Congressional

June 14, 1963

Honorable Stephen M. Young
United States Senate
Washington, D.C.

Dear Senator Young:

I have your letter of June 8, 1963, inquiring about the reported use of civil defense personnel during the recent disturbance in Birmingham, Alabama.

According to information I have received, members of a local volunteer civil defense unit participated to some extent in the quelling of the riot which resulted after the two bombings in Birmingham on the night of May 11, 1963. The members of that unit were all Negroes and, reportedly, were unarmed and participated only to the extent of trying to persuade the Negro rioters to cease the violence and go home. I have received no reports of any violence, brutality or other mistreatment on the part of the civil defense personnel who were present.

I hope this information will be helpful to you.

Sincerely,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

DEPARTMENT OF JUSTICE

ROUTE SLIP

TO	NAME	BUILDING AND ROOM
1.	Gerald Jones	
2.		
3.		
4.		
5.		

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

Can you prepare a draft reply?

FROM NAME	BUILDING, ROOM, EXT.	DATE
Jones		6/11/63

United States Senate

COMMITTEE ON ARMED SERVICES

June 8, 1963

Thelton Henderson?
Henry Jones?

Hon. Burke Marshall
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Dear Mr. Marshall:

It has been reported to me that paid civil defense employees and local civil defense volunteers were deputized by the municipal authorities in Birmingham, Alabama, during the recent racial disturbances in that city. Forthermore, am told that civil defense equipment was used by local authorities at that time.

Would appreciate your looking into this matter and informing me without delay as to the basis for these reports.

It is alleged that these fellows were wearing civil defense arm bands when they participated in operations against demonstrators.

What are the facts?

With best regards.

Sincerely yours,

Stephen M. Young

Stephen M. Young

Y/l

Senatorial

BM:WJH:lm
T. 5/23/63

Honorable Albert Gore
United States Senate
Washington 25, D. C.

Dear Senator Gore:

Thank you for your letter of May 15, expressing interest in the application of Mr. Steven L. Engelberg for summer employment with this Division.

Last summer we were authorized to employ a few pre-law students who rendered valuable assistance to this Division. On that basis I submitted Mr. Engelberg's name for a summer position, since I was impressed by his qualifications and the recommendations made on his behalf. Because of the tremendous number of applications made to the Division and to the Department, coupled with the limited funds available, the Department has now restricted the summer hiring authority of all legal divisions to students who have completed at least one year of law school and to college students who are rated eligible by the Civil Service Commission as clerk-typists. The only exception relating to college student employment is granted to those who have been previously employed by this Department. These limitations unfortunately eliminated from consideration a number of impressive pre-law students, including Mr. Engelberg, whom we wished to have with us. We have been in touch with Mr. Engelberg, and find that he is unable to qualify on the limited basis open to college students.

I am hopeful that Mr. Engelberg will apply for a summer position after he has entered law school.

Sincerely,

Burke Marshall
Assistant Attorney General
Civil Rights Division

cc: W. J. Holloran

Congressional

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BM:ILB:mep 11,801
144-40-2<4

Honorable J. Howard Edmondson
United States Senate
Washington 25, D.C.

Attention: John M. Mack, Assistant

Dear Senator Edmondson:

This is in reply to your referral of a letter from Mr. A. D. Lester of Westville, Oklahoma, regarding alleged misconduct of United States Marshals at Oxford, Mississippi.

The Department has made every effort to determine whether there is any semblance of truth in the charges of brutality by the Marshals, but we have been unable to find any evidence to substantiate them.

As you have requested, Mr. Lester's letter is herewith returned.

Sincerely,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

Enclosure

cc: Records
Chrono.
Greene (2)
Blair
Mr. Marshall
Mr. Dolan, Rm. 4208

United States Senate

COMMITTEE ON THE JUDICIARY

April 15, 1963

Honorable Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington 25, D. C.

My dear Mr. Marshall:

A number of my constituents have written to me in protest against the tactics being used to intimidate prospective Negro voters in Alabama and Mississippi.

I am deeply concerned about this situation and believe that every necessary step should be taken by the Federal government to protect the rights and safety of these citizens. I would be grateful for a report from the Department on this matter.

You cooperation, as always, is deeply appreciated.

Very sincerely yours,

Kenneth B. Keating

John Doar: Can we get something on this letter?
Kiey

Correspondence folder

T.4/16/63
BN:JD:ls
72-40-43
#11,194

16 April 1963

Honorable Kenneth B. Keating
United States Senate
Washington 25, D. C.

Dear Senator Keating:

In reply to your letter of April 15, I am happy to furnish you the following information.

During the past three years the Department has established the principle that regardless of the form which a threat or intimidation takes, the Department is authorized to act to remedy the effect of the intimidation on Negro citizens. Thus, economic sanctions such as evictions and the closing of the channels of trade have been held to be violations of Section 1971(b). In addition, we have engaged in considerable negotiation and litigation to establish the principle that the use of the state criminal processes can likewise be a violation of Section 1971(b), and the state can be restrained from proceeding with a trial or continued confinement until the matter has been thrashed out fully and finally in the federal court. This principle was most recently utilized in Greenwood, Mississippi, where we were able to obtain the release of eight persons who had been found guilty of disorderly conduct and had been sentenced to four months in jail and $200 fines each. As a result of action instituted by the United States, the City of Greenwood and Leflore County agreed to release these students pending a full hearing and final decision on the merits of the case in the United States District Court. In addition, we received assurance that there would be no further interference by the police with voter registration.

Records
Chrono
[redacted]
Putzel
Owen

In several other instances in Mississippi and Georgia, we have been able to obtain dismissals of state charges and the return of bond money after having demonstrated that the arrests and convictions were for the purpose of interfering with the rights of Negroes in the area of registering to vote.

In the Greenwood case, we have asked the court to hold that the right to register without interference includes the right peaceably to assemble and protest grievances which arise out of efforts of Negroes to register. I expect that we will have a hearing on this question in Mississippi early next fall.

At the present time there is under consideration by the Court of Appeals for the Fifth Circuit the question of whether or not a school board can refuse to rehire a school teacher apart from any question of contract arrangements or of tenure if the refusal to rehire was for the purpose of interfering with the right to register to vote. In that case, the District Court found against us and we took the appeal. If we are successful, we maintain that an integral part of the relief includes re-employment and back pay.

In every single instance that has been reported to me, we have investigated the matter as rapidly as humanly possible. These cases are difficult, however, for the reason that we are required to prove that the defendant's purpose was to interfere with registration and voting. This is not an easy burden.

So far our investigation does not show that the recent events in Birmingham are related to registration and voting.

If I can be of any further service to you, please let me know.

Sincerely yours,

Burke Marshall
Assistant Attorney General
Civil Rights Division

7 January 1964

MEMORANDUM FOR THE ATTORNEY GENERAL

From Burke Marshall

Attached is a proposed reply to Mr. Meserve's letter of January 2, which is also attached. This relates to our running dispute with Judge Cox, in which the ABA is now participating.

Attachment

Department of Justice

Washington

OCT 12 1963

DJ Cle
Dkd.

Honorable Ben F. Cameron
Circuit Judge, United States
Court of Appeals for the
Fifth Circuit
Meridian, Mississippi

Honorable John R. Brown
Circuit Judge, United States
Court of Appeals for the
Fifth Circuit
Houston, Texas

Honorable William Harold Cox
Chief Judge, United States District
Court for the Southern District of
Mississippi
Jackson, Mississippi

Dear Judges Cameron, Brown and Cox:

I am writing to you about United States v. Mississippi (C.A. No. 3312), the three-judge court case involving the constitutionality of certain sections of the Mississippi constitution and statutes dealing with voter registration.

Since the purpose of this letter is to request a firm trial date in the near future, I shall set forth briefly the chronological history of this case to date.

August 28, 1962

The United States filed its Complaint.

March 5, 1963

The various motions of the defendants were argued before the three-judge court. The Court's rulings were as follows:

(1) The defendants' motions to strike and motion for more definite statements were denied.

(2) The defendants' motion to stay--doctrine of abstention, was held in abeyance for "decision very shortly", but deferring action on this motion was not to interfere with discovery or the filing of the answers.

(3) The defendants' motions to dismiss for lack of jurisdiction of the subject matter was taken with the case because the Court felt it went to the merits.

(4) The defendants' motion to quash the three-judge court as to certain matters was taken with the case for determination on the merits of the case.

(5) The motion to strike the third claim of the Complaint was taken with the case.

(6) The motion for severance on behalf of individual circuit clerks and motions for separate trials of claims was deferred until after discovery was completed, but the Court stated that arrangements would be made to insure that none of the registrars would be kept in attendance at the trial unnecessarily.

(7) The Government's motion for production of records under Rule 34 was granted.

(8) The defendants were given 30 days from March 12 in which to file their answers.

The Court exphasized the importance of going forward with discovery. Judge Brown stated, after announcing the Court's decision, "that the discovery should go forward with vigor" and that the Court would then make disposition as to the trial date.

May 13, 1963

The answers of the defendants were filed.

May 17, 1963

Defendant State of Mississippi served interrogatories on the plaintiff.

June 10, 1963

Defendant Smith, registrar of voters of Coahoma County, Mississippi, served interrogatories on the plaintiff.

June 20, 1963

Defendant Easley, registrar of voters of Claiborne County, Mississippi, served interrogatories on the plaintiff.

July 5, 1963

Defendant Wiggins, registrar of voters of Lowndes County, Mississippi, served interrogatories on the plaintiff.

July 30, 1963

On May 20, 1963, and again on July 19, 1963, the defendant State of Mississippi filed supplemental briefs in support of its motion to dismiss. On July 30, the defendant State moved the Court to dispose of the motion to dismiss after oral argument and prior to consideration of the merits.

September 1, 1963

The United States filed its Answers to Interrogatories. The answers cover the factual basis to support the plaintiff's claims for relief. The answers to the interrogatories are contained in seven volumes. These volumes contain the following materials

1. Names of Persons Contacted
   Names of Agents and Attorneys

This volume contains the names, race, type of statement given, educational level and other background information on each person contacted by agents of the plaintiff in connection with this cause and the names and addresses of agents of the plaintiff who contacted or interviewed any one in connection with this cause.

2. Statistics
   Census-Registration-Voting 1890-1962.

This volume covers State-wide registration statistics by county and by race, with dates for the following specific dates: 1890, 1899, 1954, 1955, 1960, 1962.

3. Purpose of Laws 1890,1954,1960,1962
Decrease in Negro Registration 1890-1954

This volume contains the factual basis showing (1) the racially discriminatory purpose of the registration laws under attack, (2) white primary practices in Mississippi, and (3) the decrease in Negro registration since 1890.

4. Comparison of Education for Negroes and White Persons, 1890-1963

This volume contains the facts which show that in Mississippi public education provided for Negroes was and is inferior to the public education provided for white persons.

5. Answers
Appendix A

This volume contains the answers to various interrogatories which did not require great detail. In addition, the Appendix to this volume details the factual basis and methods by which white political supremacy was established and maintained in Mississippi prior to the implementation of the constitutional interpretation test in March 1955.

6&7. Appendix B
1 & 2

These two volumes include, by county, factual data since March 24, 1955, the date of implementing the interpretation test, that Negroes have not been permitted to register since the adoption of the test. In addition, an analysis of the application forms of certain counties shows non-uniform administration of the voting laws under

attack, favored treatment to white persons in administering these laws, and the unlimited discretion vested in the registrars to administer this test.

September 13, 1963

The United States filed its notice to take the oral depositions of thirteen registrars and one deputy registrar in certain Mississippi counties. Prior to this time the United States had been negotiating with the lawyers for the defendants to set dates and places for taking the depositions of the defendant registrar without notice.

We were able to make arrangements and had set dates to take the depositions of two of the defendant registrars. The defendants moved to quash the taking of depositions on the grounds that it placed a hardship on them and that the depositions should not be taken until jurisdiction of the Court had been determined. After an oral argument, Judge Cox entered an order taking the depositions until further order of the Court "to enable the Court as re-constituted on September 12, 1963, to organize and become familiar with the issues and decide at a conference to be called by the three judges just what issues will be presented to and decided by the Court so as to make more apparent to the parties just what testimony may be considered and desirable and necessary." Thus, no depositions have been taken.

In view of the difficulty and delay which we have experienced and undoubtedly will experience in pressing for further discovery by way of depositions or otherwise, we have concluded to forego any further depositions except for those absolutely necessary because witnesses are beyond the reach of the Court's subpoena power and will not voluntarily make themselves available for trial. As to those limited depositions, we will notice and take them after the case is set for trial at a specific time.

The issues which are involved in this case are:

1. Suit Against the State -

   The legal issue is, in this attack on the constitutionality of Mississippi voting laws whether the State, by virtue of the constitutional attack on the voting law and by virtue of the Civil Rights Act of 1960 (Section 601b), which permits joining the State as a defendant, whether the State is a proper party in this litigation. As indicated, the defendant State has filed supplemental briefs on this issue. We will file a short reply to their briefs by November 1, 1963.

2. Constitutionality of Certain Laws -

   The laws which are attacked as being invalid in this case are:

   a. Section 244 of the Mississippi Const., as amended (and its implementing legislation)--provides for the constitutional interpretation test and for the duties and obligation test.

   b. Section 241-A of the Mississippi Constitution, adopted in 1960 (and its implementing legislation)-- provides for a good moral character test as a prerequisite to registration.

   c. Section 3209.6 of the Mississippi Code, as amended in 1960--permits the destruction of Sworn Written Application Forms for Registration by local registrars.

d. House Bill 600, 1962 (amended Section 3213 of the Mississippi Code)--directed that the statute which required application forms to be completed by applicants without assistance was mandatory and that all blanks on the application must be "properly and responsively" completed and that the oath, and the application form must be signed separately by the applicant.

e. House Bill 603, 1962--provides that applicants must return to the registrar's office after the waiting period for publication, to determine whether he has passed or failed registration. This Bill also provides that the registrar may not tell applicants who fail to qualify for registration the reasons for failure because that might constitute assistance on a subsequent application.

f. House Bills 622 and 934, 1962--which provide the procedure for publication of names of applicants for registration in the newspaper and establishes the right of any qualified voter to challenge the qualifications of any applicant. This statute also sets up an administrative procedure to be followed in the event an applicant is challenged.

3. The Relief -

a. What should be the specific terms of the injunction. This will involve a determination as to the qualifications and standards to be required for registration in the event of a declaration of unconstitutionality.

b. In the event of a finding of a pattern and practice of discrimination there is an issue to the effect of such a finding and the procedure to be used in the event of invocation of the referee provisions of the Civil Rights Act of 1960, 42 U.S.C. 1971(e).

These items--suit against the State, the constitutionality of the specified Mississippi laws, and the relief--are, I believe, a fair statement of the issues which are involved in this case.

To facilitate the trial in this case, the United States is preparing a list of exhibits with exhibit numbers which we plan to introduce in evidence. This list will be sent to the defendants by November 4, 1963, and the documents themselves will be made available to the defendants in Jackson, at the United States Attorney's office beginning that day. The exhibit list will contain columns so that the defendants, after they have had an opportunity to look at the exhibits, may note any questions as to the authenticity of any document. This way we can identify the document about which there is no dispute as to authenticity. Proof of authenticity of these documents would otherwise take a great deal of time at the trial.

In addition, the United States will file, by November 4, 1963, supplementary answers to the interrogatories which were filed on September 2. This will bring up to date the material which we have previously set out in these answers.

Finally, this case deserves the immediate attention of this Court. It involves the constitutionality of Mississippi voting laws. The United States claims these laws are invalid because their purpose and effect is to deprive Negroes of the right to vote without distinction of race or color. The rights involved are very important. As the Court of Appeals recently stated in United States v. Atkins (C.A. 5 Sept. 30, 1963):

> The right to vote is one of the most important and powerful privileges which our democratic form of government has to offer. Although states may regulate this right, they are subject to close judicial scrutiny when doing so and are limited by the Fifteenth Amendment in addition to the Fourteenth.

Accordingly, we believe that the matter of going forward with the trial and decision in this case is of extreme urgency.

I have sent copies of this letter to the attorneys for the defendants.

Sincerely,

John Doar

JOHN DOAR
First Assistant
Civil Rights Division

United States District Court

Southern District of Mississippi

William Harold Cox
District Judge

Jackson, Mississippi

October 16, 1963

Mr. John Doar
United States Department of Justice
Washington, D. C.

Dear Mr. Doar: Re: U.S. v. State of Mississippi
Civil Action No. 3312(Jackson)

I have a copy of your letter of October 12 regarding the above case and thought that I had made it clear to you one time at Hattiesburg that I was not in the least impressed with your impudence in reciting the chronology of a case before me with which I am completely familiar. If you need to build such transcripts for your boss man, you had better do that by inter-office memoranda because I am not favorably impressed with you or your tactics in undertaking to push one of your cases before me. I spend most of my time fooling with lousy cases brought before me by your department in the Civil Rights field and I do not intend to turn my docket over to your department for your political advancement. You have been given every consideration and every courtesy in my court and I don't think that you have any sense of gratitude or appreciation therefor. You are completely stupid if you do not fully realize that each of the judges in this court understand the importance of this case to all of the litigants. I do not intend to be hurried or harassed by you or any of your underlings in this or any court where I sit and the sooner you get that through your head the better you will get along with me, if that is of any interest to you. I do not think that the very important motions in this case should be shelved just because you are in a hurry to make some kind of showing in your docket and I shall not vote for any such irregular and completely improper procedure simply for the advancement of your political goals.

It might be well for you to give some of your valuable personal attention to the Walthall County case pending before me after arguments which you attended and subsequent to which you have not responded to a request of the Court for valuable information which is holding up my decision in that case. I just wonder if you have lost interest in this case since you are undoubtedly so efficient and alert in calling matters to my attention in the subject case.

Yours very truly,

WHC:afc

cc: Honorable Ben F. Cameron
Honorable John R. Brown

Department of Justice

Washington

OCT 12 1963

DJ file
DLO.

Honorable Ben F. Cameron
Circuit Judge, United States
Court of Appeals for the
Fifth Circuit
Meridian, Mississippi

Honorable John R. Brown
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> The right to vote is one of the most important and powerful privileges which our democratic form of government has to offer. Although states may regulate this right, they are subject to close judicial scrutiny when doing so and are limited by the Fifteenth Amendment in addition to the Fourteenth.

Accordingly, we believe that the matter of going forward with the trial and decision in this case is of extreme urgency.

I have sent copies of this letter to the attorneys for the defendants.

Sincerely,

John Doar

JOHN DOAR
First Assistant
Civil Rights Division

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Burke Marshall
Assistant Attorney General
Civil Rights Division

DATE: October 29, 1963

FROM : Harold H. Greene
Chief, Appeals and
Research Section

HHG:bcc

SUBJECT: Letter from Judge Cox to John Doar - United States v. Mississippi, C.A. 3312 (S.D. Miss.)

Attached is a memorandum from Alan Marer concerning the possible disqualification of Judge Cox on the account of his letter of October 16, 1963, to John Doar.

1. Technically speaking, except for one statement, the bias in the letter is directed against Mr. Doar personally rather than against the Government. It is unlikely that a charge of bias and prejudice can successfully be made where the judge is prejudiced against the lawyer rather than against the client. This is so particularly where the Government is involved since, at least in theory, the Government may be able to substitute other attorneys for those against whom the judge has exhibited antagonism.

2. The exception to the above is the statement that "I spend most of my time fooling with lousy cases brought before me by your Department in the Civil Rights field. . . ." I suppose that if the matter were to be litigated, Judge Cox might contend that he meant that the civil rights cases we had brought in his district were "lousy" cases, in the sense that they were either lacking in evidence, were poorly prepared, or were otherwise inadequate. In other words, the Judge's statement could be interpreted to mean, not that civil rights cases are "lousy" per se, but that the Department had brought civil rights cases in his court which happened to be "lousy."

3. Notwithstanding these more or less technical arguments, I think Judge Cox's letter would normally call for his disqualification. That letter is couched in such non-judicial language, and shows

such an obvious lack of restraint, that fair-minded persons would probably be convinced of his prejudice against the Government in civil rights cases. I am not impressed with such decisions as United States v. 16,000 Acres of Land, cited in Mr. Marer's memorandum, which appear to hold that prejudice against a particular group of cases is not sufficient. If it is shown that a judge is indeed prejudiced in a particular field (e.g., tax cases, negligence cases) it is really irrelevant in terms of trial fairness that he may be perfectly objective or favorable to the same litigant in other types of cases.

4. It is my view that if we filed an affidavit of bias and prejudice and Judge Cox refused to disqualify himself, we would stand an excellent chance of prevailing in the Supreme Court if we were representing a private litigant.

My doubts concerning the advisability of pursuing this course are based in part upon the considerations which Mr. Marer details in his memorandum. Additionally, I have a feeling that the Government should be and must be considerably more circumspect in seeking to disqualify judges than would be a private party. The Government, after all, operates in many courts involving many controversies throughout the land. It would not be crippled -- as might be a private party -- if it had to put up with a judge who is prejudiced against it in a particular case or group of cases. Moreover, the Government has many ways of making its influence felt which are not open to a private litigant, from the expenditure of funds for appeals to the appointment of judges and the enactment of legislation. For these reasons a stricter standard would -- justifiably, I think -- be applied to the Government than to a private party.

On balance, I recommend against moving to disqualify Judge Cox.

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

DATE:

TO : Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

AGM:swj

FROM : Alan G. Marer
Attorney

SUBJECT: Letter from Judge Cox to John Doar re United States v. Mississippi, C.A. No. 3312 (S.D. Miss.)

I have examined the law on the question of filing an affidavit of bias and prejudice against Judge Cox on account of his letter to John Doar dated October 16, 1963.

1. Judge Cox's letter was written in response to a letter addressed to Judges Cox, Cameron, and Brown, by Mr. Doar, dated October 12, 1963. 1/ In reply, Judge Cox said that:

> . . . I thought I had made it clear to you one time at Hattiesburg that I was not in the least impressed with your impudence in reciting the chronology of a case before me with which I am completely familiar. If you need to build such transcripts for your boss man, you had better do that by inter-office memoranda because I am not favorably impressed with you or your tactics in undertaking to push one of your cases before me.

1/ Mr. Doar's letter set forth the prior proceedings in the case, explained his views of the issues and certain other matters, asked that the case be set down for trial at an early date, and emphasized the importance of the case. Nothing in the letter would warrant the kind of reply Judge Cox made.

The letter then complains that "I spend most of my time fooling with lousy cases brought before me by your Department in the Civil Rights field and I do not intend to turn my docket over to your Department for your political advancement."

After suggesting that Mr. Doar has no "sense of gratitude or appreciation" for the consideration and courtesy Judge Cox has given him, the letter states that Mr. Doar is "completely stupid if [he does] not fully realize" that each Judge understands the importance of the pending case (United States v. State of Mississippi, C.A. No. 3312), and that the Judge does not intend to be hurried or harrassed "by you or any of your underlings in this or any court where I sit and the sooner you get that through your head the better you will get along with me, if that is of any interest to you." The letter then declares that:

> I do not think that the very important motions in this case should be shelved just because you are in a hurry to make some kind of showing in your docket and I shall not vote for any such irregular and completely improper procedure simply for the advancement of your political goals.

Finally, the letter suggests that "it might be well" for Mr. Doar to give some of his "valuable personal attention" to the Walthall County case pending before the court, and states that "I just wonder if you have lost interest in this case since you are undoubtedly so efficient and alert in calling matters to my attention in the subject case."

The question is whether this letter provides a legal basis for a motion to disqualify Judge Cox.

2. The question is governed by statute. 28 U.S.C. 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

3. The leading decision construing this statute is Berger v. United States, 255 U.S. 22 (1921). In that case several persons had been indicted for violation of the Espionage Act of 1917. They filed an affidavit of bias and prejudice, which was overruled by the district judge. The case ultimately reached the Supreme Court after trial and conviction. The Supreme Court, construing the requirement that the affidavit must set forth facts, said that ". . . The reasons and facts for the belief the litigant entertains . . . must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34. And, said the Court, the statute means that ". . . the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from

any "bias or prejudice" that might disturb the normal course of impartial judgment" (emphasis added). 255 U.S. at 36. 2/ See also Connelly v. United States District Court, 191 F.2d 692 (C.A. 9, 1951).

On the basis of the Berger case--the only Supreme Court decision concerning the necessary content of the affidavit--a strong case can be made in support of disqualification of Judge Cox. The general tone of his letter, taken as a whole, surely reveals hostility toward not just Mr. Doar personally but toward the Government's civil rights cases in general. It suggests that the "political goals" which motivate such suits are in Judge Cox's mind unworthy goals. There would seem to be no other reason for him to characterize them as "political," an expression which instantly brings to mind the common Southern charge that the Administration's civil rights program is motivated solely by a desire to win Negro votes. All of this is highlighted by the sentence which reads that "I spend most of my time fooling with lousy cases brought before me by your department in the Civil Rights field . . . ."

These expressions in Judge Cox's letter, it would seem, "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." They hardly comport with the Berger rule that the judges "shall not only be impartial" but "shall give assurance that they are impartial" and "free . . . from any bias or prejudice" that might disturb the normal course of impartial judgment."

If, therefore, Berger v. United States stood alone, it would seem that a sound basis exists upon which to seek to disqualify Judge Cox.

2/ The Berger case also reiterated the holding of Ex parte American Steel Barrel Co., 230 U.S. 35, that ". . . the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." 255 U.S. at 31. See also United States v. Lattimore, 125 F. Supp. 295 (D.D.C., 1954).

4. The lower courts, however, have in the forty years since Berger given the statute a more restrictive interpretation.

(a) It has been held that for the United States to disqualify a federal judge the judge must be biased, not simply against a class of government cases, but against the government itself. United States v. 16,000 Acres of Land, 49 F. Supp. 645 (D.Kan. 1942). That case was a condemnation proceeding. Apparently the affidavit filed by the government charged the Judge with hostility to condemnation suits. The court said (49 F. Supp. at 650, 651):

> Impersonal prejudice resulting from a judge's background or experience or prejudice against a particular type of litigation is not prejudice within the meaning of the statute. . . . [The affidavit would have to show that] the judge . . . has a personal bias and prejudice, not against a certain class of cases conducted by the United States of America, but a personal bias and prejudice against his own government. Bias and prejudice in order to be personal in the meaning of the statute, is not subject to division. It cannot be subdivided. It is entire. . . . It cannot be said to be personal if it applies only to a class of cases, for in that event the prejudice instead of being personal would relate to the nature of the proceeding itself (emphasis added).

Compare Johnson v. United States, 35 F.2d 355 (W.D. Wash. 1929) (hostility to war risk insurance suits or claimants).

If 16,000 Acres is correct, it would seem that we cannot disqualify Judge Cox because of alleged bias against civil rights cases alone. But the rationale of 16,000 Acres seems dubious at best. Where the government claims bias it seems absurd to require proof of hostility to it per se, proof which as a practical matter could hardly ever be obtained even in the rare case in which such generalized bias might exist. If, for example, Judge Cox had said, "I am implacably and unalterably opposed to Negro rights and in particular to Negro voting," I cannot believe that the Supreme Court would hold this bias to be insufficient to disqualify.

(b). 16,000 Acres of Land also indicates that we will have difficulty buttressing our case by pointing to the intemperate and insulting personal references used by Judge Cox in referring to John Doar's tactics, intellect, and perception. In 16,000 Acres the court said that "neither irritation upon the part of the judge nor comments upon judicial tactics of a party or his counsel are sufficient to show personal prejudice, whether such comments be discreet or indiscreet." 49 F. Supp. at 650. More specifically, the court said (Id. at 644):

> Complaint is made that after the hearing of the motion . . , the court remarked to one of the [government attorneys], in the corridor outside of the courtroom, that he was a pettifogger, and had been pettifogging for two hours and a half. The court's statement was a judicial conclusion based upon the presentation of the motion . . . just concluded. . . . The remark indicated no personal bias either against the United States or against counsel. It was merely a criticism of the lengthy presentation of a motion which could have been presented in a short time. 3/

3/ Much the same disposition was made of the government's objections that the court had described a government motion as "unreasonable and unwarranted;" that government motion "did not know there was a war on;" that government counsel was trying to "cover up evidence;" and that government counsel was taking unfair advantage and had tried to put misleading material into the record. Id. at 653-654. Accord: Beecher v. Federal Land Bank, 153 F. 2d 987 (C.A. 9, 1945).

Based upon 16,000 Acres, then, Judge Cox would be entitled to find that his criticism of Mr. Dear's tactics were merely "judicial conclusion[s]" drawn from what Mr. Dear had done and said orally and by letter, and therefore did not amount to "bias and prejudice." 4/

(c). Another answer of Judge Cox to our contention that his description of our civil rights cases as "lousy" shows prejudice is that he merely meant that, on the basis of the evidence he has seen in the cases he "spend[s] most of [his] time fooling with," it was his view that the cases simply had no legal merit. And there is authority for the view that a judicial opinion formed even in other lawsuits is not a basis for disqualification. Cf. Ferrari v. United States, 169 F. 2d 353 (C.A. 9, 1948); Craven v. United States, 22 F. 2d 605 (C.A. 1, 1927).

5. The three cases I have found which have held affidavits of bias and prejudice to be sufficient to disqualify all involved accusations more serious than we would be able to make.

In Connelly v. United States District Court, 191 F. 2d 692 (C.A. 9, 1951), defendants had been indicated under the Smith Act. The judge had previously been involved as a United States Attorney in investigating and prosecuting Communists, and had also made speeches to the effect that Communists intended to destroy the government, and that one of the petitioners was a Communist. He had also said to defendants' counsel that he was sorry to see the attorney get mixed up with the "Commies". The court of appeals disqualified the district judge. In so doing the court reiteriated the language of the Berger case that judges must "give assurance that they are impartial," and went on to say:

> It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the "assurance" of fairness and impartiality."

4/ It would seem, however, that Judge Cox's criticisms of our tactics are interwoven with his views about civil rights cases in general.

And in Berger v. United States, supra, the Supreme Court held an affidavit sufficient which charged the judge with having publicly said, in effect, that most German-Americans were traitors, because this "bent of mind" would interfere with a trial of a case under the World War I espionage act. See also Chafin v. United States, 5 F. 2d 592 (C.A. 4, 1925) (purpose to convict); Cf. Refoir v. Lansing Prop Forge Co., 124 F. 2d 444, 444-445 (C.A. 6, 1942).

These cases, contrasted with the decisions in which disqualification has been refused, suggest a rather stiff standard for passing upon affidavits of bias and prejudice.

6. Insofar as the legal basis for filing an affidavit of bias and prejudice is concerned, my conclusion is that, while the answer is doubtful, we are by no means precluded from making an attempt to disqualify Judge Cox. Our principal authority would be the broad language of the Berger case.

7. The procedure for filing an affidavit for bias and prejudice is as follows: The judge whose impartiality is challenged passes upon the legal sufficiency of the affidavit. He may not examine the truth of the allegation. If he finds that the allegations set forth a case of bias and prejudice, he must step aside. Berger v. United States, supra. If not, he overrules the motion. In the latter event, his action may be reviewed before trial by writ of prohibition, Connelly v. United States District Court, 191 F. 2d 692 (C.A. 9, 1951); In re Union Leader Corp., 292 F. 2d 381 (C.A. 1, 1961); 5/ or, after trial, on appeal. Berger v. United States, supra. Since the case is pending before a three-judge court, and since the All-Writs Act (28 U.S.C. 1651) is the authority for granting writs of prohibition, such a writ would apparently have to be sought in the Supreme Court, which is the only court having ultimate appellate jurisdiction over the case.

5/ But see Green v. Murphy, 259 F. 2d 591 (C.A. 3, 1958) (4-3 decision refusing to issue writ); but Cf. Albert v. United States District Court, 283 F. 2d 61 (C.A. 6, 1960).

8. There are strong practical objections to an effort to disqualify Judge Cox. He personally would rule upon such a motion, and if he denies it--which he could well do under the decided cases--our only real alternative would be to seek a writ of prohibition in the Supreme Court. (Obviously, if we did not pursue that remedy, we would not want to raise the question on appeal in the Supreme Court for at that stage our goal would be a ruling on the merits of the case). This would take time and in the meantime the case in the district court would no doubt not proceed to trial.

Moreover, even if Judge Cox disqualified himself or we succeeded in obtaining a writ of prohibition, the likely result is that Judge Mize or Judge Clayton would replace him. This would be detrimental to us because Judge Cox is probably inclined to try the case while Mize or Clayton would probably be inclined to delay it. In any event, both Mize and Clayton are at least as hostile to us as is Judge Cox. The three-judge statute does not appear to permit Judge Tuttle to assign a third circuit judge to the panel as a replacement for Judge Cox. 28 U.S.C. §2284(1) provides that:

> The district judge to whom the application for injunction . . . is presented shall constitute one member of such court.

While this provision does not say what shall happen if the district judge "to whom the application . . . is presented" is unable to sit, its clear intent is that at least one of the three judges shall be a district judge. In any event, considering the recent reshuffling of this panel, it is highly unlikely that we may expect a circuit judge to be assigned to this case.

Finally, if we charge Judge Cox with bias towards civil rights cases in general, logic would compel us to challenge him in every case we have before him. Cf. Cole v. Lewis, 76 F. Supp. 872 (S.D. Calif. 1948). Indeed, if he disqualifies himself on this ground, or if an appellate court does so, he would be morally compelled to step out of every one of our cases. The result would be that either

Judge Mize or Judge Clayton would sit on all of our suits. I can think of no sound reason why we should seek such a result.

9. Because of these practical considerations, I recommend that we should not attempt to disqualify Judge Cox.

30 October 1963

MEMORANDUM FOR MR. KATZENBACH

I would very much appreciate your views on the possibility, based on the attached research, of disqualifying Judge Cox. It would, in addition to the problems raised in the memoranda, involve some embarrassment to the President and the Attorney General and the former Deputy. But I would like to discuss it with you, and maybe thereafter with the AG.

BM

Attachments

Return to Mr. Marshall

13 November 1963

MEMORANDUM FOR THE ATTORNEY GENERAL

We have never had any formal investigation of the Mississippi Council. We have also had no results from suggestions that the Bureau should keep itself informed in the same way it does with the Klan.

RM

Attachment

13 November 1963

MEMORANDUM FOR THE ATTORNEY GENERAL

On this letter from Mr. McCord, my suggestion is that he might bring the Mayor up here and learn about the various federal programs in the same fashion as did the Mayor of Anniston. The two cities have similar problems and are in the same area.

RM

Attachment

D

23 November 1963

MEMORANDUM FOR THE ATTORNEY GENERAL

I think you would be interested in reading this memorandum from Stephen Spingarn, whom I do not know. He used to be on the FTC or FCC under Roosevelt, and was in the White House under Truman.

RK

Attachment