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VALIDITY OF FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION

ARGUMENT

OF

HON. T. U. SISSON

OF MISSISSIPPI

IN BEHALF OF

H. J. RES. 165

BEFORE THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

ON MARCH 21, 1910

WASHINGTON
GOVERNMENT PRINTING OFFICE
1910

VALIDITY OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Monday, March 21, 1910.

The committee met this day at 11 o'clock a. m., Hon. Richard Wayne Parker (chairman) presiding.

The CHAIRMAN. Now Mr. Sisson.

STATEMENT OF HON. THOMAS U. SISSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI.

Mr. SISSON. Mr. Chairman and gentlemen of the committee, I thank the chairman and the full committee for the courtesy which they have extended to me in according me this hearing. At the outset I desire to assure the committee that I will address you as lawyers. Every good lawyer is not only willing but glad to hear fair and frank discussion. If there is a class of men on earth who can without prejudice discuss a question it is a lawyer. Doctor Talmadge has called them "the balance wheels of civilization."

In presenting this purely constitutional question it is not only my duty but my desire to avoid any question of section or of partisanship. I shall absolutely eschew any political issue or any question that may arise out of the discussion of a question so delicate as this, because I want to appeal to your cool and deliberate judgment as lawyers, and do not want it beclouded by any preconceived opinions by any question of politics.

Either the fourteenth and fifteenth amendments were constitutionally adopted or they were not. If they were not the records will show. It is to the record that I shall appeal. If from that record it clearly appears that they are not properly a part of the Constitution your duty as lawyers on this important committee is plain. Report the fact fearlessly to the House. If the question is one of doubt, then make such a report to the House expressing that doubt. The House can then determine what course it should pursue. If these amendments have been added to our Constitution without satisfying the condition of Article V then neither one of them is properly a part of our Constitution and should not control either our national or state legislation. No citizen of any section will contend otherwise. I am sure that no lawyer who has any respect for his standing as a lawyer will venture the opinion that any amendment can constitutionally attach as a part of our sacred instrument without squaring with Article V. Article V is in the following language:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Con-

stitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

This clause is one which Congress considered carefully at the extra session last year, because this Congress passed the resolution submitting the "income tax amendment" and the clause was then studied by each Member of Congress for himself. I shall not discuss the difference of opinion as to the meaning of the language "two-thirds of both Houses" because the language is too plain to admit of much real difference of opinion. If it means anything it means two-thirds of the entire membership of both Houses.

Mr. CARLIN. Three-fourths?

Mr. SISSON. No; two-thirds of both Houses. Since the question has been raised at this stage we had as well look at the language and discuss it fully now, because upon the meaning of the words "two-thirds of both Houses" rests one of the strongest arguments against the validity of the amendments. Let us look at the language of other sections of the Constitution and we will see more clearly what this section must mean. In article I, section 5, paragraph 1, we find this language: "And a majority of each (House) shall constitute a quorum to do business; but a smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members, etc." Clearly the language "and a majority of each (House) shall constitute a quorum to do business" means one more than one-half of the entire roll of members. It means a majority of the whole House, the entire membership. It can mean nothing else. This is the ordinary business of the House. This is business not specifically referred to in other sections and may be transacted by a bare majority of each House. That is, a majority of a majority can pass ordinary legislation. But no one will contend that less than this number could do business. No one can by any stretch of language say that here the language "of each (House)" means less than the entire body.

Then we find this language "each (House) may punish its members for disorderly behavior and with the concurrence of two-thirds, expel a Member." This extraordinary power must be exercised by a two-thirds vote of each House and the language is not susceptible of any fair construction except that it requires two-thirds of the total membership. This is an extraordinary proceeding and it will not be contended that two-thirds of a quorum is what was meant, because if such had been the intention, language would have been used which would have meant that and only that. But the fathers said exactly what they meant; two-thirds of each House. It can mean nothing short of the entire membership.

Then again, in the same article and section we find the language "And yeas and nays of the Members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal." Here again we find it easy to determine what the language means. "One-fifth of those present" is not equivocal, and the fathers again say just what they mean.

In this same article we find the language, in reference to the passage of a bill over the President's veto, "two-thirds of that House

shall" occurs twice, and it has been construed by some Speakers to mean two-thirds of those present. But this must be taken with some qualifications. For example, suppose only a very few Members were present, say not more than one-tenth of the Members, it would be, of course, absurd to say that all of these could pass a bill over the President's veto even though the Constitution did not require a record vote. Of course this would disclose the absence of a quorum, but it would be an absurd contention to say that, but for that provision requiring a record vote, the language "two-thirds of that House" could pass a law when only one-tenth of the Members were present. This would be true, too, even though the clause requiring a majority to constitute a quorum had been left out. Then it is, to my mind, absurd to say that that language means that only two-thirds of a bare majority may pass a bill over the President's veto, because this would be much easier than to say, as is the case in some States, "shall be repassed by a majority of both houses." In all these States this is construed to mean one more than half of the entire membership. If this clause only means that two-thirds of a quorum is necessary to pass a bill, then we reach the absurd situation that one more than a third of the membership can pass a bill over the President's veto. For example, there are now 391 Members in the present House; 196 Members constitute a quorum; two-thirds of 196 is 130 and a fraction, or, that is, 131, which is only a fraction of one over one-third of the membership when the Constitution says "two-thirds of that House."

In article 1, section 7, paragraph 3, we find this language:

> Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Here we find this language: "Shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill." Here we find that the Supreme Court has settled this clause and says that it only applies to such bills, orders, and resolutions as are legislative in effect and does not apply to resolutions referred to in Article V, which provides for amendment. But in the section just quoted it provides that it shall be passed by two-thirds, according to the rules and limitations prescribed in case of a bill. So, construing this section with the preceding in reference to the passage of a measure over the President's veto, we find the only sound contention that the House and Senate could provide by rules for a bill is because the Constitution gives that power to each House, and I think the limit of any lawyer's contention would be that it meant not less and could not mean less than two-thirds of a quorum. This, however, can not be used as any reason or argument to show that "two-thirds of both Houses" in section 5 means less than the entire membership, because there can be no limitation in section 5, and in the last section discussed there may be some limitation by rule of the House and Senate. This is not free from doubt, however, and I think that the safer and sounder construction would, in the passage of a bill over a veto, be two-thirds of the entire membership.

Then again we find Article II, section 2, the President is authorized "to make treaties provided two-thirds of the Senators present concur." Here again we find language which compels the mind to reach the conclusion that less than two-thirds of the entire Senate may do this thing. But the fact that here the language "two-thirds of the Senators present concur" is used and not two-thirds of the Senate leads us again to the inevitable conclusion that the language "two-thirds of each House" means the entire membership.

In view of all the language of the Constitution in other sections, one is compelled to reach the conclusion that the words "whenever two-thirds of both Houses shall deem it necessary" means two-thirds of the whole membership of both Houses. With due regard and respect for the opinion of others, I say, it would be absolutely absurd to construe it otherwise. The other mode of amending the Constitution is where an amendment is proposed by two-thirds of the legislatures of the States or by two-thirds of the convention of States, which is the more difficult; and some lawyers have maintained that that mode is a mode that is perhaps utterly impossible, because even when you propose an amendment in Congress, where all the Members are present and where each and every Member can hear the discussion, it is with great difficulty that Members agree upon the exact language of an amendment. Therefore if an amendment were proposed by one of the legislatures of one of the States or a convention of one of the States to the other States of this Union, those bodies meeting, as they necessarily would do, in their respective States, and not having opportunity to confer with each other, it would be so difficult as to be almost impossible to ever reach an agreement upon an amendment. As one lawyer has said, "It would be batted from one State to another for a century." Therefore no method of amendment has ever been as yet adopted except that of being proposed by two-thirds of both Houses of Congress. This was the method adopted in this instance.

Now, gentlemen, I want to call your attention first to the history of the fourteenth amendment. If I had the time and you had the patience, I would have been delighted to have brought up all of the records. But before going into this history, it might be well to discuss whether this is a judicial or a political question this morning. My contention is that it is a judicial question. Whatever my private opinion is as to whether the courts should have in the beginning taken jurisdiction or whether they should have been denied jurisdiction, to determine whether our written Constitutions have or have not been amended, it is not necessary for me to state. They have taken jurisdiction. The Supreme Court of the United States will unquestionably hold that they have jurisdiction in this case. I will not stop to discuss now whether it is a political or a judicial question, except to say the Supreme Court holds that whether or not an amendment has been added to the Federal Constitution is not a political question so far as the amendment to the Federal Constitution itself is concerned, and whether the Constitution has been complied with—is not a political, but a judicial question. Some of the state courts differ as to——

Mr. CARLIN. You claim that this was not adopted by two-thirds of the Houses?

Mr. SISSON. I will come to that soon and will show by the records that they were not.

Mr. CARLIN. Do not decisions hold that that does not mean two-thirds of the entire membership?

Mr. SISSON. It has been decided, not in this case, but in another clause of the Constitution, where the language of "two-thirds" was referred to, that it meant two-thirds of a quorum.

Mr. CARLIN. This identical article has been construed by the legislative body three times, as I understand. They hold that it did not require two-thirds of the whole House.

Mr. SISSON. I understand Speaker Reed so held, but that was not a judicial determination. It was so held on these amendments, and, as I am informed, had never been so held up to that moment. Senator Garrett Davis, of Kentucky, when the amendments were claimed to be passed, notified the Senate then and there that the amendments would be absolutely void because they were not proposed by two-thirds of both Houses, and I take it, that if the Supreme Court had the question presented to it, it would so decide, and although this may be in the minds of some people a mooted question, it is not in mine.

Mr. CARLIN. Is not this the fact, that having had a legislative construction, as we have had, three times, of this very article of the Constitution, it is now a judicial question and can be raised in a hundred ways for the Supreme Court to determine, without any action on the part of Congress?

Mr. SISSON. I have no doubt of that, sir; none in the world. But the mass of the records would be extremely burdensome.

The CHAIRMAN. This is an important thing about two-thirds of the two Houses. Article I, section 7, provides that—

> Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House it shall become a law.

Now, it does not say two-thirds of the persons present, although it goes on to say—

> Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and the House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Mr. SISSON. That, as I understand, is the clause which has been construed to mean two-thirds of those present—two-thirds of a quorum. But I think if you will construe the first clause of Article V with the second clause of Article V it would reduce itself to an absurdity, if it did not mean two-thirds of the entire membership.

Mr. CARLIN. The point I call attention to is that we have had a legislative construction three times of that article of the Constitution.

Mr. SISSON. I want to say to the committee that I think that was absolutely necessary, in order that they could ever get these amendments proposed by Congress, to put that construction upon this clause. Now, I will show you why. The fourteenth amendment resolution is claimed to have passed the House of Representatives

on June 13, 1866, by a vote as follows: Yeas, 138; nays, 36, the absent Members making the complete body 223.

And, by the way, the 223 do not include the State of Mississippi, the State of Texas, and either Florida or Louisiana, I am not sure which. But, according to the rolls at that time, the membership of the House was made up of 223 Members.

Now, if you take two-thirds of 223, you will find it is 150. The fourteenth amendment resolution received only 138 votes, which is 21 votes short of the two-thirds of the membership of the House. Of course, if you consider the State of Texas and the State of Louisiana and the State of Mississippi as being at that time entitled to representation in Congress—and I am conceding, for the sake of this argument, that they were not at that time—the amendment can not be considered as having been legally proposed. And here I might state that President Lincoln, in his proclamation—I will not stop to read much of that—stated that "They," meaning the people of the Confederate States, "can at any moment have peace simply by laying down their arms and submitting to the national authority under the Constitution. In stating a single condition of peace, I mean to say that the war will cease on the part of the Government whenever it shall have ceased on the part of those who began it."

I am reading from Curtis's Constitutional History of the United States. It was George Ticknor Curtis, by the way, who appeared for Dred Scott, the slave, in the Dred Scott decision, and represented the slave, and he was a very eminent New York lawyer. He holds that the amendments were never adopted.

Now, this amendment did not receive two-thirds of the vote of Congress or those States which had organized their governments under Mr. Lincoln's proclamation and under Mr. Lincoln's announcement.

The CHAIRMAN. Do you mean three-quarters or two-thirds?

Mr. SISSON. I mean two-thirds. I am speaking about a two-thirds majority of the House still.

Now, Mr. Johnson carried out absolutely the policy of Mr. Lincoln, and the reconstruction act was never considered by Congress and was never thought of by Congress until they ascertained that even of the loyal States, as I shall show you in a moment, they lacked one vote of enough votes to adopt the fourteenth amendment. The fifteenth amendment had not yet been submitted to Congress, but the thirteenth amendment was adopted by every Southern State during the year 1865, and on December 18 of that year it was declared to be a part of the Federal Constitution. Mr. Lincoln contended that the purpose and aim and object of the war was to preserve the Union first; to preserve the Union with slavery if it must be, but to preserve the Union preferably without slavery; but "the Union forever" was the policy of Mr. Lincoln. Therefore Mr. Lincoln announced to the people "then in arms and rebellion against the Government" as he called it, "that the very moment that they laid down their arms, that at that moment they could assume their former relation with the Government. They had never been out of the Union he contended. Every assurance was given to the southern people by Mr. Lincoln, that the war was fought to preserve the Union and to preserve the Constitution. When the insurrection was put down each Southern State had all the rights with other

States. Individual soldiers and citizens may have forfeited their rights but not the State. There were hundreds of loyal Union people in every Southern State and the protecting shield of the Constitution was over them. The loyal States had no right superior, in Mr. Lincoln's view of the situation, to any Southern State. If this is not true, then the Constitution did permit secession and the war was a war of conquest and fought without constitutional warrant. It will not be contended by any good lawyer that Mr. Lincoln's Emancipation Proclamation actually freed the slaves. Mr. Lincoln says it did not. There was no constitutional warrant for this step. It was a war measure and in defiance of the Constitution. But the issue was shall the Union be preserved? The result of the war decided that issue in the affirmative. Must slavery go? The Southern States recognized that that was also decided in the affirmative, and these people in good faith were, before any law required it, before any constitution required it, bowed to the arbitriment of the sword; these two issues and these two alone were the war issues.

All the southern slave-owners, without a murmur, set their slaves at liberty. My old grandfather called all his slaves up as soon as he had heard that Lee had surrendered and emancipated his slaves. This was before even the thirteenth amendment was proposed. The Southern States recognized that the question of slavery had been decided by the issue of the war, and they recognized the fact that if these States immediately set about reorganizing their governments under Mr. Lincoln's wise policy, they could at once reenter the Union. Some of these States called constitutional conventions and others amended their constitutions and instantly abolished slavery, and on December 18, 1865, the very year that the war closed, there was not a vestige of slavery left. The state governments were in full operation and the war over.

Then in 1866 the resolution to submit the fourteenth amendment is claimed to have passed, and they submitted the fourteenth amendment then to the States, and they did not get even three-fourths of the loyal States of this Union to ratify it. It was absolutely essential and necessary that they should have the assistance of some of the Southern States. Every border State, like Maryland, Delaware, and Kentucky, declined to ratify the amendment absolutely. California declined to ratify it.

But before I get to the question of ratification, I want to invite your attention to the vote in the Senate on this proposition.

Mr. CARLIN. You claimed at first there were only 138 votes in the House, when there should have been 158.

Mr. WEBB. One hundred and fifty-nine.

Mr. CARLIN. What was the vote in the States?

Mr. SISSON. With your permission, if you will let me get through with the ratification, I will come to that in sequence. Now, in the Senate the vote was taken on the 8th day of January, 1866. Thirty-three Senators voted for the amendment.

Mr. GOEBEL. That was the fourteenth amendment?

Mr. SISSON. Yes. The fourteenth amendment in the Senate received 33 votes, and 11 were cast against the amendment. The total membership in the Senate of loyal States was 52.

Mr. CARLIN. There was not any other membership in the Senate except that of loyal States, was there?

Mr. SISSON. Not at that time; although Senators had been elected, you will recall that it was declared by a resolution introduced by Mr. Thaddeus Stevens, the date of which I do not recall at this moment, that they should not at that time be entitled to take their seats. That was the one that President Johnson vetoed, by the way, and the one that brought about all the difficulties between President Johnson and the House and Senate at that time.

Now there were 52 Senators in the Senate at that time. If you take this as a correct computation, or a correct footing of the Senators, rather, you will find that two-thirds of 52 is 34⅔, or 35. Therefore, of the loyal States, it lacked two votes of receiving the necessary majority. Now if you count, as Senator Garrett Davis, of Kentucky, contended on the floor of the Senate——

The CHAIRMAN. Have you stated the vote both for and against?

Mr. SISSON. Yes.

Mr. CARLIN. That is, assuming that two-thirds of the full membership was necessary?

Mr. SISSON. Yes. I am assuming that. If I had the time I could go into the absurdity of any other contention.

Mr. CARLIN. Your position is that, agreeing that it might be absurd, and having had a legislative construction of it by the legislature itself, there is no other body that can pass upon that except the judiciary?

Mr. SISSON. That is true.

The CHAIRMAN. Has not the Supreme Court of the United States recognized these amendments?

Mr. SISSON. The Supreme Court has never passed upon the validity of this amendment at all. You know the Supreme Court of the United States has adopted a universal rule that they will not decide any question that is not presented in the record.

Now, Senator Davis, of Kentucky, contended on the floor of the Senate, and in very violent language, too, that evinces the passion of the hour and the passion of the time, that this Senate was made up of representatives of the 37 States, or 74 Senators, it was absurd to say that 33 constituted two-thirds of 74. I am willing to concede, for the sake of argument, that none but loyal States were entitled to representation, and even then it failed to receive the two-thirds, as required by the Constitution. And if it did not receive two-thirds, as required by the Constitution, I contend that nothing done thereafter to put life into a dead thing could give it validity. It was proposed in violation of Article V.

We all love and respect the Constitution. We take an oath to support the Constitution, and there will be no lawyer who can successfully defend Article V and at the same moment contend that these amendments were legally passed, because if he does so contend, he must repeal the provisions of Article V in reference to the amendment of the Federal Constitution.

Mr. CARLIN. What does the record show in regard to the 8 absentees who did not vote? Eight members of the Senate, according to your statement, did not vote. The body consisted of 52. Eleven voted against and 33 voted for. Were they paired?

Mr. SISSON. The record shows no pair; neither the record nor the Senate Journal.

Mr. DIEKEMA. So that there were two-thirds of those present voting for the amendment?

Mr. SISSON. Yes; if you take 33 and 11.

Mr. CARLIN. If they had had 2 more, they would have had two-thirds of the total membership at that time?

Mr. SISSON. Yes.

The Supreme Court had said in an opinion that these States were never out of the Union. The exact language, I believe, is that——

Mr. CARLIN. They were in rebellion——

Mr. SISSON. The exact language is that "It is an indissoluble Union of indestructible States." I believe that is the language of the Supreme Court.

Mr. CARLIN. But the Supreme Court has held that they had a right to secede. The Supreme Court has held that three or four times.

Mr. SISSON. Prior to the rebellion.

Mr. CARLIN. And that was an effort to secede, so that they were out of the Union to that extent, under the decisions of the Supreme Court.

Mr. SISSON. I must confess that, for the purposes of this argument, I must take the contentions of Mr. Lincoln and Mr. Johnson and all of the statesmen on the other side, and I do not take the contention of Mr. Davis, because if the contentions of Mr. Calhoun and the Confederacy were true (my own opinion is that they were right and their construction of the Constitution was the correct one), these States were out of the Union, and if these States were out of the Union they had no right to representation, and therefore the argument falls to the ground. But if you concede that, you must concede the right of the State to go out of the Union. I think Mr. Johnson's argument when he vetoed this measure is the strongest document that has been published in favor of the proposition that the States were not out of the Union and that these amendments were never passed. I mean his series of vetoes of the various reconstruction measures.

Now, gentlemen of the committee, I am hurrying along, because I do not want to take the time of the committee beyond that allotted to me, inasmuch as I suppose the committee will want to adjourn at 12 o'clock; but I want to call this fact to your attention, that the following States of the Union ratified the fourteenth amendment without any question: Connecticut, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, Vermont, Maine, Missouri, Michigan, Iowa, Wisconsin, Minnesota, Kansas, West Virginia, and Illinois, making 16 in all. Nebraska and Nevada are questionable. While I do not myself raise any question about them, their action was questioned on account of the manner in which the elections were held at that time. I make no point about that, but simply call the attention of the committee to the fact that it is contended by some lawyers that the ratifications of Nebraska and Nevada were not legal.

Mr. HENRY. Mr. Sisson, before you get to that, so many States passed ordinances of secession, did they not, just prior to the war?

Mr. SISSON. Yes.

Mr. HENRY. After the war was over, how many States passed ordinances repealing the ordinances of secession in order to get back into the Union?

Mr. SISSON. As a matter of fact, it was conceded in most of the States, so far as my investigation goes, that the ordinances of seces-

sion were absolutely void by virtue of the surrender of the Southern army. The supreme court of war decided this case.

Mr. HENRY. Did not some of them pass ordinances repealing those secession ordinances?

Mr. SISSON. So far as my investigation has gone, most of the States, I understand, repealed their ordinances of secession. I do not think it is true, perhaps, of all the States, but I know that Mississippi did, and also Alabama.

Mr. HENRY. That was one of the terms on which they came back. They took the position that they were out of the Union, and in order to get back they had to accede to it again?

Mr. SISSON. Yes. I am going to show you that the contention was made by those in favor of the amendment that those States were not out of the Union, and that they must be put into a shape where they could be coerced and forced to adopt the amendment.

Mr. HIGGINS. Does the argument you are making as to the fourteenth and fifteenth amendments apply equally to the thirteenth amendment?

Mr. SISSON. No, sir; not at all. On the contrary, the validity of my argument depends upon the validity of the thirteenth amendment. In other words, if the thirteenth amendment has been legally ratified it was ratified by state governments, which States were restored to the Union before a reconstruction act of Congress was ever passed, and is unquestionable in respect to its constitutionality. The idea, under the Constitution, of Congress presuming to take away from a State its government and to prescribe for the State the constitutional qualifications of those who shall or may register is an unheard-of proposition.

Since my friend has called my attention to it, I want to state that Mr. McCardle, of my State, who afterwards wrote a history of the State of Mississippi, was arrested under some charge growing out of an alleged violation of the reconstruction act, in which some of his rights as a citizen of Mississippi under the Constitution were invaded. He at once instituted proceedings in the federal court. You will pardon me, I hope, for a momentary digression.

Immediately after the war of the rebellion was declared over, each of the States was divided into federal judicial districts, and over these federal judicial districts federal judges were appointed, and all the civil courts were established and in full operation; and General Grant was sent down by President Johnson and made a tour of the South, and you will find here an exact copy of General Grant's report. He comes back to President Johnson and filed a report to the effect that these States then had their civil governments in operation, and that peace and quiet were restored. He reported that the people formerly in rebellion had gone back to peaceful pursuits. It is a glowing document which he files on the peaceful condition of the South at that time.

Mr. CARLIN. Are you going to discuss the doctrine of acquiescence with reference to this question?

Mr. SISSON. On the part of——

Mr. CARLIN. On the part of the various States of the Union?

Mr. GOEBEL. For these many years.

Mr. SISSON. If I had an opportunity I would like to discuss that, but if it is conceded on the part of the committee—and I have not

called your attention to that fact yet—that three-fourths of the loyal States did not adopt these amendments, then there is only one position that you can possibly take that will make these instruments valid.

Mr. STERLING. Let me ask you about that.

The CHAIRMAN. What was that?

Mr. SISSON. That is, if two-thirds of the legislature did not propose and three-fourths of the States did not ratify, then acquiesence or laches is the only ground upon which you can contend that the fourteenth and fifteenth amendments were valid.

Mr. CARLIN. That changes it at once to a political question, and not a question even for the courts to determine.

Mr. HENRY. Let me ask you a question. I do not want to take up too much of your time. After the war was over the South was divided into five military divisions?

Mr. SISSON. I wish I had time to discuss that.

Mr. HENRY. And a commanding officer was sent to take charge of each division, and governors were appointed and officials were appointed by these military commanders. When these amendments were ratified, were those States still under military government or were they back in the Union and had they repealed their ordinances of secession?

Mr. SISSON. Every Southern State adopted instantly the thirteenth amendment. Every Southern State, like Virginia and the Carolinas, and all the Southern States, in fact, instantly rejected the fourteenth amendment; and when they rejected the fourteenth amendment, as a punishment for that rejection, they were deprived of their governments, which had been recognized by President Lincoln and recognized by Congress and recognized by President Johnson. They were deprived of their governments, and they were divided into those five military districts, and the qualifications of a voter were prescribed by Congress and were not prescribed by the people of the States. And when Mr. McCardle—some gentleman interrupted me a moment ago when I was going to speak of this—when Mr. McCardle raised the question as to the validity of that act, instantly they repealed the act and passed another act with a new section, in which Congress stated that the judicial and civil authorities should not in any way review the action of any of these military commanders. And if an appeal was persisted in, it was stated on the floor of the Senate by one of the Senators that, "Any judge or judicial authority who should hear an appeal of any citizen in reference to the constitutionality of the reconstruction act will be immediately impeached."

Mr. CARLIN. What are you going to do with the attitude of the Supreme Court in holding that while in a state of rebellion even the right of habeas corpus shall be suspended?

Mr. SISSON. That was in time of war.

Mr. CARLIN. That was in this time.

Mr. SISSON. No; the writ of habeas corpus was not suspended when the war was over. It was, up until the reconstruction act, in full force and effect by proclamation of President Johnson. If all the lawyers were correct in their view who believed, like Mr. Webster believed and like Mr. Lincoln believed, that these States were simply States in insurrection, and that at the very moment that the insurrection was put down and they assumed their statu quo in the Union,

at that moment they had all the rights that other States had. To concede that proposition Congress realized that it was absolutely essential that they have the ratification of those States before they could hold that the amendment was valid.

Mr. HENRY. If you are right in your contention that secession was justifiable under the Constitution, and that the Southern States actually went out, and that these amendments were ratified by the States that had come back into the Union and before they passed the ordinances repealing the ordinances of secession, and that had sent back Members of the House of Representatives and Senators—if your doctrine of secession was correct, then, were they not out of the Union until they came back into the Union and got into statu quo again?

Mr. SISSON. I do not want to argue the question of the righteousness of secession, because that has been determined by the sword.

Mr. HENRY. I know that, but that goes to the legality of the proposition.

Mr. STERLING. These amendments have been a part of the Constitution for forty years. Do you think it is desirable that they be not in the Constitution? What is your purpose in raising the question now?

Mr. SISSON. I shall speak frankly. The State of Mississippi passed a law by the last legislature in which they provided that each county should have the right to establish agricultural high schools in the State of Mississippi. The boards of supervisors of the counties, acting under that act, established schools by selling bonds, by levying a 2-mill tax, which they were authorized to do under the act by a vote of the people. Many towns secured these high schools. The matter was appealed to our supreme court, and the supreme court decided that the act was unconstitutional because no provision was made for colored children.

Mr. WEBB. And the law expressly provided that it should be only for white children?

Mr. SISSON. Yes. We provide a common school in my State for the negroes, and, having such a plurality or majority in the State, the whites paying ninety-odd per cent, nearly 99 per cent, 98 per cent and something of the taxes; giving them an equal division of the school fund, providing an agricultural college for them, providing another school for them that takes the place of the state university, and spending the money that had been spent, the position was taken that the agricultural high school, which taught agriculture in the county to the boys of the county that were able to attend it, would be of benefit to every boy, whether he attended the school or not. But that act was declared to be unconstitutional.

Mr. DIEKEMA. By your state supreme court?

Mr. SISSON. Yes; by our state supreme court.

Mr. DIEKEMA. And that was done by your state supreme court under the provisions of this amendment?

Mr. SISSON. Yes.

Mr. DIEKEMA. Was it taken up to the United States Supreme Court?

Mr. SISSON. No, sir.

Mr. DIEKEMA. Why is not that a very direct and proper thing to do?

Mr. SISSON. No question has been raised in the lower court, but you must know the history of that case——

Mr. NYE. Do you claim that this is going to force a hearing in the United States Supreme Court?

Mr. SISSON. This resolution provides that the Attorney-General shall, in some appropriate proceeding—that is, when any matter shall come up whether it is a civil or criminal case—shall intervene and present all the records to the Supreme Court of the United States.

Mr. CARLIN. Mr. Sisson, do not you believe that the Southern States had a right to secede?

Mr. SISSON. I am going to decline now to enter into a discussion of that proposition, because we have no right now, and there is no man in the South that I know of now, whatever his belief formerly was and however sincere his conviction may have been, that now believes that we have the right, for that was settled by the war. My own opinion, to be frank, is that up until that right was taken away by the sword we had it under the Constitution.

Mr. CARLIN. Do you not believe you did secede?

Mr. SISSON. We made a wonderful effort at it.

Mr. HENRY. That goes right to your legal proposition, I think.

Mr. SISSON. I do not like to get into a discussion of that kind, because I want to present the legal phases of it.

Mr. NYE. If it ever gets to the Supreme Court, that will be the only legal question.

Mr. WEBB. I understand your proposition is this, that whether these States were in or out of the Union, these amendments were not ratified by a constitutional majority.

Mr. SISSON. Yes; gentlemen of the committee, there were 16 loyal States which without question adopted these amendments. These were Connecticut, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, Vermont, Maine, Missouri, Michigan, Iowa, Wisconsin, Minnesota, Kansas, West Virginia, and Illinois, about which there is no question so far as I have been able to investigate. In Indiana the vote in the senate seems regular, but I find no record of the vote in the house of representatives of Indiana, but if you count Indiana you have 17 for the amendment. Then add Nebraska and Nevada, you have a total of 19 of the loyal States, counting doubtful.

Ohio and New Jersey rescinded their ratification and passed resolutions of rejection before enough States had ratified to make their action beyond recall. Oregon did the same thing, provided you count Ohio and New Jersey as having the right to withdraw and if my contention of the Southern States is sound. Then the States of Delaware, Maryland, Kentucky, and California rejected absolutely. This makes nine of the loyal States against the amendment. Now, three-fourths of 26 equal 19½, and since you can not split a State it would require 20 States of the 26 loyal States to adopt the fourteenth amendment. Thus the record stands as to the loyal States. The amendment is rejected.

But the record is worse when you look at the Southern States. Every Southern State rejected the fourteenth amendment. The identical state governments, with the same legislatures, same state and county officers, and with the same qualified voters that unanimously adopted the thirteenth amendment, were all recognized

and counted for this purpose. These state governments which were so recognized and have been counted for and have made valid the thirteenth amendment, these States voted to deprive their own citizens of over $2,000,000,000 of property, thinking that by so doing this would remove every obstacle to a harmonious settlement of difficulties, and that they would then, under the assurances of Lincoln and Johnson and Grant, backed by the best thought of the Republic, be not required to do more, in 1865 adopted the thirteenth amendment, and it was placed in the Constitution on the 18th of December, 1865. The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States on the 1st of February, 1865, and was declared ratified on the 18th of December, 1865. Was settlement ever more prompt? How wise was Lincoln? How fully he saw the whole situation. But alas! Sad days were in store for the suffering South. Another bitter cup must be passed to her unwilling lips and she must be forced to drink it to the bitter dregs. Other dark and terrible days were in store for her; worse than the terrible war. Her state governments must be overturned, governments by a great people, capable of governing themselves in the highest sense, must be swept away. To do this the Constitution must bleed. It must be slain by the same men who claimed that they wanted to protect it. The thirteenth amendment was proposed before the war had ceased. The South was still in arms. She knew when she abandoned further the war that it would become a part of the Constitution. She acted her part in good faith. The so-called fourteenth amendment was proposed one year after the war, on June 16, 1866, after the state governments had been allowed to vote on the thirteenth. She accepted the thirteenth, but, as she had the right to do, she rejected the fourteenth. The rejection caused the reconstruction act. The South must be forced to ratify. But I refrain from further comment, and will only discuss the legal status. And since the same question arises as to the fifteenth, I will not at this time discuss the illegality of the ratification of the fourteenth by Southern States, but will discuss the fourteenth and fifteenth together, as they are affected by reconstruction legislation.

FIFTEENTH AMENDMENT.

Let us now note what the record discloses as to the fifteenth amendment. The resolution proposing the adoption of the fifteenth amendment is claimed to have passed the House on February 25, 1869, the vote being, as shown by Congressional Globe of that date, to be:

Yeas	144
Nays	44
Not voting	35
Total	223

The House rolls show that 223 Members constitute the whole House. Now, two-thirds of 223 is 148⅔, or, since you can not split a Member, 149. Therefore the resolution lacked five votes of getting the necessary two-thirds of the Members of the House. If you count all the Southern States the roll of membership of the House would be greater and the vote would be short that additional number.

The resolution for the fifteenth is claimed to have passed the Senate on February 26, 1869, the vote being as shown by Congressional Globe of that date to be:

Yeas	39
Nays	13
Not voting	14
Total	66

Two-thirds of 66 is 44 and not 39. The resolution therefore failed by five votes to receive the necessary two-thirds. Senator Garrett Davis said on the floor of the Senate, when the presiding officer declared the resolution adopted, that there were 37 States in the Union, and that the Senate should consist of 72 Senators, and that it did not matter what happened, the resolution had no vitality, and, if ratified by the States, would be void.

RATIFICATION OF FIFTEENTH.

California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected the amendment. New York withdrew her ratification before the requisite three-fourths had ratified, and Ohio withdrew her rejection. If Ohio could withdraw her rejection of the amendment and then be permitted to ratify, then surely New York should be permitted as fully to withdraw her ratification and reject it.

The Indiana ratification of the amendment was absolutely void. The constitution of Indiana then and now provides that two-thirds of the membership of each house is necessary to constitute a quorum for the transaction of business. When the resolution to ratify the fifteenth amendment came up a bare majority was found to favor it. Those opposed to the amendment resigned their seats, thus breaking a quorum. The governor then ordered an election to fill these vacancies, and all of the members who had resigned were reelected except one, the issue being the ratification of the amendment. When the resolution came up again for ratification these members again resigned, thus breaking a quorum again. The presiding officer then made a remarkable ruling. He held that for ordinary business the Indiana constitution requested two-thirds of the members to transact business, but that since this was extraordinary business he would hold that it only required a majority and that less than two-thirds could transact extraordinary business. Thus Indiana was counted as ratifying the amendment.

The ratification by Kansas, Nevada, and Missouri is open to grave doubt. Immediately after the resolution is claimed to have passed, Congressman Clark, a Representative from Kansas, telegraphed the resolution to the governor of Kansas, because the legislature was about to adjourn and as a party measure they wanted the fifteenth amendment adopted before the coming November election. The resolution was not exact in form, and on this telegram the legislature ratified, and when compared with the resolution which it is claimed passed Congress it is materially different. Senator Stewart also telegraphed the Nevada governor for the same reason and with the same result, and so did Senator Henderson, of Missouri, to the governor of Missouri with like result. This is rather undue haste on such an important matter and should not be countenanced by the courts.

But if you count them for the amendment and only count the loyal States you will have too few States. Three-fourths of 26 is 19 and a fraction, or 20, and without Kansas, Nevada, and Missouri there are 8 States against ratification, which leave of the 26 States only 18 in favor of the amendment, which is 2 short of the necessary three-fourths. The reason I count Tennessee in this list is because her Representatives had been admitted to seats in Congress.

The CHAIRMAN. Did not the Secretary of State receive a certificate from the secretary of state of Indiana, under the seal of the State, that the amendment had been ratified? We can not go back of that, back of the seal of the State, and we can not go back of the certificate of the governor.

Mr. SISSON. I will call the chairman's attention to what the Secretary of State said at the time. It is a remarkable thing. He goes on to say that if certain conditions had been complied with——

Mr. DIEKEMA. That is, in his certificate?

Mr. SISSON. Yes. If certain conditions had been complied with, and if certain States could be counted, then enough States had ratified the amendment. This was Mr. Seward's proclamation as to the fourteenth amendment.

The CHAIRMAN. The certificate of the State of Indiana to an electoral commission would be an absolutely binding thing.

Mr. SISSON. Of course, Mr. Chairman, it is necessary that all these questions should be passed upon by the courts, as to whether or not that certificate would be absolutely binding upon the sovereign people of Indiana.

There is a remarkable thing in the history of these last two amendments. Do you know that every State in the Union, on every occasion when the question has been submitted to the vote of the people of the States, has overwhelmingly voted against the adoption of these amendments? The issue in the California fight, when every state officer was favoring the adoption of the fourteenth amendment, was whether or not they would ratify the fourteenth amendment, and by 50,000 they voted against it. The issue was submitted in Oregon, and by an overwhelming majority they voted against it. In Indiana, so far as the people had an opportunity to vote on it, they voted overwhelmingly against it.

Mr. DIEKEMA. In the Mississippi law does that law exclude in express terms, from the benefits of these schools, the colored children?

Mr. SISSON. It provides for white children.

Mr. DIEKEMA. It excludes the colored children, then?

Mr. SISSON. Yes. From that one school only are they excluded, but the benefits of all the other schools are open to the colored race.

Mr. DIEKEMA. The supreme court of your State upheld these amendments, and held that this state law was a violation of the fourteenth and fifteenth amendments?

Mr. SISSON. Yes.

The CHAIRMAN. I am sorry, Mr. Sisson, and I do not want to interrupt your argument, but I personally have to go down and look after these unanimous consents in the House. When can we continue this hearing?

Mr. SISSON. I want to say to the committee that I appreciate deeply the courtesy that you have shown me and the opportunity you have given me of presenting these views, and I trust that the

committee will have a full appreciation of the honesty and the purity of my motives in doing it.

The CHAIRMAN. I have such an appreciation that I feel that Mr. Sisson should be given the opportunity to speak further. I would like to know when it could be given to him. Would 4 o'clock this afternoon do?

Mr. CARLIN. There is a subcommittee here at 3.30—Mr. Moon's subcommittee.

The CHAIRMAN. How about 11 o'clock to-morrow morning. Would that be agreeable to the gentleman from Mississippi?

Mr. SISSON. I think, gentlemen, in view of the fact that we have thirteen or fourteen amendments to the Federal Constitution now pending before Congress, it would be well to have the exact manner in which the Constitution can be amended made clear.

The CHAIRMAN. Would it be agreeable for the committee to meet at 11 o'clock to-morrow?

Mr. CARLIN. I would like you, Mr. Sisson, to examine the report of Senator Hoar, submitted to the Senate of the United States, in reference to the retrocession of the territory to Virginia, in which the doctrine of acquiescence was determined by the Judiciary Committee of the Senate to apply, and that report was adopted by the Senate. It fixes this matter.

The CHAIRMAN. What do you say, gentlemen? Suppose we meet again at 12.30 to-morrow, and have Mr. Sisson resume his argument. Without objection, that will be done.

(Thereupon, at 12 o'clock noon, the committee adjourned, to meet to-morrow afternoon at 12.30 o'clock.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, March 22, 1910.

The committee met at 12.30 o'clock p. m., Hon. Richard Wayne Parker (chairman) presiding.

STATEMENT OF HON. THOMAS U. SISSON—Continued.

The CHAIRMAN. You may proceed, Mr. Sisson.

Mr. SISSON. I will say that I do not know that I could, perhaps, add anything to what I have already said, because I have gotten my contention before the committee, and unless the committee are going to investigate the records, which, unless the pages were pointed out to you, would be an interminable task——

The CHAIRMAN. We want the pages pointed out, because it will all be taken down.

Mr. SISSON. I will tell you, Mr. Chairman, it would be better for me to prepare at my leisure a brief——

The CHAIRMAN. It would be a great deal better. We will have it, therefore, as a part of your remarks. It will probably be brief.

Mr. SISSON (continuing). And present that to you, because to bring these records here would entail, of course, a great deal of trouble.

The CHAIRMAN. The information would not get to all the Members.

Mr. SISSON. And it would take just as much labor to do it privately, and then would simply be a rehearsing of what the actual records would show. Any gentleman of the committee who might have interest enough to investigate it would do so upon his own initiative from the brief, without my having to take up the time of the committee in discussing the matter.

The CHAIRMAN. Mr. Sisson, I wanted to get at the gist of the thing by one or two questions. I went over Mr. Curtis's work this morning, which I had read carefully before, and I found that Seward's second proclamation as to the fourteenth amendment recited 31 States out of 37 as having assented.

Mr. SISSON. Yes, sir.

The CHAIRMAN. Two of those, Ohio and New Jersey, had withdrawn.

Mr. SISSON. Yes, sir.

The CHAIRMAN. That still left 29, or more than three-fourths of the 37.

Mr. GOEBEL. But Ohio afterwards came back.

The CHAIRMAN. I know Ohio afterwards came back, but I am talking of just that particular moment, the time of the proclamation. There are several States that have since then likewise agreed that had not agreed then.

Mr. SISSON. That is true. But Ohio did not come back on the fourteenth amendment.

The CHAIRMAN. Now, taking points in order, is there any limitation of time to the right of a State to accede; that is to say, could they not accede up to the present time?

Mr. SISSON. I think so, Mr. Chairman.

The CHAIRMAN. That, then, we will dispose of; we all agree with that.

Mr. SISSON. Mr. Chairman, I take it it will be conceded by all lawyers that if a State now were to ratify both of these amendments through its legally constituted legislature, that ratification might cure any prior defect in the ratification. I do not believe that the proclamation——

The CHAIRMAN. I want to get down to short points, and I would rather have your suggestions come afterwards.

Mr. SISSON. I appreciate the interest you have taken in this, Mr. Chairman.

The CHAIRMAN. My interest is to get it down to brief points as to this proposition.

Mr. SISSON. If the Chair will hear me just a moment——

The CHAIRMAN. I will hear you in time, but I thought perhaps you would prefer to reserve it until afterwards.

Mr. SISSON. If you take the action of a State upon this amendment I believe it is reviewable at any time. I do not believe that a State would be bound unless its legislature ratified this amendment in accordance with its own constitution. I think the question of ratification is a fact. I do not believe it is a certificate; I do not believe that a certificate on the part of a secretary of state to the Secretary of State of the United States that does not state the facts necessarily means that the State has ratified the amendment, nor do I believe that the proclamation on the part of the Secretary of State,

who is authorized by Congress to make the proclamation, adds anything to the validity of either of these amendments. I think it is nothing more nor less than the clerical duties which are necessary to write into the instrument the acts of the States.

But in referring to Mr. Seward's proclamation yesterday I did so with the idea of getting to the minds of the committee the fact that at the time the fourteenth amendment was acted upon there were recognized in the Union 37 States. Being 37 States, it required three-fourths of those to ratify the amendment. Confining myself now to the fourteenth amendment, and without rehearsing, without the Southern States there was no ratification of the fourteenth amendment upon the part of the loyal States, and it is unquestioned it was the only and the sole reason for the passage of the act of reconstruction. I will not go into the trouble that was had between the President and Congress at that time. Those were stormy times. But I would call the attention of the committee to the very strong argument made by President Johnson when he vetoed what is called the "supplemental act of reconstruction," the last act, I believe, too, pertaining to the readmission of the Southern States into their original positions on the floor of Congress and in the Senate. But it was conceded by Mr. Lincoln, by the courts, by Congress, and by all the lawyers that there was no such thing as a ratification without the Southern States; but even if they had attempted to ratify without the Southern States they then lacked one State of having three-fourths of the States that were then loyal.

I want to call your attention to the action of the State of Indiana.

The CHAIRMAN. I did not find that mentioned in Mr. Curtis's books.

Mr. SISSON. No.

The CHAIRMAN. Mr. Curtis takes it for granted——

Mr. SISSON. He takes it for granted that the State of Indiana had ratified the amendment.

The CHAIRMAN. I was going to put it in a little different form. He takes it for granted that the certificate of the governor and secretary of state, under the seal of the State, is the action of the State. I only wanted to call your attention to the fact that this was the rule that was adopted in the electoral commission, and is the rule that, except in one case of the controversy of the great seal as to the Members of Congress elected from New Jersey, has always been maintained by every State with reference to the election of Members of Congress.

Mr. SISSON. That is true.

The CHAIRMAN. That is to say, that the certificate of the governor, with the secretary of state, under the seal of the State, is absolutely conclusive of its truth; that the truth of that certificate can not be inquired into.

Mr. SISSON. I think that has been unquestionably held to be true, unless you should raise the question of fraud.

The CHAIRMAN. That, of course, can be done by the House. I am not talking of the inquiry of the House into the election of its own Members afterwards, but of the right of the person certified to come upon the floor and vote, which right has always been admitted as unquestioned, except in the one case where the other party, the Democrat candidates, were called by the Clerk, although the certifi-

cate of New Jersey had certified the Whig candidates, and it almost created a revolution.

Mr. SISSON. I think, Mr. Chairman, that an entirely different principle is involved. I do not think that the same principle would be involved in reference to a flat, the certificate of a clerk to a deed, or a secretary of state, and the actions of election boards and election commissioners and votes of legislatures in reference to the election of Senators. I do not think that the same rule could possibly apply there as would apply in the ratification of an amendment to the Constitution, because I take it that Article V must be literally complied with; it must be a fact, in other words, that the State did ratify it.

The CHAIRMAN. Very well. The ratification is very much like the passage of a law. I think it is generally taken—by most lawyers, at any rate—that the signature of a speaker of a house of representatives or a house of assembly, and the signature of the president of the senate of a particular State, are absolute proof that it passed, and you can not inquire into it, and thereupon the signature of the governor, or even of the secretary of state, alone, with the seal of the State, that such a law exists, is taken absolutely as conclusive as to the existence of the law. We must have some way to prove without going into the question of whether the legislature really did vote or not.

Mr. SISSON. Do you think that if the journals of the house or assembly and the journals of the senate, which are the best evidence of what happened, should show that the speaker of the house of representatives of a State, or the president of the senate of a State, or the Speaker of the House here, or the Vice-President, signed a bill, which as a matter of fact, had not been passed legally, as shown on the face of the journal, that you could not introduce the journal to show it was an error?

The CHAIRMAN. I believe it is determined in the Supreme Court of the United States that the journals can not be referred to. It certainly is in my own State, and in a good many others. Somebody's action has to be conclusive.

Mr. SISSON. I have not investigated that question, Mr. Chairman. I simply state that in the trial of a cause in my own State, the court held that where the speaker of the house signed a certain bill which had left out a certain material clause of the bill, and the journal showed that the bill as passed by the house was a different bill from the one signed, the question could be raised in the court.

The CHAIRMAN. It is so in some States, I admit.

Mr. SISSON. Because the journal is the best evidence of what happened, not the signature of the presiding officer.

Mr. MOON. Do you mean to say that the court would take judicial cognizance that an act was different from the act certified by the secretary of state in accordance with the requirements of the law?

Mr. SISSON. If it appears absolutely on the face of the journal that it was different.

Mr. MOON. I know; but that involves a judicial inquiry going behind the act itself. I would not think so.

Mr. SISSON. The discussion, Mr. Moon, has been occasioned by virtue of the act of the State of Indiana on the fourteenth amendment.

Mr. MOON. So I understood; you were discussing that?

Mr. SISSON. Yes.

The CHAIRMAN. When was that first raised? I never heard of that matter of the State of Indiana until you mentioned it. Who raised it first?

Mr. SISSON. Mr. Seward referred to it in his proclamation.

The CHAIRMAN. Does he?

Mr. SISSON. I wish I had his proclamation.

The CHAIRMAN. I have it here.

Mr. SISSON. I want to show the committee here the doubts in Mr. Seward's mind as to whether——

The CHAIRMAN. May I not ask if you do not gather from Mr. Seward's proclamations—he issued two—that when the first was issued there was doubt, because two of the States had withdrawn their assent, and that reduced it below a majority. When he issued his second proclamation that doubt no longer existed, because more States had ratified it, and there were twenty-nine without those two. There was also doubt in Mr. Seward's mind at the time of his first proclamation as to the status of the reconstructed States, but when he issued his second proclamation that status had been recognized by Congress, and he therefore took that as a political matter which had been determined by the highest authority.

Mr. SISSON. Of course, Mr. Chairman, I have no idea about what was in Mr. Seward's mind. He only issued one proclamation in reference to the fourteenth amendment, did he not? The one July 20, 1868, was the one notifying Congress of the actions of the States. The one of the 28th was a proclamation of the fact that Congress had declared the fourteenth amendment adopted and a part of the Constitution.

The CHAIRMAN. Two proclamations as to the fourteenth.

Mr. NYE. What was that congressional recognition of the status? Did they hold that they were simply States in rebellion, that they were a part of the original States, or that they were outside?

Mr. WEBB. I do not think they ever settled that question satisfactorily.

Mr. NYE. I think the chairman spoke of Congress having taken action.

Mr. WEBB. They only decided collaterally, indirectly, I think.

The CHAIRMAN. The second proclamation was dated July 28, 1868; the first one was July 20, 1868. The first is contained at page 654 of the second volume of Curtis and the second at page 658. The recognition that they took recites that—

> On the 21st day of July, 1868, the Senate and House of Representatives had transmitted a concurrent resolution reciting that the legislatures of certain States, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendments to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress. Therefore resolved by the Senate, the House of Representatives concurring, that the said fourteenth article is hereby declared to be a part of the Constitution of the United States; and it shall be duly promulgated by the Secretary of State of the United States.

Mr. SISSON. Do you not think then that his second proclamation was the real proclamation and the one which he was really making as the proclamation or was the second notice of what Congress did after receiving his first proclamation of the 20th?

The CHAIRMAN. Yes; the second proclamation recites no doubt whatever. The first proclamation recites as you see certain doubt.

Mr. SISSON. I want the chairman's attention to this:

> Whereas it appears from official documents on file in this department that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, and Iowa; and
>
> Whereas it further appears from documents on file in this department that the amendment to the Constitution of the United States proposed as aforesaid has also been ratified by newly constituted and newly established bodies, avowing themselves to be and acting as the legislatures, respectively, of the States of Arkansas, Florida—

and so forth.

The CHAIRMAN. That is in the first proclamation; it is not in the second.

Mr. SISSON. What is the last one?

The CHAIRMAN. The 28th of July.

Mr. SISSON. This was on the 20th.

The CHAIRMAN. And between the 20th and the 28th two more States had ratified so as to take the place of those that had withdrawn; and what is more, the Senate and the House of Representatives, by a concurrent resolution, had recognized the action of the States, recognized their status, and thereupon Mr. Seward issued a determinate proclamation without any doubts whatever, and since that time, as I understand it, the governments then recognized have gone on continuously without intermission or break to the present date and are recognized as the governments of those States.

Mr. SISSON. Mr. Chairman, that action on the part of Congress contemplates that a State has a right to withdraw its refusal to ratify, but has no right to withdraw its acceptance, even prior to the date of a sufficient number of States having ratified. That is to say, if a State were the third State to ratify, or, if you please, the first State to ratify, they hold after a State had ratified the first State would have no right to withdraw its ratification.

Mr. GOEBEL. In order to break a quorum, so to speak.

Mr. SISSON. In other words, my contention is that right of recession exists up until three-fourths shall have adopted it. The very day that the State acts which make the necessary number to constitute the three-fourths, that moment every State is bound by it, and all of the States that did not adopt it are also bound by it, and by force of the ratification of three-fourths the law is extended over the States like Kentucky, Delaware, Maryland, California, and Oregon, that declined positively to ratify—not only declined, but positively refused to do it. There was no State that acted between the 20th and 28th. Oregon changed her position on the 28th, I think it was.

The CHAIRMAN. That question would be left out, however, because counting all that had withdrawn, and all that subsequently ratified after refusing, there are enough here that have ratified to make the three-fourths. The only question you bring up is the recognition of the governments of the various Southern States, as to which I simply put this question, as to whether those governments, established after the war—however they were established—have not continued from that date to this as the continuous governments of those States, recognized by all and by every one at the present time.

Mr. SISSON. In many of the States they have, of course, had new constitutions, but before we leave that point I believe if you carefully investigate it, and if the court will take cognizance of the illegal action of the State of Indiana, and if three-fourths had not ratified the amendment at the time Mississippi finally ratified, being one of the last States, and Texas finally ratified, being the last State—that then, prior to this time the State of Oregon withdrew her ratification, it would then necessitate three States, and not two, to overcome the withdrawal of the State of Oregon; that is, conceding that prior to the time that three-fourths ratified a State has the same right to withdraw her acceptance as she has to withdraw her rejection, because all of the Southern States withdrew their objections to the ratification, and they were permitted to withdraw them. Do not understand me to say that a State can not withdraw its objection. I think the thing might hang, Mr. Moon, for months at a time, or years at a time; the amendment might hang in the balance, and the State might go first from one position to the other; but do you not think the very moment that three-fourths of the States adopted the amendment, it would at that moment become a part of the Federal Constitution? Is not that true?

Mr. MOON. When it was properly declared so, you mean, in accordance with the Constitution?

Mr. SISSON. Do you mean that the declaration adds any validity to it? Would not the declaration be nothing more nor less than an addition as a mere calculation on the part of Congress, to determine the mere fact of the three-fourths, and if, in that addition, in that calculation, Congress should have added the thing erroneously, Congress should not have complied literally with Article V, and the records of the State should show that Article V had not been complied with, would it not be reviewable by the court to determine whether or not Article V had been complied with?

But I take it, Mr. Chairman, that if the objections in the State of Indiana are considered, if the State of Oregon had the right to determine prior to the time three-fourths had ratified, if the State of Ohio had the right to withdraw its affirmance, and did withdraw it, then she would have a right to register her objection prior to that time; so would the State of New Jersey. That must be true, else the Southern States ought to have been counted for all time to come against it, and if the Southern States are permitted to withdraw their indorsement, then the States of Ohio and Oregon ought to be permitted to withdraw their acceptance, and if they are permitted to withdraw their acceptance, when those 3 States withdraw their acceptances, it takes 9 States to overcome that objection, because it takes 3 States for where there is 1 State against to ever accomplish the three-fourths required under Article V of the Constitution.

Mr. MOON. Let me ask—and I ask for information, I do not know—was the withdrawal of the Southern States made an essential feature by the act of reconstruction for the reentry of those States?

Mr. SISSON. Oh, yes; it is conceded by all that without the adoption of the fourteenth amendment by the Southern States the fourteenth amendment was never adopted.

Mr. MOON. You do not get my question; probably I do not make it clear. Take the withdrawal of Mississippi and Texas, for instance. Was that made a precedent condition by the act of reconstruction for their readmission into the Union?

Mr. SISSON. Not admission into the Union, but to have her Senators and Representatives admitted to Congress.

Mr. MOON. Does that put it upon a different basis than the voluntary withdrawal?

Mr. SISSON. Yes, sir; that is the point. I want to call to your attention some remarkable clauses here.

Mr. MOON. They had not previously rejected?

Mr. SISSON. Oh, yes; by positive acts of the legislatures. The history of it is this: Every Southern State, under the proclamation of Mr. Lincoln, that was carried out by President Johnson, at once organized governments in accordance, first, with the provision that there should be no slavery there. Mr. Lincoln contended, and a short time before he died Mr. Lincoln said that slavery had not and could not be abolished in Kentucky; slavery had not and could not be abolished in any Southern State unless they ratified the thirteenth amendment; that his emancipation proclamation was a mere war measure and did not deprive the people of the States of their property in the slaves. Mr. Lincoln took that position. Everybody believed this at the time and there was nothing said, there was nothing done to disturb this belief, and every Southern State and every southern statesman acted in absolute good faith with the idea that the Union had been preserved and that the only thing necessary for them to do would be to gratify the desire of those people who said that slavery should go. So, without the thirteenth amendment to the Federal Constitution even being then the law, nearly all of these Southern States met and instantly adopted amendments to their constitutions, some of them by constitutional conventions, and abolished slavery.

Mr. GOEBEL. Lincoln's proclamation of emancipation was a war measure.

Mr. SISSON. That is true.

Mr. GOEBEL. But did it not have the same effect——

Mr. SISSON. As being a liberation of the slaves?

Mr. GOEBEL. As being a liberation of the slaves.

Mr. SISSON. That is true, and the Southern States so considered it. But Mr. Lincoln said it did not operate as a law; that it did not deprive anybody ipso facto of their property. But he said, "Even if you concede that the people of the Southern States have forfeited their right to their property by reason of treason to the Federal Government, yet that would be the forfeiture of lands as well as the forfeiture of slaves," and he did not contend that there was any forfeiture, "But whatever may be said in reference to the status of the property of the seceding States, there were loyal citizens in those seceding States. For instance, there were 300,000 troops from the States of Tennessee, and western Virginia, and West Virginia, and Kentucky, and Maryland who enlisted in the Federal Army as loyal men, and Kentucky did not secede; Maryland did not secede; Missouri did not secede, and those States had property in slaves." Mr. Lincoln said that in good faith to those people. Mr. Douglas went into those States and made campaigns for the purpose of preventing the States leaving the Union. Mr. Lincoln then said in good faith to those people, "We can not take their property away by a war measure. There is no forfeiture; there is no attainder; there is no treason."

But I did not care to get far into that discussion. I want to address this contention to you as a lawyer, that these States which were called

the Confederate States of America recognized instantly when they laid down their arms that the Union was preserved. Mr. Lincoln then said, "We must not put any obstacle in the way to preserving the Union by making it difficult for those States to resume their proper relation to the Union, because if those of us who have fought this war to preserve the Union put an obstacle in their way, we will be acting in just as bad faith as those who have been trying to break up the Union."

So the States instantly ratified the thirteenth amendment to the Federal Constitution, and that was done on the 18th day of December, 1865, and there was not a single Southern State that declined to ratify the thirteenth amendment, and the ratification to-day of that amendment is by governments in those States which were in existence before the act of reconstruction. After peace had prevailed for two years, after Congress had divided them up into judicial districts, and after Congressmen had been elected and were knocking at the doors for admission for two years; after General Grant had made his tour of the South and made the report that peace and good order prevailed, in order to get the fourteenth amendment adopted, it was necessary to pass some drastic measure, because the loyal States would not adopt the fourteenth amendment. This step could not be taken against a loyal; there was no excuse. It was necessary that some coercive measure should be made, and thus this remarkable act was directed against the Southern States:

Another thing that is remarkable about it. After the act was passed, a man by the name of McCardle, in the city of Vicksburg, was arrested for some trivial offense. By the way, Mr. Chairman, it is referred to by Mr. Curtis incidentally; he does not go into the details. But he was arrested and tried before one of the military tribunals and he appealed to the civil court, and while the civil court had it under advisement, only twelve or fifteen days, notice was sent to Congress, and Congress then repealed the act and at once passed another act of reconstruction, which last act deprived the civil court of any right to review that military tribunal's action. It was stated on the floor of the Senate during the discussion of this act that any judge that took cognizance of any cause of any kind under the reconstruction act would be impeached. I do not know that that is the reason; I do not undertake to say that that is the reason why the courts would not take jurisdiction, but an argument made stronger than I can make it is the argument made by President Johnson when he vetoed this remarkable act. I will call your attention to section 10 of that act.

Section X. *And be it further enacted*, That no civil court of the United States or of any State shall have jurisdiction of any action or proceeding, civil or criminal, against any such district commander, or any officer or person acting by his authority, for or on account of the discharge of the duties imposed upon him by this act or the acts to which it is supplementary.

And then the last act:

No district commander or member of the board of registration, or any officers or appointees acting under them, shall be bound in their action by any opinion of any civil officer of the United States.

By this act, you see, it was taken out of the mouth and out of the hands of the people. Those States—if they had constitutional rights at all—had the right to act as sovereign States, and ought to have had

the right to accept or reject the amendment. These States were deprived of that right. They were deprived of the sovereign right that a State has, as honestly, as fairly, and as positively to reject as they had to adopt.

Mr. MOON. You do not think, do you, that the Supreme Court of the United States would entertain, after this lapse of years, any question that had been so thoroughly settled, upon any technical, legal, or any other ground?

Mr. SISSON. I most assuredly do.

Mr. MOON. I am aware of this fact, that in 1789, when the Constitution was adopted, the Constitution created a Supreme Court of the United States, and it was ratified by the Senate, and a subsequent act of Congress was passed imposing certain duties of the circuit courts on the judges, which was an exceedingly onerous duty, against which these judges rebelled, and finally, about 1810, the question of the constitutionality of that act was raised. The question was raised that these judges were not judges of the circuits courts; they were not provided for under the Constitution. They never had been appointed so by the President, and they never had been confirmed by the Senate as judges of the circuit courts, and therefore they could not sit as such judges. But the Supreme Court, anxious as they were and rebelling as they did against this terrific strain upon them, said: "This was settled by a contemporaneous construction at that time, and after this lapse of years we will not attempt to disturb it, and we will not inquire into its legality." It could not have been justified, perhaps, at that time. It seems to me you are in the same way. They would not inquire into it. They simply said it was settled by the contemporaneous construction of the men who did it at that time, and that they would not disturb it.

The CHAIRMAN. There are some fifty decisions of the Supreme Court on the meaning of it, and they have taken it for granted in all their decisions, and enforced it.

Mr. MOON. I think the Supreme Court would repudiate any idea of attempting to unsettle what has been settled by contemporaneous construction.

Mr. SISSON. That is the question I want the Supreme Court to answer. If they take the view you suggest, then no harm could come from the committee reporting my resolution. But I differ with my friend, I do not think it would be revolutionary. It would not disturb the status of anybody. It would take action on the part of the States to disturb anyone or the present status of things. It would simply enable each State to determine these questions for itself.

Mr. BRANTLEY. Unfortunately, I did not hear your argument on yesterday, and it may be that you have already covered the question I am going to ask. If so, you need not answer it; I will read it in the printed record of your speech. If you have not done so, to my mind it is a question that ought to be discussed. Is there no distinction to be drawn between a constitution and a law that is enacted under a constitution? Is not the making of a constitution a political question and not a judicial question? Has the Supreme Court, or any other court, any power to do anything more than construe a constitution? The Constitution says—and this is all the judicial power that I know anything about—"The judicial power shall extend to all cases in law

and equity arising under this Constitution." Unless there is a constitution this judicial power does not attach. If these sections or amendments form no part of the Constitution, then the Supreme Court has no power to pass on them. If they do form a part of the Constitution, then the judicial power extends to their construction and to all cases that arise under them. But all the power that the courts have comes from the Constitution. It is supreme over them all, and it is an exercise of political power. I want to ask the question, If the Supreme Court would have jurisdiction to-day to pass on the question as to whether or not the original Constitution was properly assented to by the nine States, or whether the courts to-day would have judicial power to pass upon the question as to whether or not the first ten amendments were ever properly ratified? Is it in the power of the courts, in other words, to come in and set aside the Constitution of the United States on any ground?

Mr. MOON. Under which they derive their existence.

Mr. SISSON. Under Article V of this constitution it provides the manner in which the constitution may be amended. There was never any question about this constitution until the adoption of the fourteenth amendment. Their authority under this constitution is the authority that is granted to them to act in reference to this matter under Article V. The state courts are divided on the proposition. Some state courts hold that where the state legislature has declared an amendment to the state constitution to be carried, and it is embodied in the constitution of the State by the legislature, the action of the legislature being vested with that discretion to determine the question of its ratification, that it is final.

The CHAIRMAN. Have you references to these decisions?

Mr. SISSON. I could get them for you. In my State you find a case, the State *v.* Powell (77 Miss. 568), that collates all of the authorities in the United States courts and in the state courts on the proposition. The majority of the States hold that it is a judicial question.

The CHAIRMAN. Give me a reference to that one case, will you?

Mr. SISSON. That was a case involving the question whether or not an amendment to the constitution providing for the election of judges had been carried at an election.

The CHAIRMAN. Give me a reference to it, because you say it collates all the authorities.

Mr. SISSON. 77 Mississippi, 568. This is the case where one of the judges was appointed by Governor Longino. At the expiration of his term the governor issued to him his commission, and then there was a quo warranto served on him asking by what authority he was performing the duties of his office. The constitution had been amended and provided for the election of judges, and of course that brought up the question of the validity of the amendment. Our court there reviewed all the authorities and held that it was a judicial question and followed the majority of the courts. There are two holdings in the Supreme Court of the United States on this question. One case holds that where a state constitution has been amended—and that was reviewing the legality of a certain law passed under a state constitution, and whether a certain article in the constitution was or was not valid—they held that where the State had determined the question in her own borders by the authorities that were authorized

under the constitution to pass upon it, the court would not disturb that matter. That happened to be a State where it was passed upon by the legislature.

Mr. BRANTLEY. Who determines it for the United States?

Mr. SISSON. I am going to get to that. But in the Supreme Court there was another case—and I will give you that in brief—in which the court announces the doctrine that the question as to whether or not the Federal Constitution has been amended is a legal question under the Constitution, and not a political question. Of course, if the court should hold that this is a political question and the action of Congress placing the amendment there is final, that ends the matter.

Mr. MOON. Do you mean that case in the United States court decides that the amendment of the Constitution of the United States is a legal and not a political question? Do you mean to say the validity of an amendment to the Constitution of the United States was ever before a court?

The CHAIRMAN. A state constitution.

Mr. MOON. Oh, a state constitution is entirely different.

Mr. SISSON. That is what I say.

Mr. MOON. We can control the constitution making of a State, but what is the power that controls our power to change our own Constitution?

Mr. SISSON. I understand there are other people besides the people of the States. Those men in the legislature of a State are responsible to the citizens of that State for the manner in which they decide those questions that have been sent to them at the ballot box. But in the Congress of the United States the minority of the States, who themselves have rights in this question and rights under this Constitution which are protected there, which rights are sacred, these States, in their legislatures, may send Congressman after Congressman, Senator after Senator here, who may protest against it, and yet the minority of the States would be literally deprived of all right to be heard by an action of Congress that might be in violation, during times of political tempest, of the federal instrument itself.

Mr. MOON. Is not that what the States conceded? That is the power the States conceded to the United States Government when it was formed.

Mr. SISSON. It is true when Article V has been complied with. The question as to whether Article V has been complied with is certainly a question which the courts could pass upon.

Mr. MOON. You say that. Where is your authority?

Mr. SISSON. That is my opinion, and I do not think there can be any question about the federal court having a right to pass upon the question of whether or not it has been complied with.

Mr. MOON. Mr. Brantley suggested the thought, and it strikes me as being a very important one.

Mr. SISSON. I believe this, that if the Supreme Court shall decide, Mr. Brantley, that it is a judicial question, the moment they decide that they will either declare these amendments to be not valid or they must repeal Article V of the Constitution.

The CHAIRMAN. In order to declare that amendment invalid will they not have to declare that the governments of the States, established under the reconstruction acts, and which have been continued to this date, were at that time void?

Mr. SISSON. No; I do not think so.

The CHAIRMAN. Will they not have to do that in order to do so, because the number that withdrew their assent were only two, and Georgia came in immediately afterwards, and at the time of Mr. Seward's second proclamation there were enough States who assented to make three-fourths, without Ohio and without New Jersey, and afterwards Texas and Virginia came in, within a year or so, without any further withdrawals.

Mr. SISSON. Of course if the court should hold that the reconstruction act was constitutional and that the Federal Congress, without any constitutional warrant therefor, had the right to overturn a state government and to appoint men of the army to take charge of the affairs of a State and subvert its government in order to force it to do what Congress knew that it would not do if left alone—if, I say, the Supreme Court holds that, then these amendments are valid; until the Supreme Court holds this, they are not valid. If the Supreme Court holds that these Southern States ratified either of these amendments, then Congress to-morrow can subvert the government of Virginia or Georgia or New York and put them under military rule and close the doors of Congress to their Senators and Representatives until they ratify the sixteenth amendment—the income-tax amendment.

Congress has the power, if it will use its army, to subvert any States that it sees fit. But would it be constitutional? Yet you must hold this if the fourteeth and fifteenth amendments were ever adopted. The Army of the United States, under the direction of Congress, when these States had no representation in the House or Senate, forced through these amendments. Then, when the Southern States declined to ratify, overturned their governments and violated every principle of the Declaration of Independence and of our Constitution. The Southern States have never really ratified these amendments, and no man will say that they have in accordance with Article V. The State should have been given the choice freely and voluntarily to accept or reject. They all freely rejected. Congress forced them to withdraw that rejection and to go through the farce of a ratification. Congress conferred, without any authority, the right of suffrage upon whom it pleased; Congress disfranchised whom it pleased; Congress accepted the ratification of the thirteenth amendment from these state governments and overturned those state governments because they refused to ratify the fourteenth.

The CHAIRMAN. I understand that, Mr. Sisson. Nevertheless, thereby there was established a government, at least de facto, which is the only government which has existed in those States ever since that time; that is to say, that government has been continuous from that time to this; it was the establishment of government after war. It is urged by very honest men—and there is a great deal to be said in favor of the idea—that that provision that all freemen should vote was a very remarkable exercise of the war power. But nevertheless it was the establishment of government, the most necessary thing that exists on the face of the universe, and those governments have existed from then to now. What I asked you—and I can repeat it—is whether the Supreme Court could throw out the ratifications by those governments without deciding the political question that there was no government then established by law, and that there is remaining no government in these States until this date, and that their organi-

zation will have to be gone over again, because all those governments recite and rely upon the continuance of the government then established.

Mr. SISSON. Mr. Chairman, you ask quite a good deal in one question.

The CHAIRMAN. It is only a simple question, whether they could determine that the ratification was void without saying that the governments were void.

Mr. SISSON. I think unquestionably, Mr. Chairman, that the government that did the ratifying was absolutely void.

The CHAIRMAN. How is anything to become legal since then, in that event, because it is a continuance of that government from then to now?

Mr. SISSON. You know for quite a number of years practically the same government has existed that was instituted by the enfranchisement of citizens by the fourteenth amendment, conceding that the fourteenth amendment is a part of the Constitution; those men then had the right to do immediately after the adoption of the fourteenth amendment what they did not have before. If the fourteenth amendment is not a part of the Federal Constitution, then the continuance of that government which was adopted to bring about the fourteenth amendment is absolutely invalid. In other words, the invalidity, if I make myself clear, is by reason of the fact that men who were not legally authorized, men who were not legally constituted authorities of the State, provided the means of registration, provided the qualifications of registration; and, by the way, they were vested with absolute discretion, as the military authority of the United States, to say who should and who should not register.

The CHAIRMAN. Then you say everything done by that government is void?

Mr. SISSON. Everything done by that military government is void.

The CHAIRMAN. Down to the present date—all of its statutes and laws?

Mr. SISSON. Not by those state governments down to the present time, because when Congress secured the adoption of these amendments by these military legislatures they withdrew the military force and allowed the States to adopt constitutions as they saw fit and to elect legislators. They were permitted then to make laws and to act for themselves. It is true that voters were created by this military government who had no right to vote and whose right was given them by the reconstruction act of Congress, which is illegal and void. A ratification of a constitutional amendment by such congressional jugglery is also void. The fact that after this these States did not lapse into absolute anarchy is no answer to the contention that their ratification so obtained is void. During a portion of the time, shortly after this "carpet bag" government was instituted, there was almost anarchy. When reconstruction acts were being passed Grant's testimony showed that these state governments were stable and peace prevailed. As soon as reconstruction was brought about these States were bathed again in bloodshed and riot. It did not bring law and order. It brought lawlessness and disorder. But the fact that in spite of all this illegality these sovereign States did persist and did bring order out of chaos and rehabilitate their broken state governments does not weaken the contention that the

ratification was extorted and not voluntary. Certainly no fair man, whatever may be his politics, that loves our institutions will ever contend that this sort of ratification was that contemplated or dreamed of by the fathers. Will any judge of any court sworn to support Article V of the Constitution say in its opinion that an extortion like this is a fair ratification? I think not. The court will hold that the State must have the free right of its choice undisturbed and unimpaired by any external or superior force. A verdict extorted is void. A contract under fear or compulsion is void. Ratification should be by act of the States and not by act of Congress, and should be freely and voluntarily given.

The supreme court of Mississippi held that all of the acts of the supreme court appointed by the military authority were void, and called it a "military satrap," and that its decisions would not be followed by the court.

The CHAIRMAN. That was only the military court. Your argument now goes to the effect that all the acts of the legislatures of the reconstruction governments, all the acts of their governors, everything that was done, is absolutely void, because you can not get away from it if you hold one act void because the government was void.

Mr. SISSON. Yes, Mr. Chairman; I say without hesitation that it does not follow that because the ratification by the military legislature was void, that it follows that the whole state government is void. As I said a moment ago, it was a military power outside of the State's bounds, by act of Congress, which set aside and overturned and suspended the state governments long enough to secure what that Congress calls a ratification. A ratification secured by Congress through the military arm of the Government when there had been peaceful civil government in these States for two years, and these peaceful civil state governments had rejected these amendments. These same state governments that by a solid vote of their legislatures, without a single exception, ratified the thirteenth amendment, the year following with the same solid vote of every one of these States, rejected the fourteenth amendment. This was when they were acting freely and voluntarily.

I do not suppose it would be conceded for a moment that any of these States that constituted the Confederate States, by the citizenship of these States, even to this date, has ever acceded to either of these amendments.

Mr. MOON. Does not the condition which Mr. Parker has indicated, which would mean such a condition of inextricable confusion as to almost make this thing unthinkable, result from this, the proposition made by Mr. Brantley, that this was a political act over which the courts had no jurisdiction? You understand, it was regarded a great stretch when Marshall decided that the Supreme Court of the United States could declare an act of Congress, passed under the Constitution, unconstitutional. He also decided that the court had no power to invade the exercise of any political prerogative or any political power. If it was regarded a very great step, and if it did require reasoning on first principles to declare that an act of Congress passed under the Constitution was unconstitutional and void, how much greater, how much more stupendous an attempt to say that an amendment to the Constitution itself would be unconstitutional. You make the created greater than the creator the moment you do that.

Mr. SISSON. I confessed at the very outset of this discussion that if the court should hold this was a political question, then the doors were absolutely closed. The whole argument is based on the idea that it is a judicial question, under Article V of the Federal Constitution. Of course, if it is a political question, the action of Congress——

Mr. BRANTLEY. Could you not have the question raised much more directly and promptly, for instance, if your State should pass a law in terms, for instance, prohibiting a negro from voting in that State? You would get the question raised whether it was within the power of the State to do that.

Mr. SISSON. That is all I want to discuss, really, as to the merits of this resolution. But before I do that, and before I am through—unless the committee want to ask me some questions——

The CHAIRMAN. I would rather have your brief, as you say you are going to file a brief.

Mr. SISSON. I want to answer the question. I do not believe that any political jugglery investing people with rights of citizenship of a State, and giving those people who have no rights under a valid State constitution—by the way, those States, Mr. Moon, had valid constitutions—the constitution under which the State of Mississippi or under which the State of Alabama, under which the State of Georgia, under which the States of the Carolinas, the constitution under which they ratified the thirteenth amendment to the Constitution, was the constitution which the people themselves had made prior to the time of the passage of the reconstruction act, and the reconstruction act literally ignored the existence of the state government, after it had been recognized by the authorities here for two years; literally ignored the provisions of these state constitutions; literally set those state constitutions at naught and took hold of the people of the State and registered just such as they desired to register; ignored the pardons of Lincoln and Johnson that restored citizenship to these people. The government that my good friend, the chairman of the committee, referred to is a government which had been in existence prior to the civil war. It was a constitutional government which was in existence prior to the time the fourteenth amendment was ever dreamed of, and that government that was in existence then was the government that was set aside by the military act. After this constitution had been set aside, then it is that, in 1869, after the passage of the fourteenth amendment, after the enfranchisement of people who had not been enfranchised before, it was then, and not until then, that they called a constitutional convention, and in 1869 adopted the constitution of 1869 in my State.

The CHAIRMAN. The constitution of 1869 was passed by persons elected under the general franchise which had been granted before.

Mr. SISSON. That is true. But listen, that franchise, however, was by virtue of the amendment to the Constitution, known as the fourteenth amendment, and that constitution of 1869 was a constitution that, for the first time, did away with the government that you speak of. It was the constitution in 1869, and it was not by virtue of any authority under the constitution of 1869 that the fourteenth amendment was ratified. But it was by virtue of whatever authority there was under the constitution made before the civil war.

Mr. MOON. Mr. Sisson, all reconstruction acts were based on this theory, that these States in rebellion had forfeited their rights under the Constitution.

Mr. SISSON. That is true.

Mr. MOON. And, therefore, they stood in the position of a territory, that Congress had a right to legislate for, the same as it has a right to legislate to-day for New Mexico and Arizona, and had a right to prescribe a constitution for the States as a prerequisite to their reentry into the Union, just the same as they imposed on Utah the fact that they must make immutable in their constitution the exclusion of polygamy. Your argument goes to the principle on which reconstruction was based.

Mr. SISSON. I do that for the reason that we did have rights in the Union; it was recognized by everybody that we did, and that peace prevailed, and for two years we had a peaceable government.

Mr. NYE. Did you discuss the question—I have not heard it here—whether, under Article V, a State may withdraw its ratification after it was once given?

The CHAIRMAN. Yes, I think he discussed that, and he has a brief on it.

Mr. SISSON. I contend up until three-fourths have ratified, the State has. The purpose of my resolution is simply this, that in the event a case should come from any State, it would simply be obligatory upon the Attorney-General to furnish all the information for the court upon that question.

The CHAIRMAN. I think he is bound to do that already.

Mr. SISSON. For this reason, suppose I, as an individual, or any other individual, should have some rights that might be involved in a litigation of this kind. It would bankrupt the ordinary private litigant to have all these certified copies of all these records filed as a part of the record. The Supreme Court, I take it, would not undertake to go rambling around through all the States and rambling all over into Indiana. It would only consider those matters directly in the briefs and in the record as made up. Of course, if no such case and no such appropriate proceeding should be presented to the Supreme Court, this would come to naught.

Mr. HOWLAND. I have not interrupted you, but there is some information I would like to get. I do not know whether this is very pertinent to this argument or not, but it occurred to me that property rights have vested under the fourteenth and fifteenth amendments for years. Before the fourteenth and fifteenth amendments were adopted a slave could not hold property.

Mr. BRANTLEY. Before the thirteenth.

Mr. HOWLAND. Before the thirteenth, anyway. Property rights have vested.

Mr. SISSON. That would not disturb the property rights at all, because, for instance, a married woman owns property; a child may own property. It would not disturb them in any way. The truth of the business is that the States now control the descent of property.

Mr. HOWLAND. Would they get that under the thirteenth amendment?

Mr. SISSON. The right to acquire property is not a right acquired under the Federal Constitution. The right to accumulate property is regulated always under the laws of the States, and so is descent and

distribution, and the right of alienation and deed, and so on, all the state laws. So it could not affect that. It would not affect the present status of anybody with reference to the state government; it would take some positive act on the part of the state government to in any way change the status of any human being. With reference to the Federal Government this is simply an inhibition upon the State. It is a prohibition and not a permission. Is not that the construction you gentlemen put upon it? I understand all the discussion in the House and in the Senate put it on the idea it was an inhibition and not a permission; that you must not do certain things, you must not make certain indiscriminations. Now, gentlemen, I desire to thank you very much for your patient hearing.

The CHAIRMAN. It was very interesting, Mr. Sisson. If the committee after consideration should see fit and proper to report the resolution, and if the resolution should ever become a part of the laws of the country, then when the question comes before the Supreme Court, it would simply mean that the Attorney-General would furnish this information.

(Thereupon, at 1.45 o'clock p. m., the committee adjourned.)

BRIEF OF HON. T. U. SISSON.

[Filed at the request of the Judiciary Committee, as a supplement to the hearings on the resolution to test the validity of the fourteenth and fifteenth amendments to the Federal Constitution, H. J. Res. 165.]

Mr. Chairman and gentlemen of the committee, in accordance with your request and the promise to you, I beg leave to submit the following:

This resolution is simply intended to make it the imperative duty of the Attorney-General of the United States when an appropriate proceeding occurs to obtain a judicial review of the fourteenth and fifteenth amendments to the Federal Constitution, and thereby obtain the decision of the Supreme Court as to their validity. To this end it is made the duty of the Attorney-General of the United States under the resolution either to intervene in a pending proceeding, or to institute a proceeding himself; and to furnish in such proceeding all records of the United States and of the States bearing on the question and to introduce all information bearing on the so-called passage of the so-called fourteenth and fifteenth amendments, so that the Supreme Court may review such record to determine whether the so-called amendments have been added to the original Constitution in accordance with the provisions of section 5, and whether they are properly a part of the Constitution.

It has been urged by members of the committee that any litigant who desired could raise this question in the state courts and without the aid of the Attorney-General of the United States, raise the federal question and appeal to the Supreme Court of the United States. This is true, but it would require a rich litigant to do this and certainly no rich corporation would do this because they have sought shelter under the provisions of the fourteenth amendment. The poor litigant, whether in a civil or criminal case, is financially unable to do this because of the great cost of preparing such an enormous record.

The question is one of great national importance. It is no sectional question. Every State is interested in it, and whether a man is in

favor of the amendments or opposed to them should not cause him to object to this test of the law in the greatest judicial tribunal in the Republic. The additional fact that Article V has never been judicially construed and no judicial interpretation of its language has ever been had renders it highly important that a judicial decision be had so as to show exactly what procedure is absolutely essential to a valid amendment to the Federal Constitution. This question will constantly recur with every proposed amendment to the Constitution and will ever be a question of doubt until it has been removed by a fair judicial interpretation. There are now pending in this Congress 28 resolutions to repeal some clause of our Constitution or to add some new clause. One amendment is now pending before the States and is seeking ratification. Is it not wise to have some guide to safely direct our steps in a sure and safe path, blazed out by the highest authority whose directions it will be safe to follow? It may also be objected to by the committee or some member thereof, that Congress should not be asked to do a vain thing; that Congress should be shown that some substantial reasons exist that create a doubt concerning the validity of said amendments, before committing itself to the proposition that these amendments need a judicial review. The answer to this is that such reasons do exist; it is also true that Congress and the people have the right to know these reasons. Every State and every litigant has the right to have fully tested any law or any constitutional enactment. This is the right of all, in all free governments.

It will be conceded by all that the Constitution can only be amended by an exact and literal compliance with the demands of Article V of the original Constitution. Article V has been quoted and a reference to the article will show that we may for convenience divide the question into six branches, each of which will be separately and briefly treated.

First. Do the words "two-thirds" as used in Article V mean of a quorum, or of the complete bodies?

Second. What was the legal status of the States that formed the confederacy, as to their eligibility to vote on these amendments; that is, were they then in the Union?

Third. Can a State change its action either way on a proposed constitutional amendment before a sufficient number of States have ratified?

Fourth. Had Congress power to deny these States representation therein unless and until they ratified the fourteenth amendment?

Fifth. Is ratification so procured under duress, illegal and ineffective?

Sixth. Is the validity of an amendment to the Federal Constitution a judicial or political question?

1. I have already discussed before the committee the meaning of the words "two-thirds" as used in Article V and I can add but little to what has been said. Speaker Reed construed the words to mean "two-thirds of those present" and that this vote was only required on final passage. (5 Hinds' Precedents, and H. R. Dec., 7027, 7029.) This ruling was not agreed to by many Members of the House. Mr. Hill, of Connecticut, made a very strong speech against this ruling, and his reasoning evidenced that he was quite as well qualified mentally to occupy the Speaker's chair as was Mr. Reed. Political expediency has caused many decisons by Speakers that would not stand a judicial analysis. Party spirit runs high and these legislative deci-

sions have but little weight with the court when it comes to pass upon legal and constitutional questions and should not have. But the fact that these two distinguished Representatives of the same political faith differed so widely on this very important question furnishes an additional reason for seeking a judicial interpretation of Article V. This should be done before any political tempest sweeps over the country, driving men from their moorings and causing Congress and States to act upon some future amendment without chart or compass. The difference might in times of stress be so great that one or the other contending factions for government control might sweep the country in a civil strife each believing that their construction of Article V was the correct one, whereas a wise and deliberate decision now by the court would give all men a safe guide and a fixed rule by which all amendments of the future could be squared. Suppose now an amendment should be proposed, who can say beyond question that the amendment would be valid if proposed by less than two-thirds of the entire membership of each House? I most earnestly contend that so vital and far-reaching a question as the proper interpretation of Article V should at once be finally and forever settled by the Supreme Court.

I further respectfully submit that when the same words are used in other parts of the Constitution the meaning should be uniform throughout.

We find these words in clause 2 of section 5 of Article I; in clause 2 of section 7 of Article I; in clause 3 of section 7 of Article I; in the twelfth amendment to the Constitution; and in section 3 of the fourteenth amendment. When the Constitution intends that the vote, on a special class of business, shall be based on the number "present" then that word is used, as expressed in clause 7, section 8, Article I; clause 1, section 5, Article I; clause 3, section 5 of Article I; and clause 2, section 2 of Article II. In construing the same words "two-thirds" in the Cape Colony Government in South Africa, they were held to mean "two-thirds of the entire membership." It is apparent by a careful reading of Article V that the framers of the Constitution intended to place safeguards around the amendment of the Constitution so as to prevent a temporary majority from perpetuating itself through ill-advised or unscrupulous amendments. To construe these words to mean that two-thirds of a quorum (one more than half the body) can amend the Constitution defeats the safeguards provided by the Constitution.

In the Senate of the Thirty-ninth Congress there were 70 seats, of which 18 were vacant; in the House of the same Congress there were 240 seats, of which 42 were vacant. On May 10, 1866, the House passed H. J. Res. 127 (resulting in the fourteenth amendment) by a vote of yeas 128, nays 37, not voting 75. On June 8, 1866, the Senate passed the same resolution by a vote of yeas 33, nays 11. If the contention here urged as to the meaning of the words "two-thirds" used in Article V be correct, the Senate vote should have been 47 and the House vote 160 affirmatively, to make a valid amendment.

In the Fortieth Congress, the Senate had 70 seats, of which 16 were vacant, and the House had 253 seats, of which 61 were vacant.

2. What was the legal status during the war of the States that formed the confederacy, during the reconstruction period, and since?

The three coordinate branches of the Government concurred in holding that these States remained in the Union throughout the entire period. The executive branch treated them as in the Union in the proclamations of the thirteenth, fourteenth, and fifteenth amendments; the legislative branch treated them as in the Union in passing the acts of March 2, 1867, March 23, 1867, July 19, 1867, March 11, 1868, and June 25, 1868, and the judicial branch regarded them as in the Union in passing the decisions reported in 6 Wallace, 1; 6 Wallace, 443; 7 Wallace, 700; 8 Wallace, 1; 9 Wallace, 197; 12 Wallace, 349; 13 Wallace, 646; 15 Wallace, 429; 16 Wallace, 402; 16 Wallace, 402; 17 Wallace, 570; 20 Wallace, 459; 22 Wallace, 99; 22 Wallace, 479; 96 U. S., 193, 97 U. S., 454; 156 U. S., 618.

3. Can a State change its action either way on a proposed amendment, before a sufficient number have ratified it? Two States, before the proclamation of Secretary Seward of July 20, 1868, changed from the negative to the affirmative, to wit: North Carolina and South Carolina; and two States, New Jersey and Ohio, changed from the affirmative to the negative. All were counted in the affirmative and all four were necessary to constitute three-fourths.

4. Had Congress power to deny the southern States representation therein unless and until they ratified the fourteenth amendment? In our theory of government all power is derived from the people, and all power not granted by, is reserved to, them. The powers granted to Congress are 25 in number and are specified in section 8 of Article I of the Constitution, and even the exercise of these powers is subject to 11 limitations therein specified in section 9 of Article I. An act passed that can not be referred to one or more of these powers, or is in violation of the limitations prescribed on these powers, is unconstitutional and void. Thus the act of March 6, 1820 (3 Stat. L., 545) was declared unconstitutional and void in December term, 1856, in Scott *v.* Sandford (19 How., 393, 452). The acts of July 8, 1870, and August 14, 1876, were declared unconstitutional and void in The Trade Mark Cases (101 U. S., 705). The act of August 15, 1894, was declared unconstitutional and void in Pollock *v.* Trust Co. (157 U. S., 429, and 158 U. S., 601).

Other acts of Congress have been held unconstitutional in decisions reported in Gordon *v.* U. S. (2 Wall., 561); Ex parte Garland (4 Wall., 105); U. S. *v.* Dewitt (9 Wall., 41); Justices *v.* Murray (9 Wall., 273); Collector *v.* Day (11 Wall., 113); U. S. *v.* Klein (13 Wall., 128); U. S. *v.* R. R. (17 Wall., 332); U. S. *v.* Reese (2 Otto, 214); U. S. *v.* Steffens (10 Otto, 82); U. S. *v.* Fox (95 U. S., 670); U. S. *v.* Harris (106 U. S., 629); Civil Rights Cases (109 U. S., 3); Boyd *v.* U. S. (116); Callan *v.* Wilson (127 U. S., 540).

Applying these considerations to the reconstruction legislation (acts of March 2, 1867, March 23, 1867, July 19, 1867, March 11, 1868, and June 25, 1868), to what power, or powers, conferred by the Constitution, can such legislation be referred? Particularly in the first and last of these acts, the Southern States were required to ratify the fourteenth amendment as a condition precedent to the restoration of their representation in Congress. In other words, when under our theory of government, the right to govern depends on the consent of the governed, these acts required ratification of the fourteenth amendment nolens volens, and this after each of these States had previously rejected this amendment. Further than

that, to insure the ratification of this amendment nine States were transformed into five military districts; the civil power and the writ of habeas corpus were suspended, martial law was declared; citizens created by tests of the States were disfranchised and citizens created by tests of Congress were enfranchised. All of this extraordinary procedure was adopted after peace and tranquillity had been restored, and the results of the war accepted, as signified by their prompt ratification of the thirteenth amendment. Can there be any doubt that consistency with 19 How., 452; 101 U. S., 705; 157 U. S., 429; and 158 U. S., 601, and similar decisions above cited, would compel the Supreme Court to hold the reconstruction legislation, particularly the first and last of these acts, to be void and unconstitutional as beyond and in excess of the power conferred upon Congress by the Constitution? That the court has ample power to do this appears from section 2, Article III, of the Constitution. Other reviews of political power are found in 4 Wallace, 2, 277, 475; 114 U. S., 270, 622; 17 Johnson's R., 225.

5. Is ratification so procured effective and binding? It is clear that by Article V the framers of the Constitution intended that:

"No State without its consent shall be deprived of its equal suffrage in the Senate," and hence that there should be both a consenting two-thirds Senate and a consenting three-fourths States in order to make a valid amendment. But in reference to the fourteenth amendment sovereign States were deprived without their consent of their equal suffrage in the Senate, and sovereign States, without their consent, were compelled to ratify an amendment they had previously rejected as the only alternative of terminating military rule, restoring civil government, and resuming their practical relations in the Federal Government. This situation inspired the equivocal proclamation of a Republican Secretary of State dated July 20, 1868, the joint resolution of July 21, 1868, declaring that a sufficient number of States had ratified the fourteenth amendment to insure its adoption, notwithstanding that the resolutions of revocation of ratification by New Jersey and Ohio were then pending unacted on before Congress, and the second proclamation of the same amendment dated July 28, 1868, which simply effectuates said joint resolution of July 21, 1868.

6. Is the validity of an amendment to the Federal Constitution a political or judicial question?

During the history of this Government only once has the validity of an amendment to the Federal Constitution been questioned and decided. The Supreme Court sustained its jurisdiction to examine into objections to such amendments in order to ascertain whether it is a part of the Constitution that they must enforce. This was the case of Hollingsworth *v.* Va. (3 Dallas, 381). But the same court holds that this rule does not hold good as to a state constitution, it being then a political question. (Luther *v.* Borden, 7 How., 39.) The same court also holds that in our popular form of government the people make and unmake the Constitution. (Cohens *v.* Va., 6 Wheat., 389.) This last case is especially appropriate to the reconstruction acts, by which sovereign States were coerced to vote for ratification against their will, and to the withdrawal of ratification by Ohio and New Jersey, which were ignored by Congress. The judicial power is further considered in Gordon *v.* U. S. (117 U. S., 705);

Wood *v.* Fitzgerald (3 Oreg., 568; 6th Am. & Eng. En. of L., 908); Collier *v.* Frierson (24 Ala., 100); Koehler *v.* Hill (60 Iowa, 543); In re Gunn (50 Kans., 155); Westinghausen *v.* People (44 Mich., 265); Miss. *v.* Powell (77 Miss., 543); Prince *v.* Skillin (71 Mo., 367); N. J. *v.* Wurts (45 L. R. A., 251); State *v.* Pritchard (36 N. J. L., 101); State *v.* Rogers (56 N. J. L., 480); N. C. *v.* McIver (72 N. C., 76); Hudd *v.* Fimme (54 Wis., 318).

We find the doctrine which I contend for clearly laid down in the text of the American and English Encyclopedia of Law, volume 6, page 608 (and see note 4), in these words:

> The courts have full power to declare that an amendment to the Constitution has not been properly adopted, even though it has been so declared by the political department of the State.

But my whole contention is well stated in Collier *v.* Frierson (24 Ala., 100–108). The court said:

> We entertain no doubt that to change the Constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself, must be observed and the omission of any one is fatal to the amendments. We scarcely deem any argument necessary to enforce this proposition. The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done—certain requisitions are to be observed before a change can be effected. But to what purpose are these acts required or these requisitions enjoined if the legislature or any other department of the Government can dispense with them. To do so would be to violate the instrument which they swore to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law.

The question is a judicial one, and that the court is not concluded by the action of the legislature is clearly defined to the correct rule laid down in the following well-considered cases: 102 Cal., 133; 60 Iowa, 543; 60 Ind., 505; 15 L. R. A., 524 (Ky.); 45 L. R. A., 251 (N. J.); 44 Mich., 265; 29 Minn., 555; 72 N. C., 76; 144 U. S., 1; 146 Ind., 1; 77 Miss., 568.

If the rule laid down in 43 L. R. A., 590; in 54 Wis., 318; and in 10 S. D., 109, is the proper rule, then the fourteenth amendment is void because a plurality of amendments were submitted at one time in one resolution and to be voted on together and not separately. There are three distinct propositions clearly set forth in three different clauses of this amendment and they are as separate from each other and as distinct as is the thirteenth from the fifteenth. This question was discussed in Congress, but a radical majority would not listen to reason and could not be induced to separate them as they should have been in three separate sections.

The doctrine is also clearly stated in Sixtieth Iowa, 543, that it matters not if every State in the Union should ratify the amendments to the Constitution that it can not be recognized as valid unless such vote was had in pursuance with the provisions of Article V—that is, unless proposed by "two-thirds of both Houses."

The case in sixtieth Iowa, on page 545, states the rule so clearly and concisely as to when courts are authorized to take jurisdiction and when the question is a political one and when it is a judicial one that it ought to be convincing. The court says:

> While it is not competent for courts to inquire into the validity of the constitution and form of government under which they themselves exist and from which they derive their power, yet, where the existing constitution prescribes a method for its

own amendment, an amendment thereto to be valid, must be adopted in strict conformity to that method, and it is the duty of the courts in the proper case when an amendment does not relate to their own powers or functions to inquire whether in the adoption of the amendment the provisions of the existing constitution have been observed, and if not to declare the amendment invalid and of no effect.

There can be do doubt that the weight of judicial opinion expressed on this subject is in favor of regarding the validity of an amendment to the Federal Constitution as a judicial question.

There can be no good reason assigned, I respectfully submit, why this resolution should not be reported by the committee and why it should not be passed by Congress. Good faith and fairness to the States of Maryland, Kentucky, Delaware, California and Oregon, Ohio and New Jersey demand it, to say nothing of the Southern States, all of which have rights which should be considered by the Supreme Court. If these States over their protest have been unconstitutionally deprived of rights and privileges which were guaranteed to them under the original Constitution, then every fair and unbiased lawyer will admit that means should be afforded them to test their rights in the courts. The humblest citizen under the folds of our flag has this right and it should not be denied him. Then surely every consideration should move us to place in easy reach of 18 States this opportunity to have fairly tested their rights. Millions of Americans would hail with delight this test in a quiet and orderly manner before the highest judicial tribunal in our great system of government. No Congressman or Senator who believes they were adopted constitutionally should shrink from the test, and all of us who believe that they are void are willing and ready to make the test. Let the Attorney-General be required to furnish in available form the certified copies of the original evidence of the passage of the resolutions and the ratifications by the States and the test can be made easy in many cases that may arise. It will simply place in easy reach of the litigant or afford the Attorney-General, if he desires, the means to make the test.

Respectfully submitted.

T. U. SISSON.