in the highly capitalistic practice of gobbling up competitors: it has just bought control of Cologne's Bau- und Handelsbank and Frankfurt's Investitions- und Handelsbank.

Unorthodox but Rewarding. Trade unions and consumer cooperatives founded six small banks in 1948 and 1950, merged them to form B.F.G. in 1958, and still hold all of its stock. The bank avoids the natural inclination to restrict its business to union finances and interests, aggressively competes with traditional banks for commercial and industrial customers. Union and cooperative funds, which once constituted half of its deposits and credits, today account for only 18% of deposits and 15% of credits. The bank's assets have grown to nearly $1 billion, making it Germany's fourth largest bank. Some of this rapid growth has occurred just because of B.F.G.'s proletarian background. Union officials sitting on corporate boards have provided the combination for getting many industrial accounts into the vaults, and much of the bank's foreign business has been initiated through union contacts all over the free world.

The instinctive desire of a union bank for full employment has led B.F.G. into several unorthodox but rewarding transactions. While most other banks stood aside, B.F.G. last year purchased several companies left insolvent in the collapse of the Hugo Stinnes industrial empire (TIME, Oct. 18, 1963), is keeping them in operation until they can be resold. When the owner of a huge Nürnberg photographic mail-order house was arrested recently on suspicion of tax fraud, B.F.G. saved his company by putting up more than $2,000,000 to bail him out. By such ventures, the bank has preserved thousands of jobs, also reaped dividends of good will and new accou... man business community.

Considerate in a Way. B.F... proprietorship is symbolized board of supervisors, which is he... by German Trade Union Federati... Boss Ludwig Rosenberg, 61, one of the few Jews now in high positions in Germany, and studded with the names of other labor leaders. The bank is actually run by easygoing President Walter Hesselbach, a professional banker who has never worn a blue collar, usually arrives at work an hour late "so that I don't disturb my colleagues in their morning chat and coffee hour." Such considerate treatment by Hesselbach extends only to his employees. B.F.G.'s hard-pressed competitors have learned that they cannot bank on it.

BRITAIN

Flying Under Pressure

To the despair of British taxpayers, government-owned British Overseas Airways Corp. seems unable to decide whether it should be a profit-making enterprise or a showcase for the country's

BOAC'S GUTHRIE

After three aircraft types, four chairme

aircraft industry. Until 1963, when it turned a $16.8 million profit, BOAC had flown in the red since 1959. Last week it found itself in the center of some political turbulence that is almost certain to cause it further financial trouble. Criticizing the airline's management, Labor M.P. Roy Jenkins summed up BOAC's unhappy times: "The trouble started three aircraft types, four chairmen, five ministers of aviation and 80 million pounds of deficit ago."

The Plane Drain. That goes back to 1954, when BOAC's bid for competitive leadership in the jet age went down after a series of crashes of its much-touted Comet-1 jetliner. With all the Comets grounded as unsafe until 1958, BOAC concentrated on Britannia turboprops, at the government's insistence buying only British planes. By the time the Britannias were flying the all-important North Atlantic run in 1958, competing airlines had already taken off in the bigger, faster, U.S.-made long-range pure jets. Eventually BOAC got

KING FEATURES SYNDICATE

235 East 45th Street

New York, N. Y.

August 4, 1964

Mr. Harry B. Ayers
Assistant to the Publisher
The Anniston Star
P. O. Box 189
Anniston, Alabama

Dear Mr. Ayers:

Enclosed is a copy of a letter I received today from Walter Winchell regarding the item which appeared in his column on June 29. You will note that he sent a copy of it to J. Edgar Hoover and to the FBI in Los Angeles.

I know you will be interested in the background of the item in question.

Sincerely yours,

E. B. Thompson

ebt:eb
enc.
cc:Mr. Burke Marshall ✓
Ass't. Attorney General
Dep't. of Justice
Washington, D. C.

Ambassador Hotel
Los Angeles, Calif.
July 31, 1964

B. Thompson
ng Features Syndicate
235 East 45 Street
New York, New York

Dear Tommy:

Sorry for the delay in answering your letter of July 21 about Willie Smith and The Anniston Star. I have been jumping up and down the West Coast between San Francisco and San Diego. Would you please send copies of this letter to Burke Marshall, assistant U. S. Attorney General for Civil Rights and to the editor of The Anniston Star?

The letter from the Anniston newspaper about the Willie Smith fire story surprised me no little because Smith confirmed my copy before I filed it.

In the Angels' dressing room I said: "Willie, I am a reporter. My name is Winchell. Please look at this story and tell me if there is any syllable in it that is not accurate". Willie said: "It's all true". I then took him to the nearest FBI office (Los Angeles) where he repeated his story plus other things. He was interviewed again by a pair of other FBI agents three hours later in his hotel room.

When I went over the story with Willie again, he interrupted me twice to say: "The house was not an expensive one--it was very cheap. It was not yet ready for us to live in. We didn't even have enough furniture ready to live in it." I said: "But wasn't the house burned to the ground?" Willie replied, "Yes". I said: "Did any police of Anniston come to see your family and ask any questions about it?" "No", he replied, "you are the only one to ask me anything about it".

I then asked Smith to clarify something. At the FBI office (and in his dressing room) he said his wife knew the house was burned by whites. He told me his family wasn't home at the time of the fire--but were visiting or living with her mother. "How did your wife know the house was burned by whites?" I asked him.

Willie explained: "When my wife went to the scene she saw many beer cans where the stoop had been. She assumed it was done by 'segregationists'."

I asked Willie if this was the first time he had had trouble in his home town with anyone. "No," he replied, "I have had my troubles down there with both blacks and whites.

When I asked him if he had any idea who might have done it (knowing he had left to become a big league baseball player) he gave the FBI (in my presence) the name of one man. He said it might have been (deleted by Winchell), the same man who set fire to a freedom bus in Anniston about a year ago.

(MORE)

By the way, I have collected over $600 to Help Willie pay for a new home. $100 was from me. I sent most of it to the manager of the Angels to turn over to the Smith family.

So, when you wrote me that the assistant U. S. Attorney General (for Civil Rights) and the FBI (and Mrs. Smith herself) denied the story, my eyebrows wouldn't come down from where they went.

It is my suspicion that the Smith family in Anniston are still so "terrified" they want to drop the whole thing and forget it. But when the FBI there (and the Department of Justice man) and the rest of the people don't believe this reporter (who triple checked every word of it with Willie Smith) and expect me to change one word of it, I want to ask my editors at King Features Syndicate and the editor of The Anniston Star: "Would you retract, correct, etc. the same story when the husband confirms each word?"

Mr. Ayres' letter also says: "A Federal investigation completely exploded the charges". I just can't believe it.

Mr. Ayres' also says: "Mrs. Smith told an FBI agent that she had not been threatened by anyone and has no information as to the origin of the fire". I did not say (in my story) that Mrs. Smith had been threatened by anyone.

I do not understand why Mr. Marshall, the assistant U. S. Attorney General for Civil Rights does not want his name printed.

I would suggest, in order to get to the bottom of this thing, that the Federal officers involved bring charges against "Wonderful Willie Smith" for allegedly giving false information to a newspaperman if they feel his story is not true. I believe Willie told me the truth.

Best,

Walter

Walter Winchell

cc: Mr. John Edgar Hoover
cc: FBI, Los Angeles

HOUSING AND HOME FINANCE AGENCY

OFFICE OF THE ADMINISTRATOR • WASHINGTON 25, D. C.

Federal Housing Administration
Public Housing Administration
Federal National Mortgage Association
Community Facilities Administration
Urban Renewal Administration

August 7, 1964

MEMORANDUM FOR: Burke Marshall
Assistant Attorney General
Civil Rights Division
Justice Department

Attached is a report on urban renewal developments in Cambridge, Maryland.

Also, I am quoting a section from our weekly report to the President relative to the developments in the public housing project in that city:

> "Cambridge, Maryland, will get public housing somewhat sooner than expected, through special action of the Philadelphia regional office of Public Housing Administration. Recognizing that the provision of low-rent housing is one of the principal issues in the racial unrest in Cambridge, the regional office sent technicians to review plans, and gave the green light to proceed. It is expected that advertising for bids will take place about September 1."

Robert C. Weaver
Administrator

P. B.

Robert C. Weaver, Administrator

Urban Renewal Commissioner

HHFA Assistance to Cambridge, Md.;
Your memorandum of July 22, 1964

In accordance with your memo on the above subject which transmitted an inquiry from Mr. Lee C. White, Associate Special Counsel to the President, and a "Housing Report" on Cambridge's Second Ward, submitted by the Cambridge Non-violent Action Committee, we have reviewed the status and prospects for urban renewal activity in that community.

As you may recall, Cambridge's Central Business District No. 1 Project (Md. R-24) was approved for Survey and Planning on December 10, 1963. A Contract for Planning Advance was signed on March 24, 1964. This project is intended to remove blighted structures in downtown Cambridge and provide for its redevelopment. At the present time an executive director has been employed, and a project consultant and a marketability consultant have been retained. It is believed the project will be ready for a mid-planning conference in October.

Last month Cambridge had a municipal election. In the opinion of the Regional Office, the outcome of this election leaves in doubt the question of how much support urban renewal activities in Cambridge will receive in the future.

The Second Ward, which is the center of residence for Negroes in Cambridge, would certainly seem like an appropriate area for urban renewal treatment, based upon the "Housing Report" submitted by the CNAC. It remains to be determined whether there is a market which could afford moderate income housing, if such were to be the reuse for an urban renewal project in the Second Ward. This market would have to be evaluated in the light of the public housing project which has been approved for Cambridge.

URA would certainly give sympathetic consideration to any requests for cooperation from Cambridge officials. In addition, of course, we look forward to working with city officials in the preparation of Part I of the Application for Loan and Grant for the Central Business District No. 1 Project. However, as you well know, it is in the nature of the urban renewal process that we must wait upon the initiative of the city government in planning and carrying out urban renewal activities. We are not in a position to respond directly to the overtures of even so well meaning a group as the Cambridge Non-violent Action Committee.

Urban Renewal Commissioner

OFFICE OF THE ADMINISTRATOR

Federal Housing Administration
Public Housing Administration
Federal National Mortgage Association
Community Facilities Administration
Urban Renewal Administration

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Assistant Attorney General
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Robert C. Weaver
Administrator

OFFICE OF THE ADMINISTRATOR

Federal Housing Administration
Public Housing Administration
Federal National Mortgage Association
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Urban Renewal Administration

August 7, 1964

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Robert C. Weaver
Administrator

11 August 1964

Mr. Paul E. Cosby
Headmaster
Grace Church Day School
505 East Broadway
Ocala, Florida

Dear Mr. Cosby:

Thank you for sending me the cartoon of Mr. Kennedy. Not that I enjoyed seeing it, but it is useful to know how we are treated publically. The Attorney General is used to it, though it is so unfair.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

GRACE CHURCH DAY SCHOOL
505 EAST BROADWAY
OCALA, FLORIDA

4 August 1964

Dear Mr. Marshall:

I consider the enclosed cartoon of Mr. Kennedy as scurrilous a piece of slime ever printed in any paper anywhere.

Mr. Kennedy should be made aware, if he isn't already, that the Kennedy-haters have not learned their lessons since last November. Such viscous, distorted, tasteless, vile trash as this cartoon deserves a proper response on his part.

It seems to me — a native Alabaman — that the cartoon is patently libelous, certainly beneath contempt.

I'm glad Joe Mitchell is working for you now, but we miss him in Florida.

Very best wishes-

Sincerely yours,

Paul E. Cosby,
Headmaster

Dear Mr. Cosby:
Thank you for sending me the cartoon of Mr. Kennedy. Not that I enjoyed seeing it, but it is useful to know how we are treated publically. The Attorney General is used to it, ~~but I thought it is so unfair.~~
Sincerely,
BM

Prefers Iron Fist To Silk Glove

Thought

aid:

g his hearing before the
Commissioner this coming
Friday at 10:00 am Athens

2. Will be conferring with Johnson then.

3. Hopes you know what the situation is down there with respect to the "sick judge" -- before you go off the rash end.

11 August 1964

Honorable Clete D. Johnson
Solicitor General
Northern Judicial Circuit
Post Office Box 245
Royston, Georgia

Dear Mr. Johnson:

This will acknowledge receipt of your letter of August 7. We will, of course, be glad to cooperate in every way with your request for information and findings of the FBI as a result of its investigation into the killing of Lemuel A. Penn. We are having some information put together in writing summarizing information for you in usable fashion.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

bcc: Al Rosen
Floyd Buford

CLETE D. JOHNSON
Solicitor General
Northern Judicial Circuit

P. O. BOX 245
TELEPHONE 245-7254

rpe

ROYSTON, GEORGIA

August 7, 1964

Honorable Burke Marshall
Assistant Attorney General
Department of Justice
Washington, D. C.

Dear Mr. Marshall:

I am the state prosecuting attorney for the Northern Judicial Circuit of Georgia which embraces the county of Madison. I have information that one Lemuel A. Penn was shot and killed by shotgun on July 11, 1964, in Madison County, Georgia. I further understand that Cecil William Myers, Joseph Howard Sims, James S. Lackey and Herbert Guest have been arrested by the Federal Bureau of Investigation in connection with this incident on a Federal warrant charging a conspiracy in violating the civil rights of the said Lemuel A. Penn, said arrests having been made after an extensive investigation by the Federal Bureau of Investigation.

Since murder is a state offense, this letter is written as a request for information and findings of the FBI as a result of its investigation to be made available to me. I will need this information to present to the Grand Jury of Madison County, Georgia, at its August session, beginning on August 24, 1964, at which time the said Grand Jury will consider murder charges against these individuals, if the evidence is sufficient.

Please be assured that I, together with the Sheriff's Department of Madison County and the Georgia Bureau of Investigation, will fully cooperate with Federal authorities in an effort to see that the ends of justice are met.

Yours very truly,

Clete D. Johnson

CDJ:gyw

cc: Honorable Floyd Buford
United States District Attorney
Macon, Georgia

August 12, 1964

The Honorable Louis F. Oberdorfer
Assistant Attorney General
Department of Justice
Washington 25, D. C.

COPY

Re: Proposal To Encourage Anti-Discrimination Portfolios For Religious And Other Non-Profit Institutions

Dear Mr. Oberdorfer:

As you will recall, our original memorandum stated that we would evaluate the employment practices of some 500 companies which prove most popular in investment portfolios, evaluations being based initially on a questionnaire similar to the Plans for Progress report. After careful consideration, the Board of Trustees decided that such a standardized approach is completely unfeasible due to the complexities involved in making such a large-scale study meaningful for our participants.

Remembering that the ultimate goal of the United Council is to influence change in employment practices, we have, therefore, adopted the procedure fully described in the enclosed Prospectus. We feel that this new approach will ensure an immediate and constructive impact on corporate employment practices.

We welcome your comments and hope to have the opportunity to discuss the program with you.

Sincerely,

Adrienne Zuckert

AZ/pp
Enclosure
cc: Burke Marshall, Deputy Attorney General, with enclosure
Malcolm Andresen, President

UNITED COUNCIL FOR FAIR EMPLOYMENT, INC.

PROSPECTUS

August 7, 1964

Adrienne Zuckert
Executive Director

Efforts to eliminate discrimination in employment must be vigorous and unceasing. While some gains have been made in this area in recent years through Federal, State and municipal employment laws, progress has been slow. The great majority of Negro citizens are still employed in inferior or menial jobs. Thus, additional and expanding efforts must be made to correct this inequity.

A promising method of helping to achieve fair employment was suggested by the National Council of Churches' adoption in November, 1963, of the following guide line -

> "Churches should examine their investment portfolios to determine if funds are invested in enterprises that practice racial discrimination and to end investments in companies that cannot be persuaded to 'cease and desist' from racial discrimination."

The United Council For Fair Employment proposes to be the single coordinating body through which the investor power of a number of non-profit organizations will be united to form an effective force to help in the achievement of fair employment.

The Council, a membership corporation organized under New York law, has applied for tax exempt status with the Internal Revenue Service.

The United Council's program will comprise two parts; Under Part I, the support and participation of as many religious and other non-profit institutions as possible will be enlisted. These organizations working together will form the United Council For Fair Employment. Under Part II, the collective investor power of these various organizations will be concentrated in a way designed to help correct the disparity of opportunity which is prevalent in many corporations.

Once having mobilized the required support, the United Council will conduct the second part of its program in this manner.

The United Council's staff will compile a list of companies which responsible sources indicate fail to meet minimum standards of fair employment. From this research approximately five companies initially will be selected for intensive individual study. Further groups of five will subsequently be examined. These studies by the United Council will result in a realistic evaluation of the particular company's employment policies and a plan for the elimination of unfavorable practices.

The staff will then organize a committee consisting of the Board Chairman of the United Council, prominent industrial relations consultants, and representatives of participating organizations which are security holders in the corporation under examination.

The committee will first meet to discuss the findings of the United Council's staff. Then company officials will be invited to appear before the committee to discuss the issues raised by the Council's findings. The committee will next draw up a list of suggestions and proposed changes which it feels the company management could reasonably implement. A committee delegation will submit this list to the management and if necessary attempt to persuade management to adopt the suggested policy.

If management accepted the recommendations, the United Council would make periodic studies to check on actual implementation. If management rejected them, the committee would determine what action it might take to influence the corporation to modify its practices. Participating organizations would decide independently whether to divest themselves of their security holdings in a corporation which refuses to adopt a fair employment policy.

Obviously, to be effective, the above program needs widespread and substantial support. Success will be proportionate to the magnitude of its organized investor strength. Clearly then, the burden rests with non-profit organizations. Their response will determine the extent to which the United Council's goal will be realized.

It seems probable that the impact of the United Council will be immediate, strongly felt, and constructive, and that it will make a valuable contribution toward achieving equal employment opportunity throughout American industry.

CUMMINGS & LOCKWOOD
ATTORNEYS AT LAW
ONE ATLANTIC STREET
STAMFORD, CONN 06904

FRANCIS J MCNAMARA SR
COUNSEL

327-1700
AREA CODE 203

August 15, 1964

Hon. Burke Marshall
Department of Justice
Washington 25 D.C.

Dear Burke:

On my annual tour at Pentagon this week and next. Will phone you to see if your busy schedule permits a lunch break any day during the period.

Best regards.

Sincerely,

Warren W. Eginton

DEPARTMENT OF JUSTICE

ROUT SLIP

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Marshall			
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☐ RECOMMENDATION ☐ CALL ME ☐ YOUR INFORMATION
☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

August 17, 1964

1. I don't see why Bureau can't do No. 1.

2. As to tapping and mail tampering, we don't have any facts.

3. As to jamming, refer to FCC.

John

Linda -
You can file this.

FROM: NAME	BUILDING, ROOM, EXT.	DATE

DEPARTMENT OF JUSTICE

ROUT G SLIP

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REMARKS

your advice, please.

BM
8/7

1) I don't see why [illegible] can't do No. #1.

2) As to Tapping and mail tampering we don't have any facts.

3) As to [illegible] [illegible] Fee [illegible]

FROM: NAME	BUILDING, ROOM, EXT.	DATE

THE WHITE HOUSE

WASHINGTON

August 4, 1964

MEMORANDUM FOR

Mr. Burke Marshall
Assistant Attorney General
Department of Justice

There are some suggestions that Mr. Schwerner makes regarding the FBI that you may wish to consider before relaying to the Bureau. I am also sending a copy of the Schwerner letter to the Post Office Department and the FCC in order that they can look into aspects of his charges which involve their operations.

I have already acknowledged Mr. Schwerner's letter and do not believe it is necessary for anyone else to do so at this stage.

I would appreciate your reactions and suggestions as to what, if anything, should be done along the suggested lines.

Lee C. White
Associate Special Counsel
to the President

Encl.

MR. AND MRS. NATHAN H. SCHWERNER
34 FIFTH STREET
PELHAM, NEW YORK 10803
(914) PE 8-3781

August 3, 1964

Lee C. White, Esq.
Associate Special Counsel to
the President
The White House
Washington, D.C.

Dear Mr. White:

I should like to express my thanks for the time taken from your obviously pressing calendar last Thursday, the 30th. I am aware that the time consumed in our telephone conversation was far beyond your anticipation.

As you suggested, I am writing to confirm the gist of the points that the other parents of civil rights workers and I recommend for the serious consideration of the executive branch of our government.

These points are briefly:

One: That after a responsible report has been made to an FBI officer regarding the apparent arrest of a civil rights worker or that one such is unaccountably missing, and after the field agents have located such person and have so advised the field officer, that the FBI agent-in-charge, or a member of his staff, be specifically directed to convey such information back to the civil rights office initiating the investigation for the missing worker.

With regard to this matter, the concern of the parents is obvious. There have been instances when workers have been missing for many hours, their whereabouts apparently ascertained by a federal official, but no word sent to the civil rights agency or to the parents, for some period of time, at least. This creates tensions and fears which, if the facts were to be divulged promptly, would appear to be imposed needlessly. Furthermore, the result is to immobilize an indefinite number of the civil rights workers involved in searching, telephoning, etc. - a result which can be desirable only to the opponents of the government's avowed desire to foster voter registration, the expansion of education, and the other manifold facets of implementation of President Johnson's Civil Rights Program.

MR. AND MRS NATHAN H. SCHWERNER
34 FIFTH STREET
PELHAM, NEW YORK 10803
(914) PE 8-3781

Two: That there is every indication that telephone lines emanating from COFO headquarters everywhere in Mississippi are being tapped constantly. I am certain, as you agreed, that this is in direct violation of federal law and should be a subject for federal prosecution.

Three: That much of the mail sent to functionaries of COFO, especially mail sent special delivery and/or registered and/or certified, has been opened before delivery to the addressee. This is clearly, if provable, a violation of federal law which should be prosecuted.

Four: That although the installation of two-way radios in the cars of civil rights workers is a recent innovation, there have already been reports of "jamming" which, I am informed, is also a violation of federal law which should be prosecuted.

You suggested that I briefly document the foregoing so far as possible. Unfortunately, time has not permitted this in any detail for two reasons: I hesitate even to telephone people in Mississippi because this would entail divulging to the segregationists (through wire tapping) some of these subjects; further, Mrs. Schwerner and I are leaving New York for a much needed rest of a week or so, starting tomorrow.

However, there are a number of things that may well be pointed out:

In conversation with Mickey and Rita, during their brief visit North over one weekend in the Spring, they enjoined us from sending any but ordinary airmail. They indicated that registered and special delivery mail previously sent had invariably been opened. They also told us of wiretapping on telephones being so blatant that when they called Jackson from the Meridian community center, the overtones were so great that they would yell out requesting the tapper at either Meridian or Jackson to cut off, so that the other tapper might hear what they had to say. Another indication of interference with telephone communications is:

" WATS REPORT: WEDNESDAY, JULY 29, 1964

Monday night a policement told Prince Shannon, Negro, Helena, that whites don't allow Negroes in their neighborhoods, and he didn't see why Negroes should allow

MR. AND MRS. NATHAN H. SCHWERNER
34 FIFTH STREET
PELHAM, NEW YORK 10803
(914) PI 8-5781

whites in theirs (meaning Siegel). He said that they could run the SNCC people out of town and the police wouldn't do anything about it, and said that if the SNCCs tried to phone for help that he would see that their calls didn't get through."

With regard to jamming of radios, an example as recent as last Friday, the 31st, is in the following report:

"WATS REPORT: FRIDAY, JULY 31, 1964

Greenwood: Richardson and Mitchell

At 11:30 am three workers were arrested in Greenwood. Two new cars with temporary Tennessee tags were stopped by police two blocks from the office on their way to Memphis. The drivers, Silas McGee, Greenwood, and John Paul, 21, Ossining, New York, were arrested for violation of the Mississippi Code 9352-24 (relating to cars with temporary licenses). Bond for the two is $50 each. Monroe Sharp, who was operating the citizen's band radio in McGee's car, reporting the arrests to the office, was arrested for resisting arrest, bond $100. (Sharp is from Chicago). Greenwood called the Memphis FBI since Tenn. licenses are involved and because they believe that someone may be jamming their radios. The people in the cars weren't able to hear the office calling them, but the office could hear them. The jamming might be coming from the fire station. If we can prove it we'll contact the FCC."

We parents respectfully urge upon your office the following:

Regarding Point One: That a directive be issued requesting the FBI agent-in-charge to advise the initiators of call as soon as the whereabouts of a reportedly missing civil rights worker are ascertained.

Regarding Point Two: That the Post Office Department arrange an investigation to lay the groundwork for prosecution. Such an investigation might well be implemented by the preparation, in New York, of registered and/or special delivery mail (for example, on my stationery directed to Rita at Meridian or

MR. AND MRS. NATHAN H. SCHWERNER
34 FIFTH STREET
PELHAM, NEW YORK 10803
(914) PE 8-3781

Jackson - or that of some other known person directed to a functionary of COFO) and that such mail be turned over to a designated postal inspector to be followed to its destination. It is our opinion that such a technique, leading to a prosecution with a strong probability of conviction of federal crime, would act as a greater deterrent than a general directive to the Post Office Department.

Regarding Points Three and Four: We urge that the FBI, or other federal agency (perhaps the FCC) be directed to investigate these matters by providing technicians who could man the instruments involved and determine beyond a doubt, not only the facts of wiretapping and radio-jamming, but the sources as well, with an eye to federal prosecution.

Finally, I add a further word regarding documentation. We are certain that federal agents, on the scene in Jackson and near other COFO headquarters, can readily be given testimony by responsible staff workers, of instances of all the violations indicated. From here we hesitate to write or telephone due to possible leakage of the purposes for the inquiries.

Again, I wish to thank you for your time and for your assurances, as a result of which I have absolutely no doubt that every effort is being made to resolve the mystery of the disappearance of the three young men. And, if it is not presumptuous, may I ask you to convey to President Johnson my deep conviction that he is doing everything possible in this matter and my utmost appreciation for those efforts.

Most sincerely,

Nathan H. Schwerner

DEPARTMENT OF JUSTICE

ROUTING SLIP

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- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION

REMARKS

Any comments?

BM
8/17

Yes, I like this
as long -
Items II, III + IV at
the important ones, + will
be the main provisions -

FROM: NAME	BUILDING, ROOM, EXT.	DATE
Items II	thru XI are	
probably + maybe I should		
for attorneys in both		

FROM

THE OFFICE OF THE DEPUTY ATTORNEY GENERAL

TO

- ☐ ATTORNEY GENERAL
  - ☐ EXECUTIVE ASSISTANT
  - ☐ OFFICE OF PUBLIC INFORMATION
- ☐ DEPUTY ATTORNEY GENERAL
  - ☐ EXECUTIVE OFFICE—U. S. ATTORNEYS
  - ☐ EXECUTIVE OFFICE—U. S. MARSHALS
- ☐ SOLICITOR GENERAL
- ☐ ADMINISTRATIVE DIVISION
  - ☐ LIBRARY
- ☐ ANTITRUST DIVISION
- ☐ CIVIL DIVISION
- ☐ CIVIL RIGHTS DIVISION
- ☐ CRIMINAL DIVISION
- ☐ INTERNAL SECURITY DIVISION
- ☐ LANDS DIVISION
- ☐ TAX DIVISION
- ☐ OFFICE OF LEGAL COUNSEL
- ☐ OFFICE OF ALIEN PROPERTY
- ☐ BUREAU OF PRISONS
- ☐ FEDERAL PRISON INDUSTRIES, INC.
- ☐ FEDERAL BUREAU OF INVESTIGATION
- ☐ IMMIGRATION AND NATURALIZATION SERVICE
- ☐ PARDON ATTORNEY
- ☐ PAROLE BOARD
- ☐ BOARD OF IMMIGRATION APPEALS
- ☐ ATTENTION: _____

REMARKS:

Mr. Marshall

Mr. Burnett:

Any comments?

S

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- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ CALL ME

☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____

☐ PREPARE REPLY FOR THE SIGNATURE OF _____

All Assistant Attorneys General August 11, 1964

Wm. A. Geoghegan
Assistant Deputy Attorney General

Federal Government Litigation Seminar

The Attorney General has constituted Solicitor General Cox, Assistant Attorney General Clark and the writer a committee to plan a seminar on Federal government litigation for our young lawyers. The seminar would also serve as an orientation for newly appointed department attorneys.

We have decided it is not feasible to attempt to conduct what is frequently referred to as a trial practice seminar. This involves more of a difference in presentation of material than it does substance. We believe that the subject matter of the seminar can be most effectively presented in lecture form by individuals or panels.

Each division will have to assume responsibility for the conduct of the seminar sessions involving its area of work. This includes providing the necessary lecturers to present the subject matter.

We request your comments on the attached draft of a program for the seminar, particularly as it relates to the work of your division. Please suggest any revision in the form of the program or subject matter which you think will make the seminar more interesting and rewarding to those who will attend.

For your further information seminar sessions probably will be scheduled during working hours and last about two hours.

FEDERAL GOVERNMENT LITIGATION SEMINAR

I. History, Organization and Function of the Department of Justice.

a) History of the Office of the Attorney General and his role as a member of the President's cabinet. (Attorney General) 15-20 minutes.

b) Organization of Department of Justice. (Deputy Attorney General) 15-20 minutes.

c) Role of the United States as litigant and the government lawyer. (Mr. Cox) 30 minutes.

d) Function of Office of Public Information. (Mr. Guthman) 10-15 minutes.

e) Office of Legal Counsel (Office of Administrative Procedure; Conscientious Objector Section). (Mr. Schlei) 20 minutes.

f) Administration and Budget. (Mr. Andretta) 15 minutes.

II. The Development of a Criminal Case through Indictment.

The sources of potential cases - Liaison with FBI and other agencies - the extended investigation - the organized crime unit - liaison with United States Attorney's office - the prosecutive memorandum - the decision to prosecute - preparation for grand jury - the grand jury presentation - indictment - contacts with press.

III. Preparation and Trial of a Criminal Case.

Techniques of preparation - problems in presentation of facts - trial briefs - expert witnesses - selection of jury - relationship with opposing counsel - ethics - opening and closing statements - subpoenas - protecting the record - sentencing and post-conviction responsibilities - special problems of criminal case as distinguished from civil case.

IV. Pleadings and pretrial practice in civil cases.

Sources of cases - investigation - liaison with United States Attorneys' office - defense or institution of suit preparation of pleadings - discovery - pretrial conference - stipulations - settlement.

V. Trial of civil suits.

Theory of case - preparation of witnesses - use of documentary evidence - expert witnesses - cross-examination - selection of jury - jury instructions - use of briefs - use of exhibits and other trial materials - problems of civil as distinguished from criminal cases.

VI. The Civil Division.

The United States as a party in civil litigation - important statutes in the Civil Division: The Federal Tort Claims Act; Tucket Act; Wunderlich Act, etc., - representation of other agencies - fraud cases - Court of Claims - liaison with United States Attorney's offices - Admiralty cases - settlement procedures.

VII. The Antitrust Division.

Organization - antitrust laws - relationship with FTC and other regulatory agencies - antitrust investigations - grand jury - civil investigative demand - pretrial and discovery - techniques for handling the 'big case' - antitrust policy and objectives - considerations in deciding whether to bring suit - clearance policy.

VIII. The Tax Division.

Organization - relationship with IRS - settlement - procedures - refunds - criminal prosecutions and relation to organized crime matters - influencing developments in tax law - collections, liens and state court proceedings.

IX. The Civil Rights Division.

Organization - Civil Rights Acts of 1957, 1960 and 1963 - the social aspects of the Division's work - extra-statutory and extra-judicial procedures - the future.

Internal Security Division.

History and organization of Division - Smith Act - Internal Security Act of 1950 - relation to Subversive Activities Control Board - constitutional problems - Jencks Act - Foreign Agents Registration Act - investigation and prosecution of espionage and sabotage.

XI. Lands Division.

Organization and jurisdiction - condemnation - valuation - settlements - Indian rights and claims - public lands.

XII. Criminal Division.

Organization and jurisdiction - relation to United States Attorney - Organized Crime Program - relation to other agencies - enforcement policies.

XIII. Federal Bureau of Investigation.

Organization and jurisdiction - training of agents - internal security - general investigation - relation to local enforcement agencies - relation to other Federal investigative agencies - crime labs.

XIV. Bureau of Prisons.*

XV. Immigration and Naturalization Service.*

XVI. Appellate Advocacy.

Role of Solicitor General in authorizing appeal; policy considerations involved; relation to independent agencies; Supreme Court practice. Brief writing and oral argument.

* The desirability of including these subjects is open to question. Perhaps they could be combined into one session.

17 August 1964

Mr. Orzell Billingsley, jr.
Chairman
Southern Democratic Conference
1630 Fourth Avenue, North
Birmingham, Alabama

Dear Mr. Billingsley:

Thank you for the letter and its enclosures. The matter is one for consideration by the Democratic Party, and as you know, not one of official concern to the Department of Justice. But I appreciate being informed of the action of the group.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

SOUTHERN DEMOCRATIC CONFERENCE

1630 - 4TH AVENUE, NORTH
BIRMINGHAM, ALABAMA

ATTORNEY ORZELL BILLINGSLEY, JR.
VICE CHAIRMAN OF ALABAMA

TELEPHONE
324-5723

August 12, 1964

The Honorable Burke Marshall
Assistant Attorney General
of the United States
Washington, D. C.

My dear Mr. Marshall:

Re: Alabama Democratic Conference, Incorporated

Enclosed herewith is a statement of position of the Alabama Democratic Conference, Incorporated, as authorized by the Board of Directors of said organization.

We urge you to give protests contained therein your careful and serious consideration.

Thanking you for an immediate reply, I am

Sincerely yours,

ALABAMA DEMOCRATIC CONFERENCE, INC.

Orzell Billingsley, Jr.

Orzell Billingsley, Jr., Chairman

OBJr./w

Enclosures

Dear Mr. Billingsley:
Thank you for the letter and
its enclosures. The matter is one for
consideration by the Democratic Party,
and as you know, not one of official
concern to the Department of Justice.
But I appreciate being informed
of the action of the group. Sincerely

LOYALTY OATH RESOLUTION

OF THE NATIONAL DEMOCRATIC COMMITTEE

1960

"Be it resolved by the Democratic National Committee that it is the understanding that a state Democratic Party, in selecting and certifying delegates to the Democratic National Convention, thereby undertakes to assure that voters in the state will have the opportunity to cast their election ballots for the presidential and vice presidential nominees selected by said convention, and for electors pledged formally or in good conscience to the election of these presidential and vice presidential nominees, under the Democratic Party label and designation.

It is understood that the delegates to the National Democratic Convention, when certified by the State Democratic Party, are bona fide Democrats who have the interests, welfare and success of the Democratic Party at heart, and will participate in the convention in good faith and therefore no additional assurance shall be required of delegates to the Democratic National Convention in the absence of credentials contest or challenge."

Taken from the Montgomery Advertiser, August 5, 1964.

ALABAMA DEMOCRATIC CONFERENCE, INCORPORATED
1630 Fourth Avenue, North, Room 512
Birmingham, Alabama

August 11, 1964

POSITION STATEMENT

The Alabama Democratic Conference, Incorporated, reaffirms its support to the Democratic National Committee. It regards the slate of so-called "independent electors" as an improper maneuver which was achieved improperly in the May 5, 1964 Alabama Democratic Primary.

We contend that electors chosen through the bona fide machinery of the state unit of the Democratic National Party should be a binding part of the organization through which they are processed. Holding this belief, we suggest that the Democratic National Committee contest legally and otherwise, the arrangement known in Alabama as "independent electors."

To further this idea, the Alabama Democratic Conference, Incorporated, is sending a delegation of observers to the Democratic National Convention, in Atlantic City, New Jersey, August 23, 1964, to make an on-the-scene show of opposition to the Alabama arrangement described as "independent electors."

Further, the Alabama Democratic Conference, Incorporated, believes that good-faith Democrats, wherever located, must insist that voters and Democrats of every state have an opportunity to vote for the presidential choice of the Democratic National Convention. To facilitate this idea the Alabama Democratic Conference, Incorporated, urges the Credentials Committee of the Democratic National Committee to require and enforce the good-faith oath of the Democratic National Convention

a) convention seats be awarded only to those delegates who pledge to support the presidential nominees of the Democratic National Convention, and

b) who pledge and work successfully to make it possible for voters and Democrats to vote for electors in Alabama pledged to the Democratic National Party.

Observers elected by the Alabama Democratic Conference, Incorporated, are being instructed to make themselves available as good-faith Alabama delegates in the event the elected 38 Alabama delegates are refused seating or fail to be seated as authenic Democrats committed to support the presidential ticket of the Democratic National Convention.

The Alabama Democratic Conference, Incorporated, regards itself as a good-faith vehicle of the Democratic National Committee. The ADCI is ready to participate in the campaign to help elect a Democrat president of the United States of America.

Respectfully submitted,

ALABAMA DEMOCRATIC CONFERENCE, INC.

Orzell Billingsley, Jr., Chairman

Emory O. Jackson, Chairman, Public Relations & Research Committee

August 19, 1964

The Honorable Burke Marshall
The Assistant Attorney General
Department of Justice
Washington, D. C.

Dear Burke:

Today I told Bowman that I saw and heard you yesterday at the Community Relations Service meeting in Washington, but you spoke so briefly and left so quickly that I could not even get a chance to shake hands with you. He asks to be remembered, and we both want to tell you that we have had problems -- many since you left us -- when we wished lawyers had spoken as briefly as you did yesterday.

Our best.

Sincerely,

CBWjr:rgc

Mr. Marshall

20530

August 17, 1964

BM:WJH:vqb

Mr. John P. Nelson, Jr.
702 Gravier Building
535 Gravier Street
New Orleans, Louisiana 70130

Dear Mr. Nelson:

Mr. Burke Marshall has asked me to furnish you a list of the voting cases and the number of police brutality cases instituted by this Division since 1961, in reply to your letter of August 11.

Attached is a list of all cases involving violations of 42 U.S.C. 1971(a) and(b) filed by this Division. The Division also filed 46 cases involving police brutality charges from the period July 1, 1960, through June 30, 1964.

Sincerely yours,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

By:
WILLIAM J. HOLLORAN
Executive Assistant

Enclosure

ARTMENT OF JUSTICE

ROUTI SLIP

NAME	DIVISION	BUILDING	ROOM
Bill Holloran			
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- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

Would you send him list of voting cases, plus number of police brutality cases since 1961.

BM

17 August

FROM: NAME	BUILDING, ROOM, EXT.	DATE

NELSON AND NELSON
ATTORNEYS AT LAW
702 GRAVIER BUILDING
535 GRAVIER STREET
NEW ORLEANS, LOUISIANA 70130

JOHN P. NELSON, JR.
J. THOMAS NELSON
KATHERINE S. WRIGHT
OSWALDO V. RAMIREZ

TELEPHONE
529-2656

August 11, 1964

Mr. Burke Marshall
Civil Rights Division
Department of Justice
Washington, D. C.

Dear Burke:

As you may have already heard, the Louisiana Advisory Committee for the United States Civil Rights Commission held a conference last Saturday afternoon in Baton Rouge, Louisiana, for the purpose of familiarizing persons within the State of Louisiana who are engaged in direct action with the new functions of the various governmental bureaus under the terms of the Civil Rights Acts of 1964. There were from sixty to seventy people in attendance, and it is my feeling that a great deal of good came out of the meeting. It was, indeed, unfortunate that a representative of the Justice Department was not in attendance. As you can well imagine, the F.B.I. came in for a bit of criticism and, unfortunately, no one in attendance had the necessary facts to repudiate statements made. In this connection, would it be possible for you to send me a list of all pending cases against public officials brought by the Justice Department in regard to Civil Rights litigation. This would be a great help, Burke, in our efforts to counteract some of the criticism which is being levied at the Department of Justice.

Bill Holloran: Would you send him list of voting cases, plus # of police brutality cases since 1961. JP

It is our intention within the near future to hold a hearing in north Louisiana, in connection with the voter registration drive. At the present time, however, there is nothing definite as to time and place. We will keep you posted on the progress being made insofar as this hearing is concerned.

With kindest personal regards, I remain

Very truly yours,

John P. Nelson, Jr.

JPNJr/PP

13 August 1964

John P. Nelson, jr., Esquire
Nelson and Nelson
Attorneys at Law
535 Gravier Street
New Orleans, Louisiana - 70130

Dear Mr. Nelson:

I am acknowledging your letter to Mr. Marshall of 11 August. He is out of the city for a short time, and I will bring it to his attention immediately upon his return Monday, August 17.

Sincerely,

Linda K. Stores
Burke Marshall's Secretary

CASES FILED UNDER 42 U.S.C. 1971(a)

	State	County(Parish)	Date Filed	Title (U.S. v.)
1958				
1.	Ga.	Terrell I	9-4	Raines
1959				
2.	Ala.	Macon	2-5	Alabama
3.	La.	Washington	6-29	McElveen (Thomas)
4.	Tenn.	Fayette I	11-16	Fayette Demo. Exec. Comm.
1960				
5.	La.	Bienville	6-7	Assn. of Citizens Councils of La.
1961				
6.	Ala.	Bullock	1-19	Alabama
7.	Ala.	Dallas I	4-13	Atkins
8.	La.	East Carroll II	4-28	Manning
9.	Miss.	Clarke I	7-6	Ramsey
10.	Miss.	Forrest	7-6	Lynd
11.	La.	Ouachita	7-11	Lucky
12.	Miss.	Jefferson Davis	8-3	Daniel
13.	Ala.	Montgomery	8-4	Penton
14.	Miss.	Walthall I	8-5	Wood
15.	La.	Plaquemines	10-16	Fox
16.	Miss.	Panola	10-26	Duke
17.	La.	Madison	10-26	Ward
18.	Miss.	Tallahatchie	11-17	Dogan
19.	Miss.	Tallahatchie	11-17	Harris
20.	La.	State-wide; attack on Const. interp. test	12-28	Louisiana
1962				
21.	La.	Jackson	2-21	Wilder
22.	Miss.	George	4-13	Ward
23.	Ga.	Bibb	5-16	Bibb County Demo. Exec. Comm.
24.	Ala.	Choctaw	6-15	Ford
25.	Ala.	Perry	8-27	Mayton
26.	Miss.	State-wide; Const. and stat. provisions	8-28	Mississippi
1963				
27.	Miss.	Sunflower	1-26	Campbell
28.	La.	Webster	2-18	Clement
29.	La.	Red River	2-18	Crawford
30.	Ga.	Jones	6-18	Jones County Demo. Exec. Comm.

	State	County (Parish)	Date Filed	Title (U.S. v.)
1963				
31.	Miss.	Hinds	7-13	Ashford
32.	Ala.	Wilcox I	7-19	Logue
33.	Ala.	Elmore	7-19	Cartwright
34.	Ala.	Jefferson	7-31	Bellsnyder
35.	La.	State-wide	10-8	Board of Education of La.
36.	La.	St. Helena	10-22	Crouch
37.	La.	West Feliciana	10-29	Harvey
38.	Ala.	Hale	12-16	Tutwiler
39.	Ala.	Sumter	12-16	Hines
40.	Miss.	Copiah	12-17	Weeks
41.	Miss.	Lauderdale	12-17	Coleman
42.	Miss.	Oktibbeha	12-16	Henry
43.	Miss.	Chickasaw	12-16	Griffin
1964				
44.	Miss.	Madison	3-5	Campbell
45.	La.	East Feliciana	3-26	Palmer
46.	Miss.	Holmes	7-24	McClellan
47.	Miss.	Marshall	7-24	Clayton

CASES FILED UNDER 42 U.S.C. 1971(b)

	State	County (Parish)	Date Filed	Title (U.S. v.)
1960				
1.	Tenn.	Haywood I	9-13	Beaty
2.	Tenn.	Haywood II	12-1	Barcroft
3.	Tenn.	Haywood III	12-14	Atkeison
1961				
4.	La.	East Carroll I	1-19	Deal
5.	Miss.	Walthall II	9-20	Wood
1962				
6.	Miss.	Greene	6-16	Board of Education
7.	Ga.	Terrell II	8-13	Mathews
1963				
8.	Miss.	LeFlore I	3-30	City of Greenwood
9.	Miss.	Rankin	5-6	Edwards
10.	Miss.	Holmes	5-11	Holmes County
11.	Ala.	Dallas II	6-26	Dallas County
12.	Miss.	LeFlore II	6-28	LeFlore County
13.	Ala.	Dallas III	11-12	McLeod
14.	Ala.	Dallas IV	11-12	Dallas County Citizens Council
15.	Ala.	Wilcox II	12-20	Bruce
1964				
16.	Miss.	Clarke II	3-20	Warner

TOURIST COURT
JOURNAL
THE NATIONAL MAGAZINE OF MOTEL MANAGEMENT
TEMPLE, TEXAS

DOUG COCHRAN
EDITORIAL DIRECTOR

August 20, 1964

Dear Burke:

Your good letter of August 17th is acknowledged with sincere thanks. The article which you have prepared is in clearly understandable terms and should prove very helpful to the motel industry. Many of our readers have told us that their biggest present problem is in knowing specifically what they are supposed to do with regard to the new civil rights legislation.

While we wish this important article might have been included in our August or September issue, we are grateful to have it at all. Newspapers have kept us pretty well posted on how extremely busy you have been.

I appreciate your cooperation tremendously, Burke, both on a personal and professional level and trust you will call on us if there is ever any way we can be of assistance to you.

Cordially,

H. D. Cochran

HDC:gkh

Mr. Burke Marshall
Asst. Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

17 August 1964

Mr. Doug Cochran
Editorial Director
Tourist Court Journal
Temple, Texas

Dear Doug:

Enclosed is a short piece on the new law which you may use if you wish. I am sorry to be late with it. We are very pressed.

It is nice to hear from you. My regards to Nan.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

TOURIST COURT
JOURNAL
THE NATIONAL MAGAZINE OF MOTEL MANAGEMENT
TEMPLE, TEXAS

DOUG COCHRAN
EDITORIAL DIRECTOR

June 22, 1964

Dear Burke,

Perhaps you will remember Nan and me from the many evenings we spent together at Ruth and Brud Frazer's almost 10 years ago in Washington.

Since 1960 we've been deep in the heart of Texas, where I've been handling the editorial end of things on the above magazine. You've never heard of it, I'm sure, but it is a highly respected and nationally recognized trade publication for the motel industry . . . a "how to" magazine, if you will, edited to help motel owners and managers operate their properties more successfully. Our circulation is national, comprising some 27,500 motel owners/managers and we've been in business 27 years. So much for the background!

The civil rights legislative struggle has posed some problems for us editorially. But now that the issue has been (almost) finally resolved, we want to publish some guidelines telling our readers what they can do, what they can't do, and what they must do, relative to the Accommodations Section of the recently passed bill. The approach we have in mind would be a down-to-earth simple explanation devoid of legal or government-type jargon. It should be 100% factual reporting without any editorializing . . . it could be developed on the basis of an interview with you over my by-line, or could be written directly by you over your by-line, or by some other qualified person you might suggest. I can come to Washington at your convenience to put the material together.

This is a rather urgent matter for us as we feel a deep responsibility to our readers. Without being presumptiously paternalistic, we know that they will lean on us for guidance.

Under separate cover I'm sending you a copy of our June issue and, next week, a copy of the July issue. In the latter, please note our "Annual Motel Financial Report" and an article by J. Edgar Hoover written at our request. All this, I hope, will serve to acquaint you with the magazine and underscore our editorial ethics.

I sincerely hope you can give us some assistance on this. Don't hesitate to phone collect:

Office - Area Code 817 - PR 8-1313

Home - Area Code 817 - PR 8-2987

Guess both our families have done a lot of growing-up since we last visited. Hank, our oldest, will be a senior at Princeton next year; Carolyn a Sophmore at S.M.U. and the two little boys still at home. Haven't seen Ruth or Brud in years, but keep in touch via Xmas cards and occassional letters. Had a long and wonderful visit in Plainfield last February and returned here knowing the cord had been cut and that we preferred Texas.

Nan joins me in best wishes to you and Vi.

Cordially,

Doug

H. D. Cochran

P. S. As a starter, could you obtain for me a copy of the final bill as passed by the Senate?

Mr. Burke Marshall
15 E. Melrose St.
Chevy Chase, Md.

League of Women Voters, ~~Grand~~ Traverse

Area of Michigan, letters.

J. D.

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD E. THORNQUIST
LAWSON E. BECKER
LEONARD D. VERDIER, JR.
PHIL R. JOHNSON
PLATT W. DOCKERY
HAROLD S. SAWYER
CONRAD A. BRADSHAW
HAROLD F. SCHUMACHER
PETER VAN DOMELEN
JOSEPH M. NEATH, JR.
CHARLES C. LUNDSTROM
THOMAS R. WINQUIST
PAUL K. GASTON
JACK R. CLARY
LEWIS A. ENGMAN
GEORGE L. WHITFIELD
WALLSON G. KNACK

WARNER, NORCROSS & JUDD
MICHIGAN TRUST BUILDING
GRAND RAPIDS, MICHIGAN 49502

TELEPHONE
459-6121
AREA CODE 616

GEORGE S. NORCROSS
1889-1960

August 21, 1964

The Honorable Robert F. Kennedy
Attorney General
Department of Justice
Constitution Avenue and 10th Street, N.W.
Washington, D. C. 20530

Dear Mr. Kennedy:

We represent the League of Women Voters, Grand Traverse Area of Michigan, a defendant in two libel actions being brought by one Dan Smoot, a radio and television commentator from Dallas, Texas, who terms himself a "constitutional conservative" and whose Report has been placed on The John Birch Society "approved reading list." We very much would appreciate your assistance.

In the December 1963 issue of the Bulletin of the League of Women Voters, Grand Traverse Area of Michigan (which is circulated to the members of the League), an article written by the President of the local League group dealt with the responsibility of League members to promote political responsibility through informed and active participation in government. The article was in part critical of the Dan Smoot television programs and termed them a "skillful, professional job of propaganda against - against the United Nations, against all foreign aid, against the income tax, against civil rights for the negro." The article further stated that the programs are based on "slanted information," "half-truths," and "innuendoes." Smoot contends that the League article concerning his television programs and the viewpoints expressed therein were false and accordingly libelous.

The law suits are pending in the United States District Court for the Western District of Michigan. Barring unforeseen developments, it is likely that the trial will be set for sometime in October. The cases will be tried before the Honorable Noel P. Fox without a jury.

At the trial we intend to show, among other things, that the statements in the League article are true, that is, that many of Smoot's statements in fact are based upon "slanted information, half-truths, and innuendoes."

As you may be aware, the statements made by Smoot in his television broadcasts and his "Reports" contain numerous charges concerning the Department of Justice and the Kennedy Administration. We are enclosing copies of two of these Dan Smoot Reports. One, dated June 3, 1963, deals with "reasonabl(e) fears that Kennedy might take advantage of some emergency to make himself a dictator" at p. 174. The other, dated September 16, 1963, deals with a memorandum of Walter Reuther and certain action taken concerning the "radical right."

We earnestly request your assistance in determining whether the statements contained in the enclosed Dan Smoot Reports are accurate or whether the information on which they are based is slanted or untrue. We especially are interested in any specific examples of misleading statements to which you can point, together with such data in support of the same as would be admissible in a federal court. For the purposes of this litigation, a generalized answer to Mr. Smoot's charges would not be particularly helpful.

If you are able to be of assistance, we also would appreciate your suggestion as to a possible representative of the Department of Justice who might be willing to testify at the trial on behalf of the League as to any misleading or inaccurate statements or innuendoes in the enclosed Reports. We have sent similar requests concerning other Reports to Mr. Katzenbach, the Deputy Attorney General, and Mr. Marshall, the Assistant Attorney General, Civil Rights Division.

As you can well understand, this matter is of critical concern to the League of Women Voters in Michigan. Because of the increasing tendencies of certain extremist groups to stifle honest criticism, however, this litigation is a matter of importance to non-members of the League too.

We, and the League, appreciate any help you may be able to give us. In the event you have any questions, please feel free

to contact either Mr. Harold Sawyer of this office, or myself, either by mail or by a collect telephone call.

Very truly yours,

Lewis A. Engman

Lewis A. Engman

wn

Encs.

DAVID A WARNER
SIEGEL W JUDD
CONRAD E THORNQUIST
LAWSON E. BECKER
LEONARD D VERDIER, JR.
PHIL R. JOHNSON
PLATT W DOCKERY
HAROLD S SAWYER
CONRAD A BRADSHAW
HAROLD F. SCHUMACHER
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WARNER, NORCROSS & JUDD
MICHIGAN TRUST BUILDING
GRAND RAPIDS, MICHIGAN 49502

TELEPHONE
459-6121
AREA CODE 616

GEORGE S NORCROSS
1889-1960

August 21, 1964

The Honorable Nicholas de B. Katzenbach
Deputy Attorney General
Department of Justice
Constitution Avenue and 10th Street, N.W.
Washington, D. C. 20530

Dear Mr. Katzenbach:

We represent the League of Women Voters, Grand Traverse Area of Michigan, a defendant in two libel actions being brought by one Dan Smoot, a radio and television commentator from Dallas, Texas, who terms himself a "constitutional conservative" and whose Report has been placed on The John Birch Society "approved reading list." We very much would appreciate your assistance.

In the December 1963 issue of the Bulletin of the League of Women Voters, Grand Traverse Area of Michigan (which is circulated to the members of the League), an article written by the President of the local League group dealt with the responsibility of League members to promote political responsibility through informed and active participation in government. The article was in part critical of the Dan Smoot television programs and termed them a "skillful, professional job of propaganda against - against the United Nations, against all foreign aid, against the income tax, against civil rights for the negro." The article further stated that the programs are based on "slanted information," "half-truths," and "innuendoes." Smoot contends that the League article concerning his television programs and the viewpoints expressed therein were false and accordingly libelous.

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At the trial we intend to show, among other things, that the statements in the League article are true, that is, that many of Smoot's statements in fact are based upon "slanted information, half-truths, and innuendoes."

As you may be aware, the statements made by Smoot in his television broadcasts and his "Reports" contain numerous charges concerning the Department of Justice, including assertions concerning men appointed by President Kennedy to high judicial offices. We are enclosing a copy of the October 28, 1963 Dan Smoot Report in which he states that George Edwards has no known qualifications for appointment to the Sixth Circuit Court of Appeals, at p. 343.

We earnestly request your assistance in determining whether the statements contained in the enclosed Dan Smoot Report are accurate or whether the information on which they are based is slanted or untrue. We especially are interested in any specific examples of misleading statements to which you can point, together with such data in support of the same as would be admissible in a federal court. For the purposes of this litigation, a generalized answer to Mr. Smoot's charges would not be particularly helpful.

We would also appreciate your suggestion as to a representative of the Department of Justice who might be willing to testify at the trial on behalf of the League as to any misleading or inaccurate statements or innuendoes in the enclosed Report. We are making similar requests with respect to other Dan Smoot Reports of the Attorney General, and Mr. Marshall, Assistant Attorney General, Civil Rights Division.

As you can well understand, this matter is of critical concern to the League of Women Voters in Michigan. Because of the increasing tendencies of certain extremist groups to stifle honest criticism, however, this litigation is a matter of importance to non-members of the League too.

We, and the League, appreciate any help you may be able to give us. In the event you have any questions, please feel free

to contact either Mr. Harold Sawyer of this office, or myself, either by mail or by a collect telephone call.

Very truly yours,

Lewis A. Engman

wn

Enc.

/

Cambridge file

NCAC

CAMBRIDGE NON-VIOLENT ACTION COMMITTEE
AFFILIATE OF THE STUDENT NON-VIOLENT COORDINATING COMMITTEE
OF ATLANTA, GEORGIA
308 MUIR STREET
CAMBRIDGE, MARYLAND
228-4366
228-3854

August 29, 1964

Mr. Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

Dear Mr. Marshall:

Here are copies of the two letters which we sent to the Community Relations Service that you had requested copies of.

Thank you very much for your help with this matter.

Yours for Freedom,

Stanley Wise

Stanley Wise, SNCC
Field Secretary

SW/cc

NCAC

CAMBRIDGE NON-VIOLENT ACTION COMMITTEE

AFFILIATE OF THE STUDENT NON-VIOLENT COORDINATING COMMITTEE
OF ATLANTA, GEORGIA

308 MUIR STREET 228-4366
CAMBRIDGE, MARYLAND 228-3854

July 28, 1964

Gov. Leroy Collins, Director
Community Relations Service
Department of Commerce
Washington, D. C. 20230

Dear Governor Collins:

We request the aid of the Community Relations Service in helping to formulate a plan to totally desegregate the school system of Dorchester County. Several attempts at negotiation have been made from time to time with the local and state school boards, but all to no avail.

To each school in Dorchester County, students are assigned on a purely racial basis. The burden of transfer, which is the only means of attending an integrated school within the present system, lies solely on the parents of the students. Students living in the county travel up to seventy miles a day to attend the Negro junior-senior high school in Cambridge, passing white schools on the trip into town.

There are two points we wish particularly to stress to illustrate the total inadequacy of the present system. The first is the high incidence of absenteeism on the part of the county school children which is a direct result of being forced to get up so early in the morning in order to catch the school bus. The second, and most important, is the absolute necessity of placing the initiative for transfer over to the local school board. The fear of "upsetting the apple cart" by seeking transfer for their children is still very strong on the part of a large segment of the Negro population of Dorchester County. The existing transfer system plays right along with that fear, and unless revamped, will likely perpetuate segregation in the local school sysyem almost indefinitely. Therefore, we appeal to the Community Relations Service for help.

Sincerely yours,

Gloria Richardson (signed)
Chairman, CNAC

By: Stanley Wise, SNCC
Field Secretary

NCAC

CAMBRIDGE NON-VIOLENT ACTION COMMITTEE

AFFILIATE OF THE STUDENT NON-VIOLENT COORDINATING COMMITTEE OF ATLANTA, GEORGIA

308 MUIR STREET 228-4366
CAMBRIDGE, MARYLAND 228-3854

July 29, 1964

Gov. Leroy Collins, Director
Community Relations Service
Department of Commerce
Washington, D. C.

Dear Governor Collins:

Enclosed you will find some reports which we sent to the Civil Rights Commission. We had hoped that the Commission would act upon our request for an investigation in Cambridge, but to date we have received no reply. The problems that prevailed a year ago are as yet unsolved.

We in Cambridge have witnessed the recent tragic events in Harlem, Brooklyn, and Rochester, and fervently hope that there will be no similar outbreaks in Cambridge. The perils of inaction, however, pose an equally serious threat here, particularly when one considers the recent history of racial friction.

We, therefore, request the assistance of the Community Relations Service in attempting to find a solution to the pressing problems of the segregated school system, overcrowded and inadequate housing conditions, the high rate of unemployment, etc.

The news of such a step taken by your office would indeed help close the gap between the Negro and white communities. We thank you for your kind consideration of this matter.

Yours truly,

William Hall (signed)
Field Secretary, SNCC

cc: Commission on Civil Rights

August 24, 1964

Mr. Sergent Shriver, Director
War on Poverty Committee
Washington, D.C.

Dear Mr. Shriver:

In a recent meeting with Mr. Clarence W. Miles, chairman of the special committee appointed by Governor J. Millard Tawes to study the Cambridge situation, we informed Mr. Miles that Cambridge had been mentioned sometime ago as a potential area for work under the President's War on Poverty Program. Now that the legislation has become law, Mr. Miles at our request agreed that he would discuss this program with you in relationship to Cambridge. We feel this proposed program is necessary for the economic survival of the people of this area. As yet we have heard nothing from Mr. Miles on your conversation.

I am, therefore, requesting some information. 1) We would like to know if Cambridge is under consideration as a potential area in the Poverty Program? 2) If Cambridge has been determined eligible, how soon will the program be instituted here? 3) If the program for Cambridge is not already inaugerated, how soon will our community be eligible? 4) If there is a priority of areas in regard to need, what is the position of Cambridge in regard to priority areas?

We are anxiously awaiting your reply.

Yours in Freedom,

Chairman, Cambridge
CNAC

I. . Dictated by Mrs. Gloria Richardson, written and signed by me in her absence.

William Hall
Field Secretary, CNAC

PARTMENT OF JUSTICE

ROUT SLIP

	DIVISION	BUILDING	ROOM
shall	Civil Rights	Main	1145
4.			

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

Burke:

Looks like we did the right thing.

FROM: NAME	BUILDING, ROOM, EXT.	DATE
James J. P. McShane	Main 4217/2127	8/26/64

DEPARTMENT OF JUSTICE

ROUT SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. Jim McShane	Room	4217	
2.			
3.			
4.			

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

For your information. Please return.

BM
8/25

FROM: NAME	BUILDING, ROOM, EXT.	DATE

STATE OF MARYLAND
MILITARY DEPARTMENT
FIFTH REGIMENT ARMORY
BALTIMORE-1

24 August 1964

Mr. Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Constitution Ave. and 10th St., N.W.
Washington, D. C.

Dear Mr. Marshall:

I thought you would have some interest in the attached article appearing in the Baltimore Sun, August 22nd, concerning the activities of Captain William A. Harris at Cambridge.

In my opinion, and that of many others, Harris has made a major contribution toward a quiet solution of the racial problem there. He has won acceptance from both white and coloured by his reasonable, diplomatic, and pleasant approach.

The release of Harris from his normal duties with the Department of Justice to carry out his assignment in Cambridge is appreciated by all.

Sincerely,

GEORGE M. GELSTON
Brigadier General
The Assistant Adjutant General

...an Force Keeping Guard Up In Ca...bridge

By DOUGLAS D. CONNAH, JR.
[By a Sun Staff Correspondent]

Cambridge, Md., Aug. 21—The last National Guardsman on duty here is a 44-year-old Baltimore Negro, Capt. William A. Harris, who stayed behind when the troops pulled out July 11.

Captain Harris was left in Cambridge to work with the community in whatever way he could be useful and to keep on top of events for the State.

Since the racial demonstrations here died down and the guardsmen were withdrawn, Captain Harris's job has been somewhat different from the Guard's assignment for more than a year. He has needed neither a bayonet nor tear gas, and he has not had to face any angry crowds in the middle of the street.

Captain Harris has kept busy largely by finding ways to keep young and elderly Negroes busy. Besides trying to organize local recreation programs, he has spent a good deal of time taking people on trips.

Buddy Young Helps

He and a friend, Buddy Young, the former Colt star, once took 72 young Negroes to see the Orioles play the Boston Red Sox. Another time, they took 132 Negro youths to Washington, where they visited President Kennedy's grave at Arlington and shook Representative Morton's hand on the Capitol steps.

On another trip to Baltimore, Captain Harris and 37 elderly Cambridge Negroes visited a public housing project for the elderly, so they could see how activities for older people could be organized.

More recently, Captain Harris and the Dorchester county school

CAPT. WILLIAM A. HARRIS
Still on duty

time was that the [militia] law, the proclamation the Governor signed, stated that there would be no demonstrations.

"I was not here as a Negro National Guardsman; I was here as a member of the Maryland National Guard."

Captain Harris thinks that racial peace for Cambridge is finally in sight, largely because of the new Federal Civil Rights Act and the work of the Governor's commission, headed by Clarence W. Miles.

"The country had to be made aware of what has happened to the Negro, by the Gloria Richardsons and the Martin Luther Kings," he said. "Now it has a new weapon, the civil rights law. There's no more need for demonstrations.

"I also think the Miles Committee has done more for Cambridge

...rce Keeping Guard Up In Ca...bridge

By DOUGLAS D. CONNAH, JR.
(By a Sun Staff Correspondent)

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On another trip to Baltimore, Captain Harris and 37 elderly Cambridge Negroes visited a public housing project for the elderly, so they could see how activities for older people could be organized.

More recently, Captain Harris and the Dorchester county school superintendent, James C. Busick, took the football teams of two local high schools—one white, one Negro—to the Colts' intrasquad game.

The two buses the youngsters went to Baltimore in were desegregated, and nobody seemed troubled by it.

Captain Serves As Bridge

Captain Harris also seems to have become something of a symbol of authority and a bridge between the white and Negro communities.

A white restaurant owner, for example, once went to fetch Captain Harris when he thought several Negroes in his place were acting unreasonably.

"I've heard that some of the segregationists, as well as the liberals, have asked to keep me here," he said in an interview.

The Governor's committee trying to help solve Cambridge's racial troubles recommended keeping Captain Harris here until after Labor Day. Now he thinks he may remain until after election day in November.

Captain Harris has been in Cambridge since May 18. He arrived in the middle of the city's most recent series of racial protest demonstrations, set off a week earlier by the visit of Gov. George C. Wallace of Alabama.

Captain Harris was immediately greeted with hostility in the Negro Second ward when he held to the view—unpopular there—that the demonstrations had to be stopped. He was often taunted by Negroes milling in the streets and was regarded by some of the more active demonstrators as middle-class Negro playing it safe with the white power structure.

"In fact," he said, "I'm not wholly accepted here now. But what they didn't realize at the time was that the [militia] law, the proclamation the Governor signed, stated that there would be no demonstrations.

CAPT. WILLIAM A. HARRIS
Still on duty

"I was not here as a Negro National Guardsman; I was here as a member of the Maryland National Guard."

Captain Harris thinks that racial peace for Cambridge is finally in sight, largely because of the new Federal Civil Rights Act and the work of the Governor's committee, headed by Clarence W. Mile

"The country had to be mad aware of what has happened to t Negro, by the Gloria Richardson and the Martin Luther Kings," he said. "Now it has a new weapon, the civil rights law. There's no more need for demonstrations.

"I also think the Miles Committee has done more for Cambridge than all the commissions and committees ever appointed," he added.

In civilian life Captain Harris is a deputy United States marshal, and was the first Negro so employed in Maryland. He is a graduate of Morgan State College and a veteran of World War II and the Korean war.

He lives with his wife and two daughters on Cedardale road, in an integrated neighborhood in Northwest Baltimore.

"In fact," he said," In my block there are six colored families and eight white families.

TREASURY DEPARTMENT
LAW ENFORCEMENT COORDINATION
WASHINGTON 25, D.C.

August 25, 1964

Mr. Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

Dear Burke:

Following our conversation I am enclosing one of the collapsible tubular steel night sticks I mentioned to you.

As I indicated to you, I have been concerned for some time with the absence of any alternative weapons to the hand gun with which our Treasury agents can defend themselves against attack. This has been particularly true in cases where our agents have been attacked by criminal violators armed with knives, clubs, and the like. In order to protect himself in such situations the agent often has to rely on his gun. In many cases this is neither a desirable nor practicable defensive weapon. The enclosed stick would seem to offer a promising alternative to the hand gun. With its reach and strength it can be very effective against knives and similar types of weapons. Moreover, it has the great advantage of inflicting only nominal or less serious injury to the attacker than would a gun, while at the same time providing a great deal of protection to the agent employing it. This stick was designed for use by the Japanese Security Police to deal with individuals seeking to attack or assassinate high-ranking Japanese officials, which attempts were usually made with knives. Its small size and the ability to wear it on the belt or carry it in a pocket where it is out of sight and out of the way make it extremely practicable for a non-uniformed law enforcement officer.

Gripping the handle firmly and snapping it causes the stick to extend to its full length on a centrifugal force principle. In order to contract the stick it is held so that it is perpendicular to the ground with the end pointing down. By gripping the handle tightly and tapping the point lightly against a solid object or solid ground, the first or thinnest section will release. Then the second section can be pushed in with the hand.

(If the bar is struck against something soft, such as a wooden or rug covered floor, the center section may release first. If this should happen, it is best to snap the stick out again and strike the point against a hard surface in order that the first section might be released first.)

I believe that this telescopic stick provides a valuable and much needed defensive capability to our law enforcement officers, and offers an urgently needed alternative to reliance on a gun in situations where an agent may be attacked with a weapon other than a firearm. On the basis of preliminary tests we have made to date, it is quite likely that we would like to equip an appreciable number of our Treasury agents with the stick to be used for defensive purposes only. For your information, they are relatively inexpensive and can be obtained for under $3 each, including the case.

Before proceeding further with this project I would appreciate your views as to whether or not you see any objections which might mitigate against the defensive use of these sticks by our Treasury agents. My own feeling is that their effectiveness against attacks by knives and similar types of weapons, together with their non-lethal nature as compared with a gun are persuasive arguments in their favor.

Warmest regards.

Sincerely,

Arnold Sagalyn
Director

Enclosure

FROM

THE OFFICE OF THE DEPUTY ATTORNEY GENERAL

- [ ] ATTORNEY GENERAL
  - [ ] EXECUTIVE ASSISTANT
  - [ ] OFFICE OF PUBLIC INFORMATION
- [ ] DEPUTY ATTORNEY GENERAL
  - [ ] EXECUTIVE OFFICE—U. S. ATTORNEYS
  - [ ] EXECUTIVE OFFICE—U. S. MARSHALS
- [ ] SOLICITOR GENERAL
- [ ] ADMINISTRATIVE DIVISION
  - [ ] LIBRARY
- [ ] ANTITRUST DIVISION
- [ ] CIVIL DIVISION
- [XX] CIVIL RIGHTS DIVISION
- [ ] CRIMINAL DIVISION
- [ ] INTERNAL SECURITY DIVISION
- [ ] LANDS DIVISION
- [ ] TAX DIVISION
- [ ] OFFICE OF LEGAL COUNSEL
- [ ] OFFICE OF ALIEN PROPERTY
- [ ] BUREAU OF PRISONS
- [ ] FEDERAL PRISON INDUSTRIES, INC.
- [ ] FEDERAL BUREAU OF INVESTIGATION
- [ ] IMMIGRATION AND NATURALIZATION SERVICE
- [ ] PARDON ATTORNEY
- [ ] PAROLE BOARD
- [ ] BOARD OF IMMIGRATION APPEALS
- [ ] ATTENTION: _____

- [ ] SIGNATURE
- [ ] APPROVAL
- [ ] RECOMMENDATION
- [ ] COMMENT
- [ ] NECESSARY ACTION
- [ ] YOUR INFORMATION
- [ ] NOTE AND RETURN
- [ ] SEE ME
- [ ] PER CONVERSATION
- [ ] AS REQUESTED
- [ ] NOTE AND FILE
- [ ] CALL ME

- [ ] ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- [ ] PREPARE REPLY FOR SIGNATURE OF _____

REMARKS:

8/2/54

Mr. Burke Marshall
Assistant Attorney General
Civil Rights Division
Room 1145

Burke:

Yes--and I agree with the analysis and the conclusion--

NdeBK

File

DEPARTMENT OF JUSTICE

ROUTING SLIP

NAME	DIVISION	BUILDING	ROOM
Deputy Attorney General			
2.			
3.			
4.			

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
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- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

NicK:

I wanted to record these problems.
Do you think we are doing right?

BM
8/26

Yes - and I agree with the analysis of the memorandum -

FROM: NAME	BUILDING, ROOM, EXT.	DATE

Send this to Mr. Kalgenbach, with thanks Al, with note:

Nick:

I wanted to send these perfumes. Do you think we are doing right?

From: Burke Marshall

Re: Criminal Prosecutions under the Civil Rights Act of 1964

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Department of Justice
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T-8/21/64

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Greene
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by the public accommodations title. Both the proprietor and the third party intimidator are liable under federal law only because of and since enactment of the Civil Rights Act. Just as their liability is a creature of the Act, so is the right of their victim. In short, this argument proves too much, for the courts will certainly protect at least the proprietors from criminal sanctions. Moreover, in section 207(b), following the language quoted above, there appears a clause stating that "nothing in this title shall preclude any individual or any state or local agency" from asserting rights based on other federal or state statutes. This saving of jurisdiction does not mention the United States, an omission which suggests that the federal government may not, in any event, use any remedies other than those set forth in Title II to vindicate the rights created by that title.

Additional support for the view that criminal prosecutions may not be used in connection with Title II is found in the legislative history of the Civil Rights Act of 1964. On a number of occasions those supporting the bill, including yourself, assured the Congress that, as the Report of the House Judiciary Committee puts it: "the prohibitions of Title II would be enforced only by civil suits for an injunction . . . neither criminal penalties nor the recovery of money damages would be involved."

Counterbalancing somewhat this adverse picture is the fact that it is fair to say that the discussion during the debates concerning the non-availability of criminal remedies was concerned essentially with prosecutions of proprietors of places of public accommodations rather than with outsiders who interfere. Actually, no real thought was given at the time to the problem of criminal prosecutions of outside mobs which interfere with the desegregation of a place of public accommodations.

It is my view that, while the courts might well ultimately hold that the use of section 241 is not authorized in public accommodations cases, an argument that is not wholly frivolous can be made to justify such use. Such an argument would be predicated upon the proposition that Congress did not mean to foreclose the use of the criminal law against third persons who forcibly interfere with the peaceful desegregation of

public facilities, and that the statutory language and the legislative history must be read in the light of that basic understanding.

In view of the importance of dealing quickly and effectively with incidents of interference I propose to continue to use section 241 in public accommodations cases in the manner indicated unless instructed by you to the contrary.

T-8/21/64

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Burke Marshall

Re: Criminal Prosecutions under the Civil Rights Act of 1964

As you know, this Department has invoked 18 U.S.C. 241 on a number of occasions to deal with persons who interfere with the exercise of rights granted by the public accommodations title of the Civil Rights Act of 1964. Among these are a prosecution in Greenwood, Mississippi, and arrests in connection with the shooting of Lemuel Penn in Georgia.

This is to bring to your attention that some doubt exists concerning the authority of the Government to use section 241 in the manner indicated.

18 U.S.C. 241 prohibits conspiracies to intimidate citizens in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States. The statute almost certainly covers conspiracies to deprive persons of rights granted by acts of Congress (United States v. Waddell, 112 U.S. 76 (1884); United States v. Williams, 341 U.S. 70 (1951); cf. Fitzgerald v. Pan American World Airways, 229 F. 2d 499 (C.A. 2, 1956); but see United States v. Bailes, 120 F. Supp. 614 (1954)) and it would thus normally cover conspiracies to interfere with the rights granted by the public accommodations title. A problem exists here, however, because of indications that Congress did not mean to subject anyone to criminal prosecution for violating the provisions of the public accommodations title.

cc: Records
Chrono
Greene
Marshall

Section 207(b) of the 1964 Act provides in pertinent part that "the remedies provided in this Title shall be the exclusive means of enforcing the rights based on this Title . . . ." It follows that if the right to be free from interference and intimidation in connection with access to a place of public accommodation is one of the "rights based on" the public accommodations title, then the injunctive remedy granted in the title is exclusive, and a criminal prosecution will not lie.

Section 203(b) of the Act does protect the right to be free from interference or intimidation by providing that no person shall "intimidate, threaten, or coerce . . . any person with the purpose of interfering with any right or privilege secured by section 201 or 202" (that is, the substantive sections providing for a right of free access to a place of public accommodation). To the extent that section 203(b) thus establishes a right to be free from intimidation, that right may with considerable justification be said to be "based on" the public accommodations title. If that be so, then this right may be enforced only by the injunctive remedies of Title II.

It has been suggested that this result can be avoided by the argument that section 203 does not create any rights, and that the real "rights" (as that term is used in section 207(b)) are the rights declared in sections 201 and 202 to the full and equal enjoyment of the facilities of places of public accommodation. Section 203, in this view, is a remedial section which merely repeats preexisting law to the effect that no person shall intimidate another in the enjoyment of his federal rights.

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NAACP
1940 - 55

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THE
Dan Smoot Report

Vol. 3, No. 16 | Monday, April 22, 1957 | Dallas, Texas

DAN SMOOT

The Harlem Vote

In the late summer of 1956, Brigadier General Bonner Fellers — one of the most articulate and best informed men in America — remarked to me:

"The democratic and republican national conventions this year were not national conventions at all: they were gatherings of politicians jockeying for the vote in Harlem."

The truth of that remark becomes more apparent each day.

For years, Republicans condemned Franklin D. Roosevelt's new dealism — accurately labeling it the front and cover for a communist-socialist revolution in America. Actually, however, the Republicans, by and large, were not opposed to new dealism. The only thing they disliked about Roosevelt was that he was a Democrat instead of a Republican — just as liberal Democrats have nothing against Eisenhower except that Eisenhower is a Republican instead of a Democrat.

It is now apparent that Republicans — during all the years when they were acquiring the reputation of being anti-socialist, American constitutionalists — were not really trying to check the onward rush of the socialist revolution in America: they were merely trying to learn and perfect the techniques which accounted for Roosevelt's political success.

One Roosevelt technique — which modern Republicans are trying to steal and which liberal Democrats are hysterically clinging to as their very own — is that of creating and then capturing the negro vote.

Creating a negro vote was simple.

Since the middle 1920's, the communists have worked to stir up hatred between negroes and whites in America. One theme runs through all communist agitation and activity directed toward this end. The theme is presented with various disguises and sugar-coatings, but it is always, at bottom, the same: namely, that the south is a decaying part of the United States, under the control of degenerate whites whose chief pastime is to insult, oppress, beat,

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terrorize, and murder negroes. The negroes, on the other hand, are a noble race of men who yearn for nothing but peace and equality of opportunity, and brotherly love for all mankind.

In the middle 1930's, Roosevelt's new deal Democrats in the north and west adopted this communist propaganda theme as their own. With the help of preachers, and teachers, and professors, and writers, and Mrs. Roosevelt (and miscellaneous other uplifting reformers who hadn't the slightest notion what they were talking about) the new dealers and communists managed to convince not only negroes, but millions of whites as well, that this communist picture of the south was an accurate portrayal of conditions.

If some conscientious northerner, who went south and saw for himself, reported the truth that negroes and whites were doing rather well down there, that northerner would be tarred-and-feathered, figuratively if not literally, in his own liberal home town.

Consider a recent case:

In February, 1957, Mr. Milton Rosen, Commissioner of Public Utilities in St. Paul, Minnesota, made a trip to Alabama. Nowhere in the south did Mr. Rosen find dead negroes hanging from tree limbs. But he did see quite a few live ones — none of whom appeared to be cowed victims of lashes and broadax blows.

Mr. Rosen thereupon concluded that people in the north are not thoroughly well informed about the condition of negroes in Dixie; and Mr. Rosen permitted the press to quote him to that effect.

Back home in St. Paul, Mr. Rosen's remarks created quite a stir. Officers of the Dining Car Employees Union, Local 516, publicly demanded Mr. Rosen's resignation.

Mr. Ernest C. Cooper, acting executive secretary of the St. Paul Urban League, called Mr. Rosen's remarks —

"A distinct slap in the face to those individuals in the north and south, who are valiantly striving for the realization of the principle of our democratic society, equality of opportunity for all."

Poor Mr. Rosen — never having intended to slap anybody — made another statement to the press.

He said:

"Many thoughtful white people in the south *are* trying to help the negroes. Progress *is* being made.

"What I said *is* true: we do *not* at all times get the complete picture of conditions in the south."

This St. Paul story is an illustrative aside.

The point is that communist propaganda about race-conditions in the south created for Mr. Roosevelt a "negro vote" — which consisted not only of negroes, but of other racial minority groups (plus a large and influential group of professional bleeding hearts) who had been convinced that the condition of negroes in the south was a hideous sore on the fair body of our nation.

Mr. Roosevelt captured this negro vote by promising federal "civil rights" legislation which would keep blood-thirsty southern whites from kicking negroes around.

The negro vote is important. Many political analysts believe that the negro vote (broadly defined, as I have defined the phrase above) can be the determining factor in presidential elections.

In New York, for example, the vote-getting strength of Republicans and Democrats is about equal. Hence, the party which can capture the negro vote in New York City has an excellent chance to get all of the electoral votes for the entire state — the biggest bloc of electoral votes in the nation.

Capturing the negro vote by promising

federal civil rights legislation was a splendid political technique for Roosevelt and Truman — primarily because they were Democrats. Roosevelt and Truman, being Democrats, could get northern votes by insulting the south — without losing southern votes, because the south was solidly democratic.

I don't believe that one northerner or westerner out of 10,000 really understands this idiotic situation: an entire generation of southerners voting almost solidly for politicians who insulted and threatened the south.

But it isn't hard to understand.

Remember that after every major war the United States ever fought and won, we immediately embraced our fallen foe, pouring out our wealth and friendship to help him get back on his feet — in every war, except one: the Civil War.

After the Civil War, the Republicans in control of Congress offered no aid or friendship to a fallen foe. Republicans in Congress imposed upon their fellow-Americans in the south as harsh a vengeance as history records in modern times. Such a thing sinks deep into the subconscious, and lasts for generations. Time can heal such wounds; and the Reconstruction Era wounds would all have been healed by now if the miscellaneous agitators (communist, political, and social) had permitted; but they didn't; and there are many rank-and-file voters in the south who still instinctively think of the word *Republican* as meaning something evil.

Add to this hangover the considerations of "practical" politics and you have the reasons for the solid south.

With northern politicians threatening legislation that frightened the south, southern democrat politicians could present powerful arguments for their own reelection to Congress; the south had to send to Congress democrats with seniority who, because of their seniority, could get important committee assignments and block civil rights legislation.

These strange bedfellows — the white vote in the solid south and the negro vote in populous northern cities — gave the Democrats a powerful advantage in presidential elections.

The Republicans were quite willing to pander to the negro vote, but what could they do about the south?

The Republicans never did find the answer: the answer just emerged.

The Alger Hiss case in 1948 and Joe McCarthy's crusade beginning two years later, revealed to millions of Americans an awful truth: for fifteen years, under democratic administrations, agents of the Soviet Union had had easy access to practically all federal agencies and had, indeed, been in virtual control of some of the most important policy-making offices in the executive branch of government.

The Republicans made political capital of this situation.

There was a time (from about 1950 to 1953 or 1954) when *Republican* was a respected word among American constitutionalists all over the United States — even in the solid south. *Republican* was a political label for someone who respected the great principles of government embedded in the Constitution and the Declaration of Independence. *Republican* meant someone who was opposed to communism-socialism-new dealism.

It was during this period that the Republicans evolved the political strategy which outdealed the new deal and the fair deal. Republicans stole the whole new-fair deal program, in full, and made it even worse than it was under the democrats, but all the while they advertised themselves as conservative constitutionalists, damning the extravagance and

waste and pro-socialism-communism of the Democrats.

This Republican strategy worked in two presidential elections, making cracks in the solid south; but it may not, God willing, work again.

I believe the voters of America are learning to recognize a new-deal socialist regardless of what he calls himself.

I think the south's silly brass-collar loyalty to the Democratic Party is just about gone; and I do not think the Republicans can win another national election by enlarging the internationalist-socialist programs which they criticize the Democrats for starting.

Why such optimism?

I think the current struggle in Congress over civil rights legislation will, ultimately, awaken many people.

Consider, at random, a few interesting incidents.

On February 26, 1957, Senator William F. Knowland (Republican leader in the Senate) and Congressman Joseph W. Martin, Jr. (Republican leader in the House) were interviewed by the press, following their regular weekly meeting with President Eisenhower. Both expressed hope that Congress would enact President Eisenhower's civil rights program.

Now, the President's civil rights legislation was actually written and introduced into the House by a left-wing new deal Democrat — Congressman Emanuel Celler of New York. The President's civil rights program is something that the extreme left-wing in America — the communist party, all branches and splinters of the socialist party, the Americans for Democratic Action, Walter Reuther, Mrs. Eleanor Roosevelt, former Senator Herbert Lehman, Senator Hubert Humphrey — have been supporting for years.

Yet here are Senator Knowland and Congressman Martin — both known as ultra-conservatives—supporting the same program, and being careful to call it the program of *their* president.

On February 20, 1957, the Senate Constitutional Rights Subcommittee was holding hearings on civil rights legislation. The committee's schedule was interrupted to accommodate a surprise witness: Senator Everett M. Dirksen (Republican, Illinois). Senator Dirksen urged that the proposed civil rights legislation be strengthened to give the Attorney General even more power than the Democrats are planning to give him.

Senator Dirksen was for years one of the most eloquent leaders of the ultra-conservative Taft Republicans.

The President's Civil Rights Bill is being sponsored in the House by two New Yorkers: Congressman Emanuel Celler (Democrat) and Congressman Kenneth B. Keating (Republican).

These two Congressmen are in complete agreement on the terms and provisions of the bill. The only quarrel they have had this year occurred on March 5, 1957, when Congressman Celler postponed for one week a scheduled Judiciary-Committee vote on the Civil Rights Bill. Celler (the new deal democrat) ordered the postponement as a courtesy to witnesses who wanted to testify against the civil rights legislation and had not yet had an opportunity. Keating (the Eisenhower republican) said that opponents of the bill had nothing more to say that was worth hearing.

On February 17, 1957, the Democratic Advisory Council of the National Democratic Party, meeting in San Francisco, passed a formal resolution urging Democratic congressional leaders to take the lead in the new Congress to enact civil rights legislation. The Democratic Advisory Council did not criticize the Republicans' civil rights program; it criti-

cized the Republicans for stealing their program from the Democrats.

In a *whereas* reeking with partisan bitterness, the Democratic Advisory Council's resolution said:

"Republicans are attempting to create the false impression that they originated civil rights proposals, which they have belatedly copied from Democratic measures."

What does all this mean?

It means that the embittered struggle between modern Republicans and new deal Democrats over civil rights legislation is merely a continuation of that "jockeying for the vote in Harlem" which General Bonner Fellers spoke of.

Modern Republicans and new deal Democrats agree on the civil rights legislation they want. They are fighting only to see who can get "credit" with the organized minorities — credit for the most dangerous, sinister, and scurrilously motivated legislation ever proposed by a President and supported by leaders of both major parties.

Throughout this article, I have used *Democrat* and *Republican* as if I include every politician in both those parties. I do not. In both parties there are dedicated patriots who are Americans first and last, and party members only incidentally.

These men are now carrying on a determined fight against civil rights legislation.

And they are not fighting on emotional, or sectional, or racial grounds. They are fighting on constitutional grounds, trying to save what is left of the American constitutional republic — knowing that if the Eisenhower civil rights legislation is enacted, we will have taken another long leap toward a dictatorship in the United States.

Or, as Congressman Walter Rogers (Democrat, Texas) put it on March 12, 1957:

"If the administration's civil rights bill passes Congress, we will have a police state in this country."

* * * * *

Civil Rights Act of 1957

In 1956, the Eisenhower Civil Rights Bill was known as H. R. 627. Originally introduced in January, 1955, by Congressman Emanuel Celler (Democrat, New York), H. R. 627 was accepted by the Eisenhower administration and was jointly sponsored in the House by New York Republican, Kenneth B. Keating.

On July 23, 1956, the House passed the Celler-Eisenhower-Keating Civil Rights Bill by a vote of 279 to 126. In the Senate, Senator James O. Eastland (Democrat, Mississippi) managed to stop the thing in the Senate Judiciary Committee; and the Eisenhower Civil Rights Program died in 1956 with adjournment of Congress.

In the 1956 election, Eisenhower captured most of the negro vote in the United States. Of the 10 major negro newspapers in the United States, for example, nine were for Eisenhower; and the other one was neutral.

This political success made all modern Republicans and new deal Democrats hot to get on the bandwagon.

In the opening days of the 85th Congress in 1957, hundreds of civil rights bills were introduced in both houses.

In the House of Representatives, all of these bills were referred to the Judiciary Committee, whose chairman is Emanuel Celler.

The bill which Celler chose to steer through committee was known as H. R. 2145 — which bore Democrat Celler's name as author, but which was actually written in large part by Republican Keating.

On February 27, 1957, a subcommittee of Celler's House Judiciary Committee approved a slightly amended version of H. R. 2145, by a vote of 6-0.

On March 18, 1957, the full Judiciary Committee approved the bill with amendments.

On March 19, 1957, Celler reintroduced the bill as amended. The new Celler bill is known as H. R. 6127.

On that same day (March 19, 1957) the Senate Subcommittee on Constitutional Rights (whose chairman is Senator Thomas C. Hennings, Missouri Democrat) approved the Senate version of H. R. 6127.

Thus, H. R. 6127 is the civil rights bill which Congress and the nation are concerned with in 1957.

Here are the essential provisions of H. R. 6127:

Part I: Establishment of the Commission on Civil Rights

There is created in the executive branch of the Government a Commission on Civil Rights, composed of six members appointed by the President. Not more than three of the members shall at any one time be of the same political party.

Four members of the Commission shall constitute a quorum.

The Commission (or any two-man subcommittee of the Commission) may hold hearings at any time or place which they deem advisable.

The Commission may subpoena witnesses to appear and produce records at any hearing; but the Commission may not subpoena a witness to attend or produce records at a hearing held outside the U. S. judicial circuit wherein the witness is found or resides or transacts business.

Witnesses at hearings of the Commission may be accompanied by their own counsel.

The Commission may permit witnesses to submit sworn statements in writing for inclusion in the record — if the Commission considers the statements pertinent. The Commission will be the sole judge of pertinency.

If a witness refuses to obey the terms of a subpoena, the U. S. Attorney General can request a U. S. District Court to order the witness to obey. Then, any refusal to obey will be punishable as contempt of court (that is, on the sole authority of the federal judge, without a jury trial).

Witnesses subpoenaed to attend any session of the Commission will be paid a fee of $4.00 a day, plus $12.00 a day for living expenses, and 8c a mile for travel.

The Commissioners themselves will receive $50.00 a day compensation, plus travel and living expense.

The Commission may hire a full-time staff director and any other personnel it wants — paying them up to $50.00 a day each.

The Commission may also accept the services of voluntary and uncompensated personnel, paying such personnel travel and living expenses.

This voluntary personnel will enjoy the same special protections of, and exemptions from, the United States Criminal Code that all regular federal employees enjoy.

The Commission may set up whatever advisory committees it wants, wherever it wants them.

The duties of the Commission shall be:

(1) to investigate allegations that United States citizens are being deprived of their right to vote, by reason of their color, race, religion, or national origin;

(2) to collect information concerning state or local laws (or any other legal developments) which constitute a denial of equal protection of the laws under the Constitution.

Part II: To Provide for An Additional Assistant Attorney General

There shall be in the Department of Justice one additional Assistant Attorney General. His duties will be to handle civil rights matters, exclusively.

Parts III and IV: To Strengthen the Civil Rights Statutes, and To Provide Means of Further Securing and Protecting the Right to Vote

Whenever any persons have engaged, or there are reasonable grounds to believe that any persons are about to engage, in any acts or practices forbidden by civil rights statutes, the Attorney General may institute in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary court injunction, restraining order, or other order. Then, if anyone disobeys the court order, he can be punished for contempt of court — fined or jailed, without a jury trial.

When someone claims that his civil rights have been violated, the U. S. District Court shall have jurisdiction in the matter, regardless of whether the person has, or has not, tried to get justice in state courts.

This Act may be cited as the "Civil Rights Act of 1957."

* * * * *

The Police State

Arthur Krock, columnist for the *New York Times*, on March 1, 1957, reported that opposition to the Eisenhower civil rights bill this year is not "an emotional resistance to change in the sensitive area of southern negro-caucasian relations." The opposition is being led by constitutional lawyers (like Senator Sam J. Ervin, Jr., former member of the Supreme Court in North Carolina) who know that the civil rights legislation can destroy basic constitutional rights of all Americans.

Here are a few of the things which America's foremost authorities on the Constitution say *could* happen if the Civil Rights Act of 1957 is enacted into law:

The Constitution leaves to the states the power to determine qualifications for voters. Some states require that voters be able to read and write.

Let us assume that the Attorney General of the United States, a Republican, believes that all negroes in a southern state want to vote for Republican candidates in an important election. He knows that state has a literacy test for voters. He imagines that many negroes in the state cannot pass the literacy test, and he guesses that election officials of the state will therefore disqualify those negroes as voters.

Having reason to believe all of these things, the Attorney General of the United States can get a federal court order enjoining all election officials in that state from giving a literacy test. Any election official who tries to obey the provisions of state election laws can then be sent to jail, without a trial, for being in contempt of court.

Or, let us assume that the Attorney General of the United States is a Democrat. In a presidential election year, he calculates that California will go Republican. On the eve of the election, he could arrange to have every election official in California subpoenaed to testify at a civil rights hearing. He could require them to produce and surrender all of the state's official election records. He could, in fact, use a federal court order to impound all official records and documents of the State of California and make it thus impossible for an election to be held in California.

Let's say you live in Maine. You have a little business in which you employ ten people. Someone complains that you have "discriminated" against, or hurt the feelings of, some negro — or some Presbyterian, or some Catholic, or some Mohammedan, or some Jew, or some Irishman, or some Mexican — because of his "color, race, religion, or national origin."

The President's Civil Rights Commission can deputize ("accept the voluntary services of") some official of the National Association for the Advancement of Colored People to come into your office and examine all of your books, papers, and records. The NAACP official could impose such demands on you as would make it impossible for you to carry on your business.

WHO IS DAN SMOOT?

Dan Smoot was born in Missouri. Reared in Texas, he attended SMU in Dallas, taking BA and MA degrees from that university in 1938 and 1940.

In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for the degree of Doctor of Philosophy in the field of American Civilization.

In 1942, he took a leave of absence from Harvard in order to join the FBI. At the close of the war, he stayed in the FBI, rather than return to Harvard.

He served as an FBI Agent in all parts of the nation, handling all kinds of assignments. But for three and a half years, he worked exclusively on communist investigations in the industrial midwest. For two years following that, he was on FBI headquarters staff in Washington, as an Administrative Assistant to J. Edgar Hoover.

After nine and a half years in the FBI, Smoot resigned to help start the Facts Forum movement in Dallas. As the radio and television commentator for Facts Forum, Smoot, for almost four years, spoke to a national audience giving both sides of great controversial issues.

In July, 1955, he resigned and started his own independent program, in order to give only one side — the side that uses fundamental American principles as a yardstick for measuring all important issues. Smoot now has no support from, or connections with, any other person or organization. His program is financed entirely from sales of his weekly publication, *The Dan Smoot Report*.

If you believe that Dan Smoot is providing effective tools for those who want to think and talk and write on the side of freedom, you can help immensely by subscribing, and encouraging others to subscribe, to *The Dan Smoot Report*.

You (perhaps knowing that 41% of the officers of the NAACP are either communists or members of communist fronts) may not want to let this NAACP official violate your constitutional right to be secure in your papers and effects — and put you out of business.

If you don't comply, however, the NAACP official can cause a court order to be issued. Then, if you don't obey the NAACP official, you can be put in jail for contempt of court.

Or, perhaps the NAACP official doesn't want to bother to come to your office. He'd rather subpoena you to bring all of your records to him.

Suppose he is working for a subcommittee of the Civil Rights Commission which is holding hearings in Puerto Rico. You live in Maine. The Civil Rights Act of 1957 says you can't be subpoenaed to go outside the judicial circuit where you reside or do business.

But that's all right, because Puerto Rico and Maine are in the same Judicial Circuit. Hence, you have an option: (1) you can either go to jail without a jury trial (which the Constitution is supposed to guarantee you); or, (2) you can pack up a truck load of your papers and effects and haul them from Maine to Puerto Rico to be examined by an official of the National Association for the Advancement of Colored People.

The United States and *all* of its territorial possessions, you see, are divided into only 11 judicial circuits.

Suppose you are a California banker, accused of "discriminating" against some oriental, because you refused to grant him a loan.

California is in the Ninth Judicial Circuit — which also includes Guam, Alaska, Hawaii, Montana and a few other western states.

See the possibilities?

And these are only a few of the possibilities under the Civil Rights Act of 1957.

Was Congressman Walter Rogers of Pampa, Texas, exaggerating when he said the Eisenhower civil rights program would create a police state in America?

If you do not keep a permanent file of *The Dan Smoot Report,* please mail this copy to a friend who is interested in sound government.

DAN SMOOT,
P. O. Box 1305
Dallas, Texas

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CITY AND STATE

THE
Dan Smoot Report

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DAN SMOOT

An American Tragedy

In 1928, the Workers Library Publishers, 35 East 125th Street, New York (official publishing company of the Communist Party, USA) published a 16-page booklet entitled *American Negro Problems* — written by John Pepper.

John Pepper (whose real name was Joseph Pogany, but who used numerous aliases, such as John Pepper, John Schwartz, John Swift, and so on) was the communist official specially designated by Moscow to direct the American communist party's program of racial agitation in the United States.

John Pepper's *American Negro Problems* was written primarily as a guide for communist agitation activity in the presidential election campaign of 1928.

As early as 1913, Lenin had urged American communists to use the "negro problem" as a means of creating the disorder and strife necessary for revolution in the United States. After Stalin seized power, he urged the same thing. In 1928, the Kremlin decided to take advantage of the national political elections in America to launch the communist racial agitation campaign.

In selecting the year 1928 as the time to begin their all-out campaign to tear the American union apart with racial agitation, the communists were motivated by three main considerations:

(1) It was expedient to launch such a program under the cover of a "political" campaign. Communists could cry "political persecution" when their activities ran afoul of law.

Americans — somewhat accustomed to exaggerations and inflammatory charges during national political campaigns, and sensitive about preserving their important tradition of freedom of speech to avoid the dangerous possibility that someone *might* be persecuted and silenced because of his legitimate political views — would be more inclined to tolerate license on the part of communists during a presidential campaign year than at any other time.

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(2) Passions and emotions are nearly always inflamed (and rational thought usually at low ebb) during national political campaigns. Hence, a presidential election year is an appropriate time to launch a foreign-directed campaign of subversive agitation.

(3) In 1928, the communists were spurred by a sense of urgency. They realized that they were rapidly losing the chance to capitalize on the most delicate and dangerous situation ever to burden a civilized and peaceful nation. If the communists waited another four or eight years, their golden opportunity might be gone forever.

From the communists' point-of-view, this third consideration was the most important of all, because the "negro problem" in America was, indeed, being solved with miraculous speed.

Consider the situation.

Negroes whom New England and British slave traders brought to the new world were not a civilized people captured and sold into bondage. They were uncivilized barbarians — many of them cannibalistic — with no civilization or cultural attainments of their own. The evil bondage to the white man — to which they were subjected in America — was, physically speaking, an actual improvement upon the life which they had made for themselves in Africa.

These were the people — illiterate, propertyless, with no racial traditions of freedom, of culture or of self-government — who, at the close of the civil war, after three centuries of slavery in the new world, were abruptly freed without any training or preparation to bear the burdens and privileges of freedom.

In one violent step, they who had never developed a civilization of their own, were declared equal heirs of a civilization which it had taken the white man thousands of years to develop.

In addition to this, the southern white people who had the main task of helping the negroes assimilate an ancient and alien culture were pauperized, demoralized, and embittered by war — a people whose own way of life had been shattered by military action.

Americans in the north were also hurt and embittered by four years of savage warfare.

Hurt and bitterness were the guiding motives of policy during the ten years that followed Lee's surrender at Appomatox.

The guns and cannon of northern occupation armies forced southern whites to accept provisional state governments run by illiterate negroes and villainous white carpetbaggers — governments which, under the cover of "law" despoiled southerners of their homes and other property, for the benefit of greedy manipulators behind the governments.

It is pointless to revive old arguments about which side was "right" and which "wrong."

It was northern slave-traders who brought the negroes here. It was southern plantation owners who bought and used them.

It was not that southerners were above engaging in the slave trade or that northerners were above owning and working slaves. The economics of the time assigned the north and south their respective roles.

Slavery was a national sin. The horrible conditions following the civil war were part of the wages of that sin.

Add to these postwar conditions, the undeniable fact that there are wide and essential native differences between the black and white races — differences which make relationships at close range delicate under the most ideal circumstances — and it is easy to see what a monumental problem the southern states had at the close of the civil war.

It was a problem that only the chemistry of time and tolerance and patience and Christian love could solve. Yet, the problem was being solved with miraculous speed until alien

agitators, aided and abetted by venal domestic politicians, entered the picture.

Every American — north and south, black and white — should be proud of the record of what happened between the end of the Reconstruction Era (about 1875) and 1928 —the beginning of the all-out communist campaign of racial agitation.

In those 53 years, the American negro made more progress than the black man had ever made anywhere else in the entire history of the human race.

Large numbers of negroes were still on plantations and were not living as "first-class citizens" in the same sense that their white employers were living.

But the same could be said (in any nation at any period of time) of large numbers of people — whatever their color or whatever section of the nation they may occupy.

It is simple truth that no individual (particularly in a free society) is a "first class" citizen unless he possesses the qualities of one — and behaves like one.

It is also truth that in the south during the 53 years between 1875 and 1928 American negroes made miraculous progress toward full integration into the white man's culture — not integration in the contemporary sense of losing their racial identity by full amalgamation with the white race, but integration in the sense that they began to develop a pride in their own race and, with the white man's help, began to build their own cultural and educational institutions, establish their own businesses, build their own homes, own their own land.

With marvelous speed, the American negroes — thanks to the understanding and sympathetic aid of southern whites — were becoming a proud and distinctive part of the total American population.

The communists were keenly aware that the "negro problem" was vanishing when they launched their program of racial agitation in 1928.

Examine these passages from John Pepper's communist booklet published in 1928:

"The two major capitalist parties, the Republican and Democratic, and their small brother, the Socialist Party, have an unwritten 'gentleman's agreement' on the Negro question. According to this sacred 'gentleman's agreement,' which no capitalist politician has dared to violate in the present election campaign, there is no Negro question in the United States, there are no problems of social and political equality, no questions of discrimination against the Negro masses. During the whole course of the election campaign there has been only one political party which has had the courage to violate this 'gentleman's agreement' to keep a deathly silence on the Negro question. The Workers (Communist) Party of America has come out in its election platform and in its whole election struggle as the fearless champion of the Negro masses.

"The southern states are stirred up by the political struggle of the communist speakers and organizers for the Negro masses. Communist anti-lynching leaflets are being distributed everywhere.

"The candidates of the Communist Party are everywhere putting up a courageous fight for the full social and political equality of the Negro race."

To anyone familiar with American politics, it goes without saying that if there had been any real "negro problem" in the United States in 1928, one or the other of the major parties would have seized upon it to gain political advantage.

This communist handbook is full of communist cliches about the "oppressed negro masses" in the United States, but the following passages from the book reveal that the communists knew what the actual situation was:

"The Negroes of the United States are the most advanced section of the Negro population of the world. . . .

"A sharp class differentiation has taken place in the Negro population in recent years. Formerly the Negro was in the main the cotton farmer in the south and the domestic help in the north. . . . (But now) in the big cities and industrial centres of the north there is concentrated to a growing degree a Negro working-class population. . . . At the same time there is a rapid development of a Negro petit-bourgeoisie, a Negro intelligentsia, and even a Negro bourgeoisie. The very fact of segregation of the Negro masses creates the basis for the development of a stratum of small merchants, lawyers, physicians, preachers, brokers, who try to attract the Negro workers and farmers as consumers. . . .

"It would be a major mistake to overlook the existence

of class differences among the Negroes, especially the crystallization of a Negro bourgeoisie. There were in 1924, 73 Negro banks, carrying an annual volume of business of over 100,000,000 dollars. There are 25 Negro insurance companies; 14 of these have assets totalling 6,000,000 dollars and during 1926 alone paid over 3,000,000 dollars in claims. This Negro bourgeoisie is closely tied up with the white bourgeoisie; is often the agent of white capitalists. Economically the Negro banks are often part of the Federal Reserve System of banking.

"Politically the Negro bourgeoisie is participating, to a growing degree, in the so-called 'commissions for interracial cooperation.' These committees exist in eight hundred counties of the south and are spreading all through the black belt."

The constructive negro leaders whom the communists in 1928 were referring to as the petit-bourgeoisie and the bourgeoisie were the same type of good ("first-class") negro citizens whom the NAACP today refers to as "Uncle Toms." They were negroes who, with pride in their own race, were becoming leaders of their own people — leading them not in hatred and strife, but toward full-scale participation in the free American economic system.

Note that the communists were particularly disturbed because the "Negro bourgeoisie" was participating with southern whites in voluntary commissions for inter-racial cooperation.

Negro progress in the United States was so fast and so solid — and harmonious relations between black and white races were being so effectively developed—that communists alone could not have done serious harm.

The "race problem" did not become a major American tragedy until the Democratic party, under the leadership of Roosevelt and Truman, adopted the communist program of racial agitation.

The problem did not become a major national disaster —transforming law-abiding citizens into hysterical mobs, converting peaceful communities into cauldrons of violence, and threatening to establish a military dictatorship in the southern states — until modern Republicans under the leadership of Eisenhower launched an all-out political struggle to win organized negro support away from the Democrats.

Both major parties, which were silent on the negro question in 1928, as shown in the communist quotation above, have now adopted the *total communist platform* for racial agitation which is designed to destroy constitutional government and shatter the American union.

If you don't believe it, read the 1928 communist platform, set out on page 5 of *American Negro Problems:*

"1. Abolition of the whole system of race discrimination. Full racial, political, and social equality for the Negro race.

"2. Abolition of all laws which result in segregation of Negroes. Abolition of all Jim Crow laws. The law shall forbid all discrimination against Negroes in selling or renting houses.

"3. Abolition of all laws which disfranchise the Negroes.

"4. Abolition of laws forbidding intermarriage of persons of different races.

"5. Abolition of all laws and public administration measures which prohibit, or in practice prevent, Negro children or youth from attending general public schools or universities.

"6. Full and equal admittance of Negroes to all railway station waiting rooms, restaurants, hotels, and theatres.

"7. Federal law against lynching and the protection of the Negro masses in their right of self-defense.

"8. Abolition of discriminatory practices in courts against Negroes. No discrimination in jury service.

"9. Abolition of the convict lease system and of the chain-gang.

"10. Abolition of all Jim Crow distinction in the army, navy, and civil service.

"11. Immediate removal of all restrictions in all trade unions against the membership of Negro workers.

"12. Equal opportunity for employment, wages, hours, and working conditions for Negro and white workers. Equal pay for equal work for Negro and white workers."

* * * * *

Terror

There is no longer much serious doubt about racial agitation in the United States being a communist program. All well informed people know that it is.

On March 7, 8 and 9, 1957, the Joint Legislative Committee of the Louisiana legislature held hearings in Baton Rouge, Louisiana. Testimony and evidence presented to that committee prove that Supreme Court decisions in

the "segregation" cases, the administration's forcing integration in the armed forces, the administration's using government contracts to force integration in private industry, and the activities of leaders of both political parties in agitating for force bills known as "civil rights legislation," are recklessly carrying out well-laid schemes of the communist international.

One specific important item of information publicized by the Louisiana committee was that ten top leaders of the National Association for the Advancement of Colored People have extensive communist front records. The ten are:

- Algernon D. Black, NAACP Board of Directors
- Hubert T. Delany, NAACP Board of Directors
- Earl B. Dickerson, NAACP Board of Directors
- Oscar Hammerstein II, Vice President of NAACP
- S. Ralph Harlow, NAACP Board of Directors
- William Lloyd Imes, Vice President of NAACP
- Benjamine E. Mays, NAACP Board of Directors
- Eleanor Roosevelt, NAACP Board of Directors
- Channing H. Tobias, Chairman of the Board, NAACP
- W. J. Walls, Vice President of NAACP.

None of this is being reported to prove a southern contention that integration of the races is "bad" or "undesirable." It is being reported to underscore an obvious truth: that whenever force is injected into a problem as delicate as race-relations, nothing but evil can result.

This would be so, even if the force were legal. When it is patently illegal, unconstitutional, and immoral — as the federal government's activities in this field have been — the probable end results are quite terrible to contemplate.

Every thinking person has known this from the beginning; yet, the foremost leaders of our land have blindly followed a communist plot to the point where our nation borders on revolutionary violence and civil war.

Why do you suppose that smiling, peaceful housewives standing on the lawn at Central High School in Little Rock, Arkansas, suddenly became hysterical at the news that eight negro children had entered the building?

These are Americans who know that the Supreme Court's school-segregation decision was based on the writings and philosophies of alien communists and socialists and not on American constitutional law. They know that the federal government has no shade of constitutional authority to tell the sovereign states how they must run their schools. These Little Rock citizens are, moreover, parents who have read the record of what has happened in such places as Washington, D. C., where integration in the schools was hastily enforced.

Believing that they are American citizens who have not only a right but a responsibility to protest illegal and tyrannical acts on the part of their own government, they assemble for that purpose. When they are abruptly confronted with the realization that they are helpless to direct the lives of their own children in their own way; when they see that the efforts of mere citizens are vain and fruitless against the naked power of a police state — they are scared.

Every thoughtful citizen in the south today is scared — as he anxiously anticipates the horrible effects of a police state coming into his own peaceful community, catching him and his children up in a maelstrom of violence and hate.

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DAN SMOOT

UNFAIR HOUSING

On December 30, 1960, President-elect John F. Kennedy announced the appointment of Dr. Robert Weaver as Administrator of the Housing and Home Finance Agency — which means that he will direct the federal government's multi-billion dollar housing programs.

Dr. Weaver, a negro, has been chairman of the National Association for the Advancement of Colored People, and also Vice Chairman of the Housing and Redevelopment Board of New York City.

The really significant fact about Dr. Weaver is not that he is a negro, but that he was chairman of the NAACP. This outfit, dominated for years by persons who have long records of association with communist causes, has done, and is doing, more harm in creating strife, fear, mutual distrust, and mutual hatred among racial groups in America than all of the so-called "hate-groups" which 'liberals,' in and out of the NAACP, are always talking about. The fact is that the NAACP is the major, organized "hate-group" in America today.

It poses as an organization of and for negroes, existing for the purpose of helping negroes advance. In fact, it is dominated by whites and mulattoes who have no real love for, or understanding of, American negroes.

Prior to the late 1920's and early 1930's (when the communist party and the NAACP began their parallel programs of racial-hatred agitation) American whites and negroes were solving their "racial problems" with miraculous speed. American negroes were developing pride in their own race, were helping to build their own cultural and educational institutions, and were establishing their own businesses. With marvelous speed, American negroes were becoming a proud and distinctive part of the total American population.

The pockets of undesirable conditions that did still exist were unfortunate but inevitable hangovers from the Civil War and the Reconstruction Era. They were being eliminated in the only way

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possible — gradually, by the chemistry of time and tolerance and patience and Christian love.

When the NAACP and the communist party attacked these isolated cases of racial abuse, they dishonestly portrayed them as typical of all negro-white relations in America. The NAACP and communist agitation was not intended to eliminate racial feelings and attitudes which were prolonging undesirable race-relations in isolated cases. The agitation was intended to inflame those feelings into hatred, and spread them to the total population.

The motivation of the communists is obvious: to create chaos in our society. The motivation of the NAACP, where different from that of the communists, is fascinating. The racial agitation of the NAACP—which is supposed to be an organization for the *advancement* of colored people —reflects a hatred and contempt of colored people.

Consider the awful developments in Little Rock, 1957.

The NAACP in the Little Rock affair displayed far more disregard for the needs and desires of colored people than was displayed by whites who tried to keep negroes out of the white high school. The colored people of Little Rock wanted a school for themselves as good as the one white folks had; and they already had that. The very colored parents who did send their children out of their own district in order to enroll them in the white high school and cause turmoil, were not motivated by any desire to provide a better education for their own children. They were either bribed, or high-pressured into using their own children as pawns which the NAACP could manipulate to serve its own ends of creating racial strife and hatred.

This practice of the NAACP—of using negroes as tools to stir up hatred which hurts negroes more than it hurts anyone else—can be clearly seen in controversies over public housing.

We will ignore for a moment the real fact—that public housing is unconstitutional and should not therefore exist for any reason whatever. All officials, members, and supporters of the NAACP call themselves 'liberals'—which means that they are socialists who believe in public housing.

This being understood, it would make a great deal of sense if the NAACP (which is supposed to be interested in advancement for colored people) were constantly pushing for more and better housing for more negroes. But the NAACP does just the opposite. The NAACP does not push for public housing for negroes. On the contrary, the NAACP makes the most determined opposition to public housing for negroes!

In the past few years, the NAACP has strongly opposed every proposal for a public housing project for negroes. The NAACP even opposes the building of public housing projects in colored neighborhoods. Indeed, there have been many cases in New York, Pennsylvania, and adjoining states where the NAACP put pressure on a housing authority to keep it from renting, to negroes, public housing that already existed.

Why? The NAACP does not want negroes to have the freedom to live in their own communities. NAACP wants to force negroes to live in intimacy with whites.

The NAACP—the National Accociation for the *Advancement* of Colored People—is ashamed and contemptuous of colored people. The NAACP agitators do not want our negro citizens to be proud and *distinctive* parts of the total American population. The NAACP does not want the black man to preserve his God-given identity as a black man. The NAACP wants to eliminate the negroes as distinctive human beings: to stir negroes into the white population until they will be unnoticed.

This is why the NAACP is constantly agitating (and in recent years, with frightful success) for laws which make it illegal to show a human being's race on a birth certificate or death certificate; which make it illegal for employers even to ask prospective employees what race they belong

to; which make it illegal for employment agencies to mention race when advertising jobs available; which make it illegal for insurance companies to mention race when writing policies; or for banks to mention or consider race when considering loan applications; or for individuals to consider race in the use and management of their own homes and other property.

Such laws as these — which are destructive of every basic principle of our society — are being pressed by the NAACP and other 'liberal' race-hating agitators at the community, county, state, and federal levels all over America.

Non-Segregated Housing

The major push in recent years has been in the field of housing—and for an obvious reason.

Since the racial agitation of NAACP-liberals is motivated by contempt for colored people and is designed ultimately to eliminate colored people as a distinctive part of our population, liberals know that their ultimate objective can never be reached until black and white races are submerged in each other—until they intermarry and procreate a racially blended population of light brown people.

So, NAACP-liberals are determined to force colored and white people to live together in the same neighborhoods and same houses, hoping that this intimacy of living will finally lead to the real and final intimacy of inter-marriage.

Most of the widely publicized controversies over 'segregated' housing have involed the federal government's housing programs. Every year, when new housing legislation is proposed in Washington (or old legislation must be renewed) 'liberals' try to insert "anti-segregation" riders — providing that no federal money of any kind can be used to promote housing that is or will be segregated.

The housing industry in America would be almost totally socialized today if it were not for the annual squabbles in Washington between "segregationists" and "non-segregationists."

We can expect this aspect of the NAACP "brotherhood" program—that is, the use of federal tax money to enforce racial togetherness in housing — to be expanded and intensified, now that Dr. Robert Weaver, the NAACP's own director, is in charge of the federal government's "housing" programs.

"Fair" Housing

Dr. Weaver's prestige and power will also be felt in the stimulation of "Fair Housing" programs at community and state levels.

"Fair Housing" is not intended to make more or better, or any, housing available for more people. In fact, wherever "Fair Housing" laws are enacted they make less housing available for the population. And "Fair Housing" laws do not encourage "fairness" in the building, renting, or selling of houses: they do the opposite. They enable members of a minority racial group (who are under constant incitation and brainwashing by sinister organizations) to force themselves into intimate living with majority racial groups; and in the process, they destroy the most important and sacred (which means God-given) rights of all members of society, including the rights of members of the minority group: that is, Fair Housing laws eliminate an American individual's right to free use of his own real estate.

In 1959, "Fair Housing" laws were proposed to 13 different state legislatures, and adopted by four of them: Colorado, Massachusetts, Oregon, and Connecticut.

In addition to that, some kind of "Fair Housing" laws have been written into the municipal codes of several big northern and eastern cities, including New York. They are not all alike. Some are worse than others. But they all, generally, intend to outlaw "racial discrimination" in the financing, building, renting, and selling of private residences—residences that are built entirely with private capital, for private use.

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DAN SMOOT

THE MISSISSIPPI TRAGEDY

In a television speech to the nation on Sunday night, September 30, 1962, President Kennedy explained his actions in Mississippi: he repeated practically the same things that former President Eisenhower had said on September 24, 1957, when explaining the troops in Little Rock. Like Eisenhower before him, Kennedy said he was enforcing *the law of the land.*

What law?

Only Congress can constitutionally make laws for the nation, and Congress has never made a law concerning integration in schools or colleges.

In fact, the Constitution of the United States prohibits the Congress from making any such law. The Tenth Amendment says:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Constitution does not delegate any power to the federal government to interfere, in any way, with the operation of schools and colleges in the individual states.

Obviously, then, when the Supreme Court, or any other federal court, tells the state governments how to operate schools or colleges, that court is usurping power not delegated by the Constitution. It follows that all federal court edicts, injunctions, decisions, and orders concerning the enrollment of James H. Meredith in the University of Mississippi (or dealing with any educational matter in any state) are illegal.

In the Meredith case, Kennedy could not even honestly claim legality by saying that he was enforcing a Supreme Court decision. There has been no Supreme Court decision with regard to Meredith.

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Facts of the Meredith Case

James H. Meredith, a 29-year old negro, served nine years in the United States Air Force, being discharged in 1960 with the rank of sergeant. Upon discharge, he enrolled at Jackson State College, a Mississippi school for negroes.

The National Association for the Advancement of Colored People encouraged Meredith to leave Jackson State and to enroll at the University of Mississippi, an all-white school at Oxford. The laws of Mississippi prohibit the enrollment of negroes in the all-white University. The NAACP financed Meredith's court fight to force enrollment, in defiance of the laws.[1]

The NAACP lost the first round of its fight. Federal District Judge Sidney C. Mize upheld University officials in denying Meredith admission.

The NAACP appealed to a three-judge U.S. Circuit Court of Appeals in New Orleans which, in a 2 to 1 decision, reversed the District Court decision. Judge Dozier DeVane, the Circuit Court Judge who dissented, said:

"In my opinion, Judge Mize was correct in finding and holding that appellant bore all the characteristics of becoming a trouble-maker if permitted to enter the University of Mississippi, and his entry therein may be nothing short of a catastrophe."

United States Circuit Court Judge Ben Cameron, of Meridian, Mississippi, issued an order staying execution of the New Orleans Circuit Court order that Meredith be enrolled. The NAACP appealed to the Supreme Court.

The Supreme Court was not in session; but on September 10, 1962, Supreme Court Justice Hugo Black, acting alone, set aside Judge Cameron's stay-order and ordered the University of Mississippi to admit James H. Meredith as a student.

Justice Black said that execution of the Circuit Court's order to enroll Meredith "can only work further delay and injury" to Meredith, while immediate enforcement of the order to enroll Meredith "can do no appreciable harm to the University" or to others.

Justice Black's order to enroll Meredith could not possibly be legal, because (among other things) one Supreme Court Justice cannot decide for the whole Court. Indeed, Black's own labored explanation indicates that he was uncertain of his authority to issue the order. The Associated Press dispatch from Washington, reporting on Justice Black's action (published in the *Shreveport Journal*, September 11, 1962) contains these significant paragraphs:

"Black said he was convinced he had the authority to act as he did today. But he said he had submitted to all of the justices of the Supreme Court the question of his authority to act.

" 'I am authorized to state,' said Black, 'that each of them (the other Supreme Court Justices) agrees that this case is properly before this court, that I have power to act, and that under the circumstances I should exercise that power as I have done here.' "

This then, is the "law of the land" which Kennedy enforced in Mississippi with federal troops and marshals: an illegal order by one Supreme Court Justice, in a case which Mississippi State officials did not even have a chance to argue before the Supreme Court — a case which was never even presented to the whole Supreme Court.

On September 13, 1962, Ross Barnett, Governor of Mississippi, interposed the authority of the State of Mississippi to protect the citizens and officials of that state against the operation of illegal and unconstitutional orders and actions by agencies of the federal government: that is, the Governor issued a proclamation telling appropriate state officials not to obey court orders to enroll Meredith.

On September 20, 1962, James Meredith was tried in a Mississippi State Court on the misdemeanor charge of falsifying official records, when he registered to vote. Meredith was convicted and sentenced to serve one year in

jail and to pay a five-hundred-dollar fine. State officials also obtained a criminal indictment against Meredith, for perjury in connection with his alleged falsification of official records.

Attorney General Robert Kennedy got a court order prohibiting state officials from arresting Meredith.

On September 25, 1962, the Fifth U. S. Circuit Court of Appeals in New Orleans ordered Governor Barnett and other officials in Mississippi not to bar Meredith's admission to the University.

On September 28, 1962, the Circuit Court declared Governor Barnett in contempt and ordered his arrest and the imposition of a fine of $10,000 a day, beginning October 2, if the Governor did not "purge" himself of his contempt before that time — by admitting Meredith to the University.

On Sunday night, September 30, 1962, federal officials put Meredith on the University campus by helicopter; and Kennedy's marshals and troops closed in on the hapless little college town of Oxford.

Blood on Kennedy Hands

John F. Kennedy and Robert Kennedy are fully accountable for the blood that has been shed — and may be shed — in Mississippi.

Although Mississippi had already been surrounded and invaded with enough federal military force to crush the state, Kennedy, in his September 30 television speech, said that integration was achieved at the University of Mississippi without the use of National Guard or other troops. Why this ridiculous emphasis on a technicality?

At the Democrat National Convention in 1960, Kennedy promised that he would never use federal troops to force integration in the South.[2]

Kennedy's cynical effort to keep the letter of this promise, while violating its obvious meaning, is responsible for the bloodshed in Mississippi.

One thing that makes Kennedy's action in Mississippi even uglier than Eisenhower's action in Little Rock in 1957, is that Eisenhower did at least send seasoned troops, ably commanded, to force his tyrannical will upon the people of Little Rock. Kennedy had even greater military force in Mississippi; but in the forefront of the action, he had an army of federal marshals — so that he could later say, as he is saying, that he had not "used federal troops to force integration."

Kennedy's marshals were, as Governor Barnett called them, nervous and trigger-happy. Before the marshals fired tear gas into the crowd of unarmed students at Oxford, Mississippi, not one act of violence had occurred. The students had not thrown anything at the marshals or even threatened violence against them.

An astute and seasoned observer, representing this *Report* at the scene, confirms the account of a WFAA-TV newsman that the students were not really ill-tempered. They were,

> "...kids laughing and hollering, booing and hissing, and throwing lighted matches into military trucks which the marshals used for transportation."[3]

It was into this gathering of students that Kennedy's marshals — ruthless, ready, and apparently by design — started firing tear gas shells.

The tragedy of Mississippi in 1962 is, in miniature, very similar to the tragedy of Hungary in 1956. The students who gathered in the streets of Budapest in the fall of 1956 did not intend to rebel, commit vandalism, or perform any act of violence at all. They were merely trying to make a demonstration against the communist tyranny oppressing their land. In Budapest in 1956, as in Oxford in 1962, the heavily armed and organized "authorities" were trigger-happy: they fired into the gathering of unarmed students and touched off a holocaust which bathed the city in blood, and left it writhing helplessly in the iron grip of the organized "authorities."

Walker

Edwin A. Walker (former Major General, U. S. Army), who commanded the troops which Eisenhower sent into Little Rock in 1957, was in Oxford, Mississippi, when violence occurred on Sunday night, September 30, 1962.

Walker went to Mississippi to let the world know that he, who (as a soldier) had reluctantly carried out Eisenhower's illegal orders in Little Rock five years before, is, as a civilian, still opposed to such tyranny.

He hoped, by his presence, to dramatize the fact that dictatorship already prevails in the United States — whenever there is serious opposition to the illegal actions and political ambitions of the men in power. He hoped that he would be joined in Mississippi by enough other patriots from all over the country to demonstrate that the people of Mississippi were not standing alone in their fight for constitutional principles.

General Walker did not go to Oxford to lead a mob against the armed forces of the United States. He sought, by his presence there, to encourage massive, peaceful protest against federal tyranny.

This *Report's* experienced investigator, on the scene, emphasizes that press accounts of Walker's actions in Oxford are erroneous, if not designed, distortions. Walker actually advised the students against violence; and he took no part in the violence which Kennedy's marshals touched off.

Nonetheless, on Monday, October 1, 1962, General Walker was arrested on charges of seditious conspiracy and insurrection against the United States. He was incarcerated in a federal mental hospital at Springfield, Missouri, when he was unable to post a $100,000 bond. The Constitution prohibits excessive bail — and this is clearly excessive.

General Clyde Watts, Oklahoma City attorney, flew to Springfield the night of Walker's incarceration, to serve as legal counsel. Dr. Robert A. Morris will also serve as counsel.

General Walker has no formal staff or headquarters, but his friends in Texas are being swamped with offers of help. Patriots all over the United States are beginning to show their support by wiring and calling their Senators and Representatives, protesting the "political arrest" of General Walker. Many are sending contributions for Walker's defense, to his Dallas mailing address, P. O. Box 2428, Dallas 21, Texas.

Robert Kennedy (who is responsible for Walker's arrest on charges of insurrection) was responsible in 1961 for giving official encouragement and protection to communist-supported "freedom-riders," who went into Mississippi for the specific purpose of inciting insurrection against *the law of the land.*

Posse Comitatus

Claiming the color of law and constitutionality, John F. Kennedy, in his September 30 television speech, said he acted in compliance with his "obligation, under the Constitution and statutes of the United States."

As pointed out before, there is no statute of the United States (and there could not constitutionally be one) concerning the operation of educational institutions in the states.

The Posse Comitatus Act of 1878 (20 Stat. 152) provides that:

"... it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

An Attorney General's ruling holds that the effects of this Statute have largely been nullified by Sections 5298 and 5300 of the Revised Statutes, which authorize the President to use military force to assist U.S. marshals.

It should be obvious, however, that the Revised Statutes of Congress can not authorize what the Constitution forbids. Article 4, Section 4, of the Constitution clearly provides that the President can act against domestic violence in a State *only* when requested to do so by the government of that State.

Kennedy violated the Constitution. It is possible that he committed a felony under the laws of the United States.

Kennedy and the Constitution

In his September 30 television speech, Kennedy said that we have "a government of laws, and not of men"; and he said he had acted as he did in Mississippi, to uphold the Constitution.

Kennedy's pretense of respect for the Constitution is galling to all American patriots who have watched him violate the principles and clear provisions of that noble document — especially galling to all who have read the President's speech to "student internes" at the White House on August 28, 1962. "Student internes" are students who had government jobs in Washington during the summer of 1962. President Kennedy said:

"Well, the American Constitution is an extraordinary document . . . but it has required men to make it work, and it still does today. After all, the Constitution was written for an entirely different period in our nation's history. It was written under entirely different conditions. It was written during a period of isolation. It was written at a time when there were thirteen different units which had to be joined together and which, of course, were extremely desirous of limiting the central power of the government.

"That Constitution has served us extremely well, but all of its clauses, the general welfare and due process and all the rest, had to be interpreted by man and had to be made to work by men, and it has to be made to work today in an entirely different world from the day in which it was written."

Kennedy's remark about "government of laws, and not of men," in his September 30 television speech, directly contradicts his remarks of August 28 to the "student internes." Obviously, he has no respect for the Constitution as a contract of government — but thinks it is something to be stretched and reinterpreted at will to serve his own ambitions and lust for power.

Honor and Patriotism

In his September 30 television speech, Kennedy spoke of honor. His real concept of honor was revealed by his action in April, 1961: calling off air-cover, which he had promised, for Cuban patriots on the beaches at the Bay of Pigs, thus leaving them to be slaughtered.

In his speech, Kennedy spoke of patriotism. His real concept of patriotism was revealed by his behavior on December 16, 1961, when he was publicly welcomed to Venezuela by Romulo Betancourt, the communist president of that nation. Betancourt's welcoming speech was an insulting tirade against the United States (but filled with personal praise for Kennedy and Franklin D. Roosevelt). Kennedy listened to these insults against his nation with solemn approval, and then spoke (on that occasion and on other public occasions while he was in Venezuela) of Betancourt in terms of extravagant praise.

Interposition

It is almost universally (and inaccurately) reported that Governor Barnett was trying to make the State of Mississippi superior to the federal government, by "nullifying" a *law of the land*.

As pointed out before, there is no *law of the land* involved. Furthermore, Governor Barnett was not invoking the doctrine of nullification — the doctrine that a state can nullify a law of Congress. Barnett was invoking the doctrine of interposition, enunciated by James Madison and Thomas Jefferson, when they wrote the Virginia and Kentucky Resolutions early in the 19th Century.

The Father of our Constitution — James Madison — believed that the final arbiter of the meaning of the Constitution is not the Supreme Court or any other branch of the federal government: it is the people in the states. The federal government did not form

the union and create the states. It was vice versa. The states formed the union and created the federal government.

Final authority in a vitally important constitutional question must rest in the creator — not in the creature.

James Madison and Thomas Jefferson held that the Constitution is a compact, or contract, between sovereign states.

What can be done if the federal government violates the contract? Jefferson and Madison held that when the federal government, in a case of palpable importance, violates the Constitution (breaks the contract which created the federal government), the states have the right and the duty to interpose their sovereign authority to protect their citizens against the unconstitutional power of the federal government.

This causes a direct clash of authority: federal government versus state governments.

Who is to be the arbiter?

It is silly to say that the Supreme Court should be the arbiter, because the Supreme Court is a branch of the federal government. If you thought you had a legal claim against someone, would you think it sensible or just if that person's lawyer had absolute power to determine the validity of your claim?

Are the nine Supreme Court justices superhuman and infallible? What if they make a mistake, or willfully distort the meaning of our Constitution? Are we without recourse, except to beg their reconsideration?

Must we, a nation of 186 million people, be irrevocably bound by the dictates of nine appointed men, even when their dictates clearly violate our basic document of government?

According to the doctrine of the Father of our Constitution, state governments should interpose — should refuse to obey the court decrees which are manifestly unconstitutional.

If the federal government insists on enforcing the decrees and state governments insist on not enforcing them, can we resolve the clash of authority legally, without calling out the army and settling it by brute force?

Yes; we should submit the question to the people themselves.

Congress should submit a proposed constitutional amendment saying, in effect, that the Supreme Court, in all matters affecting race relations, shall be an oligarchy with absolute power — and that whatever the Court orders must be done.

This would legally dispose of the clash of authority over the question of racial segregation. If the people (through three-fourths of the state governments) ratified an amendment giving the federal government the power it has assumed, the state governments would be obliged to back down.

If the people rejected the amendment, the federal government would have to back down.

Kennedy could have taken the lead in demonstrating that we have "a government of laws, and not of men." He could have shown the world that America can settle grave constitutional questions, involving emotionally-surcharged issues, by due constitutional process. He chose instead to show the world that an American President can be as tough as Khrushchev: if the people do not humbly obey an illicit decree, he will cram it down their throats with army bayonets.

Our Race Relations

In his September 30 television speech, President Kennedy spoke of the "accumulated wrongs of the last 100 years of race relations" in the United States.

This is the sensitive point that has divided even constitutional conservatives in the United States. Many conservatives in the West and North privately admit that the federal government is acting unconstitutionally and tyrannically in racial-segregation matters. They know the President is acting, not because of any tender concern for alleged suppressed

minorities, but for the political objective of commanding for his party the negro votes in key northern states. But these same northern and western conservatives are ashamed to speak out against these evils, because they think southern whites are "morally" wrong in their race relations.

To such constitutionalists outside of the old South, I offer a word of warning: if Kennedy, under the pretext of protecting minority rights, can impose an illegal military dictatorship on the State of Mississippi, he (or some other President), under some other pretext, can impose the same dictatorship on any other state, where the people do not behave politically as the President wishes.

Actually every American, North and South, President or private citizen, should cite race relations in the United States with pride.

Look at the facts.

The negroes, whom New England and British slave traders brought to the new world, were not a civilized people captured and sold into bondage. They were barbarians. The evil bondage to the white man (to which they were subjected in America) was, physically, an actual improvement upon the life which they had made for themselves in Africa.

These were the people — illiterate, propertyless, with no racial traditions of freedom, of culture or of self-government — who, at the close of the Civil War were abruptly freed without any training or preparation to bear the burdens of freedom.

In one violent step, they, who had never developed a civilization of their own, were declared equal heirs of a civilization which it had taken the white man thousands of years to develop.

The southern white people, who had the main task of helping the negroes assimilate an ancient and alien culture, were pauperized, demoralized, and embittered by war — a people whose own way of life had been shattered by military action.

Americans in the North were also hurt and embittered by four years of savage warfare.

Hurt and bitterness were the guiding motives of policy during the ten years that followed Lee's surrender at Appomattox.

Northern occupation armies forced southern whites to accept state governments run by illiterate negroes and villainous white carpetbaggers — governments which, under the cover of "law," despoiled southerners of their property, for the benefit of greedy manipulators behind the governments.

Slavery was a national sin. The Civil War and the conditions following it were part of the wages of that sin.

Here was a problem that only the chemistry of time and tolerance and patience and Christian love could solve. Yet, it was being solved with miraculous speed until alien agitators, aided and abetted by venal domestic politicians, entered the picture.

Between the 1870's (end of the Reconstruction Era) and 1928 (formal beginning of the communist program of racial agitation in the United States) the American negro made more progress than any other people had ever made anywhere else in the entire history of the human race. They were miraculously advancing toward integration into the white man's culture — not integration in the contemporary sense of losing their racial identity by full amalgamation with the white race, but integration in the sense that they began to develop a pride in their own race, and (with the white man's help) began to build their own cultural and educational institutions, establish their own businesses, build their own homes, own their own land.

American negroes — thanks to the understanding and sympathetic aid of southern whites — were becoming a proud and distinctive part of the total American population.

The "race problem" did not become a major American tragedy until the Democrat

party, under the leadership of Roosevelt and Truman, adopted the communist program of racial agitation.

The problem did not become a major national disaster — converting peaceful communities into cauldrons of violence, and threatening to establish a military dictatorship in the southern states — until modern Republicans, under the leadership of Eisenhower, launched an all-out political struggle to win organized negro support away from the Democrats.

Now, both parties are vying for leadership in this awful contest for the organized negro vote.

What to Do

Effective legal action must be initiated by Congress. Congress will do nothing until the people elect a Congress filled with men who have the patriotism to respect, the sense to understand, and the courage to support, the Constitution of the United States.

Such a Congress could bring a bill of impeachment against John F. Kennedy, and also could impeach Robert F. Kennedy so that he could be removed from office and indicted for the crimes now being charged against General Walker: seditious conspiracy and inciting insurrection in the State of Mississippi.

Such a Congress would declare the Fourteenth Amendment null and void, because it was never legally ratified, and then, to discover the will of the people in this matter, would resubmit the Fourteenth Amendment for legal ratification or rejection, through due constitutional process.

Such a Congress would enact a law prohibiting the Supreme Court or any other federal court from exercising appellate jurisdiction in any matter affecting education.

FOOTNOTES

(1) *U. S. News & World Report*, October 8, 1962, pp. 57-58
(2) *Dallas Morning News*, 10/1/62, p. 1
(3) Bill Folsom, newsman for WFAA-TV, Dallas, Texas, quoted in *Dallas Morning News*, 10/2/62

STATEMENT REQUIRED BY THE ACT OF AUGUST 21, 1912, AS AMENDED BY THE ACTS OF MARCH 3, 1933, AND JULY 2, 1946 (Title 39, United States Code, Section 233) SHOWING OWNERSHIP, MANAGEMENT, AND CIRCULATION OF *THE DAN SMOOT REPORT, INC.*, published weekly, at Dallas, Texas, as of October 1, 1962.

The names and addresses of the publisher, editor, managing editor and business managers are: Publisher, *The Dan Smoot Report, Inc.*; Editor, Dan Smoot; Managing Editor, none; Business Manager, Mabeth E. Smoot, Dallas, Texas.

The owner is: The Dan Smoot Report, Inc.

There are no bondholders, mortgages, or other security holders.

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The average number of copies of each issue of this publication sold or distributed through the mails or otherwise, to paid subscribers, during the 12 months preceding the date shown above was 21,892.

Signed by Mabeth E. Smoot, Business Manager.

Sworn to and subscribed before me, this 2nd day of October, 1962, C. Herbert Davis, Jr., Notary Public, County of Dallas, Texas. Commission expires June 30, 1963.

WHO IS DAN SMOOT?

Dan Smoot was born in Missouri. Reared in Texas, he attended SMU in Dallas, taking BA and MA degrees from that university in 1938 and 1940.

In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for the degree of Doctor of Philosophy in the field of American Civilization.

In 1942, he took leave of absence from Harvard in order to join the FBI. At the close of the war, he stayed in the FBI, rather than return to Harvard.

He worked as an FBI Agent in all parts of the nation, handling all kinds of assignments. But for three and a half years, he worked exclusively on communist investigations in the industrial midwest. For two years following that, he was on FBI headquarters staff in Washington, as an Administrative Assistant to J. Edgar Hoover.

After nine and a half years in the FBI, Smoot resigned to help start the Facts Forum movement in Dallas. As the radio and television commentator for Facts Forum, Smoot, for almost four years spoke to a national audience giving both sides of great controversial issues.

In July, 1955, he resigned and started his own independent program, in order to give only one side — the side that uses fundamental American principles as a yardstick for measuring all important issues.

If you believe that Dan Smoot is providing effective tools for those who want to think and talk and write on the side of freedom, you can help immensely by subscribing, and encouraging others to subscribe, to *The Dan Smoot Report*.

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DAN SMOOT

PLANNED DICTATORSHIP

"The way to have good and safe government is not to trust it all to one; but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the National government be entrusted with the defense of the nation, and its foreign and federal relations; the State government with the civil rights, laws, police and administration of what concerns the State generally; the counties with the local concerns of the counties and each ward direct the interests within itself. It is by dividing and subdividing these republics, from the great national one down through all its subordinations, until it ends in the administration of every man's farm and affairs by himself; ... that all will be done for the best. What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or France or of the aristocrats of a Venetian Senate."

—Thomas Jefferson

In June, 1955, the Federal Civil Defense Administration staged Operation Alert, a nation-wide rehearsal of what civil defense would do in the event of a nuclear bombing raid on the United States which killed around 10 million people. Operation Alert revealed that sudden disaster could cause drastic confusion in the civil defense system. It also revealed that absolute dictatorship would emerge before the casualties could be counted.

After receiving reports of the mock casualties in the mock nuclear air raid, in connection with Operation Alert, President Eisenhower, on June 16, 1955 (without waiting for reports to see whether normal civil authorities could maintain order) used his Executive Power to issue a mock declaration of martial law for the whole nation.

Comments in the press and in Congress were, generally, unfavorable. To some, it was chilling to see how readily a President of the United States would proclaim a military dictatorship in time of emergency and disaster. To others, Eisenhower's haste to issue a mock declaration of martial law revealed only that the Administration had no adequate plan of action — that Eisenhower reached for the weapon of martial law because he did not know what else to do.[1]

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Hence, the Operation Alert exercise of 1955 helped create demand for a better plan of national action to be followed if the United States were suddenly struck a devastating blow.

In 1958, President Eisenhower reorganized the civil defense system. He merged the Civil Defense Administration with the old Office of Defense Mobilization, creating a new agency called the Office of Civil and Defense Mobilization.

President Kennedy scrapped the Eisenhower system and established something entirely new. Kennedy says that civil defense should not be handled by a separate agency of government, but that the multiple activities of civil defense should be handled by the regular departments and agencies of government — all of their activities to be planned and coordinated by a small presidential staff.

Kennedy's Executive Orders

On July 20, 1961, Kennedy (by Executive Order No. 10952) abolished the Office of Civil and Defense Mobilization, immediately transferring most civil defense functions to the Department of Defense. On August 1, 1961, Secretary of Defense McNamara put Adam Yarmolinsky temporarily in charge of all civil defense activities in the Department of Defense. Yarmolinsky (whose parents are notorious communist-fronters) has a record of participating in communist activities since his undergraduate days at Harvard.[2] Since the Kennedy Administration apparently considers Yarmolinsky indispensable for other duties in the Defense Department, Yarmolinsky was soon replaced as head of civil defense activities. The present Assistant Secretary of Defense for Civil Defense is Steuart L. Pittman.

On August 14, 1961, Kennedy issued Executive Order No. 10958, giving the Secretary of Health, Education, and Welfare the civil defense responsibility of stockpiling medical supplies; giving to the Secretary of Agriculture the civil defense responsibility of stockpiling food.

On February 16, 1962, Kennedy issued *ten* Executive Orders (10995 and 10997 through 11005) delegating other civil defense responsibilities to heads of other departments and agencies — Interior Department, Commerce Department, Labor Department, Post Office Department, Federal Aviation Agency, Housing and Home Finance Agency, Interstate Commerce Commission, and so on.

The small presidential staff, which has the responsibility of planning and co-ordinating the civil defense activities of the regular agencies and departments of government, is called the Office of Emergency Planning. Oddly enough, President Kennedy did not issue an Executive Order "creating" the Office of Emergency Planning and outlining its duties until September, 1962 — more than a year after the OEP had been actively in existence.

On September 27, 1962, Kennedy issued Executive Order 11051, "Prescribing Responsibilities of the Office of Emergency Planning in the Executive Office of the President." The most notable thing about this Executive Order, however, is that it amended 15 previous Executive Orders (5 issued by Truman; 8, by Eisenhower; 2, by Kennedy himself) by deleting references to "Civil and Defense Mobilization" and replacing those references with "Office of Emergency Planning."

The significance of this change in language is subtle. In November, 1962, the Eighth NATO Parliamentarians' Conference met in Paris, attended by delegates from the parliaments of the 15 countries belonging to the North Atlantic Treaty Organization. Thirteen United States Senators (under the chairmanship of J. William Fulbright, extreme leftwing Democrat from Arkansas); and eight United States Representatives (under

the chairmanship of Wayne L. Hays, extreme leftwing Democrat from Ohio) made up the delegation from the American "parliament" to the Eighth NATO Parliamentarians' Conference.

Senator Fulbright's official report to the Senate on the Eighth NATO Parliamentarians' Conference contains a brief section on Civil Defense, from which the following is quoted:

"Civil emergency planning is much wider in its implications than civil defense.

"Whereas civil defense can be considered as a purely national responsibility, civil emergency planning requires close cooperation between the NATO Allies. . . .

"Although civil emergency planning does not directly encroach on the responsibilities of national authorities, nevertheless on a number of points the organization of the latter will have to take account of the former's planning and preparations."[3]

Here appears to be a reason for changing "civil defense" and "defense mobilization" to "emergency planning." It takes our civil defense preparations out of the "purely national" realm, and makes them part of an over-all international plan.

On February 26, 1963, President Kennedy issued nine more Executive Orders (11087 through 11095) delegating "emergency planning" activities to heads of governmental agencies not mentioned in previous Executive Orders on the subject: Federal Communications Commission, Civil Service Commission, Atomic Energy Commission, General Services Administration, Federal Reserve System, Tennessee Valley Authority, Federal Power Commission, National Science Foundation, and so on.

In all, Kennedy has issued 23 Executive Orders, dealing with emergency planning, which prescribe the lines of authority for a total dictatorship to be controlled and coordinated at the top by a small group of emergency planners in the executive office of the President.

The national police state thus planned would be a tighter, more complete dictatorship than any which has ever existed in modern times, in communist countries or elsewhere. Kennedy's executive orders outline a plan, not for protecting the American people from suffering and death in the event of disaster, but for seizing absolute control of every aspect of human life in the United States.

The Executive Orders, which formally proclaimed the plan, have been published in the *Federal Register*. This is the modern way of giving executive proclamations the force of law. In the formulation of such "executive law," Congress does not deliberate and legislate, in response to the desires of the people and in conformity with grants of power in the Constitution. Indeed, Congress has no role at all. The President proclaims a law, then gives it statutory force by merely publishing it in the *Federal Register*.

Thus, President Kennedy, by Executive Orders which bypass Congress, has already created a body of "laws" to transform our Republic into a dictatorship — at the discretion of the President. The extraordinary principle (that the President can do anything he pleases in time of dire emergency, and that the President alone can determine what is a dire emergency) was proclaimed by Franklin D. Roosevelt in November, 1933, and reaffirmed by the Attorney General — and has never been challenged by the Courts or the Congress of the United States.[4]

Can We Trust Our Leaders?

It is a dangerous delusion to feel that we can trust our President to tell us the truth; trust him not to exercise authority unnecessarily; trust him to act only in the best interest of the American nation.

Let us not forget what happened on October 29, 1962. On that day, Arthur Sylvester (Kennedy's Assistant Secretary of Defense for Public Affairs) admitted that the Kennedy Administration was giving the public false information about Cuba. Sylvester defended official falsification of the news as proper "management" and "control," saying that the "generation of news" by officialdom is "part of the weaponry that a President has" in the "solution of political problems" — and that the end of creating, in the minds of the people, the correct attitude about governmental programs, justifies the means.[5]

Let us remember also President Kennedy's statement on May 12, 1963, concerning the dispatch of Federal troops to Alabama. The President said:

"This Government will do whatever must be done to . . . uphold the law of the land. . . . The Birmingham agreement was and is a fair and just accord. . . . The Federal Government will not permit it to be sabotaged by a few extremists on either side who think they can defy both the law and the wishes of responsible citizens by inciting or inviting violence."[6]

Unless there is obvious and significant violation of legitimate federal authority, the President (under the Constitution) has no right to send troops into a state to maintain order, except on invitation of the government of that state. In Alabama, the Governor had asked the President *not* to send troops. No federal authority was being violated. The "law of the land" which the President mentioned was a figment of his own mind — because no federal law, or even federal court order, was involved. The "Birmingham agreement" which the President said he would enforce with federal troops, was a private agreement between whites and negroes, dealing, primarily, with the question of job opportunities for negroes.

As to "inciting or inviting violence" in Alabama, the President himself was guilty of that, by continual agitation of the delicate situation, specifically by calling Mrs. Martin Luther King to express concern when her husband (a professional agitator, with a communist front and jail record) was behind bars for inciting civil disturbance.

As to the *need* for federal troops to suppress violence: the total of human suffering which the race riots have caused in Birmingham is hardly worthy of notice in comparison with the continual savage depradations upon white people, by negro hoodlums, in the city of Washington, D. C.

In the Alabama affair, the President *proves* that he *does* misrepresent facts to the people and *does* use illegal and unnecessary power to serve his own political ends.

As to whether the President can be trusted to act only in the best interests of the nation — note two cases which indicate otherwise: El Chamizal and Panama.

EL CHAMIZAL — The Treaty of Guadalupe, February 2, 1848, established the Rio Grande River as the boundary between Texas and Mexico. Between 1864 and 1868, the Rio Grande eroded a large portion of the high Mexican south bank and formed an alluvial deposit (about 630 acres in size) on the United States side of the river. This occurred just south of El Paso, then a small border town. As El Paso grew, it took in the great alluvial deposit which came to be called *El Chamizal*. In 1895, the Mexican government made a formal claim to El Chamizal. The American government maintained, in effect, that the middle of the River was the boundary line, and that all soil north of that boundary line was American soil, regardless of how it got there.

On June 24, 1910, the Mexican and United States governments agreed to let an Arbitration Commission (composed of one Mexican,

one American, one Canadian) decide whether El Chamizal belonged to the United States or to Mexico. The Arbitration Commission refused to decide the question. Instead, the Commission decided, on June 15, 1911, that El Chamizal should be divided between Mexico and the United States. The United States government would not accept that decision, which the Arbitration Commission had not been empowered to make.

The issue became dormant for more than fifty years, except for an occasional political speech by some Mexican demagogue who whipped up hatred for the United States and gathered votes for himself by denouncing the El Chamizal "land grab."

President Kennedy reopened the old El Chamizal sore. Trying to win Mexican support for his Alliance for Progress, Kennedy quietly opened negotiations with the Mexican government, to work out a means of giving Mexico the 630 acres of United States territory, which, meanwhile, had become part of the downtown section of modern El Paso. Kennedy got support from the city government of El Paso and from certain business interests there, by promising tremendous outlays of taxpayers' money to "compensate" the city for the loss of territory.[7]

An article in *The Dallas Morning News*, May 28, 1963, reported information, from "authoritative sources," that the United States and Mexico would announce within the next few days a settlement of the El Chamizal dispute.

PANAMA — Many events and circumstances (too numerous to review at this time) indicate that Kennedy is also planning to surrender American control of the Panama Canal, either to the government of Panama or to a United Nations agency. Following the example set by Eisenhower, Kennedy has already weakened the American position by permitting the flying of the Panama flag alongside the Stars and Stripes in the Canal Zone, thus showing a Panamanian "titular" sovereignty over our territory.

As to the question (if there be a question) of whether the Kennedy Administration *wants* a socialist dictatorship in the United States — we need only to read one publication of the U. S. Arms Control and Disarmament Agency.

United Nations officials — realizing that the massive outpouring of American tax dollars (in the United States and abroad) is rapidly building a one-world socialist system; realizing that most of that spending is done under the guise of *arming to resist communism;* and realizing that the Kennedy Administration is determined to disarm the United States — grew concerned about the reduction of American governmental spending which disarmament might bring.

On September 22, 1961, the UN Secretariat requested that the United States furnish information on "the economic and social consequences of disarmament in the U.S." Kennedy's U.S. Arms Control and Disarmament Agency prepared a report to reassure the United Nations officials. The report, published in July, 1962, says, in essence, that disarmament will not substantially reduce the spending of American tax dollars, but will deflect those dollars into such programs as social security, federal aid to education, urban renewal, financing mass transit systems, expanding public health and mental health activities, and increasing foreign aid channelled through United Nations agencies.[8]

Only An Emergency Is Needed

Any thoughtful person who has watched the arrogant and lawless behavior of the Kennedy Administration; its studied efforts to deceive the people and the Congress; its habit of appeasing foreign powers (particularly communist and pro-communist powers) by sacrificing American national interests; and

its relentless drive toward the total socialist state — reasonably fears that Kennedy might take advantage of some emergency to make himself a dictator, in accordance with the plan which his Executive Orders have already outlined.

The May, 1963, Wheat Referendum (when farmers repudiated Kennedy's farm program, in the face of Kennedy's threats and promises) is only one of many indications of a growing political revolt against the Kennedy Administration. Kennedy has enough cunning to see this. If his prestige and influence continue to sink, what will he do in 1964 if he feels he cannot win re-election? Will he accept the verdict of elections and surrender the power so dear to him? Or will he make himself a dictator, by creating an "emergency"?

What kind of emergency could he create? Since the temperament and disposition of the President became apparent, in the first months of his Administration, there has been anxiety that he might arrange a war for the United States in 1964, if he felt that necessary for his own re-election. This anxiety is by no means unfounded. It deepened in late 1962 when Kennedy made war-like gestures about Cuba for the purpose of getting New Frontier supporters elected to Congress.

There is another possible emergency — already building up under the senseless and ceaseless prodding of the President and his brother, the Attorney General: an emergency involving racial conflict in the United States.

Note this grim paragraph from the May, 1963, issue of *H. du B. Reports*, a newsletter written in Paris, France, by the extremely well-informed Hilaire du Berrier:

"The governments of Western Europe are receiving alarming reports which touch on America's internal stability. Their informants put it bluntly: A development has taken place within the past few weeks which can shake America, and a crisis in America can endanger the West. The NAACP has consistently expressed embarrassment at the violence and anti-White declarations of another group, the Black Muslims, who preach a distorted mohammedanism under the leadership of a former factory hand, Elijah Poole, now known as Elijah Muhammad. The NAACP's moderate leaders have acquired both sympathy and support by repudiating Black Muslim advocacy of terrorism and black supremacy. However, according to reliable reports reaching governments around the world (though not the American public), the NAACP and Elijah Muhammad's followers have formed a common front, which means that the more violent leaders have assumed direction. The focal points for a sudden, brutal outbreak are now New York, Detroit and Chicago, Black Muslim strongholds where for five years Elijah Muhammad's lieutenants have been organizing an elite militia and stocking arms."

The Black Muslims want negro supremacy, and openly advocate murder of white people until all whites in the United States are either exterminated or reduced to bondage. The NAACP has made an elaborate pretense of "repudiating" the Black Muslims movement, but there are many indications that the NAACP and the Black Muslims are working hand-in-glove: the NAACP warning that if their particular brand of violence is not fully supported, the bloodier violence of the Black Muslims is inevitable.

United States Representative Adam Clayton Powell (Democrat, New York), negro Chairman of the House Education and Labor Committee, is a life-member of the NAACP. Yet he has openly associated himself with the Black Muslims movement. He recently spoke gloatingly on a national television program about how the negro "has the white man running scared."[9]

The head of the NAACP in Washington, D. C. (where negro criminal violence against white people is creating something akin to a reign of terror) said, on a national television program in early May, 1963, that negro

violence is coming and that the NAACP will promote the violence if whites do not immediately give the negro what he demands.

What does he demand? Absolute legal equality with whites? Not at all! The most explosive racial situation in America is not in the South, but in New York City — where the white man's right to own and dispose of private property and his right to choose his own associates have been violated to grant negroes so-called "anti-discrimination" laws. In New York, negroes have no trouble exercising their voting rights. There are no legal barriers to school integration. Housing laws make it illegal for private realtors to refuse rental or sale on racial grounds. And "fair employment" laws make it illegal for private employers to refuse employment to negroes because of race.

Yet, the negroes of New York City, prodded by Black Muslim and NAACP leaders and by men like Adam Clayton Powell, are more restless than ever before. Now they are demanding *enforced social and economic equality* with white people — which means nothing less than confiscation of the property and earnings of white people (whose superior abilities give them superior earning power) in order to give negroes what they lack innate ability to earn.

In New Rochelle, New York; in Berkeley, California; in Englewood, New Jersey; in Nashville, Tennessee; in Baltimore, Maryland; in Birmingham, Alabama; in Detroit, Michigan; in Greenwood, Mississippi; in Chicago, Illinois; in Washington, D. C. — all across the land, racial tensions are growing every day. Everywhere, they are being prodded by the whole pack of liberal politicians, both

WHAT YOU CAN DO

Washington officialdom uses your taxes for programs that are creating vast cesspools of waste and corruption — and dragging our Republic into the quicksands of socialism. But what can you do about it?

You can help educate and arouse the people who elect men responsible for harmful programs of government. When enough other Americans know and care as you do, political action to restore our Republic will come.

If *The Dan Smoot Report* was instrumental in bringing you to the point of asking what *you* can do about saving the country from mushrooming big government, here is a checklist for you: Have you urged others to subscribe to the *Report*? Have you sent them reprints of a particular issue of the *Report*? Have you shown them a Dan Smoot film? Have you ever suggested a Bound Volume of *The Dan Smoot Report* for use by speakers, debaters, students, writers? Have you read and passed on to others any of the Dan Smoot books — *The Invisible Government, The Hope Of The World, America's Promise*?

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Republican and Democrat, who are jockeying for the organized negro vote in 1964.

This situation could become the "emergency" which projects John F. Kennedy into absolute dictatorship.

What To Do

It may very well be that President Kennedy will never try to make himself a dictator, or involve the nation in war just to get himself re-elected. Despite the blueprint for dictatorship already prepared by Kennedy's Executive Orders; and despite abundant indications that Kennedy is capable of creating a pretext for seizing power if he fears defeat at the polls in 1964, it is quite likely that none of this will happen. But the very *possibility* — however remote — should be removed. Congress could remove it, and probably would, if there were sufficient public demand.

Congress should abolish (by withholding funds, if necessary) the whole federal civil defense, and "emergency planning," setup. In time of emergency or disaster, individuals and communities would be infinitely better off in looking after themselves, than in waiting for direction and dictation from federal bureaucrats.

Beyond that, Congress should submit an amendment to repeal the income tax amendment. The corrupt, oppressive income tax system feeds all the plans for socialist dictatorship in the United States. Cut off the excess tax money, and the evil plans will wither and die.

The public could demand that Congress enact a law providing that *all* appropriations will be withheld from *any* agency of government trying to initiate *any* program which has not been authorized by Congress through formal, constitutional, legislative process.

A Congress which would do that would go further, and reverse the settled trend toward dictatorship in the United States.

FOOTNOTES

(1) *The Powers of the President as Commander in Chief of the Army and Navy of the United States*, House Document No. 443, 84th Congress, June 14, 1956, pp. 14, 137-45
(2) *Military Cold War Education and Speech Review Policies*, Hearings before the Special Preparedness Subcommittee of the Senate Armed Services Committee, 1962, Part IV, pp. 1491-2
(3) *Eighth NATO Parliamentarians' Conference*, Report to the Senate Committee on Foreign Relations, April 8, 1963, p. 23
(4) "Between the Lines — Emergency Planners," by Edith Kermit Roosevelt, *The Shreveport Journal*, November 17, 1962, p. 2
(5) "Free Press Maintains Confidence of Public," AP story by J. M. Roberts, *The Dallas Morning News*, November 1, 1962, Section 1, p. 8
(6) *Congressional Quarterly Weekly Report*, May 17, 1963, p. 783
(7) "Mexico Seems Sure to Win 'Chamizal'," by Walter B. Moore, *The Dallas Morning News*, March 9, 1963, Section 4, p. 2; "35 Million Indemnity For 'Chamizal' Seen," UPI dispatch from El Paso, Texas, *The Dallas Times Herald*, July 18, 1962, p. A-6; *Congressional Record*, January 29, 1963, pp. 1243 ff.; UPI dispatch from Laredo, Texas, *The Dallas Morning News*, February 24, 1963, Section 1, p. 16
(8) *The Economic and Social Consequences of Disarmament*, U.S. Arms Control and Disarmament Agency Publication No. 6, July, 1962; "Would Disarmament Mean a Depression"? by Emile Benoit, *The New York Times Magazine*, April 28, 1963, pp. 16 ff.
(9) "Two Ways: Black Muslim and N.A.A.C.P.," by Gertrude Samuels, *The New York Times Magazine*, May 12, 1963, pp. 26 ff.

* * * * *

THE
Dan Smoot Report

Vol. 9, No. 25 (Broadcast 410) June 24, 1963 Dallas, Texas

DAN SMOOT

WASHINGTON: THE MODEL CITY

On January 18, 1963, President Kennedy said of Washington, D. C.:

"Let us make it a city of which the nation may be proud — an example and a show place for the rest of the world."

The remark was strangely reminiscent of one made by President Eisenhower nine years before. When the Supreme Court handed down its school desegregation decision in May, 1954, President Eisenhower, praising the Court, urged Washington, D. C., officials to hasten integration of public schools, in order to make the capital city a model for the nation. District school officials complied immediately.

At the time of integration, the District of Columbia school system was rated among the best in the nation. Twenty-nine months later — in September, 1956 — a Congressional subcommittee began an investigation to find out how racial integration of public schools was working out. United States Representative James C. Davis (Democrat, Georgia) was Chairman of the subcommittee. Mr. William Gerber served as counsel.

The following are excerpts from the subcommittee's transcript of hearings on September 19, 1956.

TESTIMONY OF MR. C. MELVIN SHARPE, PRESIDENT OF THE DISTRICT OF COLUMBIA BOARD OF EDUCATION:

MR. GERBER: Mr. Sharpe, prior to September of 1954 under what system were the District of Columbia schools operated?

MR. SHARPE: They were operated on what we call the dual system of schools. We had Division 1, which was to designate the white schools, and Division No. 2, designated for colored.

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MR. GERBER: . . . did the two school systems . . . have access to the same curriculum?

MR. SHARPE: They did.

MR. GERBER: Did they have access to the same textbooks?

MR. SHARPE: . . . I had every reason to believe that there had been no discrimination whatsoever in the textbooks, the schools, buildings, teachers and whatnot. We had a very eminent man in charge of Division 2 . . . a colored man. . . . I thought he did an admirable job.

MR. GERBER: How long after . . . [the Supreme Court decision of May 17, 1954] was handed down did the Board of Education vote to integrate the District of Columbia schools?

MR. SHARPE: . . . within two weeks.

MR. GERBER: Mr. Sharpe, do you find that, after the schools were integrated, a great many white children . . . withdrew from the public schools?

MR. SHARPE: I did.

MR. GERBER: Where did they go? . . .

MR. SHARPE: . . . to Virginia and Maryland, and . . . private schools. . . .

MR. GERBER: . . . Was it the contention of the proponents of integration . . . that integration would reduce the cost of operation of the schools?

MR. SHARPE: Yes, sir; that was the professional advice we received.

MR. GERBER: That professional advice, you found, was all wrong?

MR. SHARPE: That is right.

DEPOSITION OF MR. JOHN PAUL COLLINS WHO WAS TOO ILL TO APPEAR BEFORE THE COMMITTEE:

My name is John Paul Collins. After 34 years in the District of Columbia school system, I retired last year as a result of ill health directly attributable to the conditions that developed in Eastern High School after the integration of the District Schools. During my tenure in the District school system I served as principal at Anacostia High School and Eastern High School.

After integration of the schools in 1954, . . . the problem of discipline was tremendous. . . .

At times, I heard colored girls at the school use language that was far worse than I have ever heard, even in the Marine Corps.

White children manifested a spirit of cooperation to help the colored children become acclimated, but these efforts were not particularly successful.

Fighting, including several knifings, went on continuously. . . .

There have been more thefts at Eastern in the last two years than I had known in all my 30-odd years in the school system. A teacher, still active at Eastern, told me recently that stealing is now so rife at the school that it is no longer practical to attempt to report all stealing incidents.

There were many sex problems during the year following integration. . . . I overhead two colored boys making obscene remarks about white girls who were passing in the hall. I promptly suspended the boys, until such time as I could get satisfactory assurances from their parents that they would discontinue such conduct. My authority to do this was questioned by the administration, but I stuck to my guns.

White girls complained of being touched by colored boys in a suggestive manner when passing them in the halls. One white girl left school one afternoon and was surrounded by a group of colored boys and girls. One of the colored boys put a knife at her back, marched her down an alley and backed her up against a wall. While the group debated as to whether they should make her take her clothes off, she broke away and ran home. . . .

On another occasion a colored girl complained to me that a colored boy had exposed himself to her in the classroom. I got hold of the boy and found him to have a record of sex offenses, and recommended that he be re-

moved from Eastern. This recommendation was accepted.

Never in all of my experience have I observed such filthy and revolting habits in the lavatories. Some of the urinals were completely torn away from the walls. Nothing like this had ever occurred prior to integration. . . .

Colored children have been known to forge names at the school bank.

There were a dozen or more colored girls who became pregnant during my last year at Eastern. Pregnancy among white girls was very rare, and had occurred only in isolated instances.

Superintendent Corning ordered all school records to be kept without regard to race. This order was repeated several times during the school year.

The colored students dominated the failing groups, which were much larger than any year before integration. . . .

The average colored student cannot keep up with the average white students academically. . . .

I can say from experience that integration has brought about a lowering of public-school standards and student academic achievement in the District public schools. It has created problems of discipline that have disrupted educational processes. It has created grave social problems that cannot be solved under existing circumstances. . . .

TESTIMONY OF MR. HUGH STEWART SMITH, WHO HAD BEEN PRINCIPAL OF JEFFERSON JUNIOR HIGH SCHOOL, WASHINGTON, D. C., FOR 26 YEARS:

MR. GERBER: Prior to integration, was this an all-white school?

MR. SMITH: Yes.

MR. GERBER: Mr. Smith, what was the percentage of white and colored in your school last year?

MR. SMITH: About 55 per cent Negro; 45 per cent white. . . .

MR. GERBER: Mr. Smith, after the integration of the school systems here in the District of Columbia, did you encounter any unusual disciplinary problems?

MR. SMITH: . . . you get many of these [colored] children who thought that you got what you wanted by fighting. We had a great deal of attempting to get, let us say, small bits of money from children at lunchtime. . . . I think we had threats for the first time, to both the person and property of teachers. . . .

MR. GERBER: Does the disciplinary problem . . . have any effect on the teachers' being able to teach?

MR. SMITH: Any time you have discipline problems, that happens. That is one of the areas that I think we have been unable to entirely cope with in our public schools. We have no way to put these children who are vicious out of the school, for any reason at all. The law says they are to be in school until they are 16 years old.

MR. GERBER: Mr. Smith, did you find that the Negro pupils that came to your junior high school from the colored schools were properly graded?

MR. SMITH: I can't tell how they were graded in the elementary school, but the children who came to me were very much retarded, far more than our white children had been. Also, many of them had been passed when they hadn't gone to school. . . .

We had a few children who were in our top group, but had I gone completely on the records of achievement, even those few colored children in that top group would probably not have been able to be there. . . .

MR. GERBER: Mr. Smith, has there been a difference in the I.Q. of the students that you had previous to integration, and what you have got now?

MR. SMITH: Yes, sir; that has fallen every year. I think that I would like to have you realize that I am in a part of our city which has always been a low economic area. It has always been that. But 10 years ago we had an

average I.Q. for the school of 96, and this year it has dropped down to 85. With the incoming seventh grade, the average is 82, so it is still going down.

MR. GERBER: . . . Don't you think that the . . . upper-grade students have suffered educationally as a result of being mixed with these lower-achievement students?

MR. SMITH: Not in the junior high school. We . . . group children according to their achievements. In the top group, even when we began integration, we had frankly only a few Negro children who achieved what the white children were achieving, and they went into the group, but the bottom groups were almost entirely Negro children. . . .

CONGRESSMAN WILLIAMS: Do you notice a difference in white children's rate of achievement coming from those same neighborhoods, with the same economic status as their colored neighbors?

MR. SMITH: Yes.

CONGRESSMAN WILLIAMS: Then, on the basis of that, could you say that environment and economic status are not the sole contributing factors to that condition?

MR. SMITH: Yes, sir.

TESTIMONY OF MRS. HELEN R. MAGUIRE, PRINCIPAL OF DAVIS ELEMENTARY SCHOOL, WASHINGTON, D. C.:

MR. GERBER: Mrs. Maguire . . . what [is] your school population?

MRS. MAGUIRE: . . . about 775. . . . It is about 90 [per cent] colored and 10 per cent white. . . . And two years ago it was a white neighborhood.

MR. GERBER: What is it now?

MRS. MAGUIRE: Well, it is mostly a colored neighborhood. And it will be, as soon as the people can sell their houses. They are all for sale. All the white people's houses. . . .

MR. GERBER: Mrs. Maguire, did you have any trouble about the demotion of a child in your school last year?

MRS. MAGUIRE: Not last year, but the first year I had one little boy who was a disturbance. He was an emotional problem. He did absolutely nothing in the classroom but upset the classroom. And I put him from a first grade to a kindergarten, simply to study him. I didn't know what to do with him. He upset everybody in the classroom. And I said to the kindergarten teacher, "Let's put him here and let him come three hours a day, and maybe we can find the best place for him."

MR. GERBER: And what happened about that? Did you get a call from anybody about it?

MRS. MAGUIRE: I got a call from the mother first, asking me about it, and I wrote her a note and explained why we were doing it. And at 3 o'clock in the afternoon, after school was dismissed, I got a call from a Dr. Knox, I think it is, from Howard University. And he was head of the — he told me that he was head of the educational committee for the NAACP and that he wanted to know why I had put this child back. And the mother had called him, he said, and he was very adamant as to why I had put the child back to the kindergarten. The child was old enough to be in the first grade, and "that is where he should be."

And I said, "Well," — I tried to explain to him the conditions.

But I said, "Dr. Knox, I have been in the school system 35 years, and you are the first person from any organization that has ever questioned what we do to children when we are trying to do the best we can."

And so he talked on, and he said, "Still, that child should be in the first grade. He is old enough to be in the first grade, so you put him there."

He said, "I will give you three days, and then you will hear from me again."

Well, you can imagine the condition I was in. . . . It was the first time anything like that had ever happened to me, and I really was very upset. I didn't do it. I studied the child. And

when I made my study, I put him where he should be. . . . And I didn't hear any more of it.

CONGRESSMAN WILLIAMS: Mrs. Maguire, would you . . . venture an opinion as to whether the level of school achievement, on the average, is as good today among the students as it was two years ago?

MRS. MAGUIRE: Oh, no. It isn't. It is way down. And the teachers are saying to me, "We have just got to lower everything we do." And the spark is gone. . . .

TESTIMONY OF MRS. KATHERINE REID, TEACHER AT TYLER SCHOOL, WASHINGTON, D. C.:

MR. GERBER: Do you remember approximately how many children you had to teach last year?

MRS. REID: I had 41 children, 31 colored.

MR. GERBER: And 10 white?

MRS. REID: Yes.

MR. GERBER: Mrs. Reid, did you find any disciplinary problem in your class and in your school, after the schools were integrated, that you didn't have prior to integration?

MRS. REID: I found it very difficult. White teachers are not supposed to use corporal punishment, and I found it very hard to make the colored children do what I told them. And one day I was talking to a little colored girl, and one of the colored boys said, "Miss Reid, why don't you stop talking to her and bat her over the head, the way her last teacher did?" . . . I did find them hard to control.

MR. GERBER: Did you have any sex problems in your third and fourth grades in that elementary school? . . .

MRS. REID: Well, I had a colored boy who was very fresh with a little white girl. And I spoke to the little white girl and told her to go back to her seat and told the colored boy to take his seat, and he said, "Don't you want us to be friends?" And I said, "Yes, I want you to be friends, but right now I want you to work and do your school work, and this has nothing to do with what you have been doing."

And then I had a colored boy who exposed himself to a white girl. He did it several times.

Finally, in exasperation, I said to the white girl, "Just don't look."

CONGRESSMAN DAVIS: Is that a constant thing, then, this sex situation? . . .

MRS. REID: Well, I wouldn't say it was constant. . . . I had these two incidents which stand out in my mind. There were plenty of others in the bathrooms, in the lavatories. I mean, teachers were constantly on guard. But I wouldn't want to use the word "constant."

CONGRESSMAN DAVIS: Was last year the first year those conditions had existed?

MRS. REID: Well, last year was the first year I had colored children. I don't remember any particular ones with white children, of that particular kind.

MR. GERBER: Did you have any destruction of property there in the school that you didn't have prior to integration?

MRS. REID: Yes. Books, pencils; the books were terrible. I mean, their misuse of books.

MR. GERBER: You mean the students would steal books?

MRS. REID: I mean they would bat each other over the heads with the books.

TESTIMONY OF MR. ARTHUR STOREY, PRINCIPAL OF THE McFARLAND JUNIOR HIGH SCHOOL, WASHINGTON, D. C.:

MR. GERBER: Mr. Storey, what was the school population at McFarland last year, do you recall?

MR. STOREY: Our maximum enrollment last year was about 1,300. . . . I would estimate it is between 60 and 70 per cent [colored]. . . .

MR. GERBER: Mr. Storey, can you tell us about some of the disciplinary problems you had last year?

MR. STOREY: Yes. They would be such things as stealing, boys feeling girls . . . disobedience in the class room, failure to obey teachers, carrying knives, and that type of thing.

MR. GERBER: I will ask you if during last year it was necessary for you to have the police at the school?

MR. STOREY: Oh, yes. . . .

CONGRESSMAN WILLIAMS: Did you find it necessary during your entire tenure as principal to request police assistance . . . to keep order, prior to . . . integrating the schools?

MR. STOREY: No, sir.

CONGRESSMAN WILLIAMS: Could you tell us from . . . memory how many times in 1955 . . . you found it necessary to request police assistance?

MR. STOREY: . . . I imagine around 50 times.[1]

The Horror Spreads

The Supreme Court's Mallory Case decision in 1957 made matters even worse. Andrew R. Mallory, a 19-year-old-negro, confessed to raping a woman in the cellar of her apartment house (where he caught her while she was doing the family washing). Mallory was tried and convicted in a Washington District Court. His conviction was upheld by the Court of Appeals.

The conviction was reversed by the Supreme Court in a unanimous opinion written by Justice Frankfurter, who referred to the confessed rapist as a "19-year-old lad." The Supreme Court did not suggest that there was any doubt about Mallory's guilt. There was no question of police brutality or third-degree treatment. The Supreme Court caused Mallory to be set free and go unpunished for his crime, merely because the police had questioned him before his formal arraignment. The decision means that Washington police cannot question a suspect before he is formally arrested and arraigned unless the suspect agrees. If he is arrested, he cannot be questioned at all, without his consent.[2]

When police are prohibited from *questioning* suspects — particularly in such crimes as rape, where material evidence of guilt is often non-existent or extremely difficult to obtain — police are almost helpless to afford society adequate protection. Since the Mallory case decision, hideous incidents have become commonplace in our nation's capital.

A congressional secretary was stabbed and robbed by a negro while she knelt to pray in St. Peter's Catholic Church on Capitol Hill. The wife of a general was attacked in her bathtub, by a negro who had broken into her home. Two negroes broke into an apartment at midday and attacked the granddaughter of a Washington official. A retired minister's wife was criminally assaulted in her own home. Mrs. Brooks Hays, wife of a Special Assistant to the President, was robbed and injured by a 17-year-old negro who forced his way into her bedroom.

A 79-year-old colored Baptist preacher, living in retirement in Washington, took a stroll in his neighborhood one Saturday evening after dinner. Four young negroes robbed him and beat him to death. The killers got $1.29 — which they spent on cakes and soft drinks immediately after leaving the old man dying on the street. There were several witnesses to the murder, but none offered the old man any help, and none would offer the police any help in identifying the murderers. Whether the witnesses were afraid or indifferent, no one really knows.[3]

These are typical of recent incidents which came to public attention.

On Thanksgiving Day last year, 48,000 spectators attended a high school championship football game at District of Columbia Stadium. The rival teams were from St. John's Catholic High School (practically all-white) and Eastern High School (practically all-

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A negro arrested for robbing liquor stores in daylight explained he prefers daytime operations because he is afraid to carry money on the streets at night.[6]

Venereal disease is reaching epidemic proportions among Washington teenagers. Practically all of those infected are negroes. One out of every 5 children born in the nation's capital is illegitimate: 92% of the illegitimates are negroes. In 1961, Washington's crime rate was up 41% over the 1958-1960 average; the national increase for that period was 14%.[5]

Negroes constitute 85% of the public school population in Washington. Hence almost total segregation is again in effect, nine years after Eisenhower ordered immediate, compulsory integration as a means of making the Washington school system a model for the nation. Schools that were all white are now all negro. A few predominantly-white schools remain — in expensive neighborhoods where high-salaried governmental officials and wealthy persons live. The few white children who remain in predominantly-negro schools belong to families who cannot afford to move or send their children to private schools, or elsewhere.

Apologists for the situation claim that the negroes behave as they do, because they have been mistreated in the South and have never had a chance; but the truth is that policies of the federal government — in the hands of politicians, both Republican and Democrat, who degrade the whole nation by bidding for negro votes — have created the ugly sore in Washington, D. C. And the sore is rapidly spreading, through cities all across the land — with the President of the United States himself encouraging a lawless minority to insurrection and civil disturbance which threaten to become bloody revolution.

NEXT WEEK: More on the racial problem.

FOOTNOTES

(1) "Congress Hears — How Mixed Schools Are Working In Washington," *U. S. News & World Report*, September 26, 1956, pp. 98-107
(2) Statement by U. S. Senator William E. Jenner (Republican, Indiana) to the Senate Internal Security Subcommittee, August 7, 1957
(3) *The Evening Star*, Washington, D. C., April 19, 1963
(4) Remarks of U. S. Representative William B. Widnall (Republican, New Jersey), *Congressional Record*, March 18, 1963, pp. 4209-11
(5) "The Blight in the Nation's Capital," *U. S. News & World Report*, February 18, 1963, pp. 37-9
(6) "Washington, D. C. — Portrait of a Sick City," by Fletcher Knebel, *Look Magazine*, June 4, 1963

* * * * *

WHO IS DAN SMOOT?

Born in Missouri, reared in Texas, Dan Smoot went to SMU in Dallas, getting BA and MA degrees in 1938 and 1940. In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for a doctorate in American Civilization.

In 1942, he left Harvard and joined the FBI. As an FBI Agent, he worked for three and a half years on communist investigations in the industrial Midwest; two years as an administrative assistant to J. Edgar Hoover on FBI headquarters staff in Washington; and almost four years on general FBI cases in various parts of the nation.

In 1951, Smoot resigned from the FBI and helped start Facts Forum. On Facts Forum radio and television programs, Smoot spoke to a national audience, giving *both sides* of controversial issues.

In July, 1955, he resigned and started his present independent publishing and broadcasting business — a free-enterprise operation financed entirely by profits from sales: sales of *The Dan Smoot Report*, a weekly magazine; and sales of a weekly news-analysis broadcast, to business firms, for use on radio and television as an advertising vehicle. The *Report* and the broadcast give only *one* side in presenting documented truth about important issues — the side that uses the American Constitution as a yardstick. The *Report* is available by subscription; and the broadcasts are available for commercial sponsorship, anywhere in the United States.

If you think Dan Smoot is providing effective tools for Americans fighting socialism and communism, you can help immensely — by helping him get more customers for his *Report* and broadcasts.

THE
Dan Smoot Report

Vol. 9, No. 26 (Broadcast 411) July 1, 1963 Dallas, Texas

DAN SMOOT

CIVIL RIGHTS ACT OF 1963

On February 28, 1963, President Kennedy asked Congress for legislation in the field of civil rights which would:

(1) provide federal referees to supervise voting in areas where any colored person had brought suit claiming he had been denied the right to vote;

(2) require such suits to be given preferential treatment in the federal courts;

(3) prohibit, in elections involving federal offices, the application of different tests and standards to different voter applicants;

(4) eliminate state literacy qualifications for voting, by providing that completion of the sixth grade must be taken as presumption of literacy;

(5) expand the authority of the Civil Rights Commission and extend its life beyond November 30, 1963, when, under present law, it is due to go out of existence;

(6) give special federal technical and financial assistance to school districts in the process of desegregation.[1]

One of the most important powers of state governments is that of setting voter qualifications. No subject was more thoroughly debated during the Constitutional Convention of 1787.[2]

When an illiterate, shiftless, propertyless, irresponsible individual (of any race) has as much voice in selecting national rulers and in changing the organic law of the nation (amending the Constitution) as an industrious, thrifty, productive individual, what is to prevent the dregs and drones of society from plundering hard-working and productive citizens? Politicians can fan

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hatred in low-income groups for middle and upper-income groups, telling the "masses" they are poor because they are oppressed; making them believe that everyone who has something somehow acquired it by evil means; promising to soak the well-to-do with taxes for "benefits" to the poor in order to redistribute the national wealth and guarantee that everyone has his "fair share."

The Founding Fathers were aware of this danger in "democracy." They had studied the record of how it had destroyed ancient civilizations — just as anyone today can see how a similar situation creates poverty, wild disorder, and tyranny in many Latin American nations where unscrupulous politicians go into the squatters' slums, buying votes with promises to pull down the high and mighty and to provide free and easy living for the masses.

The Founding Fathers wanted a constitutional system in which all — high and low, rich and poor, good and bad, lazy and hard-working, thrifty and profligate, weak and strong, educated and illiterate, stupid and intelligent — all would be equal before the law; all equally free to lead their own kind of life, as long as they did not infringe on the rights of others; all enjoying the same guarantees against tyrannical oppression by their own government. But the Founding Fathers felt that the *vote* — which, in final analysis, is the power to set the policies and direct the affairs of the nation — should be restricted to mature individuals who could understand, and have some vested interest in, the necessity of maintaining a constitutional system of government.

Hence, there was demand in the Constitutional Convention of 1787 that the right to vote be somehow restricted to responsible citizens. There were proposals that the federal government be assigned the role of establishing voter qualifications throughout the union. All such proposals were based on the fear that individual states might grant the voting right to people not qualified to exercise it.[2]

The proposals were defeated, however, because of a greater fear that pervaded the thinking of the Founding Fathers: fear of creating a federal government so strong that it could destroy state governments and eliminate God-given rights of individuals. Admitting the *need* for voter qualifications which would keep the power of the ballot out of the hands of irresponsible people, the Founding Fathers felt that there was a greater need to leave this basic attribute of sovereignty in the individual states. They rejected all proposals for constitutional provisions which would give the federal government *any* authority in this field.

Hence, the President's proposals for federal intervention in elections violate the intent, the spirit, and the provisions of the Constitution.

As to the need for action to guarantee qualified negroes the right to vote — there is no need. Throughout the South, voter qualifications (whether they be poll tax or literacy requirements) apply equally to whites and negroes.

The President's proposal for a law requiring that civil rights "voting" suits be given preferential treatment in the federal courts nullifies the constitutional concept of equality-before-the-law. Why should litigation by one class or color of citizens be given preference over litigation by other citizens?

The President's proposal for special federal financial aid to school districts "in the process of desegregation" is unconstitutional in the sense that all federal aid to education is: namely, there is no delegation of power in the Constitution to the federal government for *any* kind of educational activity; and the Tenth Amendment specifically *prohibits* the federal government from engaging in activity for which there is no constitutional grant of power. Beyond that, the President's proposal would authorize the very kind of discrimination and unequal treatment which he says violates the Constitution: disbursement of federal funds which all taxpayers pay, not to all

alike, but to arbitrarily selected groups or communities.

The Civil Rights Commission was created by the Civil Rights Act of 1957. It was to go out of existence in three years; but Congress, in 1960, extended its life for another three years. It is now scheduled to go out of existence in November, 1963; and President Kennedy wants Congress to extend it again. In the six years of its existence, the Civil Rights Commission has recommended one constitutional amendment to institute what virtually amounts to universal suffrage.[3] This would eliminate the old constitutional provisions which leave the establishment of voter qualifications as one of the reserved rights of states. The Commission has made a large number of widely publicized proposals which have had the effect of further agitating and inflaming the already inflammatory racial situation in the United States.

The Omnibus Bill

On June 19, 1963, President Kennedy submitted to Congress a message proposing the Civil Rights Act of 1963. This Act would incorporate all the proposals of his February 28 message, discussed above, plus new proposals which the President groups under five general headings: (1) Equal Accommodations in Public Facilities, (2) Desegregation of Schools, (3) Fair and Full Employment, (4) Community Relations Service, and (5) Federal Programs.[4]

In one proposal under "Federal Programs," the President asks for authority to withhold federal funds, at his discretion, where racial discrimination exists. This has been widely interpreted as a reversal of the stand he took on April 24, when he rejected a Civil Rights Commission proposal that federal funds be withheld from states and communities where discrimination exists. Apparently, the President did not like the Civil Rights Commission proposal because it might have *required* him to withhold all federal aid to "offending" states or communities. The President wants a free hand, and absolute authority, to *grant* or *withhold* aid as *he* pleases — whether racial discrimination is practiced or not; and that is the broad authority he demands in his Civil Rights Act of 1963.

Under the Community Relations Service of his civil rights message, President Kennedy asks Congress to authorize a federal board or commission (in addition to the Civil Rights Commission) which will be formally organized and authorized to do what he and Robert F. Kennedy have been doing for months — that is, to meet with local and state officials, businessmen, leading individuals, and private organizations, explaining to them the kind of action the administration wants and putting pressure on them to comply with official policies before conflict erupts into public view.

In his civil rights message, the President boasts that officials of his administration have already been doing what he now asks Congress to authorize; and he announces that, pending congressional action, he will go ahead and create, by Executive Order, the very organization he is asking legislation for.

Under the Fair and Full Employment section of his civil rights message, the President proposes nothing really new. Rather, he uses the racial crisis as an excuse for urging passage of New Frontier legislation, and for demanding enlargement of programs already in existence.

MANPOWER DEVELOPMENT AND TRAINING PROGRAM: Early in 1962, Congress passed the Manpower Development and Training Act, authorizing the Secretary of Labor to determine the number of Americans who should be working in any specific industry at

any given time and place; and authorizing allocation of tax money for training American youth in fields which the *Secretary of Labor* thinks they should be trained in. In his civil rights message of June 19, 1963, President Kennedy urges overall expansion of this program.

YOUTH EMPLOYMENT PROGRAM: On April 10, 1963, the Senate passed Kennedy's Youth Employment Act of 1963. This Act could create an American counterpart of government youth organizations which are essential tools of dictatorship in all communist countries, as they were in nazi Germany and in fascist Italy before World War II. There are strong indications that the House of Representatives will kill this Youth Employment Act. In his civil rights message, Kennedy argues that enlargement and passage of the Act would help relieve racial tensions.

VOCATIONAL EDUCATION: A program of federal aid for vocational education in high schools has been in existence since 1917, and has been enlarged and expanded many times, particularly in recent years. In his civil rights message, Kennedy asks for federal funds to provide part-time employment for students in federally-supported vocational education schools.

ADULT EDUCATION: Among Kennedy's federal-aid-to-education proposals for 1963 (not yet acted on by Congress) is a request for an elaborate adult education program. In his civil rights message, the President requests that his adult education program be enacted and enlarged beyond his original proposals.

PUBLIC WELFARE WORK-RELIEF: In his civil rights message, the President requests additional federal aid to states for the employment of welfare recipients on local public works projects.

FAIR EMPLOYMENT PRACTICES LAW: In his civil rights message, the President renews his request for a federal Fair Employment Practices Act, applicable to both employers and unions, which would outlaw racial discrimination in private employment and in union membership.

In making this proposal, the President admits that two-thirds of the nation's labor force is already covered by federal, state, and local fair employment practices measures of the very kind he requests. Such measures have done nothing to relieve racial tensions or solve racial problems. Indeed, the racial problem is at its worst in areas that already have fair employment practices laws —Washington, D.C., and New York City, for example. Yet the President would violate the Constitution to impose upon the entire nation a type of legislation which will do infinite harm, and no good at all.

In the Desegregation of Schools section of his civil rights proposal, President Kennedy asks congressional authority for the Attorney General to initiate, in federal district courts, legal proceedings against school boards and tax-supported colleges — or to intervene in existing cases — whenever the Attorney General receives a written complaint from any parent or student who says he is being denied "equal protection of the laws" because of segregation.

What could be more "unequal" and "discriminatory" than to give one particular class of citizen the special privilege of by-passing the normal channels of justice which ordinary citizens must follow? An agitator or trouble-maker or crank who happens to be a negro can bring public school and college officials into federal court, by merely writing a letter to the Attorney General; and the agitator will be represented, at no cost to himself, by officials and attorneys of the federal government.

The Equal Accommodations in Public Facilities section of the President's proposed Civil Rights Act of 1963 is the most dangerous of all. Here, in the President's language, is the essence

of this section:

"I am today proposing, as part of the Civil Rights Act of 1963, a provision to guarantee all citizens equal access to the services and facilities of hotels, restaurants, places of amusement, and retail establishments . . . . The proposal could give the persons aggrieved the right to obtain a court order against the offending establishment or persons.

"Upon receiving a complaint in a case sufficiently important to warrant his conclusion that a suit would materially further the purposes of the act, the Attorney General (if he finds that the aggrieved party is unable to undertake or otherwise arrange for a suit on his own, for lack of financial means or effective representation, or for fear of economic or other injury) will first refer the case for voluntary settlement to the community relations service . . . give the establishment involved time to correct its practices, permit state and local equal access laws (if any) to operate first, and then, and only then, initiate a suit for compliance."[1]

The President is not clear about the authority for such legislation. He hints that the Interstate Commerce clause of the Constitution gives the federal government authority to eliminate the right of a private businessman to select his own customers. At another point, the President suggests that the Fourteenth Amendment may provide the constitutional authority. But here is the President's key sentence concerning the "authority" for federal officialdom to eliminate the private property rights of businessmen:

"The argument that such measures constitute an unconstitutional interference with property rights has consistently been rejected by the courts in upholding laws . . . designed to make certain that the use of private property is consistent with the public interest."

In Kennedy's view, an American citizen has no right to own and use private property, unless he uses it in a way that officialdom considers to be consistent with the public interest.

Today, it is the demands of racial-agitation groups which fix official notions of what is consistent with the public interest. Tomorrow, it could be something else: President Kennedy recently announced that we must adopt a friendlier attitude toward the Soviet Union and other communist countries.[1] It would show a friendly national attitude toward communists if all private merchants in the United States were compelled to sell merchandise imported from communist countries. The Civil Rights Act of 1963 would give the President ample authority to order such a thing if he should decide that any merchant who refuses to handle communist goods is not using his private property in a way that is consistent with the public interest.

Under authority which he requests in the proposed Civil Rights Act of 1963, the President could order all private employers to hire communists, if the President should decide that this would promote his program of proving to the Soviets that America has no ill will for communists. The President could order employers to hire, or not hire, Catholics, Jews, Presbyterians, Methodists, Mormons, Christian Scientists, atheists, black muslims, Buddhists: the President could compel private businessmen to do anything the President wants, on the simple pretext that he is requiring the use of private property in a way that is "consistent with the public interest."

Why Now?

The President used almost 7,000 words to present the five-point Civil Rights Message which is summarized and discussed above. It is a badly composed, hastily written, ill-at-ease document — replete with inaccurate statements; contradictions; repetitions; flimsy arguments; demagogic appeals to the emotions of hate, fear, and shame.

Why the haste? Some feel that the President, after playing a major role in stirring race feeling to the danger point, cynically used the dan-

ger as a pretext for throwing Congress a civil rights bill which he knew Congress would not pass — but which would monopolize the attention of Congress and thus give the President an excuse for the failure of his legislative program in 1963. Of 25 Bills listed by *Congressional Quarterly* as major legislation, Congress, by June 21, had passed only 3: extension of the draft law; extension of the "emergency" feed grains bill; and raising of the national debt limit. The latter two major bills passed in the House by very close votes, and only after extreme pressures had been exerted by the administration.

Another theory is that Kennedy's proposal of the civil rights legislation in mid-June, 1963, was part of a calculated effort to keep the public so preoccupied with a dangerous domestic issue that it would pay little attention to foreign policy decisions which might, otherwise, cause a storm of protest.

In early 1962, President Kennedy and his Secretary of Defense made public statements to the effect that the American moratorium on nuclear testing (from 1958 through 1961) had left us behind the Soviets in weapons research and development.[5] The President said that nuclear testing was essential to research, vital to our defenses, and that self-interest would compel us to resume and continue nuclear testing until, or unless, we could negotiate with the Soviets a safe, guaranteed test ban, binding on both sides. Throughout 1962 and the first half of 1963, Kennedy officials engaged the Soviets in fruitless negotiations for a test ban treaty. And then, on June 10, 1963, the President announced that he had ordered a halt to American nuclear tests in the atmosphere, without any agreement or commitment at all from the Soviets.[6]

This announcement — involving a life-or-death matter for the nation — made little impression on the public: the media of mass communication were preoccupied with news about the racial crisis.

Kennedy could not have been elected in 1960 without the negro vote, which was promised and delivered by leaders of racial agitation organizations. The President now knows that he has no chance of re-election without the support of these same agitators. Hence, a plausible explanation for the President's sudden decision in mid-June to demand a civil rights bill is that negro leaders virtually ordered him to do so.

Note Adam Clayton Powell's boast that he wrote major portions of Kennedy's June 19 civil rights message. Speaking in Long Beach, California, on June 21, 1963, Powell said:

"The President had no intention of including many of the points that he did in his message. I rewrote half of his speech for him the night before it was delivered before Congress."[6]

In all of American history, it would be hard to find anything more shameful than this. Adam Clayton Powell has been associated with many communist front organizations; he has been criminally indicted for income tax frauds; his tours of foreign nightclubs with his "secretaries," at taxpayers expense, have scandalized the nation; and his hatred for the white man has been openly expressed and broadcast to the nation. This is the man who says he told Kennedy what to put in his civil rights message of June 19, 1963.

The Congress of Racial Equality (CORE) and the National Association for the Advancement of Colored People (NAACP) are both heavily infiltrated, at the top, with communist

fronters.[7] Directorates of the two organizations are interlocked (officials of one organization being officials in the other);[8] and they are interlocked with the directorate of the National Urban League and with the directorate of the Southern Christian Leadership Conference — the agitation group of Martin Luther King, who also has a record of pro-communist activities. The Student Non-Violent Coordinating Committee is another organization militantly active in racial agitation.

These outfits (indirectly interlocked with the Council on Foreign Relations) have learned that racial agitation is a profitable activity. Appealing for funds to support their "struggle for racial equality," they raise huge sums of money. Hence, they have developed an intense intra-family rivalry — each one trying to demonstrate, by militant activity, that it is more effective and more deserving of financial support than others.

Adam Clayton Powell appears to be striving for the role of over-all leader and spokesman; and it is Powell who is bringing the policies of all the negro racial agitation groups into line with the policies of the black muslims — a group which advocates black supremacy and violence against whites.[9]

John F. Kennedy, catering to this crowd, is sowing the seeds of hate and violence: the nation will reap a bloody harvest.

It is obvious that President Kennedy's June 19 civil rights proposal *was* an act of kowtowing to radical negro leaders; but astute observers think there was a deeper motive behind the proposal.

President Kennedy, under the pretext of preparing the nation for civil defense in time of emergency, has already, by executive orders, established a plan for total dictatorship. The racial crisis could become the necessary emergency.[10]

After a series of public statements which were

bound to encourage mob action and violence on the part of negro groups, the President suddenly proposed a civil rights program which Congress (if it has any regard at all for the Republic) cannot pass; and then the President, in effect (not directly, but in an oblique way), told the negro agitators not to engage in any more violence *unless* Congress fails to pass the civil rights legislation.

Could there be a more effective means of fanning what Kennedy himself calls the "fires of frustration" into a raging inferno?

What To Do

Americans who value liberty — however they may feel about the racial problem — should *storm* the Congress with demands that the President's Civil Rights Act of 1963 be rejected, in entirety. This Bill *must* be defeated.

NEXT WEEK: More on the racial problem.

FOOTNOTES

(1) Text of President Kennedy's Civil Rights Message, AP dispatch from Washington, *The Dallas Times Herald*, June 19, 1963, pp. 23-4 B

(2) "Debates in the Federal Convention of 1787 as Reported by James Madison," *Documents Illustrative Of The Formation Of The Union Of The American States*, published as House Document No. 398, 69th Congress, Government Printing Office, 1927

(3) "Civil-Rights Report on Schools . . . Voting . . . Housing," *U. S. News & World Report*, September 21, 1959, p. 123

(4) President Kennedy's June 10 address On World Peace," *Congressional Quarterly Weekly Report*, June 14, 1963, pp. 976-8

(5) *The Test Ban: An American Strategy of Gradual Self-Mutilation*, by Stefan T. Possony, *Congressional Record*, March 21, 1963, pp. 4358-70

(6) "Credit For Rights Message Rewrite Claimed By Powell," UPI dispatch from Long Beach, California, *The Dallas Times Herald*, June 23, 1963, p. 17A

(7) "Activities in the Southern States," speech by U. S. Senator James O. Eastland (Democrat, Mississippi), containing official records from the House Committee on Un-American Activities, and Senate Internal Security Subcommittee, *Congressional Record*, May 25, 1961, pp. 8349-63

(8) *Activities of "The Nation of Islam" or the Muslim Cult of Islam, in Louisiana*, Report No. 3, The Joint Legislative Committee on Un-American Activities, State of Louisiana, January 9, 1963

(9) See this *Report*, "Planned Dictatorship," June 3, 1963, for a complete discussion of the Executive Orders issued by President Kennedy.

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DAN SMOOT

MORE EQUAL THAN EQUAL

Here is the civil rights platform announced by the communist party in 1928, when communists formally launched their program to create social disorder in the United States by agitating the racial situation:

"1. Abolition of the whole system of race discrimination. Full racial, political, and social equality for the Negro race.

"2. Abolition of all laws which result in segregation of Negroes. Abolition of all Jim Crow laws. The law shall forbid all discrimination against Negroes in selling or renting houses.

"3. Abolition of all laws which disfranchise the Negroes.

"4. Abolition of laws forbidding intermarriage of persons of different races.

"5. Abolition of all laws and public administration measures which prohibit, or in practice prevent, Negro children or youth from attending general public schools or universities.

"6. Full and equal admittance of Negroes to all railway station waiting rooms, restaurants, hotels, and theatres.

"7. Federal law against lynching and the protection of the Negro masses in their right of self-defense.

"8. Abolition of discriminatory practices in courts against Negroes. No discrimination in jury service.

"9. Abolition of the convict lease system and of the chain-gang.

"10. Abolition of all Jim Crow distinction in the army, navy, and civil service.

"11. Immediate removal of all restrictions in all trade unions against the membership of Negro workers.

"12. Equal opportunity for employment, wages, hours, and working conditions for Negro and white workers. Equal pay for equal work for Negro and white workers."[1]

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In 1946, President Truman created a President's Committee on Civil Rights. In October, 1947, this Committee published a report, recommending federal legislation to outlaw all discrimination and segregation based on race, color, creed, or national origin. In February, 1948, President Truman requested of Congress civil rights legislation based on the 1947 Report. Congress refused. The Democrat Party put strong civil rights provisions in its political platform for the 1948 elections, and so did the Republican Party.[2]

Thus, twenty years after communists initiated their program to create racial strife, the two major political parties made the race question a primary issue in a presidential election. Kennedy's civil rights proposals in 1963 go beyond the original communist program.[3]

Enforcing Equality

On August 13, 1953, President Eisenhower issued an Executive Order creating the Government Contract Committee (with Vice President Nixon as chairman). This Committee had the responsibility of seeing that business firms with government contracts did not permit racial discrimination in their employment practices.

On January 18, 1955, President Eisenhower issued an Executive Order creating the Committee on Government Employment Policy, to guarantee that all considerations of race be eliminated in the hiring of persons to work for the federal government.

On March 6, 1961, President Kennedy issued an Executive Order abolishing the two Eisenhower committees, and substituting for them the President's Committee on Equal Employment Opportunity, with Vice President Johnson as chairman. The responsibility of this Committee is to eliminate racial discrimination in every activity that has any connection, direct or indirect, with the spending or lending of federal tax money. Private builders who get FHA, or other, loans must not permit any racial discrimination in their own employment practices or in the employment practices of their contractors. They must sell, rent, or lease their real estate without regard to race. Federal agencies must eliminate all kinds of racial discrimination or segregation; and any state or private agencies receiving federal funds, and any private firm contracting, or subcontracting, work for the federal government, must do the same.

The fact is, of course, that the federal government has no constitutional authority to lend money or guarantee private loans, through FHA or otherwise, to individuals or business firms. It has no constitutional authority to give tax money to state governments for schools, welfare, unemployment compensation, employment activities, and so on.

Individuals and state governments — in the South and elsewhere — who take illegal federal handouts and then complain about illegal federal controls have no logic to support their position. The way to end this particular aspect of federal domination of private and state affairs is to eliminate the federal subsidies which give some color of justification for the domination. It is interesting to note, in this connection, that advocates of all federal aid programs (particularly federal aid to education) incessantly repeat the tired old argument that federal help does not mean federal control, although every one knows better, and can see in the record of current events that a primary reason for federal aid is to create a pretext for federal control.

Federal requirements against discrimination in the employment practices of private business firms working on contracts or subcontracts for the government have no basis in the spirit or provisions of American constitutional law. When the government buys goods from private individuals, or contracts with them to produce goods, it has a right and responsibility to require honest

and efficient contract fulfillment. It has no right to force on the private contractors the social or political ideology of reigning Washington officialdom. Yet, from 1953 to 1961, Eisenhower and Nixon (through Eisenhower's Government Contract Committee); and since 1961, Kennedy and Johnson (through Kennedy's Committee on Equal Employment Opportunity) have used government contracts as a club to promote their own political ends.

It is a big club. Federal government spending amounts to more than 20% of the Gross National Product of the United States.[4]

State and Local Action

In addition to federal efforts, at least 20 states (and many municipalities) have laws against racial discrimination in private employment, in public employment, in housing, in schools, and in the use of public facilities.[5]

Most state laws against racial discrimination go to extraordinary extremes. The California Fair Employment Practice Act, for example, makes it illegal for a private employer to ask a job applicant whether he is a citizen of the United States — or even to ask him how long he has been a resident in this country.

Since the California Fair Employment Practices Commission was created in 1959, over 425 cases against private employers have been handled. One typical case involved Lennie L. Andrews, a negro, employed as a coach cleaner in the Barstow, California, yards of the Santa Fe Railroad Company. Andrews did not like the job of cleaning coaches. He asked for promotion to the job of carman. The railroad refused to promote him because he had no aptitude for the job he wanted. Shortly thereafter (in March, 1960), Andrews was found asleep during working hours in a coach he was supposed to be cleaning. He was fired. He complained to the California FEPC that he had been denied the promotion and had been fired because he was a negro. The FEPC, ignoring the facts supplied by the railroad (facts strongly buttressed by the circumstances that the company has a large number of negro employees who have been promoted on merit and who have not been fired), ruled that the company had discriminated against Andrews. The FEPC ordered Santa Fe to reinstate Andrews in his old job, to give him 10 months' back pay, and to promote him at the first opportunity.[6]

Another typical California FEPC case involved Clarence B. Ramsey. In January, 1961, Ramsey, a negro, applied for a job as shipping clerk with the T. H. Wilson Company, a photographic supply firm in San Francisco. The company, considering him unqualified, refused to hire him. Ramsey complained to the FEPC — which ruled that refusal to hire Ramsey was an act of racial discrimination. In August, 1961, the FEPC ordered the company to give Ramsey $2175.50 — which represented the amount of money Ramsey would have earned in wages from January to August, 1961, if he had been hired.[7]

These two California cases are typical of outrageous injustices and violations of individual rights which are commonplace, not only in California, but in all states which have "FEPC" laws.

Consequences

Existing civil rights programs (of federal, state, and local governments) already cover at least two-thirds of the total population in the United States, according to statements which President Kennedy made in his civil rights message of June 19, 1963. The ostensible purpose of the programs is to eliminate racial tensions by abolishing racial discrimination. Yet, racial tensions are infinitely worse now than before any of the programs were initiated. The odd distortions of "liberal" reason on the race question have had incredible consequences.

On September 24, 1957, President Eisenhower sent a Division of airborne troops to Little

Rock, because, he said, "disorderly mobs" in that city were "defying the law." No law was involved, however. The "disorderly mobs" consisted of about 200 housewives and workers, congregated on the lawn at Central High School, jeering, or standing in silent protest against a Supreme Court order that nine negro children should be enrolled in Central High (even though a more modern and commodious public high school was available to the children in their own neighborhood). President Eisenhower interrupted a vacation in Rhode Island and returned to Washington for a radio-television speech to the nation about the Little Rock affair which, because of his action, was emblazoned in banner headlines all over the world.

About midnight on September 23, 1957 (just a few hours before Eisenhower's military action against the "disorderly mobs" in Little Rock) some real mob violence erupted in Lone Star, Texas. Approximately 1000 strikers (United Steel Workers-CIO) jammed entrance gates at the Lone Star Steel Company, preventing employees who wanted to work from entering the plant. They threw rocks at cars and non-strikers, and shouted insults and obscenities at workers who approached the gates. It was an "illegal" strike — in the sense that the union had not authorized it, and management was not certain what it was all about. The company obtained a court injunction against mass picketing, but the strike continued anyway. Company cars were stoned, windows were broken. One company truckdriver said he was followed by two carloads of strikers who fired on him, puncturing a tire on his truck. The wife of one non-striker said the lives of her children were endangered. A sales representative said one hundred strikers mobbed his car, trying to turn it over.

In Little Rock, Arkansas — 200 housewives and workers milling around Central High School; in Lone Star, Texas, 1000 CIO strikers armed with rocks, clubs, and guns doing violence to the life, liberty, and property of innocent citizens!

President Eisenhower did nothing, said nothing, about the Lone Star, Texas, affair.

President Kennedy has displayed the same bias. Washington, D. C., has become a place where people are not safe on the streets at night, or even in church or in their own homes, unless carefully guarded. Last Thanksgiving Day, a small minority of white people in a predominantly negro crowd at a high school football game were savagely mauled by negro spectators, after the white football team had defeated the negro team. Police were powerless to protect the white minority, just as police in Washington are generally unable to give the minority white population adequate protection against negro hoodlums.[5] The President could, with constitutional authority, use federal troops to protect the people of Washington against lawless violence, since the city is in a federal district; but the President has never done it.

In May, 1963, however, President Kennedy was quick to send federal troops to protect rioting negroes in Birmingham — where authorities had the situation well in hand and were impartially enforcing the law; where no federal law or federal court order had been violated or even threatened; where there was no constitutional authority for federal intervention.

It is safe to say that less damage to the persons and property of innocent people has occurred in all racial strife in the State of Alabama during the past ten years, than occurred in thirty minutes on Thanksgiving Day, 1962, at Washington, D. C.

On June 12, 1963, Medgar Evers, negro field representative for the National Association for the Advancement of Colored People in Mississippi, was murdered in Jackson. The FBI investigated the crime as a federal case. FBI agents identified a suspect and arrested him under authority of federal civil rights laws, later turning him over to state authorities for prosecution on a murder charge.

On June 12, 1963, a white man was killed by a negro during a race riot in Lexington, North Carolina. Federal authorities showed no interest in this case.

On June 12, 1963, two white men were injured by shotgun blasts fired into their private places of business, during a race riot at Cambridge, Maryland. Federal authorities showed no interest in this case.

On the night of June 12, 1963, 6 negroes stabbed an 18-year-old white boy and raped his 15-year-old companion in Cleveland, Ohio. Federal authorities showed no interest in this case.

On June 19, 1963, Medgar Evers, the slain NAACP leader (an ex-serviceman) was buried in Arlington National Cemetery, with all the solemn ceremony customary at the burial of a national hero.

On June 19, 1963, three white soldiers were dragged out of their car in Washington, D. C., and beaten by a gang of negroes. One of the white soldiers — Edward Betcher — was killed. The negroes ran over his body with their car, as they were leaving the scene.[9] The FBI did not enter this case; and the funeral of Betcher, a murdered white soldier, was not even reported in the press.

On June 19, 1963, a homemade bomb, thrown or placed by unknown assailants, damaged a negro church near Gillett, Arkansas. Newspaper accounts indicate that the FBI did enter this case.[10]

On the night of June 26, 1963, dynamite bombs blasted the homes of two white police officers in Minneapolis. Prior to the bombings, both white men had received numerous threatening telephone calls from negroes. Federal authorities did not enter this case.

On June 5, 1963, the Dallas Post Office announced the promotion of 3 negroes to supervisory positions. On the basis of merit, 53 white men ranked higher than the highest ranking negro on the promotion list.

On July 5, 1963, a *San Antonio Evening News* columnist quoted local federal officials as saying they had been told to "fill vacancies with nothing but Negroes." The order was given verbally.[11] On July 6, various regional federal officials denied the San Antonio story, by saying that the San Antonio officials had "exaggerated what we've asked them to do."[12]

Concerning negroes in government service, United States Representative Bruce Alger (Republican, Texas) says:

> "While the negroes comprise only 10 percent of the population . . . they already hold jobs, especially in government, far beyond this percentage. In Washington, in such agencies as the Post Office Department, General Services Administration, etc., employment for negroes runs as high as 40 to 50 percent."[13]

In sum: civil rights for negroes, in the eyes of politicians hungry for negro votes, means that harming a negro is a national disaster which requires federal action even when such action violates the Constitution; but negro violence against whites is a routine matter beneath the notice of federal authorities. Civil rights for negroes in federal employment means that they must be promoted above white men who outrank them on the basis of personal merit, and must be given preference as applicants for employment, even though they already hold a disproportionate share of all government jobs.[14]

Overt Demands for Preference

Agitators of the racial problem have long contended that they merely want to abolish discrimination *against* negroes — to eliminate racial consciousness so that negroes will be treated as individuals, without regard to their race. Now, however, these same agitators are frankly demanding that negroes be given preferential treatment *because of their race.*

In northern cities, taxpayers are burdened with the expense of transportation services to haul

negro children miles from their neighborhoods so that they can be enrolled in schools with white children.

On June 30, 1963, Martin Luther King (notorious negro agitator) demanded "discrimination in reverse." That is, he wants preferential treatment of negroes in the form of financial aid from the federal government to provide negroes special advantages in employment, education, housing, and so on.[158] On July 1, 1963, Lincoln Lynch, an official of The Congress of Racial Equality, went one step further in demanding that negroes be given preferential treatment, not only by government but by private organizations.[159]

These negro agitators threaten the nation with violence if they do not get the preferential treatment they demand.

Negro leaders are now saying that the absence of white children from all-negro schools "means a shortage of ambitious, education-minded models for negro children to copy."[160] This does coincide with the findings of scientific research.

Dr. Audrey M. Shuey, Chairman of the Department of Psychology at Randolph-Macon Woman's College, Lynchburg, Virginia, wrote a book, *The Testing of Negro Intelligence* (1958). Dr. Shuey reviewed all extensive psychological testing of negroes done in the United States during this century. Her conclusion is that, on the whole, negroes have lower IQ's than whites, *regardless* of environmental factors, and that there are definite intelligence differences between white and negro races.

Dr. Henry E. Garrett, former President of the American Psychological Association and Professor Emeritus of Psychology at Columbia University, says in the introduction to Dr. Shuey's book:

"Dr. Shuey concludes that the regularity and consistency of the results strongly imply a racial basis for these differences. I believe that the weight of evidence supports her conclusion."

Impartial foreign observers have come to the same conclusion. Peregrine Worsthorne, an editor of the London *Sunday Telegraph*, says:

"To be brutally frank, the most serious and ineradicable obstacle to a genuine multi-racial society in the United States may be less the Southern white man's privileges than the Northern black man's inadequacies."[161]

Only God can evaluate the worth of human individuals or races. It is quite beyond the province of man to know whether any individual or race is "superior" to another. Only God knows whether negroes have contributed more or less than whites to fulfillment of God's plan for humanity. Only God knows whether "civilization," as we know it, is better or worse than the primitive society of negroes in the jungles of Africa.

In evaluating human accomplishments, the best we can do is to use standards known to us. All of us who are heirs of Western civilization (which includes negroes among us) use such words as "progress" and "accomplishment" in conformity with the standards of our civilization — even when we acknowledge that God's concept of "progress" and "accomplishment" may differ from ours.

In this context, certain things are obvious.

It is obvious that Western civilization was produced by whites. For primitive living under harsh physical conditions, the black man is obviously better adapted than whites; but for living in the white man's civilization, whites are obviously better adapted than negroes.

When left alone, the negro has never advanced beyond a primitive culture. When left alone after taking over an advanced white civilization (as in Haiti), the negro has retrograded rather than progressed.[162] Nowhere else on earth has the negro made such substantial progress as in the United States, where he has received extraordinary assistance from whites.

In demanding enforced racial mixing so that negroes will benefit from association with whites, negro leaders inadvertently admit negro inferior-

ity; but to justify their demands for preferential treatment, they claim that negroes are now entitled to preference because they always before have been oppressed; they claim that negroes are backward in our civilization because they have never been given a chance.

This simply is not so.

Before negro agitation became a major issue in American politics, whites (in southern states, especially) voluntarily gave negroes preferential treatment of the kind that was most beneficial to negroes. The prevailing attitude in the South was that whites had a responsibility to help negroes. White employers would put up with laziness, dishonesty, and irresponsibility on the part of negro employees that they would not for a moment tolerate in whites. White families voluntarily assumed a responsibility for negroes that they would never assume for other whites. Whites would take financial risks to help a negro which they would not think of taking to help a white man with comparable resources and credit rating. This is why there are more independent, prosperous negro businesses in the southern part of the United States than in any other part of the world: white men, understanding the negro and feeling responsibility for him, gave him special help that was not available to anyone else.

It is true that for generations following the Civil War, great numbers of southern negroes were treated like children, because they behaved like children. But, generally, since the end of the Civil War, the negro has been treated on the basis of individual merit. Those who have the ability to rise in our society have risen, many to great heights, where they enjoy all the advantages of wealth, fame, and public acclaim that whites with comparable accomplishments enjoy.

The arrogance of contemporary negro leaders, the wide-spread violence against whites and mass defiance of local laws by negroes who are supported, encouraged, and defended by Washington officials so greedy for power that they are willing to destroy the Constitution and abolish the most fundamental rights of all the people in order to get the votes of organized negroes in key northern cities; the preferential treatment of negroes in government employment, and the governmentally-enforced, preferential treatment of negro job applicants in private industry, in a time of unemployment — these are creating a general resentment of whites against negroes that did not exist before. The negro in America will soon realize that liberal politicians and agitators have led him into disaster. The whole nation will suffer.

What To Do

The most obvious thing that we ought to do

about the race problem is to demand that the federal government quit meddling with it. Congress should reject President Kennedy's civil rights program entirely; and it should repeal all existing civil rights legislation in order to return to the ideal of equality-before-the-law for all persons in our nation.

If this could be done; and if all the federal government's unconstitutional programs of aiding and meddling in state and local affairs could be stopped, we would return to a free and voluntary society in which each community or state could handle its own race problem, if any, in its own way. This is a slow and long-range approach; but it is the only approach that offers any hope of solution for the most dangerous domestic problem in the United States since the outbreak of the Civil War.

Whites, outnumbering negroes by about 10 to 1, could vote out of office every politician who is ruining the country by bidding for negro votes with civil rights proposals. If whites continue submitting to the dictation of the radical leaders of a small minority, they will deserve what they get.

FOOTNOTES

(1) *American Negro Problems*, by John Pepper, Workers Library Publishers, New York City, 1928
(2) "Perspective: Time for Statesmanship," by Raymond Moley, *Newsweek*, March 15, 1948; "Perspective: Toward a Civil Rights Solution," by Raymond Moley, *Newsweek*, November 22, 1948
(3) For additional information on President Kennedy's 1963 Civil Rights proposals, see this *Report*, "Civil Rights Act of 1963," July 1, 1963.
(4) *The Budget in Brief for 1964 Fiscal Year*, Bureau of the Budget, January 17, 1963, pp. 17-20
(5) *The Book of the States*, 1960-1961, *Volume XIII*, The Council of State Governments, 1960, p. 458
(6) "FEPC Orders Rail Worker's Reinstatement," *The Los Angeles Times*, March 1, 1961
(7) AP dispatch from San Francisco, *The Los Angeles Times*, August 24, 1961
(8) For a discussion of conditions in Washington, D.C., see this *Report*, "Washington: The Model City," June 24, 1963.
(9) "Five Negroes Held In Soldier's Death," AP story from Washington, *The Dallas Morning News*, June 20, 1963, Section 1, p. 3
(10) UPI dispatch from Gillett, Arkansas, *The New York Times*, June 20, 1963, p. 19
(11) "Hire Negroes Only, Reported U.S. Order," *The Dallas Times Herald*, July 6, 1963, p. 1
(12) "Official Denies SS Units Told to Hire Only Negroes," by Carl Harris, *The Dallas Morning News*, July 7, 1963, Section 1, p. 21
(13) "Washington Report," by U.S. Representative Bruce Alger (Republican, Texas), June 22, 1963
(14) "What New Turn In Negro Drive Means," *U.S. News & World Report*, June 17, 1963, pp. 40-7
(15) "Dr. King Urges Negro 'G.I. Bill'; Calls for 'Preferential' Plan to Meet Education Needs," *The New York Times*, July 1, 1963, p. 21
(16) "CORE to Intensify Militancy On L.I.," by Ronald Maiorana, *The New York Times*, July 2, 1963, p. 14
(17) "Should All Northern Schools Be Integrated?" *Time*, September 7, 1962 p. 33
(18) "'Black And White Reality'—A British Observer's View," by Peregrine Worsthorne, *U.S. News & World Report*, July 1, 1963, pp. 62-3
(19) For a discussion of Haiti, see this *Report*, "The American Tragedy," July 8, 1963, pp. 213-4.

WHAT YOU CAN DO

Washington officialdom uses your taxes for programs that are creating vast cesspools of waste and corruption — and dragging our Republic into the quicksands of socialism. What can you do about it?

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This is the answer to Mr. Smoot

STATEMENT
BY
MRS. MARY TINGLOF, MEMBER
BOARD OF EDUCATION

PRESENTED AT THE REGULAR BOARD MEETING
MONDAY, AUGUST 12, 1963

In response to the personal attack made upon me last Thursday by Mr. Smoot, I should like to make a statement not only to him but to the Board and the Administration. This response could be made in several ways, but I choose not to answer in kind to the insinuations or innuendoes.

I was elected to this Board in July, 1957, and re-elected in 1961 due to the tremendous efforts of teachers, city-wide community organizations, labor representatives, professional associations (including those in which I have personal associations, such as legal, medical, art, and music), welfare and social agencies, and personal friends--all of whom contributed individually or collectively some money, but most of all blood, sweat, and shoe leather to the success of those campaigns. In both instances, it was what one would term a "grass roots" endeavor in support of my avowed principles dealing with excellence in curricula, adequate recognition of the teaching profession, academic freedom, programs for both youth and adults, and a firm belief that education and sociological changes in our metropolitan Los Angeles had to move hand in hand. This has been and will continue to be my goal, not only during my term of office, but whenever I might return to private life.

Some of these avowed goals of mine have annihilated long-standing friendships for it is human nature not to upset the status quo or to leave peaceful pastures for stormy seas. If this personal attitude should be called "Rebel", I accept the title for I refuse to adhere to any policy which is not for the good of all--according to the way I view it after considerable inner debate with my own conscience.

I have long since determined that because the pattern of society is to become institutionalized, reforms must stem from individuals--and I also believe that when a crisis is faced there are superhuman efforts that can be brought to bear because the magnitude of the problem demands it.

On December 7, 1941, this country was faced with a national emergency and intermediate steps were taken to avert disaster. Many of these first steps were wrong and most inadequate, but those first attempts got this country off dead center--and intermediate steps in a relatively short period of time helped through those perilous months--though in time they were discarded for others which brought our nation ultimate victory. The point is, in that crisis, immediate positive steps were taken by our government; the problem of the minorities in this country today is no less a crisis.

I hold no special brief for the transporting of students as suggested in my motion of July 18th as the perfect solution, but I reiterate it was one method of moving in a situation which will wait for no moderate clime. Nor was that motion offered in a dictatorial form--inasmuch as it was a suggestion presented in the due process of democratic procedure to this Board for acceptance in whole or in part or for rejection.

From May 20th, when the Ad Hoc Committee's recommendations were adopted by this Board, to June 6th, when the proposals of the NAACP were heard, I, as President, hoped the initiative for solving this dilemma would stem from other members of this Board in recognition of our collective awareness of this acute national situation. This, to my dismay, was not forthcoming; hence, one week after I had again been returned to regular Board membership, I submitted my motion knowing full well its obvious shortcomings, but indicating a positive willingness to make some moves in six high schools on the perimeter of the heart of the Negro ghetto. No one would deny that housing evils are at the core of this cancer, but waiting for this to straighten its course only passes the buck

while children, both black and white, continue to grow older with their short-changed knowledge about the ways, attitudes, and behavioral characteristics of a different culture and heritage.

Mr. Smoot, you may sail your small boat in a happy sea, but I choose to cast mine into an angry foam for I find it more challenging. This wave of indignation sweeping our land has been brought about by our own shortsightedness, whether in Birmingham or Los Angeles, and I shall ride that crest so long as some Americans continue to wear blinders on Justice for all.

These, my people, have just and reasonable demands; they ask not for miracles but for action--both immediate and of longer duration. They are keenly aware of our limitations, but there is no problem so involved that there can be no temporary alleviation until greater strides are culminated. We are so steeped in tradition that some school boundaries have become as rigid as Berlin walls. Someday a novelist will write a book whose title could be "The Sacredness of Alameda Street." The role of principal or administrator to place personnel and set individual school procedures has been held in many instances so inviolate that small kingdoms have been built, authoritarian to a degree which annihilates the democratic education which we profess to teach. Traditional ways of conducting education in many schools have made life so sterile that creativity--the quality so badly needed for strengthening our country--has been lost in the multitudinous rules and regulations of the "system."

My response to you, Mr. Smoot, is in an appeal to you who profess to believe in Christianity. This is not a movement by these people to seek special privileges, but it probes the depth of your true humanitarian beliefs. A portion of God's children who, by no fault of their own, have been here, as in other states, prevented from achieving a full citizenship immediately upon birth because the bonds and stigma of the past adhere to them by those of us who say "Prove Yourself" before we accept you.

In these past few days the question has been asked frequently whether during my terms of office a Board member has been so severely castigated by a colleague. To my knowledge, I think not, but though in my mind your facts and conclusions are grossly erroneous, I would be the first to defend vigorously your right and privilege to disagree with me and my viewpoint. This is not a personal feud, but it is a soul-searching depth finder to ascertain whether a majority of this Board can speedily relieve a tension before the patient goes into shock.

My words and actions are no payment for any political favors, but an obligation to a personal promise I made to myself some twenty years ago when I joined the NAACP. If my position as a member of this Board has thrust me into a place of responsibility, I shall make every attempt to pay off that promise to a cause in which I believe. That same principle and devotion has been given to my other dedications--better relations between our students and those of Japan, between the teachers of foreign language and our professional staff, between the public librarians and their counterparts in schools, between the people of the Mexican community and our school district--a community whose cause is similar and for whom I work in other civic agencies, and in addition, my city and county affiliations on behalf of senior citizens. As in the past, I will continue in the future to pressure this Board and administration into creative programs to achieve the greatest possible educational opportunity for every child and adult which this district must serve. The present Negro problem is not only one of equal educational opportunity, but it must be a massive attempt to fill in the back-log of inequalities that have existed over this past century.

One way to help shorten this gap, Mr. Smoot, would be to reanalyze your personal commitments to the principles of your religious belief.

MEMORANDUM ON "THE DAN SMOOT REPORT"

The truth of the following statements made in reference to the NAACP in "The Dan Smoot Report" is questionable:

1. Vol. 3, No. 16, Monday, April 22, 1957, page 8:

> You (perhaps knowing that 41% of the officers of the NAACP are either communists or members of communist fronts) may not want to let this NAACP official violate your constitutional right to be secure in your papers and effects--and put you out of business.

2. Vol. 3, No. 39, Monday, September 30, 1957, page 5:

> One specific important item of information publicized by the Louisiana committee was that ten top leaders of the National Association for the Advancement of Colored People have extensive communist front records. The ten are:
>
> Algernon D. Black, NAACP Board of Directors
> Hubert T. Delany, NAACP Board of Directors
> Earl B. Dickerson, NAACP Board of Directors
> Oscar Hammerstein II, Vice President of NAACP
> S. Ralph Harlow, NAACP Board of Directors
> William Lloyd Imes, Vice President of NAACP
> Benjamine E. Mays, NAACP Board of Directors
> Eleanor Roosevelt, NAACP Board of Directors
> Channing H. Tobias, Chairman of the Board, NAACP
> W. J. Walls, Vice President of NAACP

3. Vol. 7, No. 4 (Broadcast 286), January 23, 1961:

A. The really significant fact about Dr. Weaver is not that he is a negro, but that he was chairman of the NAACP. This outfit, dominated for years by persons who have long records of association with communist causes, has done, and is doing, more harm in creating strife, fear, mutual distrust, and mutual hatred among racial groups in America than all of the so-called "hate groups" which 'liberals', in and out of the NAACP, are always talking about. The fact is that the NAACP is the major, organized 'hate group' in America today.

B. Prior to the late 1920's and early 1930's (when the communist party and the NAACP began their parallel

programs of racial-hatred agitation) American whites and negroes were solving their "racial problems" with miraculous speed.

C. When the NAACP and the communist party attacked these isolated cases of racial abuse, they dishonestly portrayed them as typical of all negro-white relations in America. The NAACP and communist agitation was not intended to eliminate racial feelings and attitudes which were prolonging undersirable race-relations in isolated cases. The agitation was intended to inflame those feelings into hatred, and spread them to the total population.

D. The racial agitation of the NAACP...reflects a hatred and contempt of colored people.

E. Parents who enrolled their children in the white high school in the Little Rock affair were "either bribed or high-pressured into using their own children as pawns which the NAACP could manipulate to serve its own end of creating racial strife and hatred."

F. It is a practice of the NAACP to use Negroes as tools to stir up hatred which hurts Negroes more than it hurts anyone else.

For example, the NAACP does not push for public housing for Negroes but determinedly opposes such a measure. It has strong opposed every proposal for a public housing project for Negroes...The NAACP does not want Negroes to have the freedom to live in their own communities. NACCP wants to force Negroes to live in intimacy with whites...

G. The NAACP is ashamed and contemptous of colored people. The NAACP wants to eliminate the Negroes as distinctive human beings: to stir negroes into the white population until they will be unnoticed.

H. This [the reference is to paragraph G] is why the NAACP is constantly agitating (and in recent years, with frightful success) for laws which make it illegal to show a human being's race on a birth certificate or death certificate; which make it illegal for employees even to ask prospective employees what race they belong to; which make it illegal for employment agencies to mention race when advertising jobs available; which make it illegal for insurance

companies to mention race when writing policies; or for banks to mention or consider race when considering loan applications; or for individuals to consider race in the use and management of their own homes and other property.

So, NAACP-liberals are determined to force colored and white people to live together in the same neighborhoods and same houses, hoping that this intimacy of living will finally lead to the real and final intimacy of inter-marriage.

OK. +. The NAACP advocates the use of federal tax money to enforce racial togetherness in housing...

4. Vol. 8, No. 41, October 8, 1962, page 322, paragraph 2:

The NAACP financed Meredith's court fight to force enrollment, in defiance of the laws. [This statement was made in reference to James H. Meredith when he sought to enroll in the University of Mississippi, contrary to the segregation laws of Mississippi.

5. Vol. 9, No. 22, June 3, 1963:

A. Page 174, paragraph 6:

The Black Muslims want negro supremacy, and openly advocate murder of white people until all whites in the United States are either exterminated or reduced to bondage. The NAACP has made an elaborate pretense of 'repudiating' the Black Muslims movement, but there are many indications that the NAACP and the Black Muslims are working hand-in-glove: the NAACP warning that if their particular brand of violence is not fully supported, the bloodier violence of the Black Muslims is inevitable.

[In the next paragraph it is asserted that Adam Clayton Powell is a life member of the NAACP and has openly associated with the Black Muslims.]

B. Page 174-175, paragraph 7:

+ The head of the NAACP in Washington, D.C. (where negro criminal violence against white people is creating something akin to a reign of terror) said, on a national television program in early May, 1963, that negro violence is coming and that the NAACP will promote the violence if whites do not immediately give the negro what he demands.

6. Vol. 9, No. 26, July 1, 1963, page 206, paragraph 8:

The NAACP is heavily infiltrated, at the top, with communist fronters 7/. (Footnote: "Activities in the Southern States," speech by U.S. Senator James O. Eastland (Democrat, Mississippi), containing official records from the House Committee on Un-American Activities, and Senate Internal Security Subcommittee, Congressional Record, May 25, 1961, pp. 8349-63).

THE
Dan Smoot Report

Vol. 10, No. 22 (Broadcast 458) June 1, 1964 Dallas, Texas

DAN SMOOT

COMMUNISM IN THE CIVIL RIGHTS MOVEMENT

On May 20, 1964, Leo Pfeffer (general counsel of the American Jewish Congress) announced in New York that civil rights and religious organizations have arranged for 60 volunteer lawyers to spend at least two weeks without pay in southern states this summer, to defend civil rights demonstrators who may be charged with violations of local and state laws. The other "civil rights and religious organizations" joining the American Jewish Congress are the National Council of Churches, the Congress of Racial Equality, the National Association for the Advancement of Colored People, the American Civil Liberties Union, the American Jewish Committee, and the Student Non-Violent Coordinating Committee.(1)

What motivates these people who stir cauldrons of violence and issue calls for lawless insurrection? Some of them, no doubt, think they are doing what is right, though it is difficult to understand how anyone could think so. It is obvious, however, that some are being manipulated by sinister forces to do the job of the communist party: to tear American society apart and destroy constitutional government.

On August 25, 1963, Attorney General Robert F. Kennedy, testifying before the Senate Commerce Committee, denied that there is significant communist influence in the civil rights movement. He said FBI investigations had produced "no evidence that any . . . leaders of major civil rights groups are communists or communist-controlled."(2) On January 29, 1964, FBI Director J. Edgar Hoover, testifying before the House Appropriations Subcommittee, said that communist influence in the civil rights movement is "vitally important."(3) Who is telling the truth: FBI Director J. Edgar Hoover, or Attorney General Robert F. Kennedy? One of them is bound to be wrong, since they contradict each other.

Most of Mr. Hoover's important testimony — in which, obviously, he gave names and other specifics about communists who control, or manipulate, civil rights groups — was "off the record," and may never be made public, certainly not as long as Robert F. Kennedy or anyone like him is

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Attorney General (the Attorney General being above Mr. Hoover in the chain of command). There is enough evidence from other sources, however, to prove that the major civil rights groups are virtually controlled by communists or by persons so closely associated with communist activities and so thoroughly sympathetic with the objectives of communism, that their non-membership in the communist party is of no importance.

NAACP

The National Association for the Advancement of Colored People is the primary civil rights group — connected with all the others through interlocking directorates. The NAACP was founded in New York City, May 30, 1909, at a meeting of 55 prominent "liberals and socialists," mostly white.[1] The first five top officials of the NAACP were well-known socialists: Dr. Henry Moskowitz, Oswald Garrison Villard, Mary Ovington White, William English Walling, and Dr. W. E. B. DuBois. DuBois was the only negro in the group.[2,3] He later became a militant communist, but remained an official of the NAACP until his death (when he was mourned by communists everywhere).[2a]

In 1920, the New York State Legislative Committee Investigating Seditious Activities, branded the NAACP a subversive organization, interlocked with several other socialist organizations, including the socialist party.[6]

In 1922, several communists (William Z. Foster, Scott Nearing, Robert W. Dunn, Benjamin Gitlow, Clarina Michelson) participated with socialists (Norman M. Thomas, Roger N. Baldwin, Morris L. Ernst, Freda Kirchwey, Lewis S. Gannett) in founding and staffing the American Fund for Public Service (commonly called the Garland Fund).[7, 8] This tax-exempt foundation was a major source of money for communist organizations, publications, and fronts.[9] Throughout the 1920's and 1930's, the Garland Fund gave and lent huge sums of money to the NAACP;[7, 8] but communists did not initiate efforts to infiltrate and control the NAACP until 1936.[5] By 1956, at least 77 top officials of the NAACP were known to agencies of the federal government as persons who participated in communist or pro-communist activities.[10] Here are a few NAACP officials known to have communist-front records:

Roy Wilkins (national administrator of NAACP)

Arthur B. Spingarn (president of NAACP)

Allan Knight Chalmers (listed in 1956 as national treasurer of NAACP)

Channing Tobias (head of the department of international justice and goodwill of the National Council of Churches)

A. Philip Randolph (vice president of the AFL-CIO, leader of the August, 1963, March on Washington)

Eric Johnston (deceased, former motion picture Czar, member of the Council on Foreign Relations)

Dr. Robert C. Weaver (vice president of NAACP, now Administrator of the Federal Housing and Home Finance Agency)

Lewis S. Gannett (retired editor of *The New York Herald-Tribune*)

Norman Cousins (editor of *The Saturday Review*, member of the Council on Foreign Relations)

Dr. Ralph Bunche (Under Secretary General of the United Nations)

Alfred Baker Lewis (insurance executive, former official of the socialist party, Committee on Political Education of the AFL-CIO)

Earl B. Dickerson (founder of the American Legion, past president of the American Bar Association and of the National Lawyers Guild)

Lloyd K. Garrison (vice-chairman of the American Civil Liberties Union, past president of the National Urban League, various government positions in the Roosevelt administration)

Morris L. Ernst (member of the Board of Directors of the American Civil Liberties Union, various positions in the Roosevelt and Truman administrations)

Thurgood Marshall (chief counsel of NAACP

until appointed a federal judge by President Kennedy)"[10]

For many years, Walter White held the top position in the NAACP that Roy Wilkins now holds. White (who had a communist-front record)[11] often made anti-communist statements, for public relations purposes. Manning Johnson (a negro who was for years a communist party official) testified in 1957 concerning Walter White and the NAACP. Johnson said:

"Basically, Walter White was never against the Communists, because he joined with them in numerous Communist front movements . . . . while at the same time the Communists were actively infiltrating the organization from below . . . .

"Let us examine . . . some of these people who have been in the driver's seat in the NAACP. You have this peculiar combination. You have Negroes. You have white philanthropists. You have Communists, fellow-travelers, some eggheads, and Realists, and people who do not know what they want, combined with Socialists, and Trotskyites. The people most influential are the Socialistic elements inside the Executive Board of the NAACP. They are the ones who are screaming against the Communists, because they want to control the Negro movement for themselves . . . . So, it is a family quarrel between the Socialists, the Social-Democrats, the Trotskyites and the Communists — all of whom are concentrated in the organization itself . . . .

"But there is one thing they all have in common, and that is that their programs and policies are based upon the teachings of Karl Marx. The only difference between the Social-Democrats, the Communists and the Trotskyites, basically, is the question of strategy and tactics. The Socialists believe it can be done one way; the Communists believe it can be done another. So there is a conflict, and all of them are fighting over the poor Negro. They want to use him in their political plans . . . .

"I don't care whether it's the Socialism of the Socialists or the Social-Democrats, or the Socialism of the Trotskyites, or the Socialism of the Communists—they are all anti-American. They are basically anti-capitalism; they all seek in one form or another the destruction of the government of the United States . . . ."[8]

Personalities

The foremost personality in the civil rights movement is Dr. Martin Luther King. King is pastor of a Baptist Church in Montgomery, Alabama. He frequently speaks at important meetings of the National Council of Churches (of which he is a member), and at Protestant churches affiliated with the National Council. His associations with communists, communist-fronters, communist organizations, and moral degenerates are, however, notorious.

For about five years (approximately 1955 to 1960) Bayard Rustin was Martin Luther King's secretary. Bayard Rustin joined the Young Communist League at the City College of New York in 1936.[11] In the early 1940's, he was field secretary of the Congress of Racial Equality (CORE) and was race relations director of the Fellowship of Reconciliation[11] (an extremist pacifist organization). During World War II, Bayard Rustin was arrested, tried, and convicted as a draft-dodger. For this offense, he was sent to federal prison on March 7, 1944; discharged, June 11, 1946.[12]

On January 21, 1953, Rustin spoke to the American Association of University Women in Pasadena, California, on the subject of world peace. He was scheduled to speak on the same subject that evening to a group at the First Methodist Church in Pasadena, but went to jail instead. That night, Pasadena police arrested Rustin in a car with two other men, and charged him with "sex perversion" and "lewd vagrancy."[13] The next day (January 22, 1953), Rustin pleaded guilty to the charges and was sentenced to 60 days in the Los Angeles County jail.[14]

In February, 1957, Rustin was one of 11 "impartial observers" invited by communists to attend the 16th national convention of the communist party, USA. At the conclusion of the convention (February 12, 1957), Rustin joined communist officials in a communist-party policy statement which condemned the Senate Internal Security Subcommittee for subpoenaing Eugene Dennis (then communist party national secretary) to testify.[15]

In early 1958, Rustin went to the Soviet Union.[12] Shortly after his return, he organized Martin Luther King's 1958 "march on Washington"—which *The Worker* (communist party newspaper) called a communist party project.[12] Rustin was second in command of the bigger March on Washington, August 28, 1963, which Martin Luther King helped organize and direct.[11]

This ex-convict, bed-fellow of communists, and moral degenerate was Martin Luther King's right-hand man for about five years during the late 1950's, helping King organize, during that time, the Southern Christian Leadership Conference — which King has used as a front for staging many notorious activities, including the infamous boycotts and demonstrations in Alabama.

When King and Rustin separated (about 1960), King replaced Rustin with Hunter Pitts O'Dell, alias Jack H. O'Dell. As recently as June, 1963, O'Dell was in charge of Martin Luther King's SCLC office in New York. In 1961, O'Dell was elected to the national committee of the communist party, USA — a position given only to important communists who have served the party a long time.[16, 17]

Martin Luther King is a close friend, supporter, and associate of Anne Braden,[18] Carl Braden,[19] Aubrey W. Williams,[19] and Dr. James A. Dombrowski[19]— all identified members of the communist party;[18, 19] all serve (or have served) as officials of the Southern Conference Educational Fund, Inc.[19, 20] Concerning the Southern Conference Educational Fund (and Martin Luther King's connection with it), the Joint Legislative Committee on Un-American Activities of the State of Louisiana concluded (in a report published April 13, 1964):

"The evidence presented to us in the two hearings recorded in this report solidly confirms our prior findings that the Southern Conference Educational Fund is in fact a Communist Front and a Subversive Organization. The Southern Conference Educational Fund is managed and operated by Communists and has obvious multiple connections with other Communist Front organizations. It has openly supported many well-identified Communists and Communist causes. It has published and distributed Communist political propaganda written by and about well-identified Communists setting forth the Communist propaganda line. We reaffirm our previous findings regarding the Southern Conference Educational Fund and our conclusion that James A. Dombrowski, Executive Director of the SCEF, is and has long been, a 'concealed Communist.'

"The infiltration of the Communist Party into the so-called 'civil rights' movement through the SCEF is shocking and highly dangerous to this State and the nation. We do not suggest, nor do we believe, that everyone connected with the civil rights movement is a Comanunist. There are many sincere and well-meaning people involved in this cause. We do suggest and the evidence before us is quite conclusive, that the civil rights movement has been grossly and solidly infiltrated by the Communist Party . . . .

"The evidence before us shows clearly, that Martin Luther King has very closely connected his organization, the Southern Christian Leadership Conference, with the SCEF and the Communist personalities managing the SCEF. This has been going on for some four and a half years. By thus connecting himself with the Communists, Martin Luther King has cynically betrayed his responsibilities as a Christian Minister and the political leader of a large number of people . . . .

"The Student Non-violent Coordinating Committee . . . is substantially under the influence of the Communist Party through the support and management given it by the Communists in the SCEF . . . . [and] is now getting strong financial aid from the SCEF . . . .

"The . . . Southern Christian Leadership Conference [Martin Luther King's organization] and the Student Non-violent Coordinating Committee are substantially under the control of the Comanunist Party through the influence of the Southern Conference Educational Fund and the Communists who manage it . . . ."[20]

The Southern Conference Educational Fund, Inc., also contributes money, and other support to (and has overlapping membership with) the Fair Play For Cuba Committee — the communist-front organization to which Lee Harvey Oswald belonged.[20] The Fair Play For Cuba Committee has similar interlocking connections with CORE (Congress of Racial Equality),[20, 21] which, in turn, has an interlock with NAACP.[22]

Martin Luther King is closely connected with

the notorious Highlander Folk School (now called Highlander Center). Myles Horton (district director of the communist party in Tennessee)[19] and Don West (district director of the communist party in North Carolina)[20] founded the Highlander Folk School at Monteagle, Tennessee.[20] In 1943, Horton and communist James Dombrowski incorporated the school under the laws of Tennessee.[20] The school served as an important meeting place and training ground for communist leaders. One significant communist meeting at Highlander Folk School was held on Labor Day, 1957. Five persons organized and directed the meeting: Myles Horton, Don West, Abner W. Berry, James Dombrowski (all officials of the communist party), and Martin Luther King.[21] The purpose of the meeting was to recruit new members for the National Association for the Advancement of Colored People (of which Martin Luther King is a life member[20]) and to lay plans for racial agitation and violent demonstrations throughout the South.[21]

After investigation by a committee of the Tennessee Legislature, the State of Tennessee (in 1961) revoked Highlander Folk School's charter of incorporation.[25] Communists changed the name to Highlander Center, and continued to operate the school as before (though now not incorporated), under management of Myles Horton.[26]

In March, 1963, the Internal Revenue Service gave this communist center federal tax exemption as an educational institution.[26] About the same time, it was revealed that the American Association of University Women had given a $3000.00 fellowship to Mrs. Myles Horton to complete her study on the Highlander Folk School as a "regional adult education center in the South."[26] The complex interlock between the communist party, church groups, unions, the American Civil Liberties Union, major civil rights agitation groups, and others is indicated by the following list of names of persons who are connected with the communist Highlander Center:

James L. Adams, Roger N. Baldwin, Dr. Viola W. Vernard, Dr. Algernon D. Black, Lloyd K. Garrison, Martin Luther King, Freda Kirchwey, Max Lerner, Reinhold Neibuhr, A. Philip Randolph, Jackie Robinson.[27]

Other Organizations

The Congress of Racial Equality (CORE) has, perhaps, directly instigated more racial violence and civil disobedience than any other civil rights group. Martin Luther King and his communist friends who held the Labor Day, 1957, meeting at the Highlander Folk School originated the idea of "freedom riders" — busloads of agitators traveling through southern states to violate local laws and provoke violence. Martin Luther King first tested the idea in Alabama; but the Congress of Racial Equality was in the forefront of the freedom riders' lawlessness and violence which plagued southern states during 1961. Many of the demonstrators whom CORE recruited for freedom-rider operations were arrested, and identified as communists.[27] Many were recruited from the Fair Play For Cuba Committee (Lee Harvey Oswald's outfit).[27] CORE was the leading agitation group which organized the riots that led to the death of a white Presbyterian minister in Cleveland, Ohio, on April 7, 1964 (and to a great deal more bloodshed and violence).[27] CORE also tried to organize a "stall-in" to cripple New York City on the opening day of the World's Fair this year.[29]

On May 25, 1961, United States Senator James O. Eastland (Democrat, Mississippi), Chairman of the Senate Judiciary Committee and the Internal Security Subcommittee, presented impressive documentation concerning the communist conspiracy and its relationship to the Congress of Racial Equality and the National Association for the Advancement of Colored People. His documentation was from files of the Senate Internal Security Subcommittee and the House Committee on Un-American Activities.[22] Senator Eastland concluded:

"From investigation and examination of the facts and records there can be little doubt, in my judgment, but that this group [CORE] is an arm of the Communist conspiracy. They are agents of worldwide communism, who sow strife and discord in this country . . . ."[22]

The interlock between communism, CORE, and

NAACP is indicated by the following list of names. All persons listed below are official members of CORE and of NAACP and also have communist-front records:

Roger N. Baldwin, Dr. Algernon D. Black, Allan Knight Chalmers, Earl B. Dickerson, Rabbi Roland B. Gittelsohn, Martin Luther King, A. Philip Randolph, Professor Ira DeA. Reid, Walter P. Reuther, Lillian Smith, Charles S. Zimmerman.[22, 40]

The National Council of Churches has become one of the most militant racial-agitation groups in the United States. Officials (or prominent members) of the National Council of Churches have been identified with most violent race riots and demonstrations in recent years. Officials of the National Council have been arrested for law violation in connection with racial demonstrations. The National Council of Churches lobbies for the pending Civil Rights Act of 1964 (in violation of federal tax laws which prohibit tax-exempt organizations from trying "to influence legislation") It even urges organized churches and individual church members to boycott business firms whose employment practices displease the National Council.[30]

At least 658 officials of the National Council of Churches have communist-front records — according to a 310-page book (listing names and records) published by Circuit Riders, Inc., 110 Government Place, Cincinnati 2, Ohio ($4.00). The interlock between communism, the National Council of Churches, and all other groups active in the civil rights movement can be seen in overlapping memberships. Some officials, or prominent members, of the National Council of Churches who have communist-front records, are also members of The National Association for the Advancement of Colored People, the American Civil Liberties Union, the Southern Christian Leadership Conference, the Southern Conference Educational Fund, the Student Non-Violent Coordinating Committee, the Congress of Racial Equality, the Southern Regional Council, or the Urban League. The interlock is intricate and multiple, but it is obvious.

The National Urban League was founded in 1910, incorporated in the State of New York in 1913. Among officials of the Urban League who are also officials of the NAACP with communist front records are Lloyd K. Garrison, Ira DeA. Reid, Walter P. Reuther, and Charles S. Zimmerman.[10, 22]

The American Civil Liberties Union (very influential in the civil rights movement) was founded in 1920 by Felix Frankfurter (member of the Council on Foreign Relations), by Dr. Harry F. Ward (notorious communist-fronter),[31] by Roger Baldwin (socialist with a communist-front record,[31] and by two well-known communists: William Z. Foster and Elizabeth Gurley Flynn.[32] Aubrey Williams, presently an official of the ACLU, has been identified as a communist.[19] Among other present ACLU officials whose names have been linked with communist-fronts or communist activities are:

Morris L. Ernst,[10] Lloyd K. Garrison,[10] Roger N. Baldwin,[31] Allan Knight Chalmers,[16] Melvyn Douglas,[31] Harry Emerson Fosdick,[31] J. Robert Oppenheimer,[33] A. Philip Randolph.[10]

I have no list of members and officials of the American Jewish Congress (another powerful force in the civil rights movement). Hence, I cannot say whether it is infiltrated by communists. The record shows, however, that Rabbi Stephen Wise was head of the American Jewish Congress for years. Before his death, he was associated with approximately 40 communist-fronts.[34] Israel Goldstein (head of the AJC for a brief period after Wise) had a communist-front record.[34] Rabbi Joachim Prinz,[34] present head of the AJC, has a communist-front record, and so does Will Maslow,[34] executive director of the American Jewish Congress. Maslow is also an official of CORE.[40]

Financing The Civil Rights Movement

All organizations participating in racial agitation which is called the civil rights movement

rely on contributions. In late 1962, Governor Nelson A. Rockefeller gave $10,000.00 to Martin Luther King's Southern Christian Leadership Conference.[35] The Southern Conference Educational Fund, the Garland Fund, and many other tax-exempt foundations pour money into the racial-agitation groups. For example, the Center for the Study of Democratic Institutions of the Fund for the Republic (founded on a multi-million dollar grant by the Ford Foundation) has given more than 2 million dollars to the NAACP, the National Urban League, the National Council of Churches, the Anti-Defamation League of B'nai B'rith, and the Southern Regional Council — for work in the field of "race relations."[36]

On May 14, 1964, the NAACP raised an estimated one million dollars in contributions, through a closed-circuit television program broadcast to theaters across the nation. Among Hollywood and TV personalities contributing their talents to the show:

Ed Sullivan, Sammy Davis, Jr., Lena Horn, Steve Allen, Elizabeth Taylor, Richard Burton, Duke Ellington, Harry Belafonte, Fredric March, Burt Lancaster, Gene Kelly, Edward G. Robinson, Agnes Moorehead, Nat "King" Cole, Richard Widmark, Tony Bennett.[37]

What To Do

Propaganda and pressures for civil rights legislation which will destroy constitutional government (while protecting no civil rights for anyone) can be offset by counterpressures on Congress. Before the people can take action which will sway Congress to save the Republic, they must know the truth about the so-called civil rights movement. This *Report* of last week ("Discrimination in Reverse") and others mentioned therein would be useful in the public education job that must be done.

With whatever tools you choose, by whatever means available, do your utmost to inform and activate other Americans. Otherwise, there is no hope.

FOOTNOTES

(1) AP dispatch from New York City, *The Dallas Morning News*, May 21, 1964, Section 1, p. 12

(2) AP story from Washington, *The Dallas Times Herald*, July 25, 1963, p. 6A

(3) AP story from Washington, *The Dallas Morning News*, April 22, 1964, Section 1, p. 2; *Strom Thurmond Reports to the People*, Vol. X, No. 15, April 27, 1964

(4) *The Negro People in American History*, by William Z. Foster, International Publishers, New York City, 1948, pp. 422-9

WHO IS DAN SMOOT?

Born in Missouri, reared in Texas, Dan Smoot went to SMU getting BA and MA degrees, 1938 and 1940. In 1941, he joined the faculty at Harvard as a Teaching Fellow, doing graduate work for a doctorate in American civilization. From 1942 to 1951, he was an FBI agent: three and a half years on communist investigations; two years on FBI headquarters staff; almost four years on general FBI cases in various places. He resigned from the FBI and, from 1951 to 1955, was commentator on national radio and television programs, giving *both* sides of controversial issues. In July, 1955, he started his present profit-supported, free-enterprise business: publishing *The Dan Smoot Report*, a weekly magazine available by subscription; and producing a weekly news-analysis radio and television broadcast, available for sponsorship by reputable business firms, as an advertising vehicle. The *Report* and broadcast give *one* side of important issues: the side that presents documented truth using the American Constitution as a yardstick. If you think Smoot's materials are effective against socialism and communism, you can help immensely—help get subscribers for the *Report*, commercial sponsors for the broadcast.

You can help educate and arouse the people who elect men responsible for harmful programs of government. When enough other Americans know and care as you do, political action to restore our Republic will come.

If *The Dan Smoot Report* was instrumental in bringing you to the point of asking what *you* can do about saving the country from mushrooming big government, here is a checklist for you: Have you urged others to subscribe to the *Report*? Have you sent them reprints of a particular issue of the *Report*? Have you shown them a Dan Smoot film? Have you ever suggested a Bound Volume of *The Dan Smoot Report* for use by speakers, debaters, students, writers? Have you read and passed on to others any of the Dan Smoot books — *The Invisible Government, The Hope Of The World, America's Promise?*

(5) "The Ugly Truth About The NAACP," speech by Attorney General Eugene Cook of Georgia, 1955

(6) "Chapter V: Propaganda Among Negroes," *Revolutionary Radicalism. Part One: Subversive Movements,* Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, J. B. Lyon Company, Albany, 1920, pp. 1476-1522

(7) *The American Fund for Public Service, Inc., Report for Four Years, 1930-1934, Summary of Twelve Years,* November, 1934

(8) *Subversion In Racial Unrest,* Public Hearings of the Joint Legislative Committee of the State of Louisiana, March, 1957, 370 pp., including testimony by former communist officials Joseph Z. Kornfeder, Manning Johnson, and Leonard Patterson

(9) *Guide to Subversive Organizations and Publications,* U. S. House of Representatives Document No. 398, 1962, pp. 21-2

(10) *Congressional Record,* February 23, 1956, pp. 2796-2849 (daily), containing House Committee on Un-American Activities documents on NAACP officials

(11) Article by Susanna McBee, *The Washington Post,* August 11, 1963

(12) Series of syndicated articles by Frank van der Linden, *The Nashville Banner,* July 26, 27, 28, 1963

(13) *The Los Angeles Times,* January 22, 1953

(14) *The Los Angeles Times,* January 23, 1953

(15) "Statement of Observers," *Proceedings (abridged) of the 16th National Convention of the Communist Party, U. S. A.,* 1957, pp. 349-50

(16) "Dr. King's United Front," *The Richmond News Leader,* September 27, 1963

(17) *Structure and Organization of the Communist Party of the United States: Part I,* U. S. House Committee on Un-American Activities, 1962, pp. 575-6

(18) *The National Program Letter,* National Education Program, Searcy, Ark., February, 1955

(19) *Southern Conference Educational Fund, Inc.,* Hearings and Report, U. S. Senate Internal Security Subcommittee of the Judiciary Committee, March, 1954, 168 pp.

(20) *Report No. 4* and *Report No. 5,* "Activities of the Southern Conference Educational Fund, Inc. in Louisiana," The Joint Legislative Committee on Un-American Activities, State of Louisiana, November, 1963, and April, 1964

(21) "Communists Identified Among Freedom Riders," by Fulton Lewis, Jr., *Human Events,* September 22, 1961, p. 633

(22) "Activities in the Southern States," speech by U. S. Senator James O. Eastland (Dem., Miss.) containing official documents from the Senate Internal Security Subcommittee and House Committee on Un-American Activities, *Congressional Record,* May 25, 1961, pp. 8349-63 (daily) 8956-70 (bound)

(23) *Testimony of Paul Crouch,* Hearings before the U. S. House Committee on Un-American Activities, May 6, 1949, pp. 181-220

(24) *Highlander Folk School,* Georgia Commission on Education, Governor Marvin Griffin, chairman, 1957

(25) Special from Washington, *The News and Courier,* Charleston, S.C., October 10, 1961, p. 7A

(26) "IRS Labels Highlander Tax Exempt," *The Knoxville Journal,* April 2, 1963, p. 11

(27) List of officials from letterhead of Highlander Center, 1625 Riverside Drive, Knoxville 15, Tenn., dated May 15, 1963

(28) UPI story from Cleveland, *The Dallas Times Herald,* April 21, 1964, p. 4A; UPI story from Cleveland, *The Dallas Morning News,* April 8, 1964, Section 1, p. 1

(29) "Five Angry Men Speak Their Minds," by Gertrude Samuels, *The New York Times Magazine,* May 17, 1964, pp. 14, 110-1

(30) For a discussion of the National Council of Churches, see this *Report,* "National Council of Churches," January 15, 1964.

(31) *Investigation of Un-American Propaganda Activities in the United States: Appendix—Part IX: Communist Front Organizations, Special House Committee on Un-American Activities, 1944.* This old HCUA 3-volume, 1895-page publication is now reprinted and available from Poor Richard's Book Shop, 5403 Hollywood Blvd., Los Angeles, Calif. 90027, price: $29.90.

(32) *Revolutionary Radicalism, Part One: Subversive Movements,* Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, J. B. Lyon Company, Albany, 1920, pp. 1085-1102, 1979-90

(33) "The Oppenheimer Security Case of 1954 and the Oppenheimer Fermi Award of 1963," speech by U. S. Representative Craig Hosmer (Rep., Calif.), including findings of the Gray Board and Atomic Energy Commission, *Congressional Record,* July 11, 1963, pp. A4346-7 (daily)

(34) *32% of the Unitarian Clergymen and 450 Rabbis, A Compilation of Public Records,* Circuit Riders, Inc., 110 Government Place, Cincinnati 2, Ohio, January, 1961, 310 pp., price: $5.00

(35) "We're Ready to Build," by Jackie Robinson, *SCLC Newsletter,* Vol. 1, No. 8, December, 1962, pp. 1, 3

(36) "The Record, the Program, and the Prospects of the Fund for the Republic and its Center for the Study of Democratic Institutions," *Bulletin, Center for the Study of Democratic Institutions,* November, 1963

(37) *The Dallas Times Herald,* May 15, 1964, p. 3C

(38) "Senator Hails Communist," by Fulton Lewis, Jr., *The Shreveport Journal,* March 4, 1964; *The Worker,* February 16, 1964, p. 12

(39) "Fighting Pastor, Martin Luther King," by Ted Poston, *The New York Post,* April 10, 1957, pp. 4, 65

(40) Letterhead, Congress of Racial Equality, 38 Park Row, New York 38, New York, signed by Harry Belafonte, circa 1961

Legal
NAACP
vs. Attacks

September 24, 1964

MEMORANDUM TO: Bishop Spottswood
Mr. Wilkins

FROM: John Morsell
COPIES: Messrs. Current, Mitchell, Moon

As you know, we have from time to time discussed the possibilities and prospects of some kind of legal action in defense of the Association against defamatory attacks such as those widely broadcast on radio, television and printed media by Dan Smoot, Billy James Hargis and others. We are now presented with an opportunity to accomplish some measure of this needed rebuttal in a court of law.

On August 21, 1964, the Grand Rapids law firm of Warner, Norcross and Judd wrote to ask our assistance in a libel action which has been brought by Dan Smoot against the League of Women Voters (Grand Traverse Area) in Michigan. Apparently the bulletin of the League last December contained observations that the Dan Smoot television programs were, among other things, based on "slanted information," "half truths," and "innuendoes." Among the statements so characterized by the League of Women Voters were a number directed against the NAACP and accusing it and its officers of communist domination and of troublemaking.

Smoot has brought suit against the League of Women Voters and the law firm expects to base its defense upon establishment of the truth of the article in question.

The trial will be set for sometime in October in the United States District Court for the Western District of Michigan. I asked Barbara Morris to communicate with Warner, Norcross and Judd in order to determine what kind of help they wanted from us and, if this seemed feasible, to proceed with whatever work was needed in order for us to be of help. Essentially it will require the submission of certain statements and the oral testimony of an officer of the Association, preferably the executive director. In view of the uncertainty of the trial date and of the executive director's heavy commitments during October, I have indicated that I would be available for this purpose if needed. It is our understanding, incidentally, that counsel for the League of Women Voters

will, as is customary, cover the expenses of its witnesses at the trial.

It seems to me, as noted above, that we have here excellent opportunity at little or no expense to the Association to establish the facts on the record in an unprejudiced courtroom.

Attached is a copy of Barbara Morris' memorandum citing the specified references in the Dan Smoot Report which are relevant to the NAACP. Several other organizations are similarly participating in the defense in the libel action.

JAM:erb
Attachment

memo from **mildred bond**

to Barbara Morris

November 6, 1964

Attached is a copy of a letter, under the date of November 2, from Joseph F. Hennessey to John de J. Pemberton, Jr., Executive Director of the American Civil Liberties Union, which I am forwarding to you for your information inasmuch as it concerns the ACLU inquiry relating to the Dan Smoot Report.

MB/eb
Attachment

National Association for the Advancement of Colored People
20 West 40th Street, New York 18, N. Y. BRyant 9-1400

LAW OFFICES OF
BOOTH & LOVETT
BROADCASTING BUILDING
1735 DE SALES STREET, N.W.
WASHINGTON, D. C. 20036

ELIOT C. LOVETT (1963)
ROBERT M. BOOTH, JR.
LEE G. LOVETT
JOSEPH F. HENNESSEY
JOHN N. PAPAJOHN

TELEPHONE
RE 7 - 9600

CABLE ADDRESS
"BOLO"

November 2, 1964

Gentlemen:

This office, as counsel for Television Station KTVA, Anchorage, Alaska, is in receipt of a letter, dated October 19, 1964, on the letterhead of the American Civil Liberties Union, containing an inquiry relating to the Dan Smoot Report of June 1, 1964 (Broadcast # 458).

Please be advised that the questions raised in your letter are under consideration and will beanswered at the earliest possible date.

Very truly yours,

Joseph F. Hennessey

Joseph F. Hennessey
Counsel for
NORTHERN TELEVISION, INCORPORATED

John de J. Pemberton, Jr.
Executive Director
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

James Farmer
National Director
Congress Of Racial Equality
38 Park Row
New York, New York 10038

Will Maslow
Executive Director
American Jewish Congress
15 East 84th Street
New York, New York 10028

Roy Wilkins
Executive Director
National Association for the Advancement of Colored People
20 West 40th Street
New York, New York

Whitney Young, Jr.
Executive Director
National Urban League
14 East 48th Street
New York, New York

No. 16207

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAN SMOOT,
Petitioner,
v.
HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

ON PETITION for Writ of Prohibition and Mandamus.

Decided December 30, 1964.

Before: WEICK, Chief Judge, CECIL, Circuit Judge, and BOYD, District Judge.

PER CURIAM. This cause is before the Court on petition of Dan Smoot for a writ of Prohibition and Mandamus against the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan. The petition is filed under authority of Section 1631, Title 28, U. S. C. The action arises from the pendency of two cases in the District Court. These cases are numbers 4708 and 4709, on the docket of the court, in which the petitioner herein is plaintiff and The League of Women Voters of the Grand Traverse Area of Michigan, an association affiliated with the League of Women Voters of Michigan, a Michigan Corporation, and certain individuals are defendants. We will refer to the parties as plaintiff and defendants.

The plaintiff is a resident of the state of Texas and is engaged in television and radio broadcasting in Texas and other areas of the United States, including the state of

Michigan. The subject of the actions in the District Court is an alleged charge of libel growing out of a letter published in a column of the Traverse City Record Eagle, under the heading of "Voice of the People," and a monthly bulletin known as "The Bulletin—League of Women Voters—Grand Traverse Area of Michigan."

The actions were filed on March 9, 1964, and were set for trial on October 14, 1964. A pre-trial was held on September 25, 1964. At this time, counsel for the plaintiff, who had filed his petitions, moved for a continuance on the ground that he was going on an extended vacation. The trial judge denied the motion. Thereupon counsel withdrew as counsel but prepared a motion to dismiss the cases which was presented to the court by counsel's sister, also a member of the Michigan Bar. She represented that counsel's health precluded his further participation in the cases.

Subsequently, after interim counsel failed to get a continuance, present counsel came into the case and on October 12, 1964, moved to dismiss the cases with prejudice to the filing of new actions. This motion was denied and on October 14th the petition now before us was filed in our Court. The petitioner sought a continuance from the immediate trial date and an order requiring the District Judge to sustain the motion to dismiss the actions with prejudice. We granted a stay of further proceedings and issued an order to the District Judge to show cause why a writ of mandamus should not issue. An answer and brief were filed by the respondent. The petitioner filed a reply brief and to this the respondent filed a brief in reply and an amicus curiae brief was filed on behalf of the defendants.

The cases in the District Court have undoubtedly created a great deal of public interest and have generated considerable heat between the parties. We are here concerned with the legal right of plaintiff to have the actions dismissed and with the right or duty of this Court to intervene in the matter.

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides, "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This rule contemplates the dismissal by plaintiff of an action without prejudice and is clearly discretionary with

the court. All of the cases [1] cited by respondent, supporting the discretionary right of the court to dismiss cases on motion of the plaintiff, concern the dismissal without prejudice.

No case has been cited to us, nor have we found any, where a plaintiff, upon his own motion, was denied the right to dismiss his case with prejudice. New counsel for the plaintiff said that he advised his client that on authority of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, he would have to show malice on the part of the defendants in order to succeed in his litigation. It was counsel's view that this could not be shown, or, at least, it could not be developed in the limited time available for preparation. We know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he considers he has no cause of action or for any reason wishes to dismiss his action with prejudice, the client being agreeable. A plaintiff should have the same right to refuse to offer evidence in support of his claim that a defendant has.

Of course, if he declines to offer evidence, he must suffer the consequences, which in this case would be judgment against him and a judgment in favor of the defendants. Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this. *Panza* v. *Armco Steel Corp.*, 316 F.2d 69, C.A. 3, cert. den. 375 U.S. 897; *Creek Indians Nat. Council* v. *Sinclair Prairie Oil Co.*, 142 F.2d 842, 845, CA. 10, cert. den. 323 U.S. 781; *Olsen* v. *Muskegon Piston Ring Co.*, 117 F.2d 163, 165, C.A. 6; *D.A.C. Uranium Co.* v. *Benton*, 149 F.Supp. 667, 673; *Daley* v. *Sears, Roebuck & Co.*, 90 F.

[1] *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212; *Grivas* v. *Parmalee Transp. Co.*, 207 F.2d 334, C.A. 7, reversing *Bolten* v. *General Motors Corp.*, 180 F.2d 379, holding that a plaintiff could dismiss without prejudice as a matter of right; *Adney* v. *Mississippi Lime Co. of Missouri*, 241 F.2d 43, 44, C.A. 7; *Barnett* v. *Terminal R. Ass'n of St. Louis*, 200 F.2d 893, 894, C.A. 8; *Moore* v. *C. R. Anthony Co.*, 198 F.2d 607, 608, C.A. 10; *Westinghouse Electric Corp.* v. *United Electrical Radio and Machine Workers of America*, 194 F.2d 770, 771, C.A. 3; *Ockert* v. *Union Barge Line Corp.*, 190 F.2d 303, 304, C.A. 3; *Larsen* v. *Switzer*, 183 F.2d 850, 851, C.A. 8; *New York, C. & St. L. R. Co.* v. *Vardaman*, 181 F.2d 769, 770, C.A. 8; *Churchward International Steel Co.* v. *Carnegie Steel Co.*, 286 Fed. 158; *Lunn* v. *United Aircraft Corp.*, 26 F.R.D. 12; *Mott* v. *Connecticut General Life Ins. Co.*, 2 F.R.D. 523, 524.

Supp. 562, 563. See also, *Rose* v. *Bourne, Inc.*, 172 F.Supp. 536, 538.

We are loathe to grant petitions for writs of mandamus and refrain from doing so where mandamus is resorted to as a substitute for appeal. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953); *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Hoffa* v. *Gray*, 323 F.2d 178, 179, cert. den. 375 U.S. 907; *Aday* v. *United States District Court*, 318 F.2d 588, 591, cert. den. 374 U.S. 823; *Beneke* v. *Weick*, 275 F.2d 38, 39.

In this case a two- or three-week trial is contemplated. Witnesses are to be subpoenaed from distant parts of the United States. Such a trial with an unwilling plaintiff, even if it could be enforced, would be an expensive luxury. Our District Courts are over-crowded with pending cases and the Western District of Michigan is no exception. Our district judges have no time to conduct useless trials.

We find that it was an abuse of discretion on the part of the respondent to deny the plaintiff's motion for dismissal of the actions with prejudice to bringing new actions. In the interest of justice and in order to prevent the conduct of an unnecessary trial, with its attendant accumulation of costs and inconvenience to witnesses, we grant the petition and order the respondent to dismiss the actions with prejudice, subject to the payment of all court costs by the plaintiff.

Lewis A. Engman

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NO. 16207

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAN SMOOT,

Petitioner,

vs.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,

Respondent.

PETITION FOR REHEARING AND CLARIFICATION

Respondent and Petitioner respectfully petitions for rehearing and clarification of the order of this Court entered on December 30, 1965, which directed Petitioner to dismiss Civil Actions No. 4708 and No. 4709 on the docket of the United States District Court for the Western District of Michigan. The dismissals were ordered to be "with prejudice, subject to the payment of all court costs by the plaintiff."

Before Petitioner can proceed to comply with the order to dismiss, he must resolve an uncertainty created by the Court's use of the above-quoted language in the context of the earlier proceedings before Petitioner and before this Court.

Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs shall be allowed as of course to the pre-

vailing party, unless the court otherwise directs • • •." Commentators seem to agree that Rule 54(d) vests a broad discretion in the trial court in the awarding of costs. This Court's order, however, speaks of "court costs" rather than simply "costs," the term used by Rule 54(d). In light of earlier proceedings before Petitioner and before this Court, Petitioner is uncertain whether this Court's use of the term "court costs" was intended to circumscribe Petitioner's discretion in the awarding of costs.

The earlier proceedings which give rise to Petitioner's uncertainty center on defendants' efforts to have attorneys' fees awarded as costs. The issue of attorneys' fees was raised at the earliest possible stage in these actions, in defendants' Answers. Later, defendants moved that plaintiff be ordered to give security for costs. At that time, defendants urged that the nature of the two actions made attorneys' fees properly includible as costs. Petitioner granted defendants' motion and ordered plaintiff to post a substantial bond. Plaintiff failed to post the bond, but instead moved to dismiss both actions with prejudice. In that motion plaintiff offered to pay "court costs," but argued that such costs did not include attorneys' fees. Petitioner's denial of this motion was the basis of the Court's order of December 30, 1964, and the Court's use of the same language suggests that this Court may have adopted plaintiff's position.

The parties' contentions with respect to the allowance of attorneys' fees as costs are set out in their respective memoranda of law submitted relative to defendants' Motion for Security for Costs. Copies of these memoranda are attached hereto as appendices. Defendants' arguments may be summarized as follows: Courts of equity have long exercised the power to award attorneys' fees as costs to a defendant when an action has been shown to have been brought in bad faith, vexatiously, and for an oppressive purpose. Following the merger of law and equity in federal practice, and pursuant to Rule 54(d), a district court has discretionary power to award attorneys' fees in a law action of such a character. Furthermore, when a libel action is brought maliciously and without foundation, and when the allegedly libelous publication consists of criticism

of the utterances of a public figure on matters of public concern, the constitutionally guaranteed right to freedom of expression requires that the economic burden of the suit be shifted to the plaintiff. Otherwise, the mere institution of malicious and groundless actions would serve to stifle such criticism because of the high cost of defense. In connection with their legal arguments, defendants claimed that they would show at the trial that the actions had been brought in bad faith, vexatiously, and for an oppressive purpose. Plaintiff's postion, simply stated, is that it is settled law that only nominal costs may be awarded, regardless of a plaintiff's bad faith in bringing the actions.

In granting defendants' Motion for Security for Costs, Petitioner in effect made two decisions. First, he decided that in a proper case attorneys' fees could be awarded as costs. Second, he found that defendants had shown probable cause to believe these action to be proper ones for such an award. Petitioner is aware that, before awarding attorneys' fees as costs, he must make the determination whether plaintiff did in fact bring these actions in bad faith, vexatiously, and for an oppressive purpose. However, such a factual determination, which would require the taking of proof, would be an "expensive luxury" if this Court intended, when it said "subject to the payment of all court costs," to indicate that attorneys' fees could not be awarded. The inevitable expenditure of time and effort in making such a determination would then have been contrary to the spirit of the Court's order. Thus, Petitioner hesitates to proceed without clarification by this Court of its order.

Petitioner also calls to the attention of this Court certain factual errors which are contained in its opinion:

(a) March 9, 1964 is not the date on which the actions were filed, but is the date the United States Supreme Court issued its opinion in *New York Times Co. vs. Sullivan*, 376 U.S. 254 (1964). The actions were filed by plaintiff on March 21, 1964, nearly two weeks thereafter.

(b) Secondly, this Court states in its opinion that plaintiff's new counsel said that he advised plaintiff that on authority of *New York Times Co. vs. Sullivan, supra,* plaintiff would have to show malice on the part of defendants to succeed in his litigation. However, the opinion does not take account of plaintiff's verified complaint which specifically alleges malice on the part of the defendants and was filed after the *New York Times* holding.

(c) In addition, the intimation in the opinion of this Court that Petitioner attempted to require plaintiff's counsel to submit evidence is incorrect and without basis.* On October 12, after denying plaintiff's motion to dismiss, Petitioner did advise plaintiff's counsel that he would have a full opportunity to present his case at the trial and that if plaintiff did not proceed, the Court would be obligated to permit defendants to present their proofs. At no time did Petitioner order or otherwise require plaintiff to submit evidence.

Finally, Petitioner reasserts the arguments raised in his briefs and memorandum of facts and law, and urges this Court to reconsider the conclusions of law upon which its order is based, specifically including, but not limited to, its decisions as to the scope of Rule 41(a) of the Federal Rules of Civil Procedure.

For the reasons set out above, Petitioner respectfully requests a rehearing of this matter, and asks this Court to correct its opinion as above set forth and to clarify its order by indicating whether or not attorneys' fees may be allowed as costs if the actions are found to have been

* The statement "We know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he considers he has no cause of action or for any reason wishes to dismiss his action with prejudice, the client being agreeable" on page 3 of the Opinion of this Court implies a result which the District Court did not intend and a result not contemplated by the District Court Opinion denying plaintiff's motion to dismiss. Page 5 of the transcript of the October 12, 1964 hearing on plaintiff's motion to dismiss, which transcript has been forwarded to this Court, contains the following statements by the District Court: "Then, Mr. Watts, you will have a full opportunity to present your case. If you do not proceed with your case, then the Court is obligated under the facts of this case and the law as the Court sees it, to permit the defendants to proceed with defendants' case."

brought in bad faith, vexatiously, and for an oppressive purpose.

Dated: January 14, 1965.

Respectfully submitted,

(s) Noel P. Fox
Noel P. Fox

I concur in the above Petition.

Respectfully submitted,

(s) Raymond W. Starr
Raymond W. Starr

Harold S. Sawyer,
Lewis A. Engman,
Charles E. McCallum,
Attorneys for Petitioner.
Business Address:
300 Michigan Trust Building,
Grand Rapids, Michigan 49502

STATE OF MICHIGAN
SS.
COUNTY OF KENT

Harold S. Sawyer, Lewis A. Engman and Charles E. McCallum, being duly sworn, depose and say that they make this affidavit in support of the foregoing Petition for Rehearing and Clarification, and do further say that said Petition is presented in good faith and not for purposes of

delay, and that the facts contained therein are true to the best of their knowledge.

(s) Harold S. Sawyer

(s) Lewis A. Engman

(s) Charles E. McCallum

Subscribed and sworn to before me this 13th day of January, A.D. 1965.

(s) Wanda M. Niven
Notary Public, Kent County, Michigan.
My commission expires Oct. 7, 1966.

APPENDICES

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SECURITY FOR COSTS

Summary

It is within the discretionary power of a federal district court to allow attorney's fees as costs in a proper case. The instant case, involving an action brought and maintained in bad faith, vexatiously, and for an oppressive reason, will be a proper one for the exercise of the court's discretionary power to award attorney's fees as costs.

It is within the discretionary power of a federal district court to require of a non-resident plaintiff security for the costs he may have to pay if his action fails. The instant case is a proper one for the exercise of the court's discretionary power to require security for costs, including attorney's fees.

I.

It is within the discretionary power of a Federal District Court to allow attorney's fees as costs in a proper case.

Historically, courts of equity have long had full discretion in the award of costs. This power is said to run from the statute 17 Rich. II, c. 6, authorizing the chancellor to award damages "for bringing of vexatious and unfounded suits." Federal equity courts were early held to possess the same powers as English courts of chancery, including discretion as to costs. See *10 Cyc. Fed. Proc.* § 38.01. Within the scope of this discretion is the power to award attorney's fees as costs. In the recent case of *Vaughan v. Atkinson,* 369 U.S. 527, 530 (1962), the Supreme Court stated that "allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.' "

In actions of an equitable nature, such fees are often allowed. For example, in cases of interpleader the court may allow an attorney's fee. *John Hancock Mutual Life Ins. Co. v. Lloyd,* 194 F. Supp. 816 (N.D. N.Y. 1961); *Lockridge v. Brockman,* 137 F. Supp. 383 (N.D. Ind. 1956). Again, where a few plaintiffs sue on behalf of a number, they may be allowed their counsel fees as costs. In the case of *Taussig v. Wellington Fund, Inc.,* 187 F. Supp. 179 (D. Del. 1960), minority shareholders brought an action for a judgment declaring their corporation to have the exclusive right to the use of a name. Attorney's fees were awarded to the plaintiffs, the court stating that:

> "Before attorney's fees can be assessed as an element of damages against the perpetrators of the unfair competition, the court is required to find the wrongdoer's actions were unconscionable, fraudulent, in bad faith, vexatious, or exceptional. Absent a statutory provision, and equity court is not deprived of its inherent power to award attorney's fees to the prevailing party where the circumstances warrant." *Id.* at 222-23.

See also *Milone v. English,* 306 F. 2d 814 (D. C. Cir. 1962).

In the leading case of *Rolax v. Atlantic Coast Line R. Co.,* 186 F. 2d 473 (4th Cir. 1951), Negro firemen brought an action under the Railway Labor Act against the railroad and their union to have declared void an agreement between the railroad and the union which deprived plaintiff and other Negro firemen of seniority and employment rights. Reversing and remanding a judgment for the defendant, the Fourth Circuit spoke to the issue of attorney's fees:

> "We think that the allowance of attorney's fees as a part of the costs is a matter resting in the sound discretion of the trial judge. Ordinarily, of course, attorney's fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small needs have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests." *Id.* at 481.

Even in cases where counsel fees are disallowed, the courts recognize the existence of the power to allow them. In *Universal Oil Products v. Root,* 328 U.S. 575 (1946), a patent infringement suit, certain attorneys served as *amici curiae* but also represented private interests which were not parties to the suit. The lower court awarded attorney's fees. Although it reversed on this point, the Supreme Court said that:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where for dominating reasons of justice a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

And in *United Furniture Workers of America v. Fort Smith Couch and Bedding Co.,* 214 F. Supp. 164 (W.D. Ark. 1963), a suit by a union to obtain specific performance of an arbitration provision in a collective bargaining agreement, a motion for summary judgment was sustained but counsel fees disallowed. The court said:

> "Whether an attorney's fee should be allowed turns on the historical equity powers of federal courts, since no statute authorizes attorney's fees in the instant case. Such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* at 173.

In *American Automobile Ass'n v. Spiegel,* 128 F. Supp. 794, 795 (E.D. N.Y. 1955), a suit in trade mark infringement, defendants were not allowed attorney's fees, but the court said "the law is well settled that the granting of counsel

fees and expenses in appropriate situations is part of the historic equity jurisdiction of the federal courts." However, the court continued, here there was a basis for plaintiff's belief that he had a good cause of action.

It has been stated that "by virtue of Rule 54(d) * * * the trial court now has discretion in the awarding of costs in all cases, whether the issues are of a legal or of an equitable nature." *10 Cyc. Fed. Proc.* § 38.01. In the case of *Prashker v. Beech Aircraft Corp.*, 24 F.R.D. 305 (D. Del. 1959), an action for wrongful death, it was held that the costs of the preparation of models by the defendant were not taxable as costs. However, the court stated that "the Rules of Civil Procedure being applicable to all civil actions, it is generally held that *there is now no distinction between equitable or legal considerations as to the discretion of the court as to costs.*" *Id.* at 312. (Emphasis added). Again, in *Euler v. Waller*, 295 F. 2d 765 (10th Cir. 1961), a *personal injury* action, the costs of charts and expert witnesses were disallowed. However, the court said that "for compelling reasons of justice in exceptional cases allowances may be made of items of cost not authorized by the statutes." *Id.* at 766. See also *Barron & Holtzoff, Federal Practice and Procedure*, § 1195, where it is stated that "the district court has power to establish by rule what expenditures may be taxed as costs, and may allow additional costs as exceptional or extraordinary circumstances may require * * *."

With particular reference to attorney's fees, a leading treatise states:

> "* * * A Federal District Court may award attorney's fees in favor of one party and against another where an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly or for oppressive reasons." *Moore, Federal Practice*, Vol. 6, § 1352.

And in the case of *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F. Supp. 383 (D. Md. 1963), an action for damages for infringement of trademark and misappropriation of trade secrets, attorney's fees were requested and

awarded. The award of counsel fees in the trademark phase of the case was covered by federal statute. Said the court:

> "There is no similar statute with respect to the trade secret issues. And such award must be based on the inherent power of a federal court to award attorney's fees in certain types of cases * * * unnecessary, groundless, vexatious and oppressive petitions and motions have been held to constitute appropriate reason for the exercise of the equitable power to award attorney's fees against the offending party * * *. This court reaffirms its findings that the misappropriation of plaintiff's trade secrets * * * was unconscionable, wilful, and in bad faith, the equivalent of fraud * * *. Plaintiffs are, therefore, entitled to an allowance of reasonable attorney's fees and disbursements incurred in connection with the trade secret issues as well as the patent issues." *Id.* at 414.

Indeed, this very Court awarded counsel fees to a successful defendant in a recent action for damages for trademark infringement. *General Motors Corp. v. Cadillac Marine and Boat Co.*, 226 F. Supp. 716 (W.D. Mich. 1964). In support of its decision, the Court cited *Vaughan v. Atkinson, supra,* and the passage set out above from *Moore, Federal Practice,* and concluded that "the law is clear that this court has the power to award attorney fees." 226 F. Supp. at 744.

The federal court's discretion in the award of costs cannot be diminished by state law. The award of costs is a protection against abuse of the judicial machinery, and clearly presents a "procedural" question for purposes of the *Erie* rule. The ruling on costs cannot affect the outcome of Plaintiff's action; instead, such costs will be imposed because the failure of Plaintiff's action reveals that it was groundless and brought in bad faith.

In Kellems v. California C. I. O. Council, 6 F. R. D. 358 (N. D. Cal. 1946), a libel action in which jurisdiction was based on diversity of citizenship, the court allowed attorney's fees as costs pursuant to a state statute. However,

the court did not allow the full amount authorized by state law, stating that "Rule 54(d) of the Federal Rules of Civil Procedure vests a discretionary power in the court with respect to the allowance of costs, the exercise of which cannot be curtailed by state legislation." *Id.* at 361. And in *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 209 F. 2d 467 (9th Cir. 1953), the court said in an interpleader action that the state rule forbidding allowance of attorney's fees to the stakeholder was not determinative: "This rule is not determinative in diversity actions * * *. The allowance of costs, including attorney's fees, is a matter within the discretion of the trial court and will not be disturbed unless an abuse of that discretion is clearly shown." *Id.* at 476. On this point, *Barron & Holtzoff, Federal Practice and Procedure* § 1195 conclude that "the award of costs is governed solely by federal law."

II.

The instant case, involving an action brought and maintained in bad faith, vexatiously, and for an oppressive reason, will be a proper one for the exercise of the Court's discretionary power to allow attorney's fees as costs.

Of course, there can be no final determination as to the award of counsel fees as costs until after trial. However, several factors already indicate that the instant action has been brought and maintained in bad faith, vexatiously, and for an oppressive reason. Plaintiff has never made any real contention that he suffered any actual damage as a result of Defendants' statements. Plaintiff has obstructed Defendants in their preparation of this case. The action itself is manifestly groundless and the defenses to it indisputable. Finally, the bringing of a groundless libel action is not inconsistent with "mean and dirty" schemes used by so-called "superpatriot" groups to "expose communists" and to stifle criticism. In addition, another factor weighs in favor of the exercise of the court's discretion. If Defendants could not obtain attorney's fees

as costs in such an action, their constitutional right to freedom of expression would be seriously threatened.

Damages. Plaintiff alleges in his verified complaints in these actions that he "has suffered financial loss, in that certain of his business associates and sponsors have been persuaded by said libelous article to cease to have any business dealings with said Plaintiff." But in answer to Defendants' Interrogatories, Plaintiff could not substantiate these claims.

Number 68 of Defendants' Interrogatories reads as follows: "What is the name and address of each business associate, sponsor or other person who has been prejudiced by the statement claimed to have been made by any of the Defendants not to have any business dealings with you?". In answer, Plaintiff said: "I have no list of the business associates, sponsors or other persons who have been prejudiced by Defendants not to have any business dealings with me. Any information of this kind is in the hands of my attorney." Number 69 of Defendants' Interrogatories reads as follows: "State how and in what manner your reputation has been injured, including the name and address of each person in whose opinion your good name, credit, fame and reputation has been damaged as a result of the acts claimed of." In answer, Plaintiff replied, "I have no way of assessing, in detail, the harm that Defendants' published statements about me have done." Number 70 of Defendants' Interrogatories reads as follows: "Itemize all special damages you claim to have sustained as a result of any statements made by Defendants." In answer to that question, Plaintiff said: "I have no way of making such an itemization at this time." Number 71 of Defendants' Interrogatories is: "State the name and address of each person who has knowledge of the relevant facts, information or circumstances of this case, including those persons who have special knowledge concerning the special damages you claim to have suffered." In answer Plaintiff said: "I have no list of persons who know the circumstances and details of this case, or have knowledge of the damage done me." Number 72 of Defendants' Interrogatories reads

as follows: "List all the names and addresses of the sponsors of your television program on WPBN-TV, Traverse City, Michigan." In answer Plaintiff said: "I do not know who is presented as official sponsor of my broadcast in Traverse City. That information might be obtained from my attorney, or Mr. L. F. Hunter (Route #2, Box 340, Traverse City), or Mr. Vincent J. Ryan (542½ West 10th Street, Traverse City), or Mr. Roger Follansbee (7537 North Clark Street, Chicago 26, Illinois)."

Thus, while Plaintiff swore in his complaint that certain business associates had ceased business dealings with him as a result of the alleged libel, he did not know, when asked in Defendants' Interrogatories, the names of any such business associates. Indeed, he did not even know the local sponsors of his program in Traverse City. He could not have known if that sponsor had ceased to have business dealings with him.

The fictitious nature of Plaintiff's special damage claim is further revealed in later proceedings. On May 18, 1964, the Court on its own motion ordered that not later than June 25, 1964, the attorneys for the parties appearing in this case should meet for the purpose, in part, of exhibition to opposing counsel of a written itemized statement of Plaintiff's special damage claims together with documentary evidence in support thereof. By consent the meeting date was changed to July 2, 1964. At that meeting Plaintiff's counsel exhibited no evidence of special damages and stated that Plaintiff was unable to then provide an itemized statement of his special damages. To date, no such statement has been received.

Thus, despite specific order by the Court, Plaintiff has failed to present any evidence or indeed any statement of special damages. It is clear that his broad claim of special damages was entirely groundless and that he cannot now support it.

Obstruction. On May 8, 1964, Defendants moved the Court for an order requiring Plaintiff to produce certain documents and things for inspection, including the Dan Smoot Reports. Plaintiff offered to sell these documents for about $980, but Defendants' Motion was granted by

the Court on June 1, 1964. On July 6, 1964, Defendants' attorney received from the Clerk of the Court a box which the Clerk had received from the Plaintiff and which purportedly contained the articles, pamphlets and books which Plaintiff had been ordered to produce. Upon examination of the contents of the box, Defendants' attorney discovered that some 184 copies had not been produced, and an Affidavit to that effect was filed with the Court. In a letter of July 9, 1964, Defendants' attorney informed the Plaintiff's attorney that he was filing an Affidavit as to the contents of the box, and advised Plaintiff's attorney of what at that time was termed an "oversight." On July 15, 1964, Plaintiff's attorney furnished the Clerk of the Court with 42 additional copies of the Dan Smoot Report. Upon inspection, Defendants' attorney discovered that each of the 42 issues had already been filed, and that there were still some 184 issues of the Dan Smoot Report not included; an Affidavit to this effect was filed with the Court. As of the date of this Motion, this defect has not yet been remedied.

Defendant has taken a reasonable position with respect to these defects in the production of documents and things. However, it is clear from the length of time involved and the specificity with which defects in production were pointed out to the Plaintiff that Plaintiff has made no effort at all to remedy the defects. This willful obstruction has hindered Defendants' counsel in preparation of the defense to this action and has cost time and effort. This obstruction is clear evidence of Plaintiff's lack of good faith in bringing this action and of the vexatious nature of the suit.

Manifest Groundlessness. Viewing all elements of the instant case most favorably to Plaintiff, it is manifestly clear that his action is groundless in fact and baseless in law. Examination of the films and documents on file with the Clerk of the Court reveals that the defense of truth is justified. It is readily apparent that the Plaintiff's program is based on "slanted information, half truths, innuendoes, and sometimes, worse."

For the moment ignoring the defense of truth, however, the circumstances of the case as admitted by Plaintiff in his pleadings reveal that the action is baseless in law. Plaintiff's Complaint states that "Defendants hold themselves out to the public as being engaged in 'to promote political responsibility through informed and active participation of citizens in government.'" Thus, Defendants' organization is one devoted to informing the public on matters of public interest. Dan Smoot, by taking a strong position on public matters, has invited public controversy and is to be regarded as having invited public judgment. He is in no position to complain if that judgment, opinion, comment or criticism is adverse. Defendants' comment on the Dan Smoot program was "fair". It represented the commentator's honest opinion and was published with the bona fide purpose of giving the public the benefit of comment which it is entitled to have. See *Prosser, Torts* § 95, at 619-23 (2d ed. 1955).

Indeed, there is a matter of constitutional concern involved in this case. In the recent decision in *New York Times v. Sullivan,* 84 S. St. 710 (1964), the Supreme Court of the United States stated that there was "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The same principle must apply to comments and attacks on those who, by their public utterances, invite such comments and attacks.

In his program Dan Smoot takes positions on a number of issues of national concern. Defendants, and perhaps others, disagree with his positions and believes his remarks to be misleading. The articles complained of in these two actions are at their worst no more than statements by the Defendants that the utterances of Dan Smoot are misleading — that he is a "Pied Piper." There has been no hint of malice. In light of the circumstances, the defense of privilege, constitutionally buttressed, is clearly sound. Such an action by such a person against such a group is without legal basis. Settled principles of the

law of defamation, together with high traditions of constitutional guarantee, make this action patently baseless.

Oppressive Plan. The bringing of baseless litigation is not inconsistent with devices used by so-called "superpatriot" groups to stifle honest criticism. For example, the John Birch Society Blue Book (which recommends "The Dan Smoot Report" for reading at page 80) provides as follows:

> "6. Another thing we should do, and one badly needed, would be *to start shocking the American People* — or an increasing percentage of the more literate and more intelligent who have not yet been completely brain-washed — into a realization of what is happening; into a dawning realization of how far and how completely Communists and Communist influences have crept right into communities, institutions, and activities where the general public does not have the slightest suspicion of such infiltration. *The best way to do this is by exposure,* which is why the Communists just had to get rid of McCarthy, and went to such extreme lengths to do so * * *." (Emphasis added) p. 94.

> "But *it is to be remembered that libel suits also necessarily give added publicity to the charges,* which is one thing we would be seeking and which the Left would be most anxious to avoid." (Emphasis added) p. 103.

Viewed in the light of such statements, we are provided with a possible reason for Plaintiff's filing of these libel actions and for his obstructive and delaying tactics, and the threat to Defendants' constitutional liberties is brought sharply into focus.

Constitutional Guarantee. Related to but distinct from the above discussion, the constitutional guarantee of freedom of expression is a direct factor weighing in favor of the Court's exercising its discretion to allow attorney's fees as costs in this case. In *New York Times Co. v. Sullivan,* 84 S. Ct. 710 (1964) at pp. 720-721, the United

States Supreme Court recently stressed the importance of maintaining a political and legal climate which encouraged freedom of expression upon public questions as follows:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U. S. 476, 484, 77 S. Ct. 1304, 1308, 1 L. Ed. 1498. • • • The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' United States v. Associated Press, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375-376, 47 S. Ct. 641, 648, 71 L. Ed. 1095, gave the principle its classic formulation:
>
> > 'Those who won our independence believed • • • that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that *it is hazardous to discourage thought, hope and imagination; that fear breeds repression;* that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' " (Emphasis added).

By bringing groundless and harrassing suits against those of little means who criticize him, Plaintiff may effectively deny them the right to comment freely on his views. In the words of Justice Brandeis, he may "discourage thought, hope and imagination" on the part of countless individuals and non-profit and non-endowed groups like the League of Women Voters. Even when clearly in the right, such critics may be unable to afford the costs or risks of litigation defending their rights, and thus deterred from speaking out.

It must be stressed that it is not the Defendants alone whose constitutional rights are endangered by such suits. Plaintiff effectively serves notice upon all others who might otherwise consider publicly discussing or disagreeing with his views that they too may find themselves subjected to time-consuming and expensive litigation.

In fact, these very libel actions already have effectively denied individuals in the Traverse City area from going ahead with a television program which had been planned as an answer to the Dan Smoot television programs. Defendants intend to show at the trial that an informal group in Traverse City, consisting of a Catholic priest, Protestant clergy, and others, abandoned their plans to formally present "the other side." Plaintiff and his associates should not be permitted to smugly reap the "benefits" of libel actions which infringe so drastically on constitutionally guaranteed freedom of speech and expression. This is particularly important in this action where differing political viewpoints raising potentially emotional questions are involved in a presidential election year in which "extremism" has become an issue of national significance.

Therefore, in determining whether "dominating reasons of justice" require the allowance of attorney's fees in this action, the Court should consider that to disallow these expenses as costs threatens a basic constitutional right, not

only of Defendants, but of all citizens. As pointed out above, the economic coercion involved is not a feature of this law suit alone, it is a recognized tactic of the "super-patriot" right.

III.

It is within the discretionary power of a Federal District Court to require of a non-resident plaintiff security for the costs he may have to pay if his action fails.

Security for costs is not covered by the Federal Rules of Civil Procedure. Thus, the trial courts may in this respect "regulate their practice in any manner not inconsistent with these rules." *Fed. R. Civ. P.* 83. Some district courts have local rules which regulate the subject of security for costs. In the case of *Russell v. Cunningham*, 233 F. 2d 806 (9th Cir. 1956), involving an action for assault and battery, the court said: "Appellant contends that the requirement of the rules of the District Court of Guam that non-residents file a cost bond is 'without basis in law and discriminatory.' While no federal statute authorizes security for costs, the district courts may make their own rules not inconsistent with the Federal Rules of Civil Procedure. *F. R. C. P.* 83." *Id.* at 811. In the absence of such a rule the court has discretion in each case to do whatever it wishes. *Barron & Holtzoff, Federal Practice and Procedure* § 1198. And see *Newell v. O. A. Newton & Son Co.*, 95 F. Supp. 355 (D. Del. 1950), where, after quoting Rule 83, the court continues: "I am of the opinion that the foregoing express power as well as power emanating from the inherent nature of the court itself (if not limited by rule or statute) gives to the court a discretion with relation to security for cost." See also 10 *Cyc. Fed. Proc.* § 38.47.

IV.

The instant case is a proper one for the exercise of the Court's discretionary power to require security for costs, including attorney's fees.

To require security for costs, including attorney's fees, is not to finally determine the issue of attorney's fees as costs. Whether or not they will be allowed can only be determined after the trial. But if there presently appears a reasonable likelihood that such items will be allowed, then to require security for them would be appropriate.

The factors which indicate that this will be a proper case for the court to exercise its discretion to allow attorney's fees as costs also weigh in favor of the court's requiring security for such amounts at this time. The obviously groundless and vexatious nature of the litigation make it entirely fair that Plaintiff put up this security. Constitutional considerations also require this result. Many would be forced to knuckle under and cease and desist their fair criticism when faced with the prospect of such a suit as this. This would be true even if such persons had reason to hope that their attorney's fees would be allowed them as costs. The risk and uncertainty involved in collecting such costs constitute an effective deterrent. On the other hand, if they could be assured that such amounts would be promptly paid if and when awarded, and would not involve further long and tedious litigation, such persons would not hesitate to vigorously defend such actions.

In addition, in deciding whether or not to require security for costs, the non-residence of the Plaintiff is an important factor. Even if costs are assessed against him, Defendants may find it difficult or impossible to collect from him in a distant forum. See *Barron & Holtzoff, Federal Practice and Procedure* § 1198.

Finally, the relative economic positions of the parties may be considered in resolving this question. Plaintiff is a highly prosperous radio and television personage. Defendants are a non-profit non-partisan association and four members of the association. Defendants need every financial assurance that they may in fairness be given.

For all the reasons set out above, it is urged that the instant case appears reasonably likely to be one in which attorney's fees will be awarded as costs to the Defendants, and that consequently security for such items of costs should be required, and Defendants submit that their Motion for Security for Costs should be granted. To do otherwise would be to retreat from the "profound national commitment that debate on public issues should be uninhibited, robust, and wide open."

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR BOND FOR SECURITY FOR COSTS

I.

There is no showing of any financial inability on the part of plaintiff to pay costs in the event he should not prevail.

Not only is there no showing of financial irresponsibility on the part of the plaintiff to meet any costs taxed against him by defendants, but the affidavit of their own counsel shows positively that plaintiff is financially responsible. The language of defendants' counsel in said affidavit is: "Plaintiff's answers to Defendants' Interrogatories further indicate that plaintiff has an income well in excess of $40,000 a year." Therefore there is no need for any security for costs.

> "Where plaintiffs were solvent so that defendants and their witnesses were not endangered with respect to their legal demands, motion for security for costs would be denied." *Merriman v. Cities Service Gas Co.*, D. C. Mo. 1951, 11 F. R. D. 165.

II.

The motion for security for costs is untimely made.

These cases were started on or about March 18, 1964, and are now at issue and have been at issue for some time.

Meanwhile, interrogatories for both sides have been filed, and answers filed in relation thereto, and the cases have been set down for Pre-Trial hearing September 24, 1964. In addition, depositions have been taken, one day having been spent in taking the deposition of the plaintiff, and one-half day for the deposition of two of the defendants, and plaintiff has been put to considerable expense by reason of the taking of the depositions and the preparation of answers in reply to the interrogatories.

> "Where there has been unnecessary delay in filing motion to require plaintiff to give security for costs, and plaintiff has incurred expense, the court should not require such security." *Cary vs. Hardy*, D. C., Tenn., 1940, 1 F. R. D. 355.

III.

The amount of bond requested for security of costs is highly excessive and extremely unreasonable.

The amount of $25,000.00 bond for security for costs requested is unreasonable. The taxable costs in these cases can only be nominal. No showing has been made and no showing can be made of any extraordinary situation. Moreover, this is a case in the nature of an action at law in which only nominal costs are permitted.

IV.

The motion for security for costs is an attempt to punish plaintiff for exercising his right to start suit against those who he claims have seriously libeled him.

The only costs which defendants could obtain if they were to win the lawsuit would be nominal.

> "Costs in actions at law in federal courts are creatures of statute, and ordinarily, attorneys' fees, except as fixed by statute, should not be taxed as part of costs recovered by prevailing party, although in a suit in equity where taxation of such costs is

essential to doing of justice, they may be allowed in exceptional cases." *Ruck v. Spray Cotton Mills,* D. C. N. C. 1954, 120 F. Supp. 944.

V.

State rule to govern costs.

In view of the fact that there appears to be no local rules of the U. S. District Court for the Western Division of Michigan, concerning the taxation of costs, then the State rule should govern. *Brown v. Consolidated Fisheries,* D. C. Del. 1955, 18 F. R. D. 433.

Plaintiff respectfully asks the Court to deny the motion of defendants for security for costs, or in the alternative, to fix a bond in a nominal amount.

(117)

DAVID A. WARNER
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GEORGE S. NORCROSS
1889-1960

February 5, 1965

Copy given to
SAM - 2-11-65 -
w/ incoming BMM

Mrs. Barbara Morris
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Dear Mrs. Morris:

I would like to bring you up to date on the proceedings in Smoot v. League of Women Voters, et al. since last October. You will recall that we notified you at the last minute that the League's need for the assistance of Mr. Wilkins and Mrs. Mothershed of Little Rock was delayed temporarily because of an order of the Sixth Circuit Court of Appeals.

At that time Smoot had ignored the orders of the District Judge to prepare for trial. It appeared that he had had no intention of proceeding to the trial of the libel actions. In fact, he attempted to dismiss the actions with prejudice without the setting of any terms or conditions on the dismissal by the District Judge, but this attempt was denied. On the other hand, as you know, the League necessarily had gone to great efforts to prepare its defense.

The day before trial was to begin, Smoot sought a writ from the Court of Appeals directing District Judge Fox to dismiss the actions. Smoot contended that a judge has no power to deny or condition a dismissal with prejudice. Judge Fox, as Respondent, filed a brief submitting that dismissal with prejudice in this case would be insufficient to protect the defendants' constitutional right to freedom of expression. On behalf of the League and the individual defendants, we argued that the practical effect of a dismissal without setting conditions (such as making Smoot pay the League's expenses in defending the actions) would give Smoot the

result he intended to achieve by filing the actions - the stifling of the League's criticism of him. We pointed out that the purpose and effect of Smoot's conduct was readily apparent in view of the fact that libel actions are used by the so-called "super-patriots" in our society as an acknowledged instrument of political and economic intimidation.

We argued that this is "an atmosphere in which the First Amendment freedoms cannot survive" (New York Times Co. v. Sullivan) and that the law should require that libel actions against those who criticize public figures (including news commentators) be brought in good faith. The only way to guarantee this good faith is to require those who bring such actions to suffer the consequences if they have abused the processes of the law, and to provide them with no absolute right of dismissal in such cases.

On December 30, the Court of Appeals (Circuit Judges Weick and Cecil, and District Judge Boyd), in an opinion which made no mention of the constitutional arguments, ordered Judge Fox to dismiss Smoot's actions with prejudice, "subject to the payment of all court costs by plaintiff." We thereupon filed a petition for rehearing, asking for clarification of the order. Specifically, we expressed uncertainty as to whether the Court of Appeals' use of the term "court costs" was intended to circumscribe the broad discretion customarily vested in the trial court in the awarding of "costs" by the Federal Rules of Civil Procedure. We are enclosing copies of the Order of the Court of Appeals and our Petition for Rehearing and Clarification.

On January 26, the Court of Appeals entered an order denying a rehearing, but specifically stating that the Court had "made no predetermination of the costs properly assessable against" Smoot. Accordingly, we have filed, on behalf of the League, a motion in the District Court for the assessment of costs against Smoot in the total amount of $36,906.99. In support of this motion, we will submit proofs that the statements by the League which were the basis of Smoot's libel actions are true and privileged, and that the libel actions were brought and maintained by Smoot in bad faith, vexatiously, and for oppressive

purposes. We anticipate that the hearing will be set to commence before Judge Fox during the first part of April.

At the hearing, we intend to present substantially the same proofs as we had scheduled for the trial set last October. We again would like to have Mr. Wilkins and Mrs. Mothershed testify as to the misleading or inaccurate statements and innuendoes in the Smoot Reports which we discussed with you last fall.

We, and the League, very much appreciate the invaluable assistance which you have given us on this matter. We are looking forward to working with you again.

I am enclosing an extra copy of this letter for you to give Mr. Wilkins if you desire. I am also sending a copy fo Mrs. Mothershed. I also understand that Mr. Wilkins will be in Grand Rapids on February 16th, and we very much hope that we will have an opportunity to discuss this matter with him then.

I expect to call you shortly after you receive this letter. In the event you have any questions, please feel free to contact me either by mail or by a collect telephone call. In the event I am out of the office you may talk with either Mr. Harold Sawyer or Mr. Charles McCallum of this office, both of whom are familiar with the case.

Very truly yours,

Lewis A. Engman

Lewis A. Engman

wn

Encs.

cc: Mrs. Anne L. Mothershed

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GEORGE S. NORCROSS
1889-1960

February 5, 1965

Mrs. Barbara Morris
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

C O P Y

Dear Mrs. Morris:

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Very truly yours,

Lewis A. Engman

wn

Encs.

cc: Mrs. Anne L. Mothershed

5024FEB-465

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D.C.
20554

ADDRESS ALL COMMUNICATIONS TO THE SECRETARY

FEB 2 1965

IN REPLY REFER TO:
8424
1100258

AIR MAIL

Mr. Marvin R. Steffins, Jr.
President
Williamette Family Stations, Inc.
Radio Station KWFS
Post Office Box 1122
Eugene, Oregon

Dear Mr. Steffins:

We have your letter of October 27, 1964, addressed to Chairman Henry, with which you enclose a copy of your letter of April 30, 1964 to the Commission's General Counsel and copies of various correspondence between yourself and other individuals and groups. Your letter and the enclosures have been read with considerable care and interest, and we will try to comment on all the questions you raise.

The first point you raise concerns the burdens which you feel are unreasonably imposed upon licensees in attempting to comply with the fairness doctrine. Chairman Henry gave a speech several months ago which sets forth his views on this subject. We have enclosed a copy and hope that you find it interesting.

As to the licensee's discretion and area of judgment in connection with the fairness doctrine, this is dealt with in some detail in the recently issued Fairness Primer, a copy of which is also enclosed.

You also raise a question as to your obligations under the fairness doctrine to furnish free time for the presentation of controversial issues of public importance. We are therefore enclosing a copy of the Commission's letter of September 19, 1963, to Cullman Broadcasting Co., Inc., et al. As you can see from that letter, the Commission pointed out that the obligation to furnish free time for the presentation of opposing views arises only where (1) the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, (2) has not presented and does not plan to present contrasting viewpoints in other programming, and (3) has been unable to obtain paid sponsorship for the appropriate presentation of contrasting viewpoints. In these circumstances, the Commission ruled, a licensee cannot reject a presentation otherwise suitable to him -- and thus leave the public uninformed -- on the ground that he cannot obtain paid sponsorship for the presentation. As to your question concerning the particular stations involved in the ruling, this is answered in the next to the last paragraph of the enclosed letter.

You have also inquired as to the scope of the term "personal attack." We refer you to note 6 on p. 10422 of the enclosed Fairness Primer.

This brings us to the matter which prompted your letter to the Chairman - the October 19, 1964 letter referring to the broadcast by your station of the program, "Dan Smoot Report," on June 1, 1964, entitled "Communism in the Civil Rights Movement," and requesting time to reply to the personal attack made in the program upon the signatory organizations (the Congress of Racial Equality, the American Jewish Congress, the American Civil Liberties Union, the National Association for the Advancement of Colored People, and National Urban League). You state that based upon your research, the leaders of these organizations have extensive association with "Communist Front organizations or activities" and that you "will not reply affirmatively to any requests to use our facilities by those who, by their deeds, associations or records, indicate that they are not responsible representatives of an important segment of the public in our community."

In the enclosed Cullman letter, the Commission stated that "... with the exception of the broadcast of personal attacks, there is no single group or person entitled as a matter of right to present a viewpoint differing from that previously expressed on the station"-- that rather, the choice of appropriate spokesmen is left to the good faith exercise of the licensee's best judgment. But where the licensee permits his facilities to be used for a personal attack upon an individual or group (that is to say, for an attack upon an individual's or group's integrity, character, or honesty or like personal qualities), he is under an obligation to furnish a transcript (or summary if no transcript is available) of the attack to the person or group, with an offer of a comparable opportunity to respond to the attack. See Part E, enclosed Fairness Primer, pp. 10420-21.

If, then, the June 1 Dan Smoot program contained a personal attack upon the organizations signing the October 19 letter -- e.g., accused them of being Communist or Communist-front organizations, you were under an obligation to furnish a transcript or summary of the attack portion of the program to these organizations, with an appropriate offer of time to respond. We have noted the position set forth in your letter that the organizations are, in fact, led by individuals with Communist-front associations. But that position does not mean that you need not comply with the requirements of the fairness doctrine -- nor is the position at all relevant to the Commission's review of the matter, upon complaint.

We are sure that you will agree when you analyze the matter. Suppose a radio editorial or program accuses the town mayor of stealing city funds. The mayor, if he wishes, ought to have the opportunity to dispute the charge and give his side, and the public could then decide who is right, having heard both sides. But if the station could say -- "I have investigated and the facts are right; therefore the mayor is not a responsible person who should be permitted to appear on the station" -- the public would not hear the other side. And, the last thing which this Commission should do, is to review the merits of the controversy, and decide whether the mayor gets time on the basis of whether it believes the mayor is a thief. That, of course, would be a wholly improper function for the Federal Communications Commission.

In short, it is up to you to make the programming judgment whether to present a program discussing "Communism and the Civil Rights Movement" containing personal attacks upon the above listed civil rights organizations. But these organizations, having been the subject of personal attack, have the right to give the public their side of the controversy. And that right to inform the public does not depend upon evaluation of the merits of their cause by either the licensee or the Commission.

Finally, in your letter to the General Counsel, you state that you propose to comply with the policy of furnishing transcripts to persons or groups attacked in a broadcast by offering such persons or groups an opportunity to come to the station and listen to the broadcast or to have it played on the telephone. You ask for reactions to your proposal. First, the person or group must be notified of the attack. As to the procedure in informing the person of the substance of the attack, the sending of a transcript constitutes an obvious way. But the Commission has made clear that a licensee may use "good sense" in carrying out his obligations (see Ruling 24, Fairness Primer, p. 10421). If the person attacked is informed by telephone and has no objection to stopping by the station to hear the tape, that would, of course, be permissible. So also he might be entirely satisfied to have the pertinent continuity read over the telephone. But where the person attacked does not reside in the community and the attack is a lengthy one, the foregoing procedures might be inconvenient and unacceptable to him. Again, we stress that the obligation to furnish the transcript arises only when there has been a personal attack -- an attack on individuals' or groups' integrity, character or honesty or like personal qualities -- and not when an individual or group is simply named or referred to.

In short, the licensee, after notifying the person or group of the attack, is free to suggest procedures to inform the person of the substance of the attack. Whether such procedures are reasonable could only be determined in the context of a specific factual situation.

We hope that the foregoing is fully responsive to the points in your letter and informs you as to the Commission's policies in this area. Like you, we are sending a copy to the signatory organizations in the October 19, 1964 letter.

Very truly yours,

Ben F. Waple

Ben F. Waple
Secretary

Enclosures

February 18, 1965

MEMORANDUM TO BARBARA MORRIS FROM MILDRED BOND

Attached is a copy of a letter Ben F. Waple, Secretary, FCC to Marvin R. Steffins, president, Williamette Family Station, Inc, Eugene, Oregon.

I am passing it on to you for your information inasmuch as it refers to the Dan Smoot matter.

MB:crn
attachment

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD E. THORNQUIST
LAWSON E. BECKER
LEONARD D. VERDIER, JR.
PHIL R. JOHNSON
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GEORGE S. NORCROSS
1889-1960

March 9, 1965

Mrs. Anne L. Mothershed
1302 W. 28th Street
Little Rock, Arkansas

Dear Mrs. Mothershed:

This will advise you that the hearing about which I wrote you on February 5 in Smoot v. League of Women Voters, et al. has been set to commence on Monday, April 19, and will probably continue at least through the rest of that month.

We have been in contact with Dr. Morsell in New York and Mr. Wilkins has agreed to come to Grand Rapids to testify on Friday, April 23rd. We would very much like to have you available as a witness during the afternoon of Thursday, April 22, if that time is at all convenient for you. If this date is acceptable to you, it probably would be best if you could arrange to leave Little Rock sometime in the afternoon or evening of Wednesday, April 21.

Could you please let us know if this date is a good one for you? If it is, we can arrange to obtain your air lines tickets and forward them to you. We will also be contacting you with respect to the details of your testimony, but we would prefer to wait on this until after we have received the material which the NAACP office in New York will be sending us in this regard.

In the event you have any questions at any time, please feel free to contact me either by mail or by a collect

telephone call. Our number in Grand Rapids, Michigan is 459-6121, Area Code 616.

Sincerely yours,

Lewis A. Engman

wn

cc: Dr. John Morsell

DAVID A. WARNER
SIEGEL W. JUDD
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CHARLES E. McCALLUM
THOMAS J. McNAMARA
WILLIAM S. MOODY

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GEORGE S. NORCROSS
1869-1960

March 24, 1965

Dr. John Morsell
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Dear Dr. Morsell:

As you may know, Mrs. Mothershed from Little Rock has indicated that she will be able to be a witness in the Smoot v. League of Women Voters hearing on Thursday, April 22. I assume that Mr. Wilkins will be coming into Grand Rapids sometime on that afternoon or evening, and we would appreciate being advised as soon as conveniently possible of his travel plans and the number of persons, if any, who will be coming with him from your office so that we may make the necessary hotel reservations.

In addition, it may be advisable that we meet with you, Mr. Wilkins or Mrs. Morris in New York prior to the hearing on April 19 to discuss the testimony. In any event, this is a decision which we can hold open now, although I would appreciate your comments on this.

We are particularly anxious to look at the analysis which your office has made with respect to the Smoot Reports which we sent you last summer. Would it be possible for the analysis to be sent us sometime during the next week or ten days?

As I told you before, if you have any questions, please feel free to call me collect at Grand Rapids 459-6121, Area Code 616.

Sincerely,

Lewis A. Engman

wn

DAVID A. WARNER
SIEGEL W. JUDD
CONRAD E. THORNQUIST
LAWSON E. BECHER
LEONARD D. VERDIER, JR.
PHIL R. JOHNSON
PLATT W. DOCKERY
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PAUL R. GASTON
JACK R. CLARY
LEWIS A. ENGMAN
GEORGE L. WHITFIELD
WALLSON G. KNACK

WARNER, NORCROSS & JUDD
MICHIGAN TRUST BUILDING
GRAND RAPIDS, MICHIGAN 49502

TELEPHONE
459-6121
AREA CODE 616

GEORGE S. NORCROSS
1869-1960

March 24, 1965

Mrs. Anne L. Mothershed
1302 W. 28th Street
Little Rock, Arkansas

C

O

P

Y

Dear Mrs. Mothershed:

Thank you for your letter advising us that you will be able to come to Grand Rapids as a witness in the Smoot - League of Women Voters litigation for April 22, 1965. We will arrange for plane tickets for you so that you can arrive in Grand Rapids on the afternoon or evening of Wednesday, April 21, and will forward them to you as soon as details are completed, together with your hotel reservations.

As I told you last fall, Smoot contends that the parents of the children sent to Little Rock High School in 1957 were bribed or otherwise coerced by the NAACP, and your testimony will principally revolve around this point. In addition, it may be that you can be of some assistance on some related matters, and we will write you concerning the testimony in more detail as soon as we have received the analysis which the NAACP office in New York will be sending us.

Again, thank you for your cooperation.

Sincerely,

Lewis A. Engman

wn

cc: Dr. John Morsell

No. 16,565

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAN SMOOT,

Petitioner,

vs.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Harold S. Sawyer,

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Grand Rapids, Michigan 49502

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS 2, MICHIGAN — PHONE GL 8-5326

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Does the protection of rights guaranteed by the First Amendment of the United States Constitution require a court to assess counsel fees as costs against one who brings a libel action in bad faith, vexatiously, and for an oppressive purpose?

2. As a matter of federal courts law, may counsel fees be allowed as costs in a suit found to have been brought in bad faith, vexatiously, and for an oppressive purpose?

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MISCELLANEOUS

No. 16,565

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STATEMENT OF PROCEEDINGS

This brief in opposition to the Petition for Writ of Prohibition is respectfully submitted by the Defendants in Civil Actions No. 4708 and 4709 now pending in the United States District Court for the Western District of Michigan, the League of Women Voters of the Grand Traverse Area of Michigan, Florabelle Grosvenor, Mary Force, Margot Power and Sara Hardy (herein called "Defendants"), the real parties in interest in this case.

This cause is before the Court on the petition of Dan Smoot ("Plaintiff") for a writ of prohibition against the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan. It is

the third such petition by Plaintiff arising out of two libel actions which Plaintiff filed against Defendants in the United States District Court for the Western District of Michigan on March 21, 1964, seeking one million dollars in damages. The actions were based on Plaintiff's allegations that Defendants' published criticism of his public utterances was defamatory of him. Defendants in their answer requested their attorneys' fees as costs.

As a result of Plaintiff's conduct during discovery, on August 28, 1964, Defendants moved to require of Plaintiff security for costs (including attorneys' fees). The question whether a district judge has power to allow attorneys' fees as costs in an action at law which is brought in bad faith, vexatiously, and for an oppressive purpose was briefed and argued. The District Court granted the motion, and required Plaintiff to post a substantial bond, stating:

> "If the proofs show, as defendants' counsel claimed at the hearing on the motion, that this suit was instituted for a vexatious purpose and defendants have been inhibited from speaking out since the date of the filing of the complaint in this action, then defendants will not be put to the additional burden of going to a foreign state to collect this obligation."

Implicit in the District Court's opinion was the proposition that if the suits are vexatious, then Defendants are entitled to their attorneys' fees. Explicit in the opinion was the proposition that the District Court would require the submission of proofs of the vexatious nature of the suits.

Shortly before trial, Plaintiff moved that his actions be dismissed with prejudice. After the District Court denied this motion, Plaintiff petitioned for and obtained an order from this Court directing the District Court to dismiss the actions with prejudice, "subject to the payment of all court costs by the Plaintiff." *Smoot v. Fox,* 340 F. 2d 301 (1964).

A petition for rehearing and clarification was filed in which it was pointed out that Judge Fox had previously

decided that attorneys' fees were allowable in a proper case. The petition continued:

> "Petitioner is aware that, before awarding attorneys' fees as costs, he must make the determination whether plaintiff did in fact bring these actions in bad faith, vexatiously, and for an oppressive purpose. However, such a factual determination, which would require the taking of proof, would be an 'expensive luxury' if this Court intended, when it said 'subject to the payment of all court costs,' to indicate that attorneys' fees could not be awarded. The inevitable expenditure of time and effort in making such a determination would then have been contrary to the spirit of the Court's order."

This Court denied the petition for rehearing, but stated that in using the term "court costs" it had made no ruling on the question whether these were proper cases for the award of attorneys' fees.

On February 2, 1965, Defendants filed a Motion for Assessment of Costs in the District Court. Defendants alleged, and offered to prove, that Plaintiff's actions were brought in bad faith, vexatiously, and for an oppressive purpose. They asked that Plaintiff be ordered to pay their attorneys' fees. Thereafter Plaintiff filed a motion to dismiss Defendants' motion for assessment of costs.

Prior to the hearing date on April 19, 1965, Plaintiff again petitioned this Court for a writ of prohibition directing the District Judge to allow no hearing on Defendants' motion for costs insofar as claims made for the allowance of attorneys' fees and miscellaneous costs in the preparation for trial are concerned. On April 9, 1965, this Court entered an order in Cause No. 16,501 dismissing Plaintiff's petition for a writ of prohibition, stating, "The District Court has jurisdiction to hear and determine *both* of the motions which were filed in these actions." (Emphasis added.)

On April 19, 1965, Plaintiff's motion to dismiss Defendants' motion for assessment of costs was heard and denied by District Judge Fox. The opinion was concurred in by

Chief Judge Kent and Senior Judge Starr. The hearing on Defendants' motion for assessment of costs was set to commence on May 17, 1965.

Plaintiff again petitioned this Court for a writ prohibiting the District Judge from holding a hearing for the purpose of fixing extraordinary costs. On May 12, 1965, this Court entered an order requiring the respondent to show cause why the prayer of the Plaintiff's petition should not be granted.

ARGUMENT

I.

AS A MATTER OF CONSTITUTIONAL LAW, A COURT MUST ASSESS COUNSEL FEES AS COSTS AGAINST ONE WHO BRINGS A LIBEL ACTION IN BAD FAITH, VEXATIOUSLY, AND FOR AN OPPRESSIVE PURPOSE.

This case is controlled by *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Unless the federal courts may award Defendants as costs the counsel fees and other expenses incurred in defending a baseless libel action filed by Plaintiff in bad faith and for oppressive purposes, "would-be critics" of Plaintiff and others of his ilk would be "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279. If, as Plaintiff would have us believe, the courts are powerless to tax the costs of defense in *any* case, no matter how groundless or vexatious the action, then the machinery of the courts is a potent and frightening weapon in the hands of those who would intimidate and silence the voices that disagree with them. Such an intrusion on the "exercise of precious First Amendments rights" (*Lamont v. Postmaster General*, 33 U.S.L. Week 4489, 4491 (May 24, 1965) (concurring opinion)), cannot, and will not, be permitted.

By bringing baseless libel actions in which his carefully worded and sworn complaints alleged malice (Complaints,

No. 4708, para. 8; No. 4709, para. 7), Plaintiff raised a factual issue which gave Defendants no choice but to incur heavy expenses in preparing a defense. Their alternative was to risk a million dollar judgment. The fear of such a damage award "may be markedly more inhibiting than the fear of prosecution under a criminal statute," yet "ordinary criminal-law safeguards such as the requirements of indictment and of proof beyond a reasonable doubt * * * are not available to the defendant in a civil action." *New York Times Co. v. Sullivan, supra* at 277. Thus, at the very minimum, adequate protection of the First Amendment freedom of expression requires that harassed defendants have some meaningful recourse against those who would intimidate them by means of groundless and vexatious libel actions.

A. The Bringing of a Libel Suit in Bad Faith and for an Oppressive Purpose Deprives the Defendant of His Constitutional Right to Freedom of Expression Unless the Court Awards Counsel Fees as Costs.

The baseless libel action is peculiarly well suited to serve the purpose of those who wish to intimidate a defendant by forcing him to incur the expense of retaining counsel and preparing a defense. If he wishes, the party bringing a libel action merely has to show the fact of publication and rest his case. The burden of proof is then shifted to the defendant, and unless he can show truth, or privilege, or some other defense, judgment will follow for the plaintiff. Judge Yankwich, a perceptive analyst of the law of defamation, has articulately expressed this unique character of the libel action:

> "By reason of the fictions which enshroud the law of libel, the plaintiff in any action for libel is in a more advantageous position than the plaintiff in any other civil action.
>
> "In every other branch of the law, the plaintiff is required not only to allege but also to prove the essential facts which go to constitute his cause of action.
>
> "Not so in libel.

"Once the plaintiff has proved the publication of a charge which is libelous *per se*, he has a *prima facie* case * * *."

"Damages are assumed as the consequences of the fictions of malice and falsity.

"So that, instead of the plaintiff being required to prove his good reputation, the defendant, if he grounds his defense upon an attack on plaintiff's reputation — must prove the plaintiff's bad reputation.

"Again, while the plaintiff's right of action in libel is based upon the falsity of the accusations made against him, he is not required to prove such falsity. The defendant must prove their truth. The same is true of the plea of privilege.

"This anomaly makes the task of him who defends an action for libel an arduous one." — Yankwich, *It's Libel or Contempt if You Print It* 355-56 (1950).

Thus, for the cost of the filing fee, a plaintiff in a libel action can impose heavy expense on his opponent. The defendant cannot, especially if his defense is truth, rely as he would in other cases on his opponent's inability to prove a case. Even if every indication is that the plaintiff intends to dismiss prior to trial, the defendant cannot afford to take the risk but must make full and complete preparation.

These characteristics, which make libel actions particularly susceptible to use as extra-legal instruments of harassment, intimidation, and publicity have not gone unnoticed. In his concurring opinion in *New York Times Co. v. Sullivan, supra* at 295, Mr. Justice Black points out that:

> "* * * this technique for harassing and punishing a free press — now that it has been shown to be possible — is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers."

In this respect it is significant that at least 17 libel actions, seeking total damages in excess of 288 million dollars and brought by public officials in three southern states against newspapers, magazines and a television network, were pending in state and federal courts in April 1964. *The New York Times*, April 4, 1964, p. 12.

Although most libel actions may be brought in good faith and on firm legal grounds, the baseless libel actions which do inhibit First Amendment rights cannot be dismissed as only minor aberrations in our legal system. Mr. Justice Brennan stated it succinctly in the recent case of *Lamont v. Postmaster General, supra* at 4491:

> "In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one. As the Court said in *Boyd v. United States*. 116 U.S. 616, 635:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' " (concurring opinion).

If this Plaintiff cannot be required to reimburse these Defendants for the heavy expense he has wrongfully imposed on them, the effects will be widespread and dangerous. All, and especially those of little means, who would criticize Plaintiff, or others like him, will hesitate to voice their criticism. The ease with which they will have seen the courts used to penalize Defendants for their boldness in presuming to speak freely on public questions will

effectively still the "multitude of tongues." *U. S. v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd,* 326 U.S. 1 (1945). The "prized American privilege to speak one's mind" (*Bridges v. California,* 314 U.S. 252, 270 (1941)) will have become a privilege restricted to the wealthy American — the only American who can afford the costs of defending vexatious actions.

B. One Who Uses the Courts to Deprive Another of Constitutional Rights Will be Assessed for the Fees and Expenses Incurred by That Other.

The obvious answer is that the courts must have the power to tax the costs of defense against one who uses a vexatious lawsuit to deprive another of a constitutional right. Not only must the courts have this power, originating in the United States Constitution, but it must be freely exercised in appropriate circumstances.

The existence of such a rule of law is not without precedent. In the case of *Bell v. School Board of Powhatan County,* 321 F. 2d 494 (4th Cir. 1963), defendant school board, in the face of recent and controlling Supreme Court opinions, followed a plan of obstruction and delay which forced the parents of Negro children into the courts to enforce their rights. The District Judge did not charge defendant with plaintiff's counsel fees. Reversing, the Fourth Circuit Court of Appeals said:

> "The general rule is that the award of counsel fees lies within the sound discretion of the trial court but, like other exercises of judicial discretion, it is subject to review. The matter must be judged in the perspective of all the surrounding circumstances. * * * Here we must take into account the long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education. To put it plainly, such tactics would in any other context be instantly recognized as discreditable. The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme." *Id.* at 500.

In the present case, as in the *Bell* case, one party (the Plaintiff), acting vexatiously and in bad faith, has placed upon the others (the Defendants) such a heavy burden of litigation that, unless they can be reimbursed, they will be forced to avoid such litigation and thereby lose constitutionally protected rights.

Indeed, the logic and sense of the *New York Times* case requires this result. In that case the substantive law of libel was used in an attempt to curtail freedom of the press. Here the procedural aspects of libel are brought into play in a similar attempt. But the law of costs, like the substantive law of libel, "can claim no talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan, supra* at 269. The Court expressed the stifling effect of the libel suit and referred specifically to the expense incurred by a defendant:

> "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C.A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' Speiser v. Randall, supra, 357 U.S., at 526." *Id.* at 279.

And, as pointed out by the court, that the Defendants will ultimately "win" is somewhat beside the point.

Whether or not they can survive a succession of libel suits, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

Nor can Plaintiff restrict the broadly stated principles of the *New York Times* case to cases where public officials are involved. In the case of *Pauling v. News Syndicate Co.*, 335 F. 2d 659 (2d Cir. 1964) (Friendly, J.), the court said:

> "We realize that the sole point actually determined by the decision was that the First Amendment requires a state to recognize a 'privilege for criticism of official conduct,' * * * extending to misstatements of fact, this being regarded as in some way the reciprocal of the privilege of federal officials against liability for defamatory statements 'within the outer perimeter' of their duties. * * * Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; * * *." *Id.* at 671.

Other cases have viewed the *New York Times* rationale equally broadly. See *Application of Levine*, 97 Ariz. 88, 397 P. 2d 205 (1965) (en banc); *State v. Browne*, 86 N.J. Super. 217, 206 A. 2d 591 (1965); *Gilberg v. Goffi*, 251 N.Y.S 2d 823 (App. Div. 1964).

This case must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan, supra* at

270. The simple essence of this case is that unless Defendants can be awarded their expenses as costs, Plaintiff will be able to use the courts to deprive them of their constitutional rights. Defendants urge that such perversion of judicial machinery cannot be allo[redacted]

II.

AS A MATTER OF FEDERAL COURTS LAW, COUNSEL FEES MAY BE ALLOWED AS COSTS IN A SUIT FOUND TO HAVE BEEN BROUGHT IN BAD FAITH, VEXATIOUSLY, AND FOR AN OPPRESSIVE PURPOSE.

A. The Power to Allow Counsel Fees as Costs in Vexatious Actions May be Exercised in Actions at Law As Well As Suits in Equity.

The United States Supreme Court has recently reaffirmed its adherence to the rule that the "allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the Federal courts.'" *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962), quoting *Sprague v. Ticonic National Bank*, 302 U.S. 161, 164 (1939). This power to allow counsel fees as extraordinary costs is broad and flexible, to be exercised whenever called for by "dominating reasons of justice." *Universal Oil Products v. Root*, 328 U.S. 575, 580 (1946). And dominating reasons of justice do call for the allowance of counsel fees as costs whenever, as in the case at hand, a suit is shown to be "false, unjust, vexatious, unwarranted, or oppressive." *Guardian Trust Co. v. Kansas City So. Ry.*, 28 F. 2d 233, 241 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). Decisions of this Circuit follow these principles. *Cleveland v. Second National Bank & Trust Co.*, 149 F. 2d 466 (6th Cir. 1945), *cert. denied*, 326 U.S. 775 (1945); *Swan Carburetor Co. v. Chrysler Corp.*, 149 F. 2d 476 (6th Cir. 1945).

Plaintiff has not sought to challenge such a well-settled principle of law. Instead, conceding that a district court

may allow counsel fees as costs in an appropriate case, he contends that this power is limited to cases of "equitable cognizance" and cannot be exercised "against an unsuccessful plaintiff in an action at law for damages." Plaintiff's Brief, p. 11. His reasoning is that since Defendants have not produced a reported decision allowing counsel fees as costs in an action at law, therefore the courts are powerless to allow counsel fees as costs in actions at law. That his conclusion does not follow from his premise is patently obvious.

Defendants submit that neither history nor logic support the distinction urged by Plaintiff. Defendants further submit that in any event the merger of law and equity in federal practice vested federal district courts with the power to allow counsel fees as costs in all civil actions when the suit is shown to be vexatious.

1. History does not support the distinction urged by Plaintiff.

The principle of awarding counsel fees as costs when a suit has been brought in bad faith and vexatiously is one of considerable antiquity. Its roots have been traced to the law of ancient Athens. "Distribution of Legal Expense Among Litigants," 49 *Yale L. J.* 699, 704 (1940). It has appeared in legal systems other than the Anglo-American:

> "Although many procedural penalties were employed in the earliest German and French procedures, the best medieval example of the survival of the Roman law policy that judges should have discretionary power to award costs as a penalty is the Thirteenth Century Spanish Code *Las Siete Partidas*, which declared that costs might be awarded as a punishment for bad faith in prosecuting or defending an action. The procedural aspects of *Las Siete Partidas* are thought to have been borrowed from the canonists, who were influenced by the Roman system, and this may be the link between the costs power given in the Spanish Code and the analagous discretionary power claimed by the English Chancellors who were usually clerics during the formative era. The Code declared that those who instituted any suit 'actuated by malice and knowing they have no right to the property which they claimed' should 'pay the costs incurred by the other party by reason of the suit.' But 'when the judge thinks that the defeated party was actuated by any just motive in bringing the suit or in making the defense, he has no reason to order him to pay the costs.' This procedure was used in the civil law of Spain and is incorporated in the codes of civil procedure of most of the Latin American Republics and Puerto Rico." *Id.* at 705.

And in Germanic tribal law, the precursor of Anglo-Saxon law, a "party-fine" was assessed against one who brought a suit in bad faith. "Deterring Unjustifiable Litigation by Imposing Substantial Costs," 44 *Ill. L. Rev.* 507, 509 (1949).

More importantly for present purposes, however, the common law early adopted an even broader rule:

> "According to Pollock and Maitland it is probable that before the time of Edward I, in many actions for damages, 'a successful plaintiff might often under the name of "damages" obtain a compensation which would cover the costs of litigation as well as all other harm that he had sustained.' This rule allowing plaintiff his 'costs' was brought in 1275 by the Statute of Gloucester to cover also actions for the recovery of land, then an all-important type of litigation. A series of statutes, beginning in the reign of Henry VIII and ending in that of Anne, extended finally the same advantage to successful defendants. Thus, in the common law courts, the rule became established in England long before the American Revolution that except in some cases where the plaintiff recovers only trivial damages, the party who wins a law suit is entitled to recover from the losing adversary the 'costs' of the litigation." McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 *Minn. L. Rev.* 619 (1931).

Early American legislatures, hostile to the attorney, generally altered this aspect of the common law by statute. But any statutory restriction is in derogation of the com-

mon law. And no federal statute has specifically excluded the award of counsel fees as costs in actions at law.

However, regardless of the strong argument that can be made for it (see Abbey, "Taxation of Costs in New Hampshire," 5 *N. H. Bar J.* 114, 129 (1963)), Defendants do not suggest the adoption of the common-law practice of allowing substantial costs to the prevailing party in every action. This would be contrary to long-standing American tradition. Defendants do urge, however, that the common-law rule is not precluded by local tradition in cases where a suit has been brought in bad faith and vexatiously. Indeed, the widespread appearance of such a rule in other legal systems indicates that the power to penalize one who, by bringing an unfounded suit, perverts the processes of the court, is inherent in the concept of a judicial institution. See Dayton, "Costs, Fees, and Expenses in Litigation," 167 *Annals of the American Academy of Political and Social Science* 32, 48 (1933); "Use of Taxable Costs to Regulate the Conduct of Litigants," 53 *Colum. L. Rev.* 78 (1953).

Defendants submit that the power to allow counsel fees as costs in vexatious suits is consistent with the history of the common law and is indicated by the history of the judicial process. No federal statute limits this power to suits in equity, and the passage quoted from Professor McCormick's article indicates it was not so limited in English legal history.

2. Logic does not support the distinction urged by Plaintiff.

Even assuming that the power to allow counsel fees as costs in vexatious suits was originally limited to courts of equity, there can be no reason for so limiting it now. The genius of recent American legal growth has been the victory of substance over form. And there is no substantial reason why a vexatious plaintiff should be differently treated if he brings his suit at law than if he brings it asking equitable relief.

The purpose of allowing counsel fees as costs in vexatious suits is two-fold. First, and foremost, it is to prevent the courts from being used as instruments of oppression. Second, it is to compensate the party wrongfully brought into court. Surely both these purposes are as pressing when the action has asked for money damages as when it has sought injunctive relief. To hold otherwise would be to tell the vexatious plaintiff that he may bring his unfounded action, but that he must be careful not to pray for equitable relief. He must not seek specific performance of a fictitious contract, but instead damages for a fictitious breach. If he falsely alleges a nuisance, he must be careful not to ask that it be enjoined. To limit the power as Plaintiff suggests would lead one to believe that the bringing of a vexatious and unfounded suit is not nearly so bad a thing as the bringing of such a suit and praying for equitable relief.

If it is argued that the power is restricted to suits in equity because only the more flexible procedures of equity make its exercise feasible, the answer is clear. Today, in the federal courts, procedures in law and equity are one and the same. And the merger of law and equity has not eliminated the power. See *Vaughan v. Atkinson*, 369 U. S. 527 (1962).

Defendants submit that the limitation urged by Plaintiff has no support in logic. In *Universal Oil Products v. Root*, 328 U. S. 575 (1946), the Supreme Court said:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where for 'dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

To use the language of the Court, it is the "temple of justice" that must be protected, not merely the "temple of justice" when sitting to hear equitable causes.

3. **The merger of law and equity in federal practice vested in federal courts the power to allow counsel fees as costs in all civil actions brought in bad faith.**

Since 1938, there has been one form of action in federal courts. All suits, whether formerly at law or in equity, are governed by the Federal Rules of Civil Procedure. The effect of the merger was discussed by the Court of Appeals for the District of Columbia Circuit in the case of *Groome v. Steward,* 142 F. 2d 756 (D.C. Cir. 1944):

> "Only in cases where a timely demand for a jury has been made and refused does the distinction between law and equity have any procedural relevance. In all other cases, the court must give the relief to which the parties are entitled on the facts, applying the rules of both law and equity as a single body of principles and precedents." *Id.* at 756.

Thus the equitable power to allow counsel fees as costs against one bringing a suit in bad faith, vexatiously, and for an oppressive purpose, may be exercised in all civil actions.

(a) Rule 54(d) vests this power in all civil actions.

Rule 54(d) of the Federal Rules of Civil Procedure vests in federal district courts the power to allow costs. It provides:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *."

The Rule makes no distinction between actions at law and suits in equity, and it has been suggested that under it the power to award counsel fees as costs is available in all

actions. 6 *Moore, Federal Practice,* para. 54.77(2); Note, 77 *Harv. L. Rev.* 1135, 1138 (1964).

The cases support the abolition of any distinction between actions at law and suits in equity as to the court's discretion in the award of costs. In *Harris v. Twentieth Century-Fox Film Corp.,* 139 F. 2d 571 (2d Cir. 1943) (Frank, Swan, and L. Hand, JJ.), the court says of Rule 54(d): "That Rule appears to have adopted for all suits covered by it, the previous Federal practice in equity, according to which the trial court had wide discretion in fixing costs * * *." *Id.* at 572 n.1.

In *Euler v. Waller,* 295 F. 2d 765 (10th Cir. 1961), the court, in a personal injury action, did not allow certain items of extraordinary costs. But the court recognized and stated the rule to be that: "For compelling reasons of justice in exceptional cases allowance may be made of items of cost not authorized by the statutes." *Id.* at 766. Again in *Prashker v. Beech Aircraft Corp.,* 24 F.R.D. 305 (D. Del. 1959), an action for wrongful death, the court refused to allow as costs to the successful defendant the cost of preparation of certain models. The court stated the rule to be:

> "Originally and before 1853, there being no federal provision as to the items of costs, the usage of the federal courts was to follow the rule as established by the respective state courts. Prior to the Rules of Civil Procedure, the discretionary power of the courts as to costs was more precisely and effectively set out in equity cases than in suits at law. So in equity cases, and especially patent cases, the instances are numerous where costs not mentioned in the statute have been allowed. Even in civil cases at law costs not embraced within the statute have been allowed when the services were rendered pursuant to some order of the court.
>
> "The Rules of Civil Procedure being applicable to all civil actions, it is generally held that there is now no distinction between equitable or legal considerations as to the discretion of the court as to costs.

"Indeed, it has been held that the discretionary power of the courts as to costs under Rule 54(d) changed the pre-existing rule that at law costs in the entirety necessarily followed the judgment as set out in the Peterson case, supra, and allowed the costs to be divided.

"In Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 167, 59 S. Ct. 777, 780, 83 L. Ed. 1184 (an equity case) the court approved an allowance beyond the regular taxable costs but stated:

> 'In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice.'

"Certain cases have indicated a view that the exceptional circumstances which justify additional allowances not authorized by statute are such as exist in cases of 'fraud, oppression, or bad faith,' cases of fiduciary relationship or those in which the prevailing party has helped to create the fund upon which the costs are charged." *Id.* at 311-12.

* * *

"I am of the opinion that the Statute (28 U.S.C. §1920) furnishes the prima facie list of what costs may or should be allowed and that other costs are allowable 'only in exceptional cases and for dominating reasons of justice'. (307 U.S. 161, 59 S. Ct. 780.)" *Id.* at 312.

Angoff v. Goldfine, 270 F. 2d 185 (1st Cir. 1959), was a shareholder's derivative action. The court awarded counsel fees to the successful plaintiff, saying:

> "The facts essential for Federal jurisdiction over the main cause of action based on the diversity of the citizenship of the parties thereto and the amount in controversy between them, Title 28 U.S.C. §1332(a)(1), are clear and not in dispute. And, although we have found no case discussing the point, we think it clear that jurisdiction over the main cause of action necessarily carries with it jurisdiction, in the exercise of the 'historic equity jurisdiction of the federal courts,' *Sprague v. Ticonic Nat. Bank,* 1939, 307 U. S. 161, 164 * * * to award fees and expenses in appropriate situations to counsel for a successful plaintiff." *Id.* at 186.

And see *Deering, Milliken & Co. v. Temp-Resisto Corp.,* 169 F. Supp. 453 (S.D.N.Y. 1959), *rev'd on other grounds,* 274 F. 2d 626 (2d Cir. 1960), where the court said: "This Court has discretion in awarding costs which courts of equity possessed before the enactment of the Federal Rules." *Id.* at 455.

Finally, in the case of *Farrar v. Farrar,* 106 F. Supp. 238 (W.D. Ark. 1952), an action at law for the recovery of securities, the court was confronted with the question not of allowing extraordinary items of costs, but of possibly disallowing certain ordinary costs. The court noted that historically courts of law had no discretion in awarding costs, but that courts of equity did have discretion to deny costs when equity and fairness so required. The court said:

> "Thus the form of action brought by the plaintiff is immaterial and the question before the court must be resolved under the provisions of Rule 54(d), and before the court can direct that the plaintiff should not recover her entire costs, the facts must be such as to convince the court that in equity and fairness the plaintiff should be denied her costs or they should be apportioned." *Id.* at 242.

If for dominating reasons of justice a court may deny a party traditional costs in an action at law, as formerly at equity, surely for similar compelling reasons of justice a court may allow extraordinary costs, as formerly at equity.

To sum up this portion of the argument, then, Defendants submit that the following propositions are unchallengeable: The power of a district court to allow costs

flows from Rule 54(d). Rule 54(d) makes no distinction between actions at law and suits in equity. The cases have held that under Rule 54(d) the federal district courts have the same discretion as to the award of costs as heretofore exercised by courts of equity. And Defendants submit, to use the words of Judge Moore, that "equitable growth warrants an exercise of the power" to allow counsel fees as extraordinary costs "in all civil actions." 6 *Moore, Federal Practice,* §54.77(2), at 1354.

(b) Rule 41(a)(2) vests this power in all civil actions.

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides as follows:

> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

This Rule affords a second and distinct ground upon which the court may allow attorneys' fees as costs, for it is well-settled that such an allowance may be imposed as a condition to dismissal.

Again, Plaintiff concedes this point, but urges that terms and conditions may be imposed only in case of a dismissal without prejudice. The Rule suggests no such limitation. But once again Plaintiff points out the paucity of reported decisions setting terms for a dismissal with prejudice, and argues that the lack of case authority implies the non-existence of power. Once again the illogic of this "reasoning" is apparent.

A dismissal with prejudice in such a case as this gives Plaintiff all he ever intended to get, unless the cost of defense can be assessed against him. He will have imposed on Defendants a crushing burden of defense, at little cost to himself. Defendants' "victory" will have cost them dearly.

In such a case, surely it is within the power of the court, under the broad language of Rule 41, to inquire whether the suit was brought groundlessly and vexatiously, and, upon so finding, to tax counsel fees to the Plaintiff as a condition of the dismissal. There is authority for the exercise of this power. In the case of *Krasnow v. Sacks & Perry, Inc.,* 58 F. Supp. 828 (S.D.N.Y. 1945), a patent case, plaintiff dismissed with prejudice. The court allowed defendant his counsel fees, on the ground that the plaintiff brought the action knowing it to be "unjustified."

Thus, independently of and alternatively to Rule 54(d), Rule 41(a) permits the district judge to allow counsel fees as costs whenever the court "deems proper." In such a case as this, the allowance is clearly proper.

B. State Law Cannot Curtail the Award of Extraordinary Costs by a Federal District Court.

1. The doctrines of *Erie R.R. v. Tompkins* and *Guaranty Trust Co. v. York* are not applicable, since the award of costs is governed by the Federal Rules of Civil Procedure.

The United States Supreme Court recently has announced a principle under which it is clear that state law does not affect the discretionary power of a federal court to award counsel fees as costs in extraordinary cases pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. *Hanna v. Plumer,* 85 S. Ct. 1136 (April 26, 1965). Although Michigan courts also have this discretionary power, Michigan law is inapplicable. Neither *Erie R. R. v. Tompkins,* 304 U. S. 64 (1938), and *Guaranty Trust Co. v. York,* 326 U. S. 99 (1945), nor any of their progeny may be invoked to void the discretion of a District Judge to award extraordinary costs under Rule 54(d).

In *Hanna,* a diversity case, plaintiff had effected service of process in compliance with Federal Rule 4(d)(1), but not with the applicable Massachusetts statute. The District Court, citing *Ragan v. Merchants Transfer Co.,* 337 U. S. 530 (1949), and *Guaranty Trust Co. v. York, supra,*

held that the adequacy of service was controlled by the state statute and not by federal procedure, and granted the defendant's motion for summary judgment. The Court of Appeals for the First Circuit affirmed, concluding that a "substantive rather than procedural matter" was involved. 331 F. 2d 157, 159 (1964). "Because of the threat to the goal of uniformity of federal procedure" (85 S. Ct. at 1139) posed by the lower court decision, the Supreme Court reversed in an 8 to 1 decision.

The Supreme Court held that the *Erie* doctrine is *not* the appropriate test of the applicability of a Federal Rule of Civil Procedure, 85 S. Ct. at 1143.

> "*When a situation is covered by one of the Federal Rules,* the question facing the court is a far cry from the typical, relatively unguided Erie choice: *the court has been instructed to apply the Federal Rule,* and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.
>
> "* * * For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. Cf. M'Cullough v. Maryland, 4 Wheat. 316, 421. Neither York nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which Erie had adverted * * *.
>
> "Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules." 85 S. Ct. at 1144-45. (Emphasis added.)

Thus the Supreme Court teaches us that in a situation covered by one of the Federal Rules of Civil Procedure, the Federal Rule is not to be supplanted by state law, even though it would lead to a different "outcome" from that prescribed by state law. The discretionary power of a federal district judge under Rule 54(d) to tax extraordinary costs cannot be curtailed by state law; to hold otherwise "would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Id.* at 1145.

2. Even if the *Erie* rule did apply, the award of counsel fees as costs in vexatious suits would be controlled by federal courts law.

Assuming for purposes of argument that the Federal Rules do not cover the discretionary award of extraordinary costs, application of the *Erie* doctrine still would not require the District Court to follow Michigan law. Federal courts possess broad inherent powers in addition to the express powers conferred by the Federal Rules of Civil Procedure, particularly in the area of the regulation of court proceedings. In *Hanna v. Plumer, supra* at 1145, the Supreme Court quoted with approval from the opinion of Judge Wisdom in *Lumberman's Mutual Casualty Co. v. Wright,* 322 F. 2d 759, 764 (5th Cir. 1963):

> "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. *This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.* The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative

countervailing (federal) considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority." (Emphasis added.)

The *Erie* rule as extended in *Guaranty Trust* cannot be applied without reference to *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), and *Hanna*. In *Erie* it was decided that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. "The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law." *Hanna v. Plumer, supra* at 1141. But "as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act" *(ibid.)*, evincing

> "* * * a broader policy to the effect that the federal courts should conform as near as may be — *in the absence of other considerations* — to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. E.g., Guaranty Trust Co. of New York v. York, * * * Bernhardt v. Polygraphic Co. * * *." *Byrd v. Blue Ridge Rural Elec. Coop., supra* at 536-37. (Emphasis added.)

In *Byrd* the Supreme Court emphasized that the "outcome-determination" analysis of *Guaranty Trust* was not the only test to be applied: attention also must be given to "affirmative countervailing considerations * * *. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Id.* at 537.

Thus *Guaranty's* mechanical tendency to choose state law on the premise that a federal court in a diversity case is "in effect, only another court of the State" *(Guaranty Trust Co. v. York, supra* at 108) was replaced by *Byrd* with a more penetrating approach, requiring a balancing of the policies underlying *Erie* against other federal interests. See "The Supreme Court, 1957 Term," 72 *Harv. L. Rev.* 77, 147-50 (1958); Friendly, "In Praise of Erie — And of the New Federal Common Law," 39 *N.Y. U. L. Rev.* 383 (1964).

Subsequent cases have indicated that the "affirmative countervailing considerations" emphasized in *Byrd* are not limited to the distribution of the judge-jury function and the "influence of the Seventh Amendment." For example, in *Monarch Insurance Co. v. Spach*, 281 F. 2d 401 (5th Cir. 1960), the Court of Appeals for the Fifth Circuit gave effect to a federal rule of evidence even though in every realistic sense the application of the rule voided the effect of a Florida statute. In discussing the "affirmative countervailing considerations" under the *Byrd* approach, the Court said at 407, 408:

> "Not the least of these countervailing considerations is the indispensable necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause.
>
> * * *
>
> "An important countervailing policy consideration in the Blue Ridge sense therefore is the historic purpose of the Federal Rules and the forces which led Congress to pass the Rules Enabling Act. *The broad aim, especially in fields of practice was to reverse the philosophy of conformity to local state procedure and establish, with but few specific exceptions, an approach of uniformity within the whole federal judicial trial system.*" (Emphasis added.)

In *Odekirk v. Sears Roebuck & Co.*, 274 F. 2d 441, 445 (7th Cir.), *cert. denied*, 362 U.S. 974 (1960), the Court of Appeals for the Seventh Circuit held burden of proof to be governed by federal law rather than Illinois law, citing *Byrd* for the proposition that "although a state created

right may be enforced in a federal court because of diversity of citizenship, the federal court will proceed by its own rules of procedure, acquired from the federal government, and, therefore, not necessarily identical with those of the courts in the state in which the federal court is sitting." And see *Iovino v. Waterson*, 274 F. 2d 41 (2d Cir. 1959), *cert. denied sub nom. Carlin v. Iovino*, 362 U.S. 949 (1960) (opinion by Friendly, J., a staunch defender of the *Erie* principle (see Friendly, *op. cit.* at 384), and cited with approval by the Supreme Court in *Hanna v. Plumer, supra* at 1141, 1143, 1145). Cf. *Tracy v. Finn Equipment Co.*, 290 F. 2d 498 (6th Cir., 1961), *cert. denied*, 368 U.S. 826 (1961), (dictum by McAllister, C. J., Simons and O'Sullivan, JJ., recognizing balancing test of *Byrd* although no federal issue there involved).

Thus it is settled that the federal courts not only have inherent powers, but also must exercise them in the face of conflicting state law when "affirmative countervailing considerations" so indicate. In this case there are at least two such countervailing considerations. First, in view of the crowded dockets of federal trial courts, the trial judge must be able to penalize those who bring groundless and vexatious actions. Second, it is crucial to insure that federal jurisdiction not be invoked in bad faith and vexatiously and that federal courts not be used as instruments of oppression.

The award of extraordinary costs and counsel fees is closely related to judicial administration. Such awards will be made in accordance with the practice of the court having jurisdiction. The Court of Appeals for the Second Circuit has so held, in an opinion by Judge Friendly:

> "* * * no authority is needed for the proposition that a court will tax ordinary court costs in accordance with its own practice rather than that of the state where the the claim arose. A similar rule has been applied as to the fees of a guardian *ad litem*. Gandall v. Fidelity & Casualty Co., D.C.E.D. Wis. 1958, 158 F. Supp. 879, although there the result was to make rather than withhold the allowance. We think the same rule should govern with respect to the fees of counsel, also officers

> of the court." *Conte v. Flota Mercante Del Estado*, 277 F. 2d 664, 672 (2d Cir. 1960).

See also Barrett v. Rosecliff Realty Co., 9 F.R.D. 597 (S. D.N.Y. 1950) (Kaufman, J.).

Thus, even if we ignore the existence of an applicable Federal Rule and apply the *Erie* doctrine to this case, the District Court should follow federal practice in exercising its discretion as to whether extraordinary costs should be awarded. Any other result would destroy that "uniformity" in the "administration of legal proceedings" by the federal courts which the Supreme Court emphasized in *Hanna*.

III.

MICHIGAN LAW IS IRRELEVANT. UNDER MICHIGAN LAW, A COURT COULD ASSESS COUNSEL FEES AS COSTS IN A VEXATIOUS SUIT; IT IS UNCLEAR WHETHER AN ACTION FOR MALICIOUS PROSECUTION WOULD LIE IN THE ABSENCE OF SEIZURE OR ATTACHMENT OF PROPERTY.

In the order to show cause entered in this action on May 12, 1965, it was requested that counsel advise this Court as to Michigan law on two questions: whether the state court in Michigan, if the present actions had been filed there, would have authority to include attorneys' fees for counsel for defendants as part of the costs; and whether an action for damages for malicious prosecution of a civil action may be maintained in the absence of a writ of attachment or seizure of property.

We respectfully submit that these two questions are irrelevant to any issue in this action unless decisions of the United States Supreme Court are to be disregarded by this Court. This action is governed by *New York Times Co. v. Sullivan, supra,* and the constitutional requirements therein discussed. Furthermore, even if there were no constitutional mandate, the Supreme Court decisions in *Hanna v. Plumer, supra,* and *Byrd v. Blue Ridge Rural Elec.*

Coop., supra, make state law immaterial on the question as to whether a District Court has the discretion to award extraordinary costs in this action. Bearing this in mind, we answer the questions posed by this Court as follows:

(1) A state court in Michigan, if the present actions had been filed there, would have authority to include attorneys' fees for counsel for defendants as part of the costs.

(2) It is unclear on the present state of the law whether an action for damages for malicious prosecution of a civil action may be maintained in Michigan in the absence of a writ of attachment or seizure of property.

A. Under Michigan Law, Counsel Fees May be Awarded as Extraordinary Items of Costs in the Case of an Action Brought and Maintained in Bad Faith, Vexatiously, and for an Oppressive Purpose.

The inherent power of a court of equity to allow counsel fees as extraordinary costs when required by dominating reasons of justice has long been recognized in Michigan. *Sant v. Perronville Shingle Co.*, 179 Mich. 42, 146 N.W. 2d 212 (1914).

The power of a Michigan court to tax costs now flows from Michigan General Court Rule 526.1, which provides:

> "In any action or proceeding, costs shall be allowed as of course to the prevailing party, except when express provision therefor is made either in a statute or in these Rules, or unless the court otherwise directs, for reasons stated in writing and filed in the cause."

The similarity of this Rule to Federal Rule 54(d) is not accidental. Many of the Michigan General Court Rules are patterned on the federal model. As stated in a leading Michigan text:

> "Third, we have benefit of experience with the Federal Rules. Where the new rules depart from former practice, the movement is often in the direction of the Federal Rules." *Honigman & Hawkins, Michigan Court Rules Annotated* xi (1962).

The authors encourage the Michigan practitioner to look to federal decisions for aid in construing the Court Rules. *Ibid.*

And, as in the Federal Rule, a key objective of the General Court Rules was the merger of law and equity:

> "The fundamental philosophy underlying the new act and rules is the procedural union of law and equity, and the abolition of the arbitrary procedural technicalities resulting from the separation of legal rules from equitable principles * * *." 1 *Callaghan's Michigan Pleading and Practice* §1.01, at 2.

The inherent power of a Michigan court to tax counsel fees as extraordinary costs under the new General Court Rules and Revised Judicature Act was the subject of comment in the recent case of *Merkel v. Long*, 375 Mich. 214 (1965). The majority opinion of Justice Souris (joined in by Justices Black, Kavanagh, and Smith) said:

> "I agree with Justice Adams also that there is no statutory or rule authority for the chancellor's taxation of petitioner's attorney fees against the trusts; also that, to avoid 'an inequitable result,' equity would have inherent power to require payment of such fees out of the funds of these trusts." *Id.* at 218.

The language referred to in Justice Adams' dissenting opinion (joined in by Justices Dethmers and O'Hara) was as follows:

> "As a general rule, costs are governed by statute or court rule. * * * There is no statutory authority to support the exercise of the power which was asserted by the chancellor. Nor has provision for such action been made by this Court under its rule-making powers. * * * Courts of chancery have sometimes drawn upon

their reservoir of inherent powers to award reasonable expenses to a party in litigation." *Id.* at 220.

"See the discussion of the common-law practice as it existed in England in *Sprague v. Ticonic National Bank, supra,* pp. 164, 165. These same powers are possessed by our circuit judges in chancery except as they may be modified by the Constitution and laws of this State." *Id.* at 220 n.3.

The observations made earlier in this brief as to the federal practice have striking parallels in Michigan law: The old Michigan rule was identical to the old federal practice; Michigan Court Rule 526.1 is similar to Federal Rule 54(d); the Michigan courts, like the federal courts, have held the power to award extraordinary costs to continue under the new Rules; and the Michigan Rules, like the Federal, accomplished the merger of law and equity. Thus, the power to allow counsel fees as costs is available in the Michigan courts in actions at law as well as suits in equity; to hold otherwise would contradict the "fundamental philosophy" of the recent Michigan reforms of civil procedure.

B. It is Unclear on the Present State of the Law Whether an Action for Damages for Malicious Prosecution of a Civil Action may be Maintained in Michigan in the Absence of a Writ of Attachment or Seizure of Property.

We are unaware of any decision of the Michigan Supreme Court holding that an action for damages for malicious prosecution will lie for the institution of a civil action maliciously and without probable cause, even though there has been no writ of attachment or seizure of property. On the other hand, it apparently has been held in a majority of American jurisdictions that an action for malicious prosecution may be maintained under such circumstances. See Annot., 150 A. L. R. 897, 899 et seq. (1944).

In *Brand v. Hinchman,* 68 Mich. 590 (1888), the Michigan Supreme Court, finding a technical or constructive attachment of property, upheld a judgment for the plaintiff

in a suit for malicious prosecution of a civil action. There is clear dictum in the opinion that an action for malicious prosecution is maintainable without any arrest or seizure of property. *Id.* at 596-98. However, the opinion explicitly indicates that the dictum is the individual opinion of the writer only, "the other members of the Court not deeming it necessary in this case to express any opinion upon this matter." *Id.* at 598.

In *Chesebro v. Powers,* 78 Mich. 479 (1889), a suit for defamation of title, plaintiff sought damages by reason of allegedly false and malicious claims of the defendants which had prompted plaintiff to bring an earlier suit to remove a cloud upon his title. Plaintiff had been successful in that action and had been awarded his costs. The Supreme Court, citing *Brand v. Hinchman, supra,* held that in the action for defamation of title the plaintiff would not be limited to the taxable costs awarded in the former action if the defendants acted maliciously and under a claim which they knew to be false for the purpose of harassing the plaintiff and compelled him to settle a claim they knew to be wrongful.

Six months later, in *Antcliff v. June,* 81 Mich. 477 (1890), Mr. Justice Morse repeated his comments in the *Brand* case but continued by stating that it was not necessary to determine whether the action before it was good as an action for malicious prosecution, since it sufficiently set out a conspiracy to defraud the plaintiff as well as an abuse of process. *Id.* at 490, 492.

On the basis of the above cases it might appear that it was at least tacitly recognized in Michigan that an action for malicious prosecution of a civil action would lie in the absence of a writ of attachment or seizure of property. In the case of *Powers v. Houghton,* 159 Mich. 372 (1909), however, the Michigan Supreme Court held that a successful defendant in an action of replevin cannot maintain an action of malicious prosecution of a civil action where he had sold the property prior to its seizure in the writ of replevin. *Antcliff v. June, supra,* was cited as "authority for the proposition that a gross and fraudulent

abuse of the process of the court, resulting in damage, gives a right of action to the person sustaining the damage." *Id.* at 374.

The court went on to say:

> "But we have been unable to find a single adjudicated case (and counsel for plaintiff has called our attention to none), where it is held that the defendant in a replevin suit, having no property in the goods taken, may maintain an action for malicious prosecution against the unsuccessful plaintiff in the original action. The authorities are not harmonious upon the question, where the property of the defendant in the original action is taken, and upon that question we express no opinion." *Ibid.*

Finally, the decision in *Krzyszke v. Kamin,* 163 Mich. 290 (1910), held that an action for malicious prosecution lies for the wrongful issuance of an injunction to restrain a defendant from disposing of his personal property. We have found no more recent Michigan cases which do not deal either with malicious prosecution involving criminal actions or civil actions in which there was an attachment or seizure of property.

Thus, although there is dictum in some of the early Michigan cases which would permit an action for malicious prosecution in the circumstances posited by this Court, subsequent cases, admittedly not recent, cast some doubt as to whether such an action could be maintained in Michigan.

CONCLUSION

Defendants submit that adequate protection of the First Amendment right to freedom of expression requires that counsel fees be allowed as costs when a libel action is brought in bad faith, vexatiously, and for an oppressive purpose. Defendants also contend that the power to award counsel fees as costs in vexatious actions is inherent in the federal district courts, and may be exercised in any civil action, whether or not jurisdiction is based on diversity of citizenship. Either ground is sufficient to support a ruling in Defendants' favor.

However, Defendants urge that the controlling considerations in this case flow from the United States Constitution. Use of unfounded actions to intimidate others and deprive them of their constitutional rights merely because they cannot afford the cost of defense is contrary to the spirit of the Constitution and of recent decisions under it. It is not a "rich man's" Constitution — the right to freedom of expression cannot be permitted to depend on the financial resources of those who would speak.

Recent decisions of the United States Supreme Court have reminded us that the freedoms of the First Amendment are to be carefully safeguarded. If this Court rules that counsel fees cannot be allowed as extraordinary costs in a vexatious libel action, Defendants submit that it not only will have thwarted the intent of recent Supreme Court pronouncements, but will have dealt a crushing blow to freedom of speech. Plaintiff's petition for writ of prohibition should be dismissed.

Respectfully submitted,

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Dated: June 3, 1965.

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GEORGE S. NORCROSS
1889-1960

July 26, 1965

Mrs. Barbara Morris
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Re: Smoot v. League of Women Voters, et al.

Dear Barbara:

As we advised you last May, the Court of Appeals for the Sixth Circuit decided to hear arguments on the principal legal questions involved in the Smoot - League of Women Voters case before the factual evidence is submitted in the District Court. In effect, the Court of Appeals is hearing an appeal from the legal ruling of Judge Fox, concurred in by Chief Judge Kent and Senior Judge Starr on April 19, holding that in a proper case, where a libel action is brought in bad faith, vexatiously and for an oppressive purpose, the defendants' attorneys' fees and other expenses may be awarded them.

We submitted our brief to the Court of Appeals in June, and I am enclosing a copy for your information. At our request oral argument has been granted, and the Court has set it for the October Term.

We will continue to keep you advised from time to time and I am looking forward to working with you again when the hearing to determine the factual issues is again set in the District Court.

Sincerely,

Lewis A. Engman

wn
Enc.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1069

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,
v.
DAN SMOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. _____

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,

v.

DAN SMOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, the defendants in Civil Actions No. 4708 and 4709 now pending in the United States District Court for the Western District of Michigan, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case[1] on December 13, 1965.

1 *Sub. nom. Dan Smoot v. Honorable Noel P. Fox, United States District Judge for the Western District of Michigan.* The judgment was entered granting a writ of prohibition as prayed by Smoot prohibiting the District Judge from holding a hearing on costs.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported and is printed in Appendix A hereto, *infra*, p. 9a. The opinion of the Sixth Circuit Court of Appeals, printed in Appendix A hereto, *infra*, p. 2a, is reported in 353 F.2d 830.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals, *infra*, p. 1a, was entered on December 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the protection of rights guaranteed by the First Amendment to the United States Constitution requires that a district judge have discretionary power to assess counsel fees and expenses as costs against a party who is found to have brought a libel action in bad faith, vexatiously, and for the oppressive purpose of stifling debate on public issues.

2. Whether as a matter of federal courts law a district judge has discretionary power in actions at law as well as in equity to assess counsel fees and expenses as costs against one who is found to have brought an action in bad faith, vexatiously, and for an oppressive purpose, and who seeks to dismiss the action on the eve of trial.

3. Whether under Rule 41(a)(2) of the Federal Rules of Civil Procedure a district judge may condition a dismissal with prejudice upon the payment of counsel fees and expenses, where the action is found to have been brought in bad faith, vexatiously, and for an oppressive purpose, and where the dismissal is sought on the eve of trial.

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution. It is printed in Appendix C hereto, *infra*, p. 26a. The statute involved is 28 U.S.C. Section 1920, 62 Stat. 955. It is printed in Appendix C hereto, *infra*, p. 26a. The rules involved are Rules 41(a) and 54(d) of the Federal Rules of Civil Procedure. Each is printed in Appendix C hereto, *infra*, p. 27a.

STATEMENT

On March 21, 1964, the respondent, a nationally known political commentator, filed two libel actions in the United States District Court for the Western District of Michigan against the petitioners, the League of Women Voters of the Grand Traverse Area of Michigan, an unincorporated, non-partisan political information group, and certain of its members, Florabelle Grosvenor, Mary Force, Margot Power, and Sara Hardy. The jurisdiction of the district court was invoked because of diversity of citizenship, Smoot being a citizen of Texas and petitioners citizens of Michigan.

The libel actions were based on statements published by the League critical of respondent's widely distributed series of television programs. These statements had charged that respondent relied on "slanted information, half-truths, innuendoes, and sometimes worse," had expressed concern over the atmosphere of hate surrounding the recent assassination of the President and the bombing of Negro churches, and had urged the League's members, and the public, to watch the programs critically. Smoot's verified complaints alleged malice and asked damages totaling one million dollars. (Ex. 1 to Petition for Writ of Prohibition and Mandamus in Docket No. 16,207.)[2] During dis-

2 The record was not paginated by the Court of Appeals, and references, therefore, will be made by title to individual items within the record. The records of proceedings in Docket No. 16,207 and 16,501 were incorporated by reference into the record in Docket No. 16,565 in respondent's Petition for Writ of Prohibition.

covery, Smoot relied on tactics of obstruction, harassment, and delay,[3] as a result of which the district court ordered him to put up security for costs, including petitioners' counsel fees.[4] On the eve of trial, after petitioners had incurred expenses and legal fees of over thirty thousand dollars preparing their defense,[5] Smoot moved to dismiss his actions with prejudice. The district court denied this motion,[6] whereupon Smoot obtained a writ of prohibition and mandamus from the Sixth Circuit Court of Appeals, directing the lower court to dismiss the actions with prejudice "subject to the payment of all court costs by the Plaintiff." *Smoot v. Fox,* 340 F.2d 301 (6th Cir. 1964).

On February 2, 1965, petitioners filed a Motion for Assessment of Costs, alleging and offering to prove that the libel actions had been brought in bad faith, vexatiously, and for the oppressive purpose of inhibiting and stifling petitioners' criticism, and asking that respondent be ordered to pay their counsel fees. (Exs. Nos. 1 and 2 to Petition for Writ of Prohibition in Docket No. 16,505.) A motion by Smoot to dismiss petitioners' Motion for Assessment of Costs was denied April 19, 1965, by the Honorable Noel P. Fox, District Judge, in an opinion concurred in by Chief

3 Respondent was tardy in answering interrogatories, did not answer them completely, and took over a month and a half to comply with the court's order to answer further. He failed to produce almost two hundred documents which he had been ordered to produce by the court, although they were admittedly in his possession. He objected to the taking of his deposition on specious grounds. He failed to comply with the court's order that he provide defendants with an itemization of special damages. He sought a last-minute continuance. (See 36 F.R.D. 4 (W.D. Mich. 1964), *infra* p. 21a.) He moved to disqualify the district judge on admittedly insufficient grounds. He was unable to exchange a witness list at the pre-trial, and his counsel appeared at the pre-trial lacking full authority to act for him.

4 The district court's unreported opinion is printed in Appendix B hereto, *infra* p. 18a.

5 Fees of this magnitude resulted in part from the preparation of the defense of truth. By the time dismissal was sought, counsel for petitioners had interviewed witnesses in New York, Washington, D.C., Boston, Chattanooga, Tennessee, and several cities in Michigan, sifted through and organized thousands of pages of documentary exhibits, and made final scheduling of witnesses and preparation of proofs for trial. In addition, the cost of defense was materially increased due to respondent's obstructive and delaying tactics, including his refusals to comply with the district court's discovery orders and his repeated attempts to delay the progress of the action, all of which necessitated time-consuming court appearances.

6 The district court's unreported opinion is printed in Appendix B hereto, *infra*, p. 14a.

Judge Kent and Senior Judge Starr.[7] Judge Fox proceeded to set a date for a hearing on petitioners' motion.

On May 12, 1965, before any hearing was held, the Court of Appeals for the Sixth Circuit issued an order directing Judge Fox to show cause why Smoot's petition for a second writ of prohibition should not be granted, this time prohibiting a hearing on the assessment of costs. Subsequently, on December 13, 1965, the Sixth Circuit rendered its judgment granting the writ of prohibition. The court acknowledged that counsel fees as costs were allowable in equitable actions but stated that "no authority has been found or cited holding that a district court has discretion to allow attorney's fees and expenses as part of the costs in an action at law." 353 F.2d 832, *infra*, p. 5a. The court rejected all arguments based on Rule 41(a)(2) of the Federal Rules of Civil Procedure, holding that that rule allows the setting of conditions only in the case of dismissals without prejudice. As to petitioners' contention that the threat of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in proving the truth of the alleged libelous statements, the court said: "We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The Constitution does not protect libelous statements." 353 F.2d 833, *infra*, p. 6a. The court also stated that a hearing as to whether counsel fees should be assessed as costs would be equivalent to the trial of an action for malicious prosecution of a civil action, and respondent therefore would be deprived of his right to trial by jury.[8]

7 Judge Fox invited Judges Kent and Starr to join in the consideration of the case because of its great public importance.

8 In the course of oral argument before the Court of Appeals it was established that no request had ever been made that a jury be called in for the hearing on costs, although the district court could have done so pursuant to Rule 39 of the Federal Rules of Civil Procedure, and although the district court's earlier action in granting respondent's belated motion for a jury trial, *infra*, p. 18a, indicated that such a request would have been received favorably.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the principles set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There it was held that adequate protection of First Amendment rights requires that criticism of public officials be privileged so long as not actuated by malice. Underlying that holding were the principles that the law of libel "can claim no talismanic immunity from constitutional limitations," 376 U.S. 269, that those who would speak out on matters of public concern should not be "deterred from voicing their criticism, even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so*," 376 U.S. 279 (emphasis added), and that the Constitution expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. 270.

The institution of a groundless libel action imposes a heavy economic burden on the defendant,[9] especially when he must rely on truth as his defense.[10] When the alleged libel is uttered during debate on public issues, it is clear that this debate will be inhibited[11] unless the defendant can, upon showing that the action was brought in bad faith, vexatiously, and for the oppressive purpose of stifling that debate, recover the expense he has incurred in preparing his defense.[12] In the present case, petitioners, in order to "win" the libel actions, incurred fees and expenses of over thirty thousand dollars. To call such a victory Pyrrhic is to understate the case; bluntly put, petitioners do not have the funds to pay it and cannot afford to "win" again. Unless they can be reimbursed, petitioners will remain silent in the future, having been "deterred from voicing their criticism, even though it is in fact true, because of . . . fear of the expense of having to" prove it true.

9 See Yankwich, *It's Libel or Contempt if You Print It*, 355-56 (1950).

10 Respondent's verified complaints alleged malice, thus forcing petitioners to rely on truth as their defense.

11 Following the institution of this action, respondent's program continued to be shown in Traverse City, but neither the League nor anyone else criticized or challenged it.

12 *The New York Times* decision does not, of itself, alleviate the burden of defense when malice is alleged. Defense counsel must consider the possibility of an adverse jury finding on that issue, bearing in mind that malice may be established by showing that the allegedly defamatory statements are untrue, and that the defamer had no reasonable grounds on which to believe them true. *Prosser, Law of Torts*, 795 (2d ed. 1955). In the present case, counsel for petitioners concluded that the only safe course of action was to be fully prepared to show truth. It was the preparation of this defense which caused most of petitioners' counsel fees.

The position urged by petitioners requires no sweeping revision of the law of libel. Indeed, the substantive law of libel is scarcely involved at all; at issue here are baseless libel actions brought in bad faith and for the purpose of muting criticism. Nor do petitioners contend that in every such case the district judge must allow full counsel fees and expenses as costs. Petitioners do urge, however, that the district judge must have discretion to allow such costs. Otherwise, the federal courts could be used with impunity to deprive groups and individuals such as petitioners of their constitutional rights. Proper judicial supervision of the administration of justice in the federal courts requires that those courts not permit themselves to be used so as to endanger the very constitutional rights they were created in part to protect.

The court of appeals told petitioners that they "have the right of free speech so long as their statements are not libelous."[13] This simplistic brushing aside of petitioners' serious constitutional claim suggests that the court of appeals either failed to understand or refused to follow the principles enunciated in *New York Times*. In either case, the pernicious effect of its holding, which permits courts of justice to be used as instruments for the intimidation of those who would speak out on public issues, must be extirpated. Petitioners seek only the right to enter again into active debate on public issues.

2. The decision below is in conflict with the principle underlying the decision of the Fourth Circuit Court of Appeals in *Bell v. School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963). There the defendant school board followed a pattern of evasion and obstruction, forcing plaintiffs to turn to the courts to secure rights clearly guaranteed

13 353 F.2d 833, *infra*, p. 6a.

them by the Constitution. The Fourth Circuit held that in such circumstances the defendant should be required to pay the counsel fees and expenses which its wrongful actions forced the plaintiffs to incur. Here, as there, one party, acting vexatiously and in bad faith, has placed upon others such a heavy burden of litigation that unless they can be reimbursed they will be forced to avoid such litigation and thereby lose constitutionally protected rights. The sound principle of *Bell* is that the economic burden of legal action may not be used to deprive a party of constitutional rights, and that the court therefore has the power to award vexatious costs. Although *Bell* involved the rights of Negro schoolchildren to equal protection of the laws, the right to freedom of expression under the First Amendment is no less jealously to be protected. *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (concurring opinion).

3. This is a case of great public importance. The decision below holds that those who would criticize public commentators do so at the peril of being heavily penalized by the institution of baseless libel actions. The machinery of the courts thus becomes a potent and frightening weapon in the hands of those who would intimidate and silence the voices that disagree with them. Petitioners were prepared to show that the present action is not the only instance of Smoot's use of the law of libel in attempts to silence his critics.[14] Nor is he alone in the use of libel suits for intimidation of opponents.[15] In April, 1964, for example, at least 17 libel actions, seeking total damages in excess of 288 million dollars, and brought by public officials in three southern states against newspapers, magazines, and a television network, were pending in state and federal courts.[16]

14 For example, counsel are aware of letters written by respondent in March, 1964 demanding retraction of certain statements made by a California radio announcer and charging that respondent considered those statements slanderous and defamatory in nature and that they were uttered with malicious intent.

15 The recent experience of the Santa Barbara, California, chapter of the United Nations Association is significant. The group planned a television show dealing with controversial topics. Prior to the showing they were informed that a libel action for a million dollars would be filed if the program were shown. The group withdrew the program.

16 *The New York Times*, April 4, 1964, p. 12.

The decision below, if allowed to stand, will have wide-ranging and harmful consequences. If those who speak out on public matters can inflict upon their critics a fine greater than that normally set by law for the commission of a felony merely by filing a baseless action in federal court, then such actions will find ever-increasing popularity. Large newspapers, magazines, and other such enterprises will, as Mr. Justice Black pointed out in the *New York Times* case, 376 U.S. 269, 295 (concurring opinion), be unable to afford such penalties. How much more will the League of Women Voters of the Grand Traverse Area of Michigan, and similar such groups across the country, be unable to afford them?

The timing and handling of respondent's lawsuits reveals the purpose they served. Immediately after the suits were commenced, in March of 1964, petitioners began to seek an early trial date — it was an election year, and they wanted to be free to answer respondent on election issues. But Smoot's delaying and obstructive tactics dragged the case on into autumn. During the pendency of the suit, petitioners were almost completely silenced, while Dan Smoot went on, week after week, uninterrupted and free of critical response. The threat posed by the Sixth Circuit's holding in this case to that free and open discussion which necessarily underlies the democratic process must not be left unanswered.

In considering the public importance of this case, it should not be overlooked that the court of appeals has twice granted the extraordinary writ of prohibition. Furthermore, at the district court level, Senior Judge Starr and Chief Judge Kent deemed the case so important that they joined Judge Fox in ruling that a district judge did have the power to allow counsel fees as costs. At least six judges, then, have viewed this case as one of great public impact, involving questions which must be resolved promptly and with finality.[17]

It is also significant that dozens of organizations across the country have followed the course of this litigation closely. In particular, the groups who had planned to

17 Of the six, three have ruled in petitioners' favor, and three against them.

send witnesses on the League's behalf[18] have all evidenced keen interest in the outcome of this case. The reason for their concern is apparent. If petitioners are not successful, then such organizations will be unable to answer their critics: they must remain silent in a one-sided debate. Free speech will have become a luxury available only to those who can afford to defend the baseless libel actions that will result from its exercise.

4. The decision below introduces an unwarranted law-equity distinction into federal civil procedure, which must not be allowed to stand. The court of appeals conceded,[19] in the face of overwhelming authority,[20] that counsel fees may be awarded as costs in actions in equity which are found to have been brought in bad faith, vexatiously, and for an oppressive purpose. However, it held that, despite the merger of law and equity in federal practice, such an award could not be made in actions at law. The court reasoned as follows:

> "We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit."[21]

Rule 54(d) of the Federal Rules of Civil Procedure vests the power to allow costs in federal district courts. It provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *." The Rule makes no distinction between actions at law and suits in equity, and commentators agree that under it the historic

18 The following groups, among others, had witnesses ready to appear at the trial of the libel actions, and have followed the litigation closely from its inception: Committee for Economic Development; National Education Association; Tennessee Valley Authority; N.A.A.C.P.; National Municipal League; United Nations Association.

19 353 F.2d 832, *infra*, p. 4a.

20 See cases cited in Petitioners' Brief in Opposition to Petition for Writ of Prohibition in Docket No. 16,565.

21 353 F.2d 832 n.1, *infra*, p. 5a n.1.

power to allow counsel fees as costs is available in all actions.[22]

If, as the court of appeals deems so significant, there is no appellate authority allowing counsel fees as costs in an action at law, neither is there authority denying such costs because they are requested in an action at law. And the asserted distinction flies in the face of sense and reason. In the present day and age, the allowance or disallowance of attorneys' fees should not turn on whether a litigant in the time of Henry VIII would have brought such a case to the Lord Chancellor or to the Court of Common Pleas. The need to compensate defendants wrongfully brought into court, and the desirability of penalizing vexatious plaintiffs, are just as pressing when the complaint has sought money damages as when it prays injunctive relief. In *Universal Oil Products v. Root*, 328 U.S. 575 (1946), the Court said:

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceeding could justly be assessed against the guilty parties. Such is precisely a situation where for 'dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." *Id.* at 580.

To use the language of the Court, it is the "temple of justice" which must be protected, not the "temple of justice when sitting to hear equitable causes."

If this ill-advised and unmeritorious distinction between law actions and equity suits is permitted to stand, federal district judges will be stripped in a majority of the cases before them of an effective tool for policing their courts — the discretionary imposition of extraordinary costs. Petitioners submit that the anachronism set up by the court of appeals must be eliminated now, before it further undoes that which the Federal Rules of Civil Procedure attempted to accomplish in the merger of law and equity.

22 6 *Moore, Federal Practice*, para. 54.77(2); Note, 77 *Harv. L. Rev.* 1135, 1138 (1964).

5. The decision below unduly restricts the operation of Rule 41(a)(2) of the Federal Rules of Civil Procedure. Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This rule provides an additional ground upon which the court may allow counsel fees as costs, for it is well settled that such an allowance may be imposed as a condition of dismissal.[23] The court of appeals ruled, however, that Rule 41(a)(2) applies only to dismissals without prejudice.[24] Petitioners submit that the broad language of Rule 41(a)(2) should not be so limited, and that a district judge has the power, in an appropriate case, to tax counsel fees as a condition of a dismissal with prejudice.

6. The foregoing has demonstrated that the decision below was clearly incorrect. The conclusion of the court below that the taxation of counsel fees as costs would amount to an action for malicious prosecution, depriving respondent of his right to a jury trial, is without merit. As previously pointed out, respondent never requested a jury. Furthermore, an action for malicious prosecution seeks a wholly different measure of damages. Finally, the availability of the remedy of vexatious costs to safeguard the integrity of the federal courts and to protect constitutional rights cannot be made to turn on the vagaries of state law.[25] Nor does the court of appeals assert any grounds of policy to support its position.[26] The seriousness of the error

23 2B Barron & Holtzoff, *Federal Practice and Procedure*, section 914, at 124 (Wright ed. 1961).

24 The court misread *Laurence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963), to support its position. That case merely held that in the absence of exceptional circumstances counsel fees would not be imposed as a condition of dismissal with prejudice. In the present case, special circumstances are present.

25 It is uncertain whether an action for malicious prosecution of a civil action would lie in Michigan without the attachment of property.

26 The case of *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), lends no support to the court below. There the court upheld a district judge's taxation of costs under Rule 54(d), wherein he refused to tax the full expense of transporting witnesses

below and the burden thereby imposed on petitioners by the court of appeals' decision constitute sufficient reasons for the Court to grant this petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD S. SAWYER
LEWIS A. ENGMAN
CHARLES E. MCCALLUM
Counsel for Petitioners

Dated: February 28, 1966.

26 (Continued)—

from Arabia to New York to the unsuccessful plaintiff. The court said "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. 235. This language is not inconsistent with petitioners' position, especially when it is borne in mind that petitioners alleged bad faith and oppressive purpose. Indeed, the last sentence quoted seems to support petitioners' contention that, in a proper case, a district judge does have discretion to tax other than the ordinary costs.

APPENDICES

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APPENDIX A — OPINIONS BELOW

ORDER

No. 16,565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAN SMOOT,
Petitioner,
vs.

HONORABLE NOEL P. FOX, United States District Judge for the Western District of Michigan,
Respondent.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

Upon consideration of the petition for a writ of prohibition, the answer of respondent thereto, and the briefs and arguments of counsel, it is ORDERED that a writ of prohibition be issued prohibiting the respondent from holding a hearing for the purpose of allowing as costs attorney's fees incurred by defendants in the libel actions and expenses incurred by defendants or their counsel in said libel actions; and

That respondent be and he is hereby ORDERED to compute the costs in said libel actions pursuant to the provisions of 28 U.S.C. Sec. 1920 and Rule 54 of the Federal Rules of Civil Procedure.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

OPINION

No. 16,565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Petition for a Writ of Prohibition

Dan Smoot,
Petitioner,
vs.

Honorable Noel P. Fox, United States
District Judge for the Western District
of Michigan,
Respondent.

Decided December 13, 1965.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. This controversy was first before this Court on the petition of Smoot for a Writ of Mandamus requiring the Honorable Noel P. Fox, Judge of the United States District Court for the Western District of Michigan, to grant petitioner's motion to dismiss with prejudice two actions for damages for libel filed by him against the League of Women Voters of the Grand Traverse Area of Michigan and certain individuals as defendants. The motion to dismiss with prejudice was filed by petitioner's present counsel after the District Judge had entered an order requiring Smoot to post $15,000 bond as security for costs. The dismissal had been resisted by the defendants in the libel actions on the theory that they were entitled to have a jury impaneled to hear their side of the case, even

though plaintiff was willing to have the actions dismissed with prejudice at his costs.

We granted the mandamus petition and ordered the District Judge to dismiss the actions with prejudice on payment of all court costs by Smoot. *Smoot v. Fox,* 340 F.2d 301 (6th Cir. 1964). Thereafter the District Judge filed an application for rehearing and clarification as to our intent in using the term "court costs", and for a ruling on whether attorney's fees and expenses could be allowed as costs in the libel actions. We denied the rehearing and declined to pass upon that question in the mandamus action.

The defendant then filed a motion in the District Court labeled "Motion For Assessment of Costs" which was for an order requiring plaintiff to pay costs to defendants in the amount of $35,000 for attorney's fees and $1,906.99 for expenses alleged to have been incurred by them during a period of about five months between the dates of the filing of the complaints in the libel actions and plaintiff's motion to dismiss with prejudice. In an affidavit in support of the motion for attorney's fees and expenses as costs, it was stated that defendants would adduce proofs—

> "to show that the statements of defendants, which are the basis of these libel actions are true and privileged and that said actions are groundless and were brought and maintained by plaintiff in bad faith vexatiously and for oppressive purposes."

The petitioner filed a motion to dismiss defendants' motion for attorney's fees and expenses on the ground that the allowance of such items as costs was not within the jurisdiction of the District Court after the dismissal with prejudice. The Court assigned both motions for hearing on the same date and requested each party to estimate the time required to present the motions. Defendants in the libel actions estimated it would take ten days' time to present evidence on their motion.

Before the hearing date petitioner filed a petition for a writ of prohibition in this Court to prevent the District Court from holding a hearing on the motion for allowance of attorney's fees and expenses. We denied that petition

on the ground that the District Court had jurisdiction to hear and determine both motions. Our denial was based on the assumption that the District Court would not order the allowance of costs which were not authorized by the Federal statutes and rules, and on the further assumption that the Court would allow petitioner adequate time to prepare for the hearing on defendants' motion to assess costs after ruling on petitioner's motion to dismiss.

The District Judge denied petitioner's motion to dismiss defendants' motion to allow attorney's fees as costs and refused to certify the question for an interlocutory appeal to this Court. In denying petitioner's motion the District Judge indicated that he had previously decided that attorney's fees could be proper items of costs in certain cases, and that they could possibly be an item of costs in this case. He set a hearing for May 17, 1965 to determine defendants' motion for the allowance of attorney's fees and expenses. The petitioner then filed the present proceeding in prohibition in this Court.

We thought our opinion in the mandamus action made it clear that the dismissal with prejudice precluded a trial on the merits of the libel actions. 340 F.2d 301. Yet this is precisely what the defendants are attempting to have in their motion to assess costs, for they propose to prove that the alleged libelous statements set forth in the complaints were true and privileged and that the actions were groundless. Such an evasion of our order cannot be tolerated.

In essence, defendants would convert a proceeding to assess costs into an action for damages for malicious prosecution of a civil action, and have the Court, instead of a jury, award the damages.

Respondent asserts that the allowance of attorney's fees and expenses for preparation for trial as costs, is a matter properly within his discretion as District Judge. In our opinion the allowance of such items is within the discretion of the District Court in equity cases where exceptional circumstances call for their allowance in order to do justice between the parties. *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951). Attorney's fees are also allowable where they are specifically authorized by statute

or provided for by agreement between the parties. *Local Union 984, Internat'l Bro. of Teamsters, etc. v. Humko Co.*, 287 F.2d 231 (6th Cir. 1961), cert. denied 366 U.S. 962.

However, no authority has been found or cited holding that a District Court has discretion to allow attorney's fees and expenses as part of the costs in an action at law.[1] On the contrary, in *Ruck v. Spray Cotton Mills, Inc.*, 120 F.Supp. 944, 947 (M.D. N.C. 1954), the Court stated:

> "Costs in actions at law in the United States Courts are creatures of the statute. There [is no] Federal Statute permitting District Courts to tax attorney fees as costs in actions at law as distinguished from suits in equity."

And in *Kramer v. Jarvis*, 86 F.Supp. 743, 744 (D. Neb. 1949), the Court stated that "except where it is otherwise provided by statute or rule, attorney's fees are not taxable as costs in actions at law pending in federal district courts." To the same effect see *United States v. Hoffman Const. Co.*, 163 F.Supp. 296 (E.D. Wash. 1958).

To hold otherwise would permit a Federal Court to allow attorney's fees and expenses as costs in a suit for damages for personal injury, assault and battery, or in any other type of action at law which the Court might feel was brought maliciously and without probable cause. This would have the effect of deterring the pursuit of legal remedies in the Federal Courts, which is contrary to the American system of jurisprudence. It would vest unnecessary and unwarranted power in the Court. It would practically dispense with actions in the Federal Courts for damages for malicious prosecution of civil actions.

Respondent contends that Rule 41(a)(2) of the Federal Rules of Civil Procedure permits a District Court to fix attorney's fees as costs. That rule provides that "an

1 We asked counsel for respondent at the oral argument if he could cite a single case where the Federal Courts had ever made such an allowance, and he was unable to do so. The fact that counsel could not support his contention with pertinent authority is fairly good proof that it lacks merit.

28 U.S.C. § 1920 provides for the type of costs which may be allowed by the court. See also Rule 54 Fed.R.Civ.P.

action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court may deem proper."

The cases permit allowance of attorney's fees against the dismissing party where the action is dismissed without prejudice. *E.g., Welter v. E. I. DuPont de Nemours & Co.*, 1 F.R.D. 551 (D. Minn. 1941). The reasoning behind the rule where the action is dismissed without prejudice is to compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought in another forum. See 5 Moore's §§41.05, 06. A dismissal with prejudice, however, finally terminates the cause and the defendant cannot be made to defend again. The Court in *Lawrence v. Fuld*, 32 F.R.D. 329 (D. Md. 1963) rejected the contention that there is no requirement in the Rule that limits it to dismissals without prejudice, and held that attorney's fees are not proper where the dismissal is with prejudice.

Respondent contends that defendant's First Amendment right of free expression will be violated if attorney's fees and expenses are not allowed. Reliance was placed on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) in urging that the pendency of a baseless libel action has the effect of silencing criticism for fear of the expenses involved in preparing to prove the truth of the alleged libelous statements. We see no merit in this claim. Defendants have the right of free speech so long as their statements are not libelous. The constitution does not protect libelous statements. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

Although the Supreme Court held that these cases did not foreclose its inquiry into the *Sullivan case*, because they did not sustain the use of libel laws to prohibit expression critical of public officials, the Court did not repudiate the cases or the principle. The First Amendment does not require that a person who is sued for libel be guaranteed the cost of defending himself.

On the other hand, the allowance of attorney's fees and expenses here would, in our opinion, violate petitioner's

Constitutional right to a jury trial. The District Court would necessarily have to determine whether the alleged libelous statements were true and privileged and that the actions for damages were brought in bad faith, vexatiously and for oppressive purposes. This would be a hearing to determine if Smoot was liable for malicious prosecution of a civil action, and if so, to render a judgment against him for damages under the guise of fixing costs. The Seventh Amendment to the United States Constitution preserves the right to a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. Rule 38 of the Federal Rules of Civil Procedure also preserves this right. An action for malicious prosecution falls well within the recognized forms of action at common law. 5 Moore's Federal Practice 2d Ed. §38.11 [5], p. 114.

Although no question has been raised over our jurisdiction, we are of the opinion that power was conferred upon us to entertain the proceeding in prohibition by the All Writs Statute, 28 U.S.C. §1651. 6 Moore's Federal Practice 2d Ed. §54.10[2], pp. 65, 66. Whether such power should be exercised rests within the sound discretion of the Court. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943); *Ex Parte Peru*, 318 U.S. 578 (1942).

We think this is the type of extraordinary case in which an Appellate Court should exercise its discretion in favor of the granting of the writ. By so doing the parties will be saved the cost and expense of an unnecessary trial to determine an issue which does not exist in this case. It will conserve the time of the Court, which could be devoted better to other meritorious cases requiring judicial attention in the congested Districts of Michigan.

One other matter requires comment and that is the order of the District Court requiring the plaintiff in the libel actions to post bond in the amount of $15,000. The purpose of such a large bond was unquestionably to provide security for the allowance of attorney's fees and expenses.

In the present case after we had ordered the dismissal with prejudice of the libel actions, the District Court at that late date attempted to require the plaintiff in the libel actions to post the $15,000-bond as a condition prece-

dent to granting him a pretrial conference on the assessment of costs.[2]

Since the District Judge was without right in an action at law to allow attorney's fees and expenses as part of the costs, it follows that he had no authority to require the posting of a bond as security for their payment. *McClure v. Borne Chemical Co.*, 292 F.2d 824, 835 (4th Cir. 1961).

A writ of prohibition may issue as prayed for in the petition.

2 "The Court: Mr. Watts, do you intend to comply with the Court's order requiring you to post a bond of Fifteen Thousand Dollars?

Mr. Watts: No, Sir, we do not intend to comply with the bond.

The Court: When you comply with that we will move ahead with further proceedings, as far as a pretrial is concerned.

Mr. Watts: Let me understand, until and unless Smoot files a bond, — how could he file a bond in a case that has been dismissed?

The Court: Well, as a matter of curiosity, I think in the experience you have had, Mr. Watts, you can answer that yourself, the question of costs, the bond, the order requiring the posting of the bond hasn't been dismissed and the Circuit Court of Appeals has clearly recognized that the question of costs is still before the District Court and that answers itself.

Mr. Watts: Then, as I understand the Court's ruling, until and unless we post a bond, there will be nothing further in the nature of —

The Court: — of a pretrial or any conference of that kind but that doesn't change the hearing date . . ."

OPINION ON PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' MOTION FOR ASSESSMENT OF COSTS AND MOTION TO STRIKE FROM TRIAL DOCKET

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

On August 28, 1964, defendants filed a motion for security for costs, with supporting brief alleging that the plaintiff had brought and maintained these actions in bad faith and for vexatious and oppressive reasons, and offered evidence in support of that position. Defendants claimed that at the conclusion of the case these facts would be more apparent, and for that reason requested that plaintiff be ordered to post a security bond.

At a hearing on September 25, 1964, the court considered the evidence before it, found substantial basis to grant defendants' motion, and on October 2, 1964 an order was entered requiring plaintiff to post with the Clerk of the Court by October 8, 1964 a bond of $15,000.

On February 2, 1965, defendants filed a motion for assessment of costs, including attorney fees and other ex-

penses, in which they again claimed that plaintiff had commenced and maintained these actions in bad faith, vexatiously, and for the purpose of harassing defendants.

Plaintiff's motion to dismiss defendants' motion for assessment of extraordinary costs, by its nature and circumstances in this case, raises two questions:

First, does the district court have jurisdiction to entertain defendants' motion, and

Second, is there presently before the district court sufficient material to require a hearing on defendants' motion?

Each of these questions must be answered in the affirmative.

The first question is answered by the Circuit Court of Appeals in its order of April 7, 1965, when it said at page 3:

> "The District Court has jurisdiction to hear and determine both of the motions which were filed in these actions. Title 18 U.S.C. §1920 and Rule 54 of the Federal Rules of Civil Procedure provide for the allowance of costs. The District Judge will be required upon hearing to determine what items are properly allowable for costs under the statutes and rules."

The second question likewise must be answered in the affirmative. By order of the Sixth Circuit Court of Appeals dated December 30, 1964, these actions were ordered to be dismissed with prejudice, subject to the payment "of all court costs" by the plaintiff.

Uncertain as to the effect of this language on the pending motion for security for costs, a petition for rehearing and clarification was submitted to the Court of Appeals, in which it was pointed out that petitioner (District Judge Noel P. Fox) had previously decided that attorney fees could be proper items of cost in certain cases.

The petition sought a clarification of the term "court costs," recognizing that attorney fees might have been excluded as possible items of cost by the order of the Circuit Court of Appeals.

The petition for rehearing was denied, but the order so denying stated that in using the term "court costs," the Circuit Court of Appeals had made no ruling on the question of whether or not attorney fees were properly assessable in these cases.

When this court determined that defendants' motion for security for costs had sufficient merit to require posting of a bond, it decided that in this case attorney fees could possibly be items of cost. This decision was reached after considering briefs and oral argument for both parties, and at that time plaintiff presented the same arguments relating to items properly awardable as costs.

The cases cited in plaintiff's brief on this motion are either distinguishable or unopposed to the proposition that attorney fees are proper items of costs in certain extraordinary cases.

Fleischer v. Paramount Pictures Corporation, 329 F. 2d 424 (CCA 2, 1964), in the excerpt quoted in plaintiff's brief (page 426 of 329 F. 2d) recognizes that attorney fees may be awarded in the exceptional case.

Apple Growers Ass'n. v. Pelletti Fruit Co., 153 F.Supp. 948, held that in exceptional cases the trial judge has discretion to award attorney fees as costs.

Rolax v. Atl. Coast R. Line, 186 F. 2d 473, holds that attorney fees are not *ordinarily* items of assessment, but are more commonly so in equity actions.

Warner v. Florida Bank & Trust Co., 160 F. 2d 766, involved trust remaindermen attempting to recover attorney fees as a matter of course in a case in which they were litigating their interests in the trust fund. The court merely stated that as a general rule adverse parties to litigation are required to pay their own attorney fees. The general rule is not disputed. Defendants strongly urge upon the court that the instant case is an exceptional situation which calls for the assessment of extraordinary costs.

In re Joslyn, 224 F. 2d 223, was a bankruptcy case in which costs were expressly governed by statute, and in Rosden v. Leuthold, 274 F. 2d 747, attorney fees were disallowed because the action was brought under the District of Columbia Code, which explicitly prohibited them. Like-

wise in Tabis v. Joy Music, Inc., 204 F.Supp. 556, attorney fees were sought pursuant to statutory authority.

Farmer v. Arabian American Oil Co., 379 U.S. 227, 13 L.Ed. 2d 248 is distinguishable. It involves no claim of vexatious, oppressive, or bad faith conduct. It is an ordinary contract case involving questions of what is included in ordinary costs. However, it does set at rest the plaintiff's claim that before this court can exercise its jurisdiction in determining costs the Clerk must first tax the costs.

Plaintiff also argues that this hearing is equivalent to an action for malicious prosecution and that plaintiff is therefore being deprived of a trial by jury. It is true that many of the same elements as required in an action for malicious prosecution are essential to establish entitlement to an award of attorney fees. However, this does not automatically mean that plaintiff is being deprived of a right. The procedure for awarding of such items of costs is well established, and were plaintiff's argument to prevail, there would be no such thing as a motion for security for costs or for assessment of attorney fees and extraordinary costs, for in every such instance the party respondent would be able to assert that the proceedings were in fact an action for malicious prosecution and demand trial by jury. Such an argument is patently without merit, for even after a trial before a jury, in such a situation, the trial judge alone must reach a decision as to the propriety of awarding attorney fees by considering all the facts which have been presented.

Furthermore, on the facts of the present cases, this procedure is in accord with well-established principles. The motion was filed before plaintiff's first and second motions to dismiss, at a time when it was still expected that there would be a jury trial of these cases, at which proofs relied upon by defendants would presumably have developed.

The jurisdiction of this court to conduct a hearing on the matter of assessment of costs is recognized in the order of the Sixth Circuit Court of Appeals of April 9, 1965, denying plaintiff's petition for writ of prohibition.

This court, of course, is bound to follow the governing law as set forth under the United States Code and the Federal Rules of Civil Procedure, as interpreted by decided case law.

Reviewing plaintiff's motion, the briefs of the respective parties, all pleadings, all facts and circumstances in these cases, all orders and opinions of the Sixth Circuit Court of Appeals and this court, all of which have been carefully and fully considered by me, the presiding judge, before whom oral arguments were presented this morning, I can find no reason justifying a dismissal of defendants' motion for assessment of extraordinary costs.

Chief Judge W. Wallace Kent and Senior Judge Raymond W. Starr also reviewed and considered all matters in these cases prior to the oral arguments this morning, and they concur in this conclusion.

Therefore, plaintiff's motion to dismiss defendants' motion is hereby denied.

Dated: April 19, 1965.

(s) Noel P. Fox
District Judge

We have read and concur in this opinion.

(s) W. Wallace Kent
Chief Judge

(s) Raymond W. Starr
Senior Judge

APPENDIX B — RELATED DISTRICT COURT OPINIONS

OPINION ON MOTION TO DISMISS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff.
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff.
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This suit was commenced in March of 1964, and because of the constitutional issues involved, every effort has been made to bring the case to an early trial. By order of the court, pretrial preparations were to have been completed by August 25, 1964.

On October 2, 1964, after the court had set a trial date of October 14, and after counsel for defendants had gone to great expense in preparing for trial by enlisting as witnesses a number of individuals of national prominence, plaintiff moved to dismiss the case. Negotiations between counsel broke down when plaintiff refused to sign a statement of admission, apology and retraction, and plaintiff then submitted his motion to the discretion of the court.

Rule 41(a)(2), Federal Rules of Civil Procedure, provides for dismissal after service of an answer in a case *only* by order of the court.

This matter is entirely within the discretion of the court. See 2B Barron & Holtzoff, Federal Practice and Procedure, §912, pp. 111-112.

The Seventh Circuit case of Bolten v. General Motors, 180 F. 2d 379, represented the lone example of the belief that the right to dismiss was absolute, the discretion of the court going only to the terms and conditions of dismissal.

However, the Seventh Circuit subsequently reversed itself in Grivas v. Parmelee Transportation Co., 207 F. 2d 334, cert. denied 347 U.S. 913, 74 S.Ct. 477, 98 L.Ed. 1069, where the court stated that the matter of dismissal is not a right, and the discretion of the court in a motion to dismiss goes both to whether or not the motion shall be granted, as well as to the terms and conditions.

> "It is never a pleasant task for a court of review to overrule a previous decision upon which litigants and the District Courts of the Circuit have a right to rely, but we have reached the conclusion that our interpretation as announced in the Bolten case was too broad and that this is the time to modify it. The unanimous view of other courts and textbook writers is that the allowance of a motion to dismiss under Rule 41(a)(2) is not a matter of absolute right * * * *." Id. at 336.

See also Adney v. Mississippi Lime Co., 241 F. 2d 43.

Finally, the reasoning in Churchward Int'l. Steel Co. v. Carnegie Steel Co., 286 F. 158, is especially apropos. That was a patent case in which a motion to dismiss was denied. The Court said at Page 160:

> *"Then, too, it seems that the public has an interest in having the validity of a patent established where it is seriously questioned, because what is embraced within the patent belongs to the public and the patent itself is a grant by the public. The interest of the public appears to be greater in such controversies when they relate to manufactured products which are extensively used such as steel."* (Emphasis supplied).

A fortiori, the interest of the public in this case compels this court to a similar holding. To even attempt to say that public interest in freedom of expression is less important than the public interest in steel processes is a misconception of fundamental constitutionally protected rights.

The exercise of judicial discretion in granting motions to dismiss is proper "unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit." Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 91 L.Ed. 849.

Familiarity with this case shows indisputably that dismissal at this stage would greatly prejudice defendants. They have been haled into court by a national figure, accused of besmirching his name and professional reputation, and made the subject of much publicity, since the complained of writing is an integral part of the public purpose for which defendants assert they are organized.

Plaintiff claims that he wishes only to vindicate his name (despite the fact that the suit was instituted for $1,000,000 in March of 1964, and has been desultorily prosecuted since then, neither of which is consistent with eagerness to cleanse one's name of undesirable association), but the circumstances of this case are such that defendants are now in the position equally of wishing to establish their good name.

Defendants, as stated, have retained able counsel, who have pursued the matter extensively and diligently, arranging for witnesses from Washington, D.C., New York, and Little Rock, Arkansas, to mention but a few — people of such importance that they have, defendants' counsel asserts, rescheduled national commitments to be able to appear at this trial. It is doubtful that this array of witnesses could be again duplicated, which means that a dismissal at this stage clearly prejudices defendants.

That such figures are willing to take part in this litigation emphasizes the public concern for the issues which plaintiff has raised by his complaint. Plaintiff has refused to settle the case on the terms requested by defendants, which amounted to a complete exoneration of their activities, and defendants now appear anxious to establish what plaintiff refuses to admit in settlement of the case.

Plaintiff has challenged defendants to a day in court, and because of the nature of this case, plaintiff's refusal to settle, and defendants' preparation, they are now entitled to that day in court.

The public interest in this case is well defined, and in the concern for that interest manifested in this court's written and oral opinions already entered in the case, I deny the motion to dismiss.

Dated: October 13, 1964.

Noel P. Fox,
District Judge.

I concur in the above opinion.

Raymond W. Starr,
Senior Judge.

Certified as a true copy:
Howard T. Ziel, Clerk,
By: G. E. Laxink,
Deputy Clerk.

OCT. 13, 1964.

OPINION ON MOTION FOR JURY TRIAL AND MOTION FOR SECURITY FOR COSTS

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally.
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

Counsel for plaintiff in this case has failed to properly notify opposing counsel of plaintiff's demand for jury trial.

Failure to serve a demand in proper form and within the time specified constitutes a waiver of jury trial. Rule 38, Federal Rules of Civil Procedure. See 2B Barron & Holtzoff, Federal Practice and Procedure, §879. P. 54, and cases cited.

Furthermore, "the waiver is complete even though inadvertent and unintended, and regardless of explanation or excuse." See Barron & Holtzoff, supra, P. 55, and cases cited.

However, Rule 39(b) does provide for relief in situations of this sort at the discretion of the Court, upon motion by the waiving party.

Thus, in this case the Court is presented with a complete waiver of the right to jury trial and it is absolutely

within the discretion of the Court to grant or deny the motion requesting trial by jury.

The preponderance of authority is against granting such a motion in the absence of misunderstanding, Hargreaves v. Roxy Theatre, 1 F.R.D. 537, honest mistake, Supplies Inc. v. Aetna Casualty and Surety Co., 18 F.R.D. 226, or a good faith attempt to comply with the rules, Rogers v. Montgomery Ward & Co., 26 F.Supp. 707, or unfamiliarity with the rules, Universal Picture Corp. v. Marsh, 36 F.Supp. 241.

None of these is present here; this was simple inadvertence on the part of counsel, which has been held to be insufficient for relief from waiver. Polak v. Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland, 19 F.R.D. 87 (D.C. N.Y. 1956), and Wilson & Co. v. Ward, 1 F.R.D. 691.

Finally, long delay in applying for relief from waiver of trial by jury has influenced courts in the exercise of their discretion. See Barron & Holtzoff, supra, P. 75, and cases cited.

Despite this mass of authority which would support a holding to the contrary, this Court, acting solely in its discretion, and fully aware of the lack of support in the authorities cited, feels that the plaintiff should have the privilege of a jury, in view of the nature of the constitutional issues to be decided in the case. A jury composed of twelve members of the community at large should decide whether or not the comments at issue in this suit are of a libelous nature, not a single trial judge.

I, therefore, exercise my discretion in favor of the plaintiff and grant the motion for jury trial.

This Court at this time grants defendants' motion requesting security for costs, and sets the amount at $15,000.

If the proofs show, as defendants' counsel claimed at the hearing on the motion, that this suit was instituted for a vexatious purpose and defendants have been inhibited from speaking out since the date of the filing of the complaint in this action, then defendants will not be put to the additional burden of going to a foreign state to collect this obligation.

If the proofs do not support this claim, the only loss to plaintiff will be the costs of the bond, or the interest on the cash amount for a short period of time, either of which would be offset many times by a recovery of any magnitude.

Under these circumstances, and for the further reason that it is desirable that all matters in this case be finally resolved in this forum, I feel that the granting of this motion is well justified.

Dated: October 6, 1964.

(s) Noel P. Fox,
District Judge.

OPINION

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4708

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, and FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY, jointly and severally,
Defendants.

DAN SMOOT,
Plaintiff,
vs. CIVIL ACTION NO. 4709

LEAGUE OF WOMEN VOTERS, GRAND TRAVERSE AREA OF MICHIGAN, an association affiliated with the LEAGUE OF WOMEN VOTERS OF MICHIGAN, a Michigan corporation, MARGOT POWER and MARY FORCE, jointly and severally,
Defendants.

This is a libel action brought by plaintiff, the featured commentator on a series of television programs dedicated to informing the public on topics of national concern, against defendant League, a non-profit organization, and some of its officers and members, devoted essentially to the same purposes. The subject matter of this action consists of material contained in the December 1963 Bulletin of defendant League and in a letter of the same date to the editor of the local newspaper, each of which contained allegedly libelous remarks on plaintiff's presentation and the content of his program.

At this time the Court is presented with the difficult task of setting a time for the trial of the case, in the face of burdens and obligations on the side of both parties, which must be balanced in arriving at the decision.

The action was commenced in March of 1964, claiming $500,000 damages. The Court issued an order on May 18,

1964, directing the parties to complete all preparations for a pretrial conference by August 25, 1964. On July 15, 1964, a hearing was held on objections to interrogatories, and on September 25, 1964, a hearing was held on defendants' motion for security for costs and to deny a jury trial because of failure to give notice of the demand therefor. Immediately following these matters, the pretrial was conducted, at which plaintiff's counsel notified the Court for the first time of arrangements for a vacation commencing in mid-October and terminating in late November. At the same time, he suggested to the Court that the case be tried some time after January 1, 1965.

The dominating concern for defendants in this matter is the effect which this action has on their exercise of freedom of speech. The pendency of this suit effectively stills the voice of the defendant League of Women Voters and its individual members, and this quite conceivably prevents the free interchange of ideas in the public marketplace. Not only is the Traverse City Branch of the League silenced pro tempore, but branches of the League all over the country will doubtless proceed haltingly in speaking out on political thories advanced by those of differing political persuasions, not to mention all those who are opposed to Mr. Smoot and his particular philosophy of government. The fact that this may or may not be occasioned unintentionally is of no import, for the practical result is that he and those of like mind are free to continue speaking out, while those opposed to that line of thought are not so at liberty until the question of libel here presented is settled.

The dangers inherent in this situation have long been recognized by the courts in this land. In the case of City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N.E. 86, 90 (1923) it was said:

> "While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution."

In the recent and widely publicized case of New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, attention was once more focused on the commitment of the courts to the protection of the right to freedom of expression, no matter what form the suppression assumes. It is noteworthy that at Page 269, 11 L. Ed. 2d, at 700, the Court said:

> ". . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

And in discussing the effect of libel actions in this area the Court said at Page 278, 11 L. Ed. 2d, at 705:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."(1)

Thus, this problem must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, . . ." New York Times Co. v. Sullivan, supra, at 270, 11 L. Ed. 2d, at 701.

In the mind of this Court, the case before it presents a striking example of the importance of this freedom and calls into play the very essence of the underlying reasons supporting it. Both parties here believe that they are disseminating the political opinion so essential to a functional democracy. The need for such uninhibited opportunity of conflicting opinion has been given expression since the debates which led to the creation of our Federal Constitution.

> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more

(1) It is worth noting at this point that the judgment in the state court in the Times case was $500,000, the same amount requested in the complaint in this action. How much more telling is the above quote in light of the fact that here we have not a prosperous newspaper corporation, but rather an impecunious organization which could not survive *one*, never mind a "succession of such judgments."

particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and *on the equal freedom, consequently, of examining and discussing these merits and demerits* of the candidates respectively." Madison's Report on the Virginia Resolutions, Elliot's Debates, Vol. IV, 585. (Emphasis supplied).

The language quoted in the concurring opinion of Mr. Justice Goldberg in New York Times Co. v. Sullivan, supra, is a contemporary account to the same effect, 376 U.S. 254, 297, at 302, 11 L.Ed. 2d 686, 718, at 721:

> " '[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, the Right of the People (1958), p. 41".

The extent to which this need is given deference is shown by the following:

> "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved . . ." Coleman v. MacLennan, 78 Kan. 711, at 724, 98 P. 281, at 286 (1908).

Arrayed against these compelling reasons for an early trial, made more so by the approaching national elections and the need for an informed electorate, is the inconvenience which will be caused to plaintiff's counsel by forestalling a long-planned vacation.

While it is the custom of the courts to accommodate attorneys at every opportunity in matters of this kind, as

indeed the Court has done on several occasions in this very case, the facts before me regrettably do not admit of such an accommodation.

Plaintiff's counsel indicates that he had no notion that the case would be placed in the docket so quickly. However, an examination of the transcript of the hearing on July 15 clearly reveals that this Court indicated to both counsel that its docket contained a number of open dates and that it was eager to get this case into a trial posture as soon as possible.

Despite this, and despite the order of this Court that the parties be prepared for pretrial by August 25, the case being subject to call at any time subsequent to pretrial, the first notice to this Court of a rather extended vacation was given at pretrial. Considered in this light, plaintiff's counsel had a duty at the time of the July 15, hearing to give notice to the Court of his plans, and failure to do so now bars objection on that ground.

Even absent these clear evidences of intent to move the case on at any early date, the subject matter itself provides reason enough for this decision. The convenience of attorneys is always subject to their role as representatives of the individuals whose rights are at issue. In the instant case, where the determination of those rights involves a question of such paramount importance as freedom of expression, and where its exercise is effectively stifled until the outcome of the suit, this Court reluctantly denies the request to postpone the trial date, and hereby orders that this case come on for trial on October 14, 1964.

While there is a quantity of exhibits to be examined by the plaintiff, this should not present too great a burden, since it must be presumed that any commentator who speaks with authority, as Mr. Smoot does, has already investigated his topics somewhat thoroughly, and should be able to give able assistance to his counsel on these exhibits.

For the reasons stated, I am issuing an order for trial pursuant to and concurrent with this opinion.

Dated: September 28, 1964.

(s) Noel P. Fox,
District Judge.

APPENDIX C — CONSTITUTIONAL PROVISION. STATUTE. AND RULES INVOLVED

Constitutional Provision Involved

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statute Involved

28 U.S.C., Section 1920, 62 Stat. 955:

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case:

(5) Docket fees under section 1923 of this Title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Rules Involved

Federal Rules of Civil Procedure, Rule 41(a):

"(1) Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Federal Rules of Civil Procedure, Rule 54(d):

"(d) Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

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GEORGE S. NORCROSS
1891-1960

March 14, 1966

Mrs. Barbara Morris
National Association for the
Advancement of Colored People
20 West 40th Street
New York, New York 10018

Re: Smoot v. League of Women Voters, et al.

Dear Barbara:

Since I last corresponded with you in July, the Smoot v. League of Women Voters case was argued in the Court of Appeals for the Sixth Circuit. The Court of Appeals ruled against us, in effect ruling that a district judge does not, in a proper case, have the discretionary power to assess counsel fees and expenses as costs against a party who was found to have brought a libel action in bad faith, vexatiously and for an oppressive purpose.

We are now seeking a final review of this question before the United States Supreme Court, having filed a petition for certiorari on February 28. I am enclosing a copy of the petition for your information.

I must reiterate that we and the League appreciate the assistance which you gave us and your interest in the case. We do anticipate a successful outcome in the long run, and I will continue to keep you advised.

Sincerely,

Lewis A. Engman

Lewis A. Engman

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Enc.