# White v. Crook

US Briefs

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

GARDENIA WHITE, JESSE W. FAVOR, JOHN HULETT, LILLIAN S. MCGILL, WILLIE MAE STRICKLAND, THE EPISCOPAL SOCIETY FOR CULTURAL AND RACIAL UNITY, A Corporation, THE REV. JOHN B. MORRIS, THE REV. HENRI A. STINES, THE REV. ALBERT R. DREISBACH, JR., and THE REV. MALCOLM BOYD, for themselves, jointly and severally, and for all others similarly situated,

Plaintiffs,

UNITED STATES OF AMERICA, BY NICHOLAS deB. KATZENBACH, Attorney General of the United States,

Plaintiff-Intervenor,

vs.

BRUCE CROOK, HENRY BARGANIER, and J.H. JACKSON, as members of the Jury Commission of Lowndes County, Alabama, and CARLTON PERDUE, as County Solicitor of Lowndes County, Alabama, HARRELL HAMMONDS, as Judge of Probate of Lowndes County, Alabama, C.F.RYALS, as Sheriff of Lowndes County, Alabama, W. E. HARRELL, JR., as Foreman of the Grand Jury of Lowndes County, Alabama, T. WERTH THAGARD, as Judge of the Second Judicial Circuit of Alabama (Lowndes County), ARTHUR E. GAMBLE, JR., as Solicitor of the Second Judicial Circuit of Alabama (Lowndes County), and KELLY D. COLEMAN, as Clerk of the Second Judicial Circuit of Alabama (Lowndes County),

Defendants,

CIVIL ACTION
NO. 2263-N

Dorothy, Working with you on this case was a real pleasure & friendship I value greatly -- one that I hope lasts a long, long time.

Charles

BRIEF IN SUPPORT OF INTERVENOR'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

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| GARDENIA WHITE, et al.,<br><br>Plaintiffs,<br><br>UNITED STATES OF AMERICA, By NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES,<br><br>Plaintiff-Intervenor,<br><br>v.<br><br>BRUCE CROOK, et al.,<br><br>Defendants. | CIVIL ACTION NO. 2263-N |

BRIEF IN SUPPORT OF INTERVENOR'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

I.

NATURE OF ACTION

This action was brought on August 25, 1965 as a class action by male and female Negro residents of Lowndes County, Alabama, against the members of the Jury Commission of Lowndes County, Alabama. On September 9, 1965 the plaintiffs filed an amended complaint adding as defendants other officials of Lowndes County, Alabama, having responsibility in connection with the jury selection process. By their amended complaint, the plaintiffs alleged that the defendants have systematically excluded

Negroes and women from jury service in Lowndes County, Alabama. Because of the challenge to the Alabama statute, which totally excludes women from jury service, a three-judge court pursuant to 28 U.S.C. 2281 was designated to try this case.

On October 27, 1965 this Court granted leave to the United States to intervene pursuant to Section 902 of the Civil Rights Act of 1964. The motion of the United States was based upon a proposed complaint in intervention and a certification by the Attorney General that in his judgment this case was of general public importance.

II.

THE PARTIES

The plaintiffs in this suit are male and female Negro residents of Lowndes County, Alabama; Gardenia White, Jesse W. Favor, John Hulett, Lillian S. McGill, Willie Mae Strickland, the Episcopal Society for Cultural and Racial Unity, a corporation, the Rev. John B. Morris, the Rev. Henri A. Stines, the Rev. Albert R. Dreisbach, Jr., and the Rev. Malcolm Boyd, for themselves, jointly and severally, and for all others similarly situated.

The plaintiff-intervenor is the United States of America. Its standing to intervene is established by 42 U.S.C. 2000h-2 and by Rule 24(b) of the Federal Rules of Civil Procedure. The defendants are the members and Clerk of the Jury Commission of Lowndes County, Alabama; the judge for the Second Judicial Circuit of Alabama, which includes Lowndes County; the judge and probate of Lowndes County; the Sheriff of Lowndes County; the Solicitor of the Second Judicial Circuit

of Alabama, which includes Lowndes County; and the Foreman of the Grand Jury of Lowndes County.

III.

## STATUTORY PROCEDURE FOR SELECTION OF JURORS IN ALABAMA

### A. The Jury Commission

Each county in Alabama has a jury commission composed of three members appointed by the Governor. [1] The commissioners must be qualified electors of the county and "reputed for their fairness, impartiality, integrity and good judgment." [2] Commissioners may not hold any other public office, federal, state, or local, for which compensation is paid. [3] Commissioners serve for the tenure of the Governor who appoints them. [4] In the smaller counties, such as Lowndes, the clerk of the circuit court may serve as clerk to the Jury Commission, but he does not enjoy that office *ex officio*. [5]

### B. Qualifications of Jurors

The jury commission shall place on the jury roll "the names of all male citizens of the county who are generally

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[1] Alabama Code, Title 30, §§8, 10. (All statutory references in this section are to Title 30 of the Alabama Code unless otherwise noted.)

[2] Section 9.

[3] *Ibid*.

[4] Section 10.

[5] Section 15.

reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character, and sound judgment." (Emphasis added.) [6] The following persons are excluded from selection: [7]

1. Those under twenty-one;
2. Habitual drunkards;
3. Those who, "being afflicted with a permanent disease or physical weakness [are] unfit to discharge the duties of a juror";
4. Those convicted of any offense involving moral turpitude;
5. Those who cannot read English, except those who otherwise qualify and are freeholders or householders. [8]

In addition, no person over 65 is required to serve as a juror or remain on the jury panel unless he is willing to do so. [9]

C. Selection of Names for Jury Box

The clerk of the jury commission is directed by law to "obtain the names of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence, and place of business...." [10] The jury commission must maintain a jury roll containing the names of "every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries." [11] The names of the persons

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[6] Section 21.

[7] Ibid.

[8] The term householder has been construed by the Alabama Supreme Court to mean "one who holds, or has possession of a house -- who has some stake in the community and whose reputation may be known." Aaron v. State, 37 Ala. 106, 111.

[9] Section 21.

[10] Section 18.

[11] Section 21. It is not necessary that the name of every qualified person be placed on the roll. Fikes v. State,

on the roll must also be printed on separate cards which are placed in a jury box. 12/ It is the duty of the commission to see to it that "the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box." 13/ To accomplish this, "[T]he jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information...and to visit every precinct at least once a year...." 14/

D. Procedure for Drawing Venires

For any session of a court which requires jurors for the next session, a judge "shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit jurors for the first week of such session." 15/ If a grand jury is not needed, at least 30 names are to be drawn, and as many more persons as may be needed for service for one week in courts having more than one division. 16/ The names are sealed up when drawn and 20 days

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(footnote 11/ cont.) 263 Ala. 89, 81 So. 2d 303, reversed on other grounds, 352 U.S. 191.

12/ Section 20.

13/ Section 24.

14/ Ibid.

15/ Section 30.

16/ Ibid.

before the session begins, the court sends the names to the clerk of the court, who then opens the package, makes a list of the names showing the day the jurors are to appear and the courts in which they are to serve, their occupation, residence and place of business. A venire containing these names is then issued to the sheriff, who summons the persons listed to appear and serve as jurors. [17]

All persons named in the venire are called into court and the court hears all excuses, claims of exemptions and passes on them at that time. [18]

E. Excuse of Jurors by the Court

Any person who appears to be unfit to serve may be excused on his own motion or at the instance of either party. [19] The court may excuse any person "if he is disqualified or exempt, or for any other reasonable or proper cause, to be determined by the court." [20] Statutory exemptions are provided for the following persons: [21]

1. Judges and lawyers;
2. Officers of the United States and the State;

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[17] Ibid.

[18] Section 38.

[19] Section 4.

[20] Section 5.

[21] Section 3.

3. Physicians, dentists, and pharmacists;

4. Teachers;

5. Bus drivers and all categories of railroad employees;

6. Newspaper and radio personnel;

7. Military and prison personnel.

Exemptions are not disqualifications and may be waived by the individuals to whom they apply. [22] An exemption waived by the individual may not be ground for challenge.[23]

F. Final Selection of Jury for Particular Case

The names of all jurors who are not excused are then written on slips of paper or cards and placed in a box or hat. [24] The judge then draws, in open court, the names of persons to be empaneled. Eighteen persons are drawn for the grand jury. In addition, twelve names are drawn for each of at least two petit juries and additional panels may be drawn if the judge deems it proper. [25] The persons so drawn to serve as petit jurors serve for one week unless discharged by the court, or until a case on which they are sitting is determined. Jurors for subsequent weeks, not less than 30 for any week, are to be drawn at such time as the judge or judges deem best. [26] Names of those not empaneled and not dis-

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[22] Pate v. State, 158 Ala. 1, 48 So. 388.

[23] Colley v. State, 167 Ala. 109, 52 So. 832.

[24] Section 38.

[25] Ibid.

[26] Ibid.

qualified or exempt are returned to the jury box. [27]

In capital cases, a special venire may be drawn and summoned. [28] However, this special venire may be waived by the defendant and the regular petit jury drawn for the week hears the case. To draw a special venire, the court on the first day of the session, draws from the jury box the names of 50 to 100 persons, who are then summoned by the sheriff. A list of these persons, plus those already selected for jury service during the week, is then served on the defendant one day prior to the day set for the trial, but "if the persons summoned as jurors fail to appear, or if the panel is exhausted by challenges, neither the defendant nor his counsel is entitled to a list of the persons summoned to supply their places." [29] If in any capital case the number of competent jurors is less than 30, the court must draw and have summoned additional jurors. [30]

The statutory provisons pertaining to the drawing and summoning of jurors are "directory merely, and not mandatory," [31] but some are considered mandatory nonetheless. [32]

G. Challenging and Striking of Jurors

Either party in civil and criminal cases has the right to examine jurors as to their qualifications, interest, or

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[27] Section 40.

[28] Section 63.

[29] Ibid.

[30] Section 65.

[31] Section 45.

[32] Ziniman v. State, 186 Ala. 9, 65 S. 56.

any bias that would affect the trial of the case and may examine jurors as to any matter which might affect their verdict. 33/

There are twelve grounds for challenges for cause. These are: 34/

1. Not a resident or freeholder of county for a year;
2. Not a citizen of Alabama;
3. Indictment within 12 months for felony or for any offense of the same character as that with which the defendant is charged;
4. Consanguinity;
5. Felony conviction;
6. Interest in conviction or acquittal of defendant;
7. Fixed opinion as to guilt or innocence of the defendant;
8. Under 21 or over 65;
9. Unsound mind;
10. Witness for the other party;
11. And, in civil cases, is plaintiff or defendant in any case to be tried during the same week, or
12. Is officer, employee, stockholder, policyholder of insurance company interested in suit.

In addition, in capital cases or those punishable by imprisonment in a penitentiary, a fixed opinion against capital or penitentiary punishment is a ground for challenge by the state,

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33/ Section 52.

34/ Section 55.

as is a belief that conviction should not be had on circumstantial evidence.[35]

In civil actions, each party has four peremptory challenges.[36] Alternatively, in civil actions either party may demand a struck jury and then must be furnished with a list of twenty-four qualified jurors in attendance, from which the two parties alternatively strike twelve. Jurors so selected may not be challenged except for bias or interest in the particular case.[37]

The struck jury method is the exclusive means of empaneling juries in criminal cases. In other than capital cases, the court directs that two lists of regular jurors empaneled for the week be made and that the names be struck by the solicitor and defense counsel until only twelve remain.[38] Here, however, both the state and the defense have the initial right to challenge for cause persons placed on the lists.[39] In capital cases, on the day the trial begins, the court inquires into the qualifications of the persons called for jury service by special venire or otherwise and those found competent by the court are placed on a list. If there is one defendant, the solicitor strikes one name and the defendant two until only twelve are left. If there are two defendants, each may strike one name.[40] On the refusal of the defendant to strike, the judge shall perform this task.[41]

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35/ Section 57.
36/ Section 53.
37/ Section 54.
38/ Section 60.
39/ Herndon v. State, 2 Ala. App. 118, 56 So. 85.
40/ Section 64.
41/ Section 66.

## STATEMENT OF FACTS

### A. Summary

Although responsibility rests with the Jury Commissioners for selecting prospective jurors, they do not have absolute discretion under state law in selecting who should serve. However, in Lowndes County the Jury Commission operated the jury selection system without regard to either state or federal law. The relevant issue to this case is, of course, violation of federal law. As we will show later, state requirements are relevant in framing relief.

The Lowndes County Jury Commission, in selecting persons qualified for jury service, uses as its primary source for names of prospective jurors lists on which not a single Negro is named. Other methods used by the Commission for obtaining names account for the appearance of only seven Negroes in the County jury box (used instead of a jury wheel) in the twelve-year period from the Spring of 1953 until this action was commenced. After this suit was brought, the Jury Commissioners added the names of 19 Negroes to the jury box.

Thus, from Spring 1953 to the time this suit was filed, Negroes comprised little more than 1% of the persons selected by the Commissioners as eligible and qualified for jury service. Census figures indicate that Negroes comprise 72.0% of the adult male population of Lowndes County.[1/]

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1/ 71.6% of the adult male population between the ages of 20-64 are Negro.

B. Census Statistics

The 1960 Census shows the following population figures for Lowndes County, Alabama:

| | Number | Percentage of Group Without Racial Differentiation |
|---|---|---|
| White Male Population | 1,436 | 19.3% |
| White Female Population | 1,542 | 19.4% |
| Total White Population | 2,978 | 19.3% |
| Non-white Male Population | 6,043 | 80.7% |
| Non-white Female Population | 6,396 | 80.6% |
| Total Non-white Population | 12,439 | 80.7% |
| TOTAL COUNTY POPULATION | 15,417 | |
| White Males 21 and over | 889 | |
| Non-white Males 21 and over | 2,282 | |
| Total Males 21 and over | 3,171 | |
| White Females 21 and over | 1,011 | |
| Non-white Females 21 and over | 2,840 | |
| Total Females 21 and over | 3,851 | |
| TOTAL 21 AND OVER | 7,022 | |
| White Males 21 to 65 | 738 | |
| Non-white Males 21 to 65 | 1,798 | |
| Total Males 21 to 65 | 2,536 | |
| White Females 21 to 65 | 789 | |
| Non-white Females 21 to 65 | 1,278 | |
| Total Female 21 to 65 | 2,067 | |
| TOTAL 21 to 65 | 4,603 | |
| White Heads of Households | 938 | |
| Non-white Heads of Households | 2,476 | |
| TOTAL HEADS OF HOUSEHOLDS[2/] | 3,414 | |

2/ U.S. Bureau of the Census. U.S. Census of Population: 1960, General Population Characteristics, Alabama. Table 27, Age by Color and Sex for Counties: 1960, p. 2085.

C. Qualified Negro Potential Jurors

Substantial numbers of Negro citizens residing in Lowndes County were shown at the hearing to be qualified for jury service under Alabama law. Two Negro citizens residing in the County testified at the trial both as to their own qualifications and their ability and willingness to provide the names of other qualified Negroes in their communities.[3/] Upon agreement of counsel, testimony to similar effect from five other Negroes was read into the record.[4/] Moreover, counsel stipulated that there are qualified Negroes in Lowndes County whose names have not been placed on the jury rolls or in the jury box.

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3/ Mr. William Bradley and Mr. William Cosby

4/ Mr. A. R. Stickney; Mr. Dennis Linden; Mr. R. C. Maye; Mr. John Henry Webb; Mr. Ed Moore King.

D. Procedures for Selection of Lowndes County Jurors

Jury selection methods in Lowndes County are best understood if one focuses on the jury box, a small metal box usually kept in the safe of the Lowndes County Clerk's Office. The box contains jury cards -- approximately the size of calling cards -- on each of which appears the name, residence and occupation of a prospective juror.[5/] Cards are drawn from this box to provide approximately 110 jurors for each term of court; the names are placed on two venire lists from which jurors are selected to try particular civil and criminal cases.[6/]

Cards are periodically drawn from the jury box to furnish venires and consequently the box is replenished from time to time. When the number of cards in the jury box is so depleted that the Circuit Judge cannot make a complete draw, he notifies the clerk of the Jury Commission, who then informs the Jury Commissioners that the box requires refilling.[7/] At times the Commissioners fill the box on their own initiative.[8/]

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5/ See Plaintiff-Intervenor's Exhibit #1; henceforth exhibits of Plaintiff-Intervenor will be cited by number only.

6/ Deposition of Mr. M. E. Marlette, 5-8; hereinafter cited as Marlette.

7/ Marlette 4.

8/ Judge Thagard.

The actual process of replenishing the box takes place at Jury Commission meetings held in the County Courthouse.[9] Before the meetings, attended by the three Commissioners and the clerk, either the clerk or one of the Commissioners borrows the most recent qualified voter list from the County Probate Office, located in the Courthouse.[10]

At the meeting, one of the Jury Commissioners reads the names of all males on the qualified voter list.[11] Most persons on the voter list are known to the Commissioners and they are either summarily approved or rejected as prospective jurors. Discussion of qualifications is generally unnecessary.[12]

The commissioners exclude from the box persons known to be teachers, preachers, over sixty-five years of age or physically disabled, and individuals previously convicted of crimes or having poor character reputations. However, there was testimony that a person will be disqualified on character grounds only where there are serious questions as to his reputation, as where the jury commissioners have knowledge that a person is a "voter seller."[13] Literacy is not an absolute prerequisite in order for a person to be deemed qualified for jury service. Indeed, the

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9/ Marlette, 7.

10/ Id. at 9-10.

11/ Id. at 11, 15.

12/ Testimony of Mrs. Kelly D. Coleman, present Clerk of Court and of the Lowndes County Jury Commission, hereinafter cited as Coleman.

13/ Marlette 32-34.

Jury Commissioners have not had means for testing a person's ability to read and write. At trial counsel stipulated that the names of illiterates, both Negroes and whites, have been placed in the jury box in the past.

By statute, Alabama bars all women from serving on juries in the state courts.[14/]

As names are read from the qualified voter list, those that are approved by the Commissioners are recorded on individual jury cards.[15/] The cards are placed in the jury box, but only after they are checked against the cards remaining in the box so that no duplication will occur.[16/]

Before each term of court, the presiding judge of the Second Judicial District (Lowndes County) draws at random from the box a sufficient

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14/ Code of Ala., Tit. 30, §21.

15/ Marlette, 11.

16/ Id. at 36.
During most of the period from the Spring of 1953 to the present, the jury roll was not maintained on a current basis. Only sporadically did the clerk, following Jury Commission meetings, record on the jury roll the names which had been approved by the Commissioners and placed on cards in the jury box. The record shows that entries were made in the jury roll from 1953 to 1956, then again in 1960, and finally in 1965. Jury roll books for the period 1945-1953 could not be found.
It should also be pointed out that the clerk keeps no record showing who serves on juries. Nor is any list compiled showing all persons in Lowndes County between 21 and 65 years of age. And, since 1940, no minutes have been kept of Jury Commission meetings. (Compare Minutes of Jury Commission, 1909-1939, Exhibit 9A.)

number of cards, usually 110, to provide jurors for the coming term.[17/] The names of the prospective jurors are then listed on two venire lists, one for the first week of the court session during which civil cases are heard, and one for the second week during which criminal matters are tried. It is from the jurors listed on these venires and summoned to court by subpoenas served by the sheriff that counsel, employing the strike system, select the twelve jurors who sit on a particular case.

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17/ Judge Thagard; Marlette, 20-21.

E. Sources For Jurors

1. Qualified Voter Lists

A former clerk of the Jury Commission testified that the primary source of names used by the Commissioners in filling the jury box with cards bearing the names of prospective jurors was the qualified voter lists.[18]

The extent to which the qualified voter lists were used by the Commissioners is revealed by comparing the venire lists from Spring 1953 to the present with contemporaneous voter lists. This analysis shows that 98.0% of the names on the venires of prospective jurors appear on the contemporaneous voter lists.[19]

The qualified voter list typically included the names of approximately 1,200 male citizens.[20]

Commissioner Jackson testified, and it was thereafter stipulated by counsel at trial, that no Negroes were registered to vote in Lowndes County prior to March 1, 1965.

Thus, there were no Negro names on the qualified voter lists used by the Commissioners as their primary source for finding prospective jurors.[21]

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18/ Marlette, 9.

19/ See Appendix I.

20/ Exhibit #4.

21/ About 196 Negroes registered between March 1, 1965 and August 9, 1965, the date federal examiners began to operate in Lowndes County.

2. Other Sources

The qualified voter lists were not the exclusive source for names of persons considered and deemed qualified as potential jurors by the Commissioners. To supplement the names drawn from the voter lists, the Commissioners placed the names of some non-registered persons with whom they were personally acquainted in the jury box. Commissioner Bruce Crook testified that he put Negroes in the jury box every year he served. Commissioner Jackson testified that he put Negroes in the box "right along." On the other hand, Commissioner Barganier stated that he had never put Negroes in the box until the Fall of 1965.

F. The Result

1. Exclusion of Negroes

As a result of the efforts of Commissioners Crook and Jackson in choosing some prospective jurors from among their own acquaintances rather than from the all-white voting lists, the names of seven Negroes were placed in the jury box from the Spring of 1953 until August 25, 1965, the date this action was commenced.

The record is not clear as to when these seven Negroes were initially selected but Tom McCall and Oscar Means, Negroes, were first listed on a

venire in the Spring of 1953; Will Thomas, Negro, was first listed in the Spring of 1954; Arthur King, Negro, in the Spring of 1957; Joe Miles, Negro, in the Fall of 1957; Morris Douglas, Negro, in the Fall of 1960; and Arthur Means, Negro, in the Spring of 1962. In all, these 7 Negroes were drawn for jury service a total of 19 times.[22/]

After the complaint in this action was filed, the County Jury Commission met to replenish the jury box.[23/] At that time, prompted by the pendency of this suit,[24/] the names of nineteen Negroes were placed in the box.[25/] Commissioner Barganier testified that he came to the meeting supplied with the names of ten Negroes he deemed qualified to serve as jurors. However, all ten names were not placed in the jury box by the Jury Commissioners because after the Commissioners had selected nineteen Negroes, they thought they had "enough."

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22/ See Appendix II.

23/ Coleman.

24/ Ibid.

25/ See Appendix II.

Two-thousand, seven hundred and forty-eight names, including many repetitions, have appeared on the venire lists compiled in the period from Spring 1953 to the present. Twenty-six names of Negroes (including repeats) appeared on the venire lists in this period.[26] No Negro has ever served on a civil or criminal petit jury in Lowndes County.[27]

Statistically these facts prove that from the Spring of 1953 to the time this suit was filed, Negroes comprised little more than 1% of the persons selected by the Commissioners as eligible and qualified for jury service.

2. The Limited Pool of White Jurors

Finally, it should be pointed out that the Jury Commissioners, in addition to placing only 26 Negro names in the jury box from the much larger group of Negroes concededly qualified to serve, followed procedures which restricted the number of different qualified white persons whose names were placed on cards in the jury box. Our analysis of the Lowndes County jury records demonstrates that a very limited number of jurors have constituted the core of the County jury system, and that the names of this limited group have been repeatedly recirculated through the jury box.

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26/ Their names and the dates of the appearances are shown at the end of Appendix II. See also Appendix I.

27/ Judge Thagard.

The names of only 670 persons have been on cards in the box since the Spring of 1953. Of these 670 individuals, 211 have had their names in the box six or more times, and some as many as fifteen or sixteen times.[28/] These 211 persons collectively account for 66.5% of the total of 2,748 names (counting repeats) that have appeared on venire lists from the Spring of 1953 to the present. The record further shows that 57 of these persons were called for jury service in three successive terms, 7 in four successive terms.[29/] Forty of the sixty-five persons listed on the venire for the week in which Thomas L. Coleman was tried for the murder of the Rev. Jonathan Daniels had been called for jury service a minimum of six times each during the previous twelve years. Including the call for the Coleman trial, these 40 persons appeared on the venire lists a total of 347 times since the Spring of 1953, an average of more than 8 times each.

In sum, the record shows that during the past twelve years, jury service in Lowndes County has been limited to adult white male citizens, with Negroes and women systematically excluded, and further that the white males who have served have generally been drawn from a nucleus of perpetual jurors.

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28/ See Appendix III.

29/ See Appendix III.

ARGUMENT

I

The systematic exclusion of Negroes from participation in the administration of justice in Lowndes County is unconstitutional as violative of the Fourteenth Amendment

The plaintiffs in this civil action assert the right of Negroes collectively to be free from racial discrimination in jury selection procedures. They invoke the undoubted constitutional principle that systematic purposeful discrimination against Negroes in selecting persons qualified for jury service involves arbitrary State action directly contrary to the Equal Protection Clause of the Fourteenth Amendment.[1/] The United States joins in the assertion of this right because the Attorney General regards this case as one of general public importance.

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1/ Mr. Justice Jackson, in his dissent in Cassell v. Texas, 339 U.S. 282, 298, suggested that remedies for jury exclusion other than release of criminal defendants had unfortunately been neglected.

(continued on following page)

The rule of law that Negroes may not systematically be excluded from the opportunity to serve on civil and criminal juries, grand and petit, in the state and federal courts has several basic aspects. The qualified Negro citizen has a right not to be denied participation in the democratic institution by which all citizens become most directly involved in the administration of justice. When Negroes are excluded from jury service because of their color, the action of the State "is practically a brand upon them, affixed by law, an assertion of their inferiority." Strauder v. West Virginia, 100 U.S. 303, 308.

Negroes who become involved in the litigation process, whether as civil plaintiffs or defendants, or criminal defendants, also have a right, under the Fourteenth Amendment, that members of their race not

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1 / (continued from preceding page)

> "Qualified Negroes excluded by discrimination have available ... remedies in a court of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible." Id at 303-304.

be systematically excluded from jury service. In the classic words of Strauder v. West Virginia, supra:

> The very idea of a jury is a body of men composed of the peers or equals of the persons whose rights it is selected or summoned to determine; . . .

Law abiding Negroes have a right, as do all citizens, to equal protection of the law afforded by a fairly administered system of justice.

The record in this case shows wide disproportions between the number of qualified Negro jurors in Lowndes County and the number of Negro names placed in the jury box by the defendants. This proof, without more, justifies an inference of systematic exclusion on racial grounds sufficient to show that the plaintiffs have been denied the constitutional rights they assert. Reece v. Georgia, 350 U.S. 85, 88 (1955); Hernandez v. Texas, 347 U.S. 475 (1954); Brown v. Allen, 344 U.S. 443, 477, 481 (1953); United States ex rel. Seals v. Wiman, 304 F.2d 53 (5 Cir. 1962); United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5 Cir. 1959). Cf. Swain v. Alabama, 380 U.S. 202. Moreover, the concrete evidence strongly confirms this inference of discrimination. The hearing demonstrated that the Jury Commissioners, in seeking sources for the names

of potential jurors, relied almost exclusively upon lists from which Negroes were excluded. The jury selection system, based on the use of all-white county voting lists as the primary source for names, necessarily excluded from any methodic consideration the entire Negro population of the county. The token and haphazard inclusion of a few Negro names (slightly more than 1%) from among the Commissioners' acquaintances did not, in any way, overcome the discrimination inherent in the system.

In sum, the Jury Commissioners, by using almost exclusively white sources, clearly pursued "a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." Hill v. Texas, 316 U.S. 400, 404. The defendants neither rebutted nor explained the clear proof of systematic exclusion. No defense was made and none could be made.

Furthermore, the records reveal a jury selection system which operated in practice not only to exclude virtually all Negroes, but to limit jury service to a small, select group of white males chosen from the available white male population. This additional factor makes

the need for relief on this record particularly pressing because the club-like quality of the Lowndes County jury system magnifies the evils of systematic exclusion of Negroes.

Evidence introduced at the hearing shows that, during the past twelve years, a nucleus group of 211 persons were repeatedly placed on venire lists. These 211 persons were called to serve so often that they accounted for 66.5% of the appearances on all venires since the Spring of 1953. Such an extraordinarily narrow base for a jury system entails obvious dangers to the fair administration of civil and criminal justice. Prosecutors and jury commissioners alike can learn too well the proclivities of a person who is called for jury service sixteen times within twelve years. There is great danger that jury commissioners who have shown a bias against Negroes by purposefully and systematically excluding them will consciously apply the same bias in repeatedly selecting the few white persons systematically included, choosing primarily

persons who, in practice, have shown themselves to share the Commissioners' prejudices. Furthermore, the concentration of service within a relatively small group runs contrary to the historical justification of the jury as an instrument for diffusing the State's power.

In sum, the Lowndes County jury system has been shown, beyond all doubt, to discriminate purposefully and intentionally against the Negro race by systematically excluding Negroes from jury service and repeatedly including a select group of white persons as prospective jurors.

II

The statutory exclusion of women from jury service in Alabama is unconstitutional.

Jury service should be considered by this court as one of the basic rights and obligations of citizenship. For many citizens it is, together with the right to cast a ballot, their most direct opportunity to participate in the operation of government. Nevertheless Alabama law completely bars women from serving on juries. We join the plaintiffs in asking this

Court to declare this statutory ban unconstitutional. We believe that the Court's ruling requiring that women be afforded an opportunity to serve as jurors can and should be prospective in its application.

A. The Complete Exclusion of Women from Jury Service in Alabama is Arbitrary.

Those who seek to justify different treatment of men and women in regard to jury service rely on one basic reason -- a woman's place is properly in the home. In recognition of the burdens of motherhood and family it is permissible, so the argument runs, for a state to make the legislative judgment that all women should be relieved of the civil obligations of jury service. Compare Hoyt v. Florida, 368 U.S. 57.

This proposition, although it may constitutionally allow a jury system which permits individual women to be excused from jury service, cannot justify total and absolute exclusion of women from jury service. Single women, women who are married with grown families, women who can discharge their homemaking responsibilities

without remaining full time in the home, all are excluded by Alabama law even though they are available, capable, willing, and otherwise qualified to serve. The homemaking rationale does not justify their blanket exclusion and no other reason has been advanced to justify the statutory ban.

Only three states -- Alabama, Mississippi, and South Carolina -- totally bar women from jury service. All others either treat women and men on the same basis, or provide some form of voluntary service for women.[2/]

Even assuming that a "woman-in-the-home" policy would justify a complete exclusion of women from jury service, it is difficult to so justify Alabama's exclusion. Viewed in the face of Alabama's very enlightened policy with respect to participation by women in other forms of civic duty, exclusion from

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2/ See Appendix IV

jury service seems both arbitrary and anomalous. Women hold extremely responsibile positions in Alabama which require full time commitments, not just the one or two days generally necessary for jury service. Mrs. Agnes Baggett is Secretary of the State of Alabama. Mrs. Bettye Frink is State Auditor. Judge Annie Lola Price presides over the Alabama Court of Appeals. Many women serve on the various boards of registrars. Miss Hulda Coleman is School Superintendant in Lowndes County.[3/] Women are employed by the State and counties as teachers, clerks and typists. All these tasks and duties take the women involved out of the home.

In face of Alabama's otherwise enlightened recognition of woman's right to full participation in State citizenship, it is especially true that Alabama's complete exclusion of women from jury service is arbitrary.

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3 / See Alabama Directory, 1965, Plaintiff's Exhibit #1.

B. The Development of Equal Protection Clause Notions Supports Plaintiff's Challenge.

Plaintiff's attack on Alabama's complete exclusion of women from jury service is based on the Equal Protection Clause of the 14th Amendment. So rooted, their argument may be met by the contention that, as an historical matter, the 14th Amendment was not intended to require the states to make women eligible for jury service. Compare Hernandez v. Texas, 347 U.S. 475. We believe that any such response would misconceive the function of the constitution and the courts' obligations in interpreting it.[4/]

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4/ See Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. Chi. L.R. 502 (1964).

We may assume, arguendo, that in 1867 the framers of the 14th Amendment would not have thought total exclusion of women from jury service arbitrary. That alone should be no more determinative or limiting on courts today than was the apparent failure of the original framers in 1787 to conceive of the "right to counsel" in terms of the present-day values embodied in Gideon v. Wainwright. The constitution should be read as embodying general principles meant to govern society and government as they evolve through time. The continuing vitality of the document would be seriously impaired were it interpreted to reach no more than the specific applications that might have been in the framers' minds. It is the court's function to apply the constitution as a living document to the legal cases and controversies of contemporary society. No less was meant when Chief Justice Marshall said "We must never forget, that it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

C. This Court's declaration that Alabama's complete prohibition of jury service by women is unconstitutional should be prospective in its application.

This case is a civil action in which female plaintiffs assert a right to be considered eligible for jury service without regard to their sex. It is markedly different from the claims which might be asserted by state prisoners contending that their convictions should be overturned because women were excluded from their juries. The right asserted by the plaintiffs in this case has little or nothing to do with the criminal defendant's right to trial by an impartial jury.

As the Supreme Court stated in Linkletter v. Walker, 381 U.S. 618, 627:

> [T]he effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations ... and particular conduct ... of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'

It cannot be assumed that Alabama's statutory exclusion of women from jury service renders unfair the trial in criminal cases. In the usual case where systematic exclusion of a racial class of persons from jury service is proved, the exclusion is the result of a current and continuing decision on the part of jury officials to discriminate against members of the excluded race. In such cases the bias of the jury commissioners is presumed to be reflected in racial bias on the part of the jury, and hence to result in an unfair trial to a defendant of the excluded race.

The same may not be said of Alabama's statutory exclusion of women. Alabama's decision to exclude women was not intended to produce biased juries, nor should such bias be presumed. The decision to exclude women was taken at a time in history when, we concede, it was not considered arbitrary or irrational to limit jury service to men. The decision is continued, not by present and conscious intention on the part of jury commissioners, but because it is rooted in statute, and legislative momentum has not developed sufficient to cause its repeal. Thus, although we think it clearly arbitrary and therefore unconstitutional for Alabama to presently exclude women from juries, we do not think that the exclusion necessarily results or has resulted

in unfair trials to criminal defendants. We see the right here asserted not as that of criminal defendants, but of women who want the opportunity to participate fully in the obligations and indicia of citizenship -- women who are arbitrarily denied that opportunity by Alabama law.

Until today the Alabama statute has been regarded and relied upon as constitutional. It is not contended that in the past it has been applied arbitrarily. We think that public policy is best served by a holding that a decision in this issue has no retroactive effect.

D. Prior cases are readily distinguishable.

The cases of primary concern to the court are Strauder v. West Virginia, 100 U.S. 303, particularly at 310; Fay v. New York, 332 U.S. 261, particularly at 289-290; and Hoyt v. Florida, 368 U.S. 57, particularly at 60. Strauder involved a statutory exclusion of Negroes, not women; the reference made to women in the opinion was dictum. Both Fay and Hoyt were concerned with systems of jury selection under which jury service by women was voluntary.

None of these cases involved a complete ban on jury service by women.

None were civil cases brought by civil plaintiffs urging their right not to be deemed ineligible as a class to participate in jury service.

None were shown to involve a statutory ban which was inconsistent with other state policies toward women.

For these reasons, we believe this Court should declare that, for the future, women have a right not to be excluded as a class from jury service in the Alabama courts.

## Effective relief requires a Specific and Mandatory Decree

This case is among the first civil cases brought to remedy systematic exclusion of Negroes from jury service. This form of redress was suggested by Mr. Justice Jackson dissenting in Cassell v. Texas, 339 U. S. 282, 298, 303 as a "direct and effective" means to eliminate unconstitutional discrimination. The efficacy of civil actions will largely depend upon the ability of the courts to design relief fully capable of correcting discriminatory jury exclusion practices.

In considering the appropriateness and scope of the relief in this case, we call to this Court's attention a statement of the 5th Circuit in Alabama v. United States (1962) 304 F.2d 583. That case involved a novel and detailed mandatory injunction in a voting case:

> Mandatory injunctions affirmatively compelling the doing of some act, rather than merely negatively forbidding continuation of a course of conduct, are a traditional tool of equity. Long ago we said "an injunction may compel the performance of a duty." Loisel v. Mortimer, 5 Cir., 1922, 277 F. 882, 886. . . .
>
> In prescribing a suit to be brought by the sovereign for equitable relief, the statute contemplates that the full and elastic resources of the traditional court of equity will be available to vindicate the fundamental constitutional rights sought to be secured by the statute. Once Congress has vested jurisdiction of the cause in a District Court, such Court has, in the absence of statutory limitations, all of the traditional powers and facilities of a court of equity. Williamson v. Berry,

8 How. 495, 12 L.Ed. 1170; Sprague v. Ticonic National Bank, 1939, 307 U.S. 161 59 S.Ct. 777, 83 L.Ed. 1184. Where a federal statute establishes a general right to sue, "federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 1946, 327 U.S. 678, 684, 66 S.Ct. 773, 776, 90 L.Ed. 939; Dooley v. United States, 1901, 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074, see especially 228-230, 21 S.Ct. 762, 45 L.Ed. 1074. This may at times even require that a body of federal substantive law be fashioned to effectuate the policy underlying the grant of jurisdiction. Textile Workers Union v. Lincoln Mills, 1957, 353 U.S. 448, 451, 460, 77 S.Ct. 912, 923, 1 L.Ed. 2d 972.

The aim of equity is to adapt judicial power to the needs of the situation. Thus relief in matters of public, rather than private, interests may be quite different from that ordinarily granted. Though language frequently employed might be thought to place this result on the nature of the litigant - the sovereign or an agency of Government - it is really a manifestation of the principle that the nature of the relief is to be molded by the necessities. Porter v. Warner Holding Co., 1946, 328 U.S. 395, 397, 66 S.Ct. 1086, 90 L.Ed. 1332; Hecht Co. v. Bowles, 1944, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754. The necessities will encompass, of course, special statutory objectives. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. . . .

Here the matter at stake is the fulfillment of a policy wrought out after extensive consideration of what Congress thought to be contemporary evils by States and agencies of States in the spurious, sometimes sophisticated, sometimes crude, practices by which Negroes were effectively denied the right to vote because of color and race alone. It was this evil which brought about the statute. It is inconceivable that in its enactment Congress meant by this broad language to grant less than effective judicial tools to combat it. Especially is this so since Congress must have been aware that in the context

> of racial civil rights matters mandatory orders were being issued and approved in school desegregation cases requiring admission in accordance with specific plans.

All that was said there applies as well to a case in which the United States is a party plaintiff challenging corruption in the administration of justice.

Alabama's statutory scheme governing selection of names for jury service may be envisioned as a two-step process. The Clerk of the Jury Commission first prepares a comprehensive list of all the names of male citizens of the county over 21 and under 65. In performing this task all documentary sources of names are tapped -- voter lists, directories, telephone books, and the like. These sources are supplemented by personal trips into the various precincts of the county.[5] Then, using the list compiled by the Clerk, the Jury Commissioners select therefrom all males in the county whom they deem qualified and place their names on the jury roll and in the jury box.

Alabama's qualifications for jury service require that a citizen be:

(1) Generally reputed to be honest and intelligent and esteemed in the community for his integrity, good character and sound judgment;

(2) Over 21;

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5 / Code of Alabama, Tit. 30, §§ 18, 24.

(3) Not an habitual drunkard or afflicted with a permanent disease or physical weakness, making him unfit to discharge the duties of a juror;

(4) Not convicted of any offense involving moral turpitude; and

(5) Able to read English.

If a person cannot read English and has all the other qualifications prescribed above and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.[6]

Persons exempted from jury duty are listed in section 3, Title 30 of the Alabama Code. Exemptions may be waived by the prospective juror, Pate v. State, 158 Ala. 1, 48 So. 388.

As the record shows, in Lowndes County, the Jury Commission operated the jury selection system without regard to either state or federal law. Although this court does not sit to enforce state law, it would be appropriate in fashioning relief for the proven violations of federal law for the court to tailor its decree to the scheme of state law as much as is practical and consistent with the object of eliminating discrimination in the Lowndes County jury selection system. Emphasis should be placed on "practical."

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6 / Code of Ala., Tit. 30, §21.

Complete adherence to the merely directory, non-mandatory Alabama laws governing jury selection would be extraordinarily demanding on both the clerk and members of the Jury Commission.

At the same time, corruption in the administration of justice in Lowndes County must be eliminated. To accomplish this, we propose that the Clerk be required to perform a considerable administrative task of assembling a comprehensive list of citizens who live in Lowndes County. We propose that if the Commissioners impose a literacy requirement, that it be fair and objective and administered to all in a nondiscriminatory manner. We propose that, until further order of this Court, the Commissioners be deprived of their power to judge citizens for jury service on the basis of subjective standards such as honesty, intelligence, esteem in the community, integrity, good character, and sound judgment. Past performance by the Commissioners requires that these standards be suspended.

Our proposed decree recognizes the possible burden placed on the clerk of the Jury Commission were he required to scan all possible sources and obtain a <u>totally</u> comprehensive list of the persons in Lowndes County. We therefore propose that the clerk be required to scan only the tax assessor's list, the Lowndes County qualified voter list, and the list of qualified voters compiled by the federal examiners pursuant to the Voting Rights Act of 1965. We believe that these three lists, taken together, will provide

a nondiscriminatory and substantially comprehensive cross-section of the citizens of Lowndes County. We further propose that the jury commissioners make their selections of qualified jurors from that list, applying only certain of the qualifications set out in the Alabama statutes.

Furthermore, we recognize the practical difficulties which would be faced by the Jury Commission in putting into the jury box the names of every qualified juror on the comprehensive list prepared by the clerk. We therefore suggest in our proposed decree an objective method by which the number of names considered by the Jury Commission can be fairly limited. Essentially our proposed method directs the jury commissioners to choose from the comprehensive list every nth name, with n being whatever number is necessary depending on the length of the comprehensive list to obtain a minimum of 500 names in the jury box. The figure 500 was chosen to insure that the Jury Commissioners place enough names in the jury box to obtain a full cross-section of the county. Of the names considered by the jury commissioners, all who meet Alabama's non-subjective qualifications for jury service should be placed in the jury box.

We propose that the subjective criteria for determining jury service in Lowndes County be suspended because, in our view, suspension is necessary if jury discrimination is to be completely eliminated. It is no objection to granting this relief that the subjective criteria, viewed in isolation, might be capable of valid administration.

It is a settled principle of equity that when important rights have been violated, the judicial remedy may go beyond restraining the plainly unlawful conduct and may prohibit the defendant from engaging in associated practices which others might lawfully do, and which even the defendant could do if he had not followed such practices to perpetuate the wrong done. Thus, in United States v. Bausch & Comb Co., 321 U.S. 707, 724 (1944), the Supreme Court entered an anti-trust decree directing that "subsequent price maintenance contracts, otherwise valid, should be cancelled, along with the invalid arrangements, in order that the ground may be cleansed effectually from the vice of the former illegality." "Equity has power," the Court said, "to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole."

Similarly, use of a licensing system was prohibited in Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940). There the Court said (309 U.S. at 461):

> Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to

> frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival. Local 167 v. United States, 291 U.S. 293; Warner & Co. v. Lilly & Co., 265 U.S. 526, 532. It could, in the exercise of its discretion, consider whether that could be accomplished without disestablishing the licensing system, and whether there were countervailing reasons for continuing it as a necessary or proper means for appellant to carry out other lawful purposes. Since the court rightly concluded that these reasons were without substantial weight, it properly suppressed the means by which the unlawful restraint was achieved. Local 167 v. United States, supra, 299, 300; cf. Merchants Warehouse Co. v. United States, 283 U.S. 501, 513. (emphasis added).

So too, in United States v. Gypsum Co., 340 U.S. 76, 89 (1950) the Court held that an equity decree "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal." Hence, it was said, "Acts entirely proper when viewed alone may be prohibited." 7/

The same principles govern racial discrimination cases. In United States v. Alabama, 304 F.2d 583 (C.A. 5, 1962), affirmed, 371 U.S. 37, this Court said that in enforcing the Fifteenth Amendment it would grant mandatory relief because "The aim of equity is to adopt judicial power to the needs of the situation" and that "the nature of the relief" to be granted in such cases "is to be molded by the necessities." 8/

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7/ Congress has often exercised the same broad power. See, e.g., Everard's Breweries v. Day, 265 U.S. 545, 560; Purity Extract Co. v. Lynch, 226 U.S. 192.

8/ Citing Porter v. Warner Holding Co., 328 U.S. 395 (1946); Hecht Co. v. Bowles, 321 U.S. 231, 329 (1944).

And in the by now well-known "freezing" cases this Court and the Supreme Court have frequently prohibited the use of the means of discrimination despite protestations that they would be used lawfully in the future.[9/] While the theory of these cases was that the application of literacy tests would perpetuate past discrimination, that in no way undermines the broad principle of these decisions that an otherwise valid system or practice, even though required by state law, should be banned by an equity court where such relief is essential to the complete elimination of discrimination.

Moreover, the relief we seek here is especially necessary where the "standards" set forth in State law are vague, discretionary, and inherently subject to abuse. Cf. United States v. Louisiana, 380 U.S. 145, 153 (1965) (literacy test banned because it left "the voting fate of a citizen to the passing whim or impulse of an individual registrar.").

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9/ E.g., United States v. Duke, 332 F.2d 759 (C.A. 5, 1964); United States v. Wilbur Ward, 345 F.2d 857 (C.A. 5, 1965); United States v. Louisiana, 380 U.S. 145 (1965).

On the basis of these authorities, the subjective standards prescribed by Alabama law for the selection of jurors should be suspended by this Court. The evidence of past discriminatory practices makes it clear that the defendants cannot be trusted to fairly administer criteria which leave wide latitude for racial manipulation. Nothing short of this relief would satisfy the "necessities" of this case and the "needs of the situation" shown by the record.

We do not ask for a mandatory suspension of Alabama's literacy qualification. We propose, however, that persons otherwise qualified should not be excluded from the jury box for inability to read English unless an objective determination of that fact has been made. This objective determination could be made by the commissioners at either of two points in the jury selection process: (1) Persons selected from the comprehensive list could be summoned to the courthouse and tested by administering to them a simple form literacy test. Thereafter, if they passed the test, their names would be placed in the jury box; (2) Alternatively, names could be selected from the comprehensive list and placed in the jury box without regard to literacy. At the time when prospective jurors appear in court to do jury service, but prior to the actual opening of court, the prospective jurors could be tested by means on a simple form literacy test. Those unable to fill out the form could be excused. A simple three or four question form is all

that is needed to determine literacy and that form should be approved in advance by the court.[10/] Of course it would be open to the jury commissioners not to test literacy at all.

Persons who may later claim exemptions, including teachers and persons over 65, should not be excluded from the jury box. The circuit judge has a duty to see that exemptions and excuses are neither discriminatorily applied nor abused.

As a remedy for the unconstitutional exclusion of women from jury service the Court, in our view, should order the jury commissioners to make no differentiation because of sex in selecting names for jury service. Women called for jury service should be excused from such service only by the judge of the Second Judicial Circuit, and then only upon a showing of good cause.

To insure that these various jury selection procedures are fairly followed, we ask that the defendants be required to make a report to the court within 14 days of each refilling of the box. This report should include the names and race of all persons placed in the jury box, and the names, race and reasons for rejection of all persons considered by the Jury Commissioners and found unqualified.

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10/ On the basis of future experience, we may find that, in our view, it is unconstitutional to require a literacy qualification in Lowndes County. This could be the case if a large percentage of the Negroes in Lowndes County prove to be illiterate, and their illiteracy could be traced to a longstanding failure of the state to provide suitable public education for Negroes in Lowndes County. This issue is not presently before this court.

Finally, to insure that the object of eliminating discrimination in the Lowndes County jury selection process is not frustrated by purposeful discrimination at the later stages of the jury selection process, we propose that the defendants be required to maintain records, available at the courthouse, showing the names and race of persons not found by the sheriff in serving subpoenas for jury service, the names and race of persons excused by the judges sitting in Lowndes County, the reasons for such excuses, the names and race of persons struck from the venire panels in the process of obtaining civil and petit jurors, and the names of the attorneys who struck each person.

For the reasons set forth in this brief, plaintiff-intervenor requests this court to enter judgment in accordance with plaintiff-intervenor's proposed decree.

Respectfully submitted,

JOHN DOAR
Assistant Attorney General

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Washington, D.C. 20530

DECEMBER 1965.

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

GARDENIA WHITE, JESSE W. FAVOR, JOHN HULETT, LILLIAN S. MCGILL, WILLIE MAE STRICKLAND, THE EPISCOPAL SOCIETY FOR CULTURAL AND RACIAL UNITY, A Corporation, THE REV. JOHN B. MORRIS, THE REV. HENRI A. STINES, THE REV. ALBERT R. DREISBACH, JR., and THE REV. MALCOLM BOYD, for themselves, jointly and severally, and for all others similarly situated,

Plaintiffs,

UNITED STATES OF AMERICA, BY NICHOLAS deB. KATZENBACH, Attorney General of the United States,

Plaintiff-Intervenor,

vs.

BRUCE CROOK, HENRY BARGANIER, and J. H. JACKSON, as members of the Jury Commission of Lowndes County, Alabama, and CARLTON PERDUE, as County Solicitor of Lowndes County, Alabama, HARRELL HAMMONDS, as Judge of Probate of Lowndes County, Alabama, C. F. RYALS, as Sheriff of Lowndes County, Alabama, W. E. HARRELL, JR., as Foreman of the Grand Jury of Lowndes County, Alabama, T. WERTH THAGARD, as Judge of the Second Judicial Circuit of Alabama (Lowndes County), ARTHUR E. GAMBLE, JR., as Solicitor of the Second Judicial Circuit of Alabama (Lowndes County), and KELLY D. COLEMAN, as Clerk of the Second Judicial Circuit of Alabama (Lowndes County),

Defendants,

CIVIL ACTION

NO. 2263-N

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# PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

BEN HARDEMAN,
United States Attorney

JOHN DOAR
Assistant Attorney General

CHARLES NESSON,
GEORGE RAYBORN
Attorneys,
Department of Justice

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

| | |
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| GARDENIA WHITE, et al.,<br><br>Plaintiffs,<br><br>UNITED STATES OF AMERICA, By NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES,<br><br>Plaintiff-Intervenor,<br><br>v.<br><br>BRUCE CROOK, et al.,<br><br>Defendants. | CIVIL ACTION NO. 2263-N<br><br>PLAINTIFF-INTERVENOR'S PROPOSED FINDINGS OF FACT AND PROPOSED CONCLUSIONS OF LAW |

## PROPOSED FINDINGS OF FACT

1. This suit was brought as a class action on August 25, 1965 by male and female Negro residents of Lowndes County, Alabama, against the members of the Jury Commission of Lowndes County, Alabama. On September 9, 1965, the plaintiffs filed an amended complaint adding as defendants officials of Lowndes County, Alabama, having responsibilities in connection with the jury selection process. The plaintiffs allege that the defendants have systematically excluded Negroes and women from jury service in Lowndes County, Alabama.

2. On October 27, 1965 this Court granted leave to the United States to intervene, pursuant to 42 U.S.C. §2000h-2 (Section 902 of the Civil Rights Act of 1964) and Rule 24(b) of the Federal Rules of Civil Procedure.

3. The defendants in this suit include the members and Clerk of the Jury Commission of Lowndes County, Alabama and the Judge for the Second Judicial Circuit of Alabama (Lowndes County).

(a) Defendant Jury Commissioners Bruce Crook, J. H. Jackson, and Henry Barganier have been members of the Jury Commission for at least five years.

(b) Defendant Kelly D. Coleman assumed the offices of the Clerk of the Second Judicial Circuit of Alabama (Lowndes County) and Clerk of the Jury Commission on August 16, 1965 upon the retirement of Mr. Maurice E. Marlette.

(c) The Honorable T. Werth Thagard has been Judge of the Second Judicial Circuit of Alabama for at least five years.

(d) Responsibility for selecting persons to be listed on the Lowndes County jury roll and placed in the Lowndes County jury box rests with the defendant members of the Jury Commission, assisted by the defendant Clerk and subject to the direction of the defendant Circuit Judge.

4. Alabama Law states the following qualifications for jury service:

> The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so.

5. Lowndes County, as of the 1960 Census, had an adult male population of 3,171 of which 889 were white and 2,282 Negro.

6. The Jury Commissioners exclude from the jury box the names of persons who are teachers, preachers, and over 65 years of age.

7. The Jury Commissioners have not always required literacy as a qualification for jury service. Names of illiterate persons are now and have been in the past in the jury box.

8. In the selection of potential jurors the Jury Commissioners repeatedly selected the same white individuals which resulted in the systematic inclusion of a relatively small group of white persons. The names of 670 persons have appeared on venire lists since Spring 1953 a total of 2,748 times. Two hundred and eleven of these 670 individuals have had their names in the box 6 or more times, accounting for 66.5% of the appearances on venires.

9. Negroes are systematically excluded from jury service in Lowndes County, Alabama because of their race.

(a) No Negro has ever sat on a petit jury in Lowndes County, Alabama.

(b) Between Spring, 1953 and August 25, 1965, the date on which this suit was filed, the Jury Commission selected 7 Negroes for potential jury service. Subsequent to August 25, 1965, and prompted by the filing of this suit, the Jury Commission selected an additional 19 Negroes for potential jury service.

(c) The primary source of names used by the Jury Commission in filling the jury box is the list of persons qualified to vote in Lowndes County maintained by the Lowndes County Probate Office. Approximately 98% of the names selected by the Jury Commission were taken from these lists. Prior to March 1, 1965 no Negroes were registered to vote in Lowndes County, hence no names of Negroes appeared on these lists. The Jury Commissioners used no lists other than Qualified Voter lists as sources for names of qualified jurors. Members of the Jury Commission knew that no names of Negroes appeared on the Qualified Voter Lists.

10. Women are totally excluded from jury service by Alabama law on account of their sex.

## PROPOSED CONSLUSIONS OF LAW

1. This court has jurisdiction of this action under 28 U.S.C. §§1331, 1343 (3), 2201, 2281, and 2283.

2. This suit was properly brought as a class action pursuant to Rule 23(a), Fed. R. Civ. Pro.

3. The Attorney General is authorized to intervene in this action under 42 U.S.C. 2000h-2 (Section 902 of the Civil Rights Act of 1964).

4. The Equal Protection and Due Process clauses of the Fourteenth Amendment make unlawful the systematic exclusion of Negroes from jury service because of race. When a state employs the jury system in its administration of justice, no person can be excluded on account of his race from the jury selection process.

5. The Equal Protection Clause of the Fourteenth Amendment makes unlawful the complete exclusion of women from jury service because of sex. Therefore, the statutes and laws of Alabama, insofar as they bar women from jury service in Alabama, deny to women the equal protection of the laws, and to the extent that they so bar women are null and void.

6. The fact that the defendant Jury Commissioners approved the qualifications of only 7 Negroes for jury service in the twelve years prior to the date on which this suit was filed in a county where Negroes make up 72.0% of the adult male population and the fact that the defendant Jury Commissioners knowingly used as their primary source of names for jury service lists on which the names of no Negroes appear, together prove that these defendants purposefully and systematically excluded Negroes from jury service in Lowndes County on account of their race.

7. This being a case in equity, this Court has the power and duty to fashion such specific and comprehensive relief as will insure the nondiscriminatory functioning of the jury system in Lowndes County, Alabama.

IN THE UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

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| GARDENIA WHITE, et al., Plaintiffs, UNITED STATES OF AMERICA, by Nicholas deB. Katzenbach, Attorney General of the United States, Plaintiff-Intervenor, v. BRUCE CROOK, et al., Defendants. | CIVIL ACTION NO. 2263-N<br>PLAINTIFF-INTERVENOR'S PROPOSED ORDER AND DECREE |

Pursuant to the Findings of Fact and Conclusions of Law entered this date:

1. It is ADJUDGED, DECREED and DECLARED that the statutes and laws of Alabama insofar as they bar women from jury service in Alabama deny to women the equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution, and to the extent that they so bar women, are null and void, and shall henceforth be of no effect in the State of Alabama.

2. It is ORDERED, ADJUDGED and DECREED that the defendants, Bruce Crook, Henry Barganier, and J. H. Jackson, individually and as members of the Jury Commission

of Lowndes County, Alabama, Mrs. Kelly D. Coleman, individually and as Clerk of the Jury Commission of Lowndes County, Alabama, and Clerk of the Second Judicial Circuit of Alabama (Lowndes County), and the Honorable T. Werth Thagard, as Judge of the Second Judicial Circuit of Alabama (Lowndes County), their agents, officers, employees, successors in office, and all persons in active concert with them be and each is hereby enjoined from engaging in any act or practice which involves or results in discrimination by reason of race, color, or sex, in the selection of jurors for jury service in Lowndes County, Alabama. It is specifically ORDERED that:

(a) The jury box shall be emptied forthwith. No names shall be drawn therefrom until the jury box is refilled. The jury box shall be refilled before the Spring Term of Court, 1966, in the Second Judicial Circuit of Alabama (Lowndes County) and thereafter by the following procedures.

(b) On or before 30 days from the date of this decree Mrs. Kelly D. Coleman, as Clerk of the Second Judicial Circuit of Alabama (Lowndes County) and Clerk of the Jury Commission of Lowndes County, Alabama shall examine the current Qualified Voters List of Lowndes County, Alabama, the current Tax Assessor's List of Lowndes County, Alabama, and the lists compiled by federal

examiners in Lowndes County, Alabama pursuant to the Voting Rights Act of 1965, Public Law 89-110 filed with the Probate Judge of Lowndes County on or before the date of this decree and shall compile a comprehensive alphabetical list therefrom, to be known henceforth as the "Clerk's Comprehensive List," showing the name and address of all persons listed on the said Qualified Voter List, the Tax Assessor's list, and the federal examiners' lists. A copy of this list shall be filed with the Court on or before 35 days from the date of this decree.

(c) The Jury Commissioners shall meet regularly to pass on the qualifications of persons named on the Comprehensive List. If the number of names on the Comprehensive List is 999 or less, the Jury Commissioners shall consider the qualifications of all persons listed. If the number of names exceeds 999, the qualifications of persons named on the list shall be considered in accordance with the following schedule:

| Number of Names on the Comprehensive List | Commissioners shall consider |
|---|---|
| 1000 - 1499 | every 2nd name |
| 1500 - 1999 | every 3rd name |
| 2000 - 2499 | every 4th name |
| 2500 - 2999 | every 5th name |
| 3000 - 3499 | every 6th name |
| 3500 - 3999 | every 7th name |
| 4000 - 4499 | every 8th name |
| 4500 - 4999 | every 9th name |
| 5000 - 5499 | every 10th name |
| 5500 - 5999 | every 11th name |
| 6000 - 6499 | every 12th name |
| 6500 - 6999 | every 13th name |
| 7000 - 7499 | every 14th name |
| 7500 - 7999 | every 15th name |
| 8000 - 8499 | every 16th name |
| 8500 - 8999 | every 17th name |
| 9000 - 9499 | every 18th name |
| 9500 - 9999 | every 19th name |
| 10,000 or more | every 20th name |

(d) The Jury Commissioners shall select from the names so considered all persons who meet the following qualifications and no others:

(i) the person is a resident of Lowndes County, Alabama;

(ii) the person is a citizen over 21 years of age;

(iii) the person is not an habitual drunkard;

(iv) the person is not unfit to discharge the duties of a juror by reason of a permanent disease or physical weakness;

(v) the person has not been convicted of any offense involving moral turpitude;

(vi) the person can read English. If the person cannot read English, he or she may be considered qualified if he or she is a freeholder or householder.

If a person otherwise qualifies for jury service, the Jury Commissioners shall not disqualify that person from jury service on the ground that he or she cannot read English unless that person is

objectively determined to be unable to fill out a simple form seeking his or her name, address, and occupation, and unless the same standards and tests of literacy are being applied equally to all prospective jurors. Any person who is unable to read and fill out the form shall be asked to sign it or make a mark upon it and the form thus signed or marked shall be preserved as a record of the Court. The form to be used by the Jury Commissioners shall first be submitted to and approved by this Court.

(e) If a person considered by the Jury Commissioners in accordance with the above standards and procedures is found by them to be unqualified for jury service, the Jury Commissioners shall proceed to consider the qualifications of the person immediately following the disqualified person on the Clerk's Comprehensive List, and if that person is disqualified, the Clerk shall proceed to the next name on the list.

(f) As soon as the Jury Commission has qualified at least 500 persons, the names so selected by the Jury Commissioners shall be placed by them or at their direction on the jury roll and in the jury box. Cards in the jury box shall show no designation of race.

Names of qualified persons entitled to exemptions under Alabama law, including teachers, and persons over 65 years of age, shall not be excluded from the jury box, but if such persons, upon being called for jury service, claim their exemption, the presiding judge shall decide on the validity of their claim.

(g) The names of women appearing on the Clerk's Comprehensive List and considered by the Jury Commission who, but for sex, would be qualified for jury service under Alabama law shall be placed on the jury roll and in the jury box without distinction with regard to sex.

(h) The defendant Judge of the Second Judicial Circuit of Alabama may excuse a woman called for jury service only upon a showing of good cause.

(i) At least once every two years the Jury Commissioners and the Clerk of the Jury Commission shall empty the jury box and refill it according to the procedures set forth in this decree, including the compilation of a new Clerk's Comprehensive List. In selecting names for subsequent jury boxes, the Commission shall begin the selection by starting with the second name, or third name on the Clerk's Comprehensive List depending upon the number of times the Commission has made selections.

3. It is further ORDERED that the defendant Jury Commissioners, the Clerk of the Jury Commission and of the Second Judicial Circuit of Alabama (Lowndes County) and the Judge of the Second Judicial Circuit of Alabama (Lowndes County) submit to the Clerk of this Court in writing, with a copy sent to the Plaintiff-Intervenor, within fourteen days following each meeting of the Lowndes County Jury Commission at which names of prospective jurors are selected, a report. This report shall include:

(a) A copy of the Clerk's Comprehensive List, marked by said defendants to show (i) the race of each person on the list; and (ii) the names of the persons considered by the Jury Commissioners pursuant to paragraph 2(c) of this Decree;

(b) A separate listing of those persons on the Clerk's Comprehensive List who were considered by the Jury Commissioners and found by them to be unqualified for jury service; this listing shall also show the person's race and sex, and shall give a detailed and specific description of the reason or reasons why each such person was found to be unqualified.

If the disqualification was for inability to read English, a copy of the form required by paragraph 2(f) of this decree shall be appended to the report. If the disqualification was for conviction of a crime involving moral turpitude, the report shall state the nature of the crime and the date of the conviction.

4. It is further ORDERED that defendant Kelly D. Coleman as Clerk of the Second Judicial Circuit of Alabama (Lowndes County) and as Clerk of the Lowndes County Jury Commission shall submit to the Clerk of this Court in writing, with a copy sent to the Plaintiff-Intervenor, a notice showing the date, time and place at which the next regular drawing from the Lowndes County jury box is to be made by the Judge of the Second Judicial Circuit of Alabama (Lowndes County). This notice must be sent at least ten days prior to the time when each such drawing takes place.

5. It is further ORDERED that the said defendants shall henceforth keep or cause to be kept the following records available for public inspection, and shall make all such records available for inspection and copying by agents of the United States at any reasonable time:

(a) Complete jury roll books;

(b) Civil Minutes showing the venires made up for each civil week of court, the

name, race, address, and occupation of each person on the venire; the name and race of each person not served by the sheriff with a subpoena to appear for jury service and the reason for the sheriff's failure of service; and the name and race of each person excused by the Court from grand or petit jury service and the reason for the excuse;

(c) State Minutes showing the venires made up for each criminal week of Court; the name, race, address and occupation of each person on the venire; the name and race of each person not served by the sheriff with a subpoena to appear for jury service and the reason for the sheriff's failure of service; and the name and race of each person excused by the Court from jury service and the reason for the excuse;

(d) Records for each separate civil and criminal case tried before a jury in Lowndes County, Alabama showing the panel from which the jury for the case was struck,

the persons struck from the panel, the attorneys who struck each person with specific indication which attorney struck which person, the business address of each attorney, and if an attorney is employed by the State or County, an indication to that effect.

The Court retains jurisdiction of this cause to amend or modify this decree and to issue such further orders as may be necessary or appropriate.

The costs incurred in this proceeding to date are hereby taxed against the defendants.

Done this _____ day of _____, 1966.

_____
United States Circuit Judge

_____
United States District Judge

_____
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and Appendices, Proposed Findings of Fact and Conclusions of Law, and Proposed Order for Plaintiff-Intervenor has been served by official U. S. mail in accordance with the rules of this Court to the attorneys for plaintiffs and defendants, addressed as follows:

Charles Morgan, Jr.
5 Forsyth Street, N. W.
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Richmond M. Flowers
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Leslie Hall
Assistant Attorney General
of Alabama
Montgomery, Alabama

This 23rd day of December, 1965.

JOHN DOAR
Assistant Attorney General
Department of Justice

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

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| GARDENIA WHITE, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| UNITED STATES OF AMERICA, By NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, | ) | CIVIL ACTION NO. 2263-N |
| | ) | |
| Plaintiff-Intervenor, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BRUCE CROOK, et al., | ) | |
| | ) | |
| Defendants. | ) | |

REPLY BRIEF FOR THE PLAINTIFF-INTERVENOR

BEN HARDEMAN,
United States Attorney

JOHN DOAR
Assistant Attorney General

CHARLES NESSON,
GEORGE RAYBORN
Attorneys,
Department of Justice

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

| | | |
|---|---|---|
| GARDENIA WHITE, et al., Plaintiffs, | ) | |
| UNITED STATES OF AMERICA, By NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, Plaintiff-Intervenor, | ) | CIVIL ACTION NO. 2263-N |
| v. | ) | |
| BRUCE CROOK, et al., Defendants. | ) | |

REPLY BRIEF FOR THE PLAINTIFF-INTERVENOR

I.

Mitchell v. Johnson, Civil Action No. 649-E, decided by this Court January 18, 1966, demonstrates that broad equitable relief is available against jury officials who fail in their "clear, affirmative duty" to see that "there is a nonracial jury selection." That decision establishes the right of Negroes as a class "to be free from racial discrimination

in jury selection procedures." This Court reaffirmed the constitutional principle, in the context of a civil action, that "purposeful discrimination against Negroes in selecting persons qualified for jury service involves arbitrary state action directly contrary to, and in violation of, the equal protection and due process clauses of the Fourteenth Amendment."

Mitchell v. Johnson also recognizes that the Alabama statutory scheme for jury selection, from which the defendants so clearly departed, is relevant in fashioning relief. As Judge Johnson wrote, "the purpose of the Alabama statutes is to insure at least a reasonable approximation to the requirements that jury venires include all qualified persons, and, hence, represent a cross-section of the community, with no significant groups being excluded without justifiable reasons."

Finally, it was said, "there is no question ... that under Section 1983, Title 42, United States Code, these plaintiffs, under the evidence in this case, are entitled to have the defendants adopt procedures that will insure that they and all other qualified members of their class in Macon County serve on juries."

These principles apply fully to the present case.

II.

Defendants make two basic arguments in the brief filed on behalf of defendant T. Werth Thagard to which we would like to respond. The contentions advanced are:

(1) Judge Thagard bears no responsibility for the discriminatory acts of the Lowndes County jury commissioners and, therefore, should not be subject to this Court's remedial decree.

(2) In any event, because Judge Thagard presides over the court for the Second Judicial Circuit of the State of Alabama, a federal injunction should not be made to run against him.

In our view, neither argument is well taken.

A. Judge Thagard bears responsibility for discrimination in the Lowndes County jury selection system.

The record does not indicate that Judge Thagard actively discriminated against Negroes, either in drawing names from the jury box or in the subsequent seating of jurors. Indeed, because the jury commissioners so effectively excluded Negroes when putting names into the jury box, there was little possibility for systematic discrimination beyond that point. But recognition of these factors does not foreclose the question whether Judge Thagard is an appropriate subject of this Court's equitable decree.

We maintain that regardless of his freedom from active discrimination, Judge Thagard bore a responsibility to see that any jury sitting in his court, and hence his court itself, was constitutionally composed. As the presiding judge, he was in charge. He had a duty and responsibility to see that the wrongdoing on the part of the jury commissioners was corrected, a duty and responsibility that he did not meet.

The question of Judge Thagard's ultimate responsibility was put beyond doubt by his own testimony at the hearing of this case. Government counsel asked Judge Thagard whether, if he were aware of any wrongdoing in the process by which names were placed in the jury box, he would consider it his duty, before drawing a venire, to see that the wrongdoing was corrected. Judge Thagard replied that if he thought wrongdoing had occurred, he would consider it his duty to correct it.

Nor can it be questioned that Judge Thagard was aware of the jury commissioners' practice in Lowndes County of excluding Negroes from jury service. It was his testimony which established that no Negro had ever sat on a Lowndes County petit jury.

We maintain, moreover, that Judge Thagard had the means as well as the duty to correct the discriminatory practices infecting the juries in his court. The statutes of Alabama expressly give a circuit judge authority to order the Jury Commission to empty and refill the jury box at any time. Alabama Code, Title 30, Section 22. The intent of this provision, clear on its face, is to empower judges to see that juries sitting in their courts are fairly constituted.

This statutory power was recently used for just such purpose by the Circuit Court of Macon County, Alabama. In the face of allegations of discrimination on the part of

the Macon County Jury Commission, the Circuit Court for the Fifth Judicial Circuit of Alabama, on its own motion, ordered the Jury Commissioners

> "to promptly empty and refill the Jury Box of Macon County, Alabama, with and place on the Jury Roll of said County, the names of every person possessing the qualifications prescribed [by Alabama law]." Order entered August 5, 1964, quoted in Mitchell v. Johnson, Civil Action No. 649-E, decided January 18, 1966.

In sum, Judge Thagard was aware that the Lowndes County jury commissioners excluded Negroes from the juries selected to try cases in his court. He had the responsibility and the authority to correct these unconstitutional practices. As the brief filed on his behalf states, he had authority "to run his own court on the basis of his own judgment and discretion." Because Judge Thagard failed to discharge his duty to oversee, and if necessary correct, the practices of the jury commissioners, he must be deemed in contemplation of law to share responsibility for the results.

B. It is appropriate, both on the law and the facts, to include Judge Thagard in the relief.

(1) The Lynchburg courtroom desegregation case

Wood v. Vaughan, 321 F.2d 480 (1963), decided by the Court of Appeals for the Fourth Circuit, is extremely strong authority on the point at issue. Wood involved desegregation of state courtrooms in Lynchburg, Virginia. As in this case, private Negro plaintiffs brought

a civil action in a federal district court seeking only prospective injunctive relief to prevent the continuation of racially discriminatory courtroom practices. Included as defendants were the respective judges of the Municipal Court, the Corporation Court, and the Circuit Court of Lynchburg. The district court granted motions to dismiss made by the three judges; see 209 F. Supp. 106, 108 (W.D. Va., 1962). On appeal, the Fourth Circuit Court of Appeals held:

> [W]e must now vacate the District Court's order sustaining the appellees' motion to dismiss, for the plaintiffs' allegations, if proved, are sufficient for a final injunction. 321 F.2d 480.

Although the issue of judicial immunity was not specifically discussed, the necessary result of the case is that state judges responsible for discriminatory practices in the administration of their court may be federally enjoined.[1/]

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1 / Wood is not alone in holding that federal injunctions may issue against state judges. In Bush v. Orleans Parish School Board, 187 F. Supp. 42 (U.S.D.C., E.D. La., 1960), the Honorable Oliver P. Carriere, Judge of the Civil District Court of the Parish of Orleans, Louisiana, was specifically enjoined from enforcing an injunction issued by him in connection with the desegregation of schools in New Orleans; motion to vacate denied, 364 U.S. 803; affirmed, 365 U.S. 569(1961).

Furthermore, this Court, in In re Wallace, 170 F. Supp. 63(1959), ordered Governor Wallace, at that time Judge of the Third Judicial Circuit of Alabama, to produce records sought by the Civil Rights Commission. And in United States v. Hildreth, 6 R.R. L.R. 185(1961), the District Court for the Northern District of Alabama ordered Judge Hildreth of the Seventeenth Judicial Circuit of Alabama to produce records sought by the Attorney General of the United States and to refrain from enforcing a conflicting order which Judge Hildreth had entered.

(2) Enactment by Congress of 18 U.S.C. 243 resolves any question of interference with state sovereignty.

Section 243 of Title 18, enacted in 1875, makes it a federal criminal offense for a state official charged with any duty in the selection of jurors to discriminate on account of race or color. By adopting this provision, Congress resolved the issue of interference with state sovereignty which the defendants argue to this Court. The position is fully stated in Ex Parte Virginia, 100 U.S. 339, a criminal case under §243 against a state judge:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, interferes with State rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. . . . Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. 100 U.S. at 346.

If §243 permits federal criminal prosecutions of state judges, then surely it is appropriate to include a state judge in the far less severe remedy of a corrective federal injunction.

(3) Cases cited on behalf of Judge Thagard are not in point.

The brief on behalf of Judge Thagard cites numerous cases holding that judges are immune from damage suits based on their judicial actions. They are distinguishable on two grounds other than those argued above.

First, selecting jurors is, in the language of the law, a ministerial rather than a judicial act. This was clearly established by Ex Parte Virginia.

> It was insisted during the argument on behalf of the petitioner that Congress cannot punish a state judge for his official acts; and it was assumed that Judge Cole [judge of the county court of Pittsylvania County, Virginia], in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. ... Whether he was a county judge or not is of no importance. ... [Selecting jurors] is merely a ministerial act ...." 100 U.S. at 348.

Second, there is a clear distinction between cases such as those cited on behalf of Judge Thagard in which damages are sought against judges for their past actions, and the present case in which the relief sought is entirely

injunctive, with the design of enforcing the constitution for the future.[2]

(4) The evidence and needs for relief make especially appropriate the inclusion of Judge Thagard in this Court's decree.[3]

Judge Thagard stands at the head of the Lowndes County judicial system. We have shown above in Part II that he bore a responsibility which he did not meet for seeing that his juries were fairly selected. How well the jury system in Lowndes will work in the future depends largely on the extent to which he can be made sensitive to this responsibility. Judge Thagard is in position to prevent racial discrimination by the subordinate agents of his court -- thus to obtain fairly constituted juries in Lowndes County. That is the ultimate objective of this lawsuit, an objective to which Judge Thagard, by reason of the respect and authority he commands as Circuit

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2 / Dombrowski v. Phister, 380 U.S. 479, quoted at length at page 10 of Judge Thagard's brief, granted injunctive relief of a most far reaching nature against a state court, overcoming not only the considerations of comity involved in enjoining state criminal proceedings, but also the obstacle of the abstention doctrine. See Harlan J. dissenting.

3 / There is an amicus curiae brief filed in this case on behalf of the Alabama Circuit Judges Association. The brief writer, after arguing his conclusion that relief including Judge Thagard should not be granted, states that he "has not heard nor read the evidence introduced." Amicus brief, p.10.

Judge, is the key. All of the state officials connected with jury selection are subject to his leadership and direction.

In these circumstances we believe the Court should "utilize the full equitable powers" it possesses in order to afford "complete relief." United States v. Alabama, 192 F. Supp. 677 (M.D. Ala.), affirmed, 304 F.2d 583.

In addition to the prohibitory relief we have proposed, which includes Judge Thagard, we have asked that the defendants be required to keep certain records designed to bring to light any future discrimination in the processes of summoning, excusing, challenging, and striking jurors. By including Judge Thagard in these provisions we do not intend that he hire a secretary or keep the records himself. He should direct that the records be kept by the Clerk of Court. Much of the proposed record keeping is already done by the Clerk as a matter of course. The additional information which we would require is readily available to the Clerk.

In our view, the proposed record keeping provisions are very important. As the Court may appreciate from the volume of records in this case, piecing proof together from sprawling and incomplete records is a substantial hurdle to bringing to light even the grossest forms of jury discrimination. The hurdle is likely to be far more imposing in cases involving sophisticated jury exclusion practices. Compare Swain v. Alabama, 380 U.S. 202.

III.

Modifications and Considerations
Relating to the Proposed Order

(a) In the corrected copy of our proposed order and decree we have made one significant change. The provision has been eliminated requiring the commissioners to return to the Clerk's Comprehensive List for a new name to replace any person disqualified for illiteracy. This makes it possible to test literacy at the courthouse when prospective jurors appear on the morning of court, thus avoiding the necessity for summoning jurors once to determine their qualifications and then again to serve. (See our main brief, corrected copy, 47-48.)

(b) We urge upon the court the importance of requiring names to be drawn from the Clerk's Comprehensive List by some methodic and objective method. The jury commissioners in Lowndes County purported to know almost everyone in the county. If the Commission is left discretion to pick and choose from the list, the value of starting with a list fairly representing a cross-section of the county may be lost.

IV.

A Recent Supreme Court Decision Supports
Our View that the Court's Ruling on the
Women Issue should be Prospective.

The Court's attention should be brought to the recent Supreme Court decision of Tehan v. Shott, decided

January 19, 1966, 34 Law Week 4095, and its bearing on the prospectivity of this Court's decision on the women issue. Tehan involved the retroactivity of the Supreme Court's decision last year that a prosecutor could not constitutionally comment upon a defendant's refusal to take the stand, Griffin v. California, 380 U.S. 609. In reasoning to its conclusion that the "no comment rule" of Griffin is prospective, the Court said:

> [W]e take as our starting point Linkletter's conclusion [Linkletter v. Walker, 381 U.S. 618] that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective," that there is "no impediment-constitutional or philosophical-to the use of the same rule in the constitutional area where the exigencies of the situation require such an application," in short that "the Constitution neither prohibits nor requires restrospective effect." Upon that premise, resolution of the issue requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 628-629.

The Tehan Court then proceeded to articulate three factors important to the Linkletter decision. The Fifth Amendment privilege against self-incrimination, at issue in Linkletter, is not "an adjunct to the ascertainment of truth;" there had been long standing reliance upon the former rule; and "retrospective application ... would create stresses upon the administration of justice ...." Finding that these factors applied to the no comment rule of Griffin, the Court ruled that Griffin is prospective.

We believe that the three factors would equally apply were this Court to rule that Alabama's statutory bar on jury service by women is unconstitutional.

Respectfully submitted,

JOHN DOAR
Assistant Attorney General

CHARLES R. NESSON,
GEORGE RAYBORN,
Attorneys,
Department of Justice
Washington, D. C. 20530

JANUARY 1966.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply Brief for the Plaintiff-Intervenor, and corrected copies of Plaintiff-Intervenor's Proposed Findings of Fact, Conclusions of Law and Decree, and original Brief in Support thereof, upon the counsel of record for plaintiffs and defendants, by mailing copies to them at their office addresses, airmail postage prepaid, as follows:

Honorable Richmond Flowers
Attorney General
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Montgomery, Alabama;

Honorable Harry Cole
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Honorable Charles Morgan, Jr.
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Atlanta, Georgia

Honorable Orzell Billingsley,Jr.
1630 Fourth Avenue N.
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Dated January 1966.

CHARLES R. NESSON
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Department of Justice