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Civil Rights and West Virginia: A Centennial View

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CIVIL RIGHTS AND WEST VIRGINIA:

A Centennial Study

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TO the historian, West Virginia typifies a frontier of personal independence and freedom, commencing prior to the Revolutionary War days, and where the State's motto, "Mountaineers are always free," is a vital, vigorous and living symbol; and to the scholar, who correlates achievement with the forces of history, West Virginia represents a "Federal" philosophy born of the belief that "all men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." [1]

On June 20, 1863, West Virginia became the thirty-fifth State of the Union. The progression of events leading to and finalizing the separation of the lands now known as West Virginia from the mother State of Virginia is em-

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[1] W. VA. CONST. art. 3, § 1.

blematic of the heritage of the Mountain State which, during the year 1963, is being heralded across the length and breadth of the Nation. West Virginia's Centennial Year, 1963, following a century of statehood, is an appropriate time and occasion to reflect upon the problems currently present, the events recorded during the century, and to speculate on the prospects for the future in the basic areas of civil rights.

West Virginia was born of the basic issue of civil rights —slavery—and during the succeeding century has continued in large measure a sovereign philosophy which, during the mid-1800's, was known as the "northern" viewpoint, with scattered pockets of "southern" sympathy. It is recorded that President Abraham Lincoln justified his course in signing the statehood bill as a war measure, and West Virginia is sometimes described as "war born."

EVOLUTION INTO STATEHOOD

The political development of West Virginia into statehood, both before and during the scarring and searing of its population and terrain during the Civil War conflict, is symbolical of its traditional doctrine in the development of personal equality and liberty, as eloquently portrayed by Patrick Henry, who said: "No free government or the blessings of liberty can be preserved to any people but by a fair adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles." On the vote for secession of Virginia by the people west of the mountains, 40,000 out of a total of 44,000 votes were against it. This sentiment was reflected in enlistments in the Union and Confederate armies with about 32,000 Union and about 8,000 Confederate recruits.

In the certified original of the constitution presented to Congress on behalf of the proposed new state, the seventh section of Article XI read as follows:

> 7. No slave shall be brought or free person of color be permitted to come into this state for permanent residence.

Congress was not satisfied with this terminology in the proposed constitution and required that the seventh section

of the constitution be changed so as to provide for the gradual extinguishment of slavery, and this was accomplished with the adoption by the embryo state of the following worded section:

The children of slaves born within the limits of this State after the fourth of July, eighteen hundred and sixty-three, shall be free and that all slaves within the said State who shall, at the time aforesaid, be under the age of ten years, shall be free when they arrive at the age of twenty-one years; and all slaves over ten, and under twenty-one years, shall be free when they arrive at the age of twenty-one years; and no slave shall be permitted to come into the State for permanent residence therein.

President Lincoln, after studying the West Virginia statehood bill during the maximum time permitted under the Constitution and having referred it to his Cabinet which stood equally divided, signed the bill. "Admission was under an act signed by the President on December 31, 1862, and was conditioned upon acceptance of the so-called Willey Amendment which provided for the gradual abolition of Negro slavery." [2] On April 20, 1863, President Lincoln executed the proclamation, effective sixty days from date, declaring the State of West Virginia to be one of the United States of America.[3]

Slavery was an important factor in the Civil War but it was not the primary cause of the conflict, which was the right of a state to leave the Union. Slavery, however, was one of the subjects in dispute between the eastern landholders of Virginia and the people west of the mountains that finally led to division of Virginia into two states.

The institution of slavery developed in Eastern Virginia due to cultivation of tobacco, and Negro slaves were valuable as field hands. However, there was not the same need

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[2] 5 DICTIONARY OF AMERICAN HISTORY, *West Virginia: Constitutional Aspects of its Formation* 439 (1942).

[3] "WHEREAS, by the act of Congress approved the 31st day of December last (1861) the State of West Virginia was declared to be one of the United States of America. . . . I, Abraham Lincoln, President of the United States, do hereby, in pursuance of the act of Congress aforesaid, declare and proclaim that the said act shall take effect and be in force from and after sixty days from the date hereof. . . ."

for slaves in Western Virginia where plantations were scarce and where the land was unsuitable for extensive cultivation of tobacco. In 1850 the total population of West Virginia was 302,313 but only 21,736 of that number were slaves. Most of the Negroes were owned by planters in the eastern area or by large landowners in the central area. A major reason for that was the type of people who lived in the mountains of West Virginia. They were accustomed to doing their own work. They were engaged in occupations where slaves would have been of little or no value.

Those who owned slaves in West Virginia treated them as chore-boys and domestic help. They were not overworked, had regular hours, and were given rewards for good behavior and for good work. The master felt an obligation to feed the slaves well and to furnish them with proper medical attention, clothes, and shelter. Women slaves in West Virginia were not compelled to do field work. They were engaged for the most part in spinning, cooking, and caring for the children. Slaves were permitted to marry, not legally, but by consent of their masters. In most instances the men and women felt they were joined for life and were happy.

West Virginia was near the free territory of Ohio and Pennsylvania. That had something to do with the way slaves were treated in this State. While there was a Virginia fugitive slave law intended to have runaway slaves returned to their owners, it was difficult to enforce where public sentiment was opposed to slavery. There were many white people in the State who were conscientiously opposed to slavery. They felt morally obligated to assist any slaves who wanted their freedom. As a result, there were many depots in West Virginia on the "underground railway." By that system slaves were sent from one station to another and given food and clothing on their trip to Canada where they were free.

The question of slavery was one of the important points in the admission of West Virginia as a separate state. Charles Sumner, in July 1862, refused to vote for admission of West Virginia with a constitution that recognized slavery.

The constitution contained a provision that children born of slave mothers after July 4, 1863, would be free. That was a compromise to take care of the slave owners. But Sumner held that any slaves were too many.

The subject of slavery was hotly debated at the Wheeling Convention, which wrote the new State's constitution. Gordon Battelle, an outstanding statesman, worked hard for a constitutional provision that would abolish slavery gradually. That was defeated. Then he sought to submit the question to a vote of the people. That also was rejected but by a 24-23 vote. A provision was finally adopted prohibiting any slave or free person of color from coming into the State for permanent residence after adoption of the constitution. One suggestion was made to the convention for a provision authorizing slave owners to recover from the State "the actual value of such slaves at the time of emancipation." Another suggestion proposed that Congress issue bonds for $2,000,000 with which to pay slaveholders in West Virginia. All of the suggestions and recommendations were voted down.

Then a resolution was passed unanimously on February 17th to insert the congressional requirement into the constitution. The requirement, as an amendment to the constitution, was submitted to a vote by the people of the State on March 26, 1863. It was ratified 18,862 to 514.

As West Virginia has evolved and grown from an embryo State of the Union, so has the State grown in commerce, industry and public affairs of the Union. As civil rights, considered in its broadest context, has developed, so also has the Mountain State developed. The growth of West Virginia, paralleling the development of personal liberties and freedom, has often been slow, hesitant, faltering, and in many instances disheartening, but always in an affirmative and positive manner.

An example of West Virginia's development is the area of natural resources. At the turn of the century of West Virginia's history, the Mountain State is approximately two-thirds timbered with some of the finest hardwood products of the United States. Demand for West Virginia's cherry, maple, oak and other species of hardwood comes

from practically every state of the Union as well as from many foreign nations. Used particularly in the furniture industry, West Virginia's forest products—a magnificent, recurring natural resource—are also used for many other purposes where a high-quality wood product is demanded. The supply of timber for the world's use is a long-time natural resource of the Mountain State. New timber stand practices have guaranteed future generations of an increasingly better quality of timber, thus opening the potential for new industrial use of this raw material.

The thirty-fifth State's coal deposits have long made it the virtual coal capitol of the United States. Recent adverse conditions involving unemployment, loss of population and other matters do not minimize the fact that West Virginia's coal deposits have made and are making millions of dollars available to the Union's commerce. Reflecting on coal history, the barons of early development were successful in escaping the pangs of taxation on coal exports from West Virginia. With the exceptions of wages—often meager — and royalties to landowners — also meager — the fruits of coal production, reaching into the billions of tons, fell into the hands of out-of-state commercial and industrial interests. The future of coal in the Mountain State is still one of the bright stars of her economy. Automation and techniques of production have made additional billions of tons of coal available for future generations.

The rugged mountains of West Virginia are not only an attraction for tourist investment dollars—the State being within 500 miles of approximately twenty-one percent of the Nation's population—but also are a haven for fortunes to be made in mining, timber, oil and gas, as well as other areas of endeavor from natural resources.

Having been a state that relied on rail transportation as its chief means of exporting its natural resources, West Virginia, in the transition period during the decline of the rail industry, has found itself without adequate transportation of its products. That problem is now being cured with the advent of express highway plans and projects through the mountains, linking West Virginia with its neighbor states on every side. Interstate 79 — running north and

south—the Allegheny Park Way—running east and west—the Scenic Highway—running generally southeast to northwest—are the recognition of the need in transportation necessary to redevelop West Virginia's commercial and industrial complex. A new generation of industrialists and businessmen, on the move to new fields of accomplishment, are turning their attention steadily toward the Mountain State and realizing that the domains of the past, the giants of yesterday's industry in West Virginia, are mythical barriers to new fortunes that are present and awaiting new ideas, new plans and a fresh outlook for the future.

West Virginia's birth from the basic civil rights struggle, its growth and development, the sacrifices of its people—caught, so to speak, between two fires—the overpowering faith and conviction of the forefathers of the State, the resulting respect for individual dignity, enterprise and freedom of thought, expression and movement, serve as a remarkable plateau of accomplishment in the field of past, as well as future, civil rights of the nation and the world. The risk, the gamble, the strength of character, the willingness to forsake every personal treasure, even life itself, exhibited by the West Virginians of the mid-1800's are an example of the courage and purpose then held and now so vitally needed to meet the problems of a world today—half free, half slave.

The Meaning of Civil Rights

It is considered appropriate on this occasion—the very beginning of a new century in this basic struggle of a Christian Democracy—that the Nation, as well as the world, take a solid look at true civil rights as they now exist, in light of our knowledge of history, and ponder with the deepest concern exactly where our future lies. If we are to give only lip service to true civil rights in the future, refuse to be an active part of the growth of true civil rights and the attached individual dignity of mankind, or fail to assume the responsibilities of individual achievement in the true picture of personal attainment, then we indict, summarily convict—with constitutional guar-

antees—and sentence ourselves and the generations that follow us to the bondage and slavery from which our ancestors struggled and arose with devastating suffering of both body and spirit. In a real and certain sense, we will shatter the vision of a democratic way of life—we will murder—as certainly as with a knife—the highest and most advanced state of civilization ever achieved by mortal man in all history and in all ages.

It will be sufficient purpose of this undertaking if it will provide a vehicle of thought for concerned minds to unemotionally, soberly, rationally, logically and clearly evaluate true civil rights, afford them the proper perspective, and lead the way for the continuation of our heritage—which is also the heritage, achieved or unachieved, of every human in the world.

On this occasion of the Centennial of West Virginia's creation, it is an objective viewpoint that the term "civil rights" is grossly misunderstood in that too often the term is limited and confined to some narrow, explosive and emotion-laden incident, consistent only with the contemporaneous news reporting of an event—usually of ugly proportions. While it is true that these are all elements of civil rights and its development, and are all concerned with basic principles of a vigorous Christian Democracy, they are not ends of themselves.

A civil right may be defined as one which appertains to a person by virtue of his citizenship in a state or community, a right accorded to every member of a distinct community or nation, or a right which the municipal law will enforce at the instance of a private individual for the purpose of securing to him the enjoyment of his means of happiness.

Civil rights include the rights of property, marriage, protection by the laws, freedom of contracts and trial by jury, to name but a few. As sometimes stated, civil rights consist of the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. In its broadest sense the term "civil rights" includes those rights which are the outgrowth of civilization, the existence and exercise of which neces-

sarily follow from the rights that repose in the subjects of a country exercising self-government.[4]

Civil Rights is a term applied to certain rights secured to citizens by the thirteenth and fourteenth amendments to the Constitution, or by various acts, state and federal.[5]

The [current] Solicitor General of the United States, Archibald Cox, is fond of quoting an ancient saying of Bracton—"not under man but under God and law." This surely expresses one of the essential elements of our society and of western civilization. The decisions of the Supreme Court and the orders of the lower federal courts in the civil rights field have caused great emotion and great bitterness. But this is a necessary result of the achievement of revolutionary social and economic change through legal growth. Law exists to serve the needs of men, and when the needs of men are revolutionary in nature—as has been true of the needs of Negroes in the United States in the past—the courts and the processes of the law are blamed for doing what must be done. Yet the alternative is either chaos or rigid control through dictatorship without regard to the law. So it is best that the contemporary conflicts in society are reflected in tensions in the law, and are resolved through decisions under the law.

The conflict in society which cuts the deepest today in this country is between the ideals of liberty and equality of the Declaration of Independence—that all men are created free and are equal before the law—and the deep-rooted attitudes and social customs, North as well as South, which antedate the Declaration. The conflict itself is so clear and so personal in the daily lives of so many people—both those struggling for the achievement of full civil rights and those resisting change—that the legal issues to the public must seem equally clear and subject to easy resolution. Yet the fact is that there is an increasing danger of oversimplifying the task of the lawyers and the courts, and of failing to take into account conflicting principles which are at stake.[6]

Further considering the popular restriction of the term and principle of civil rights, as that concept appears in

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[4] 14 C.J.S. *Civil Rights* § 1, at 1159 (1939).
[5] BLACK, LAW DICTIONARY (3d ed. 1933).
[6] Excerpts from Address by Assistant Attorney General Burke Marshall, NAACP Annual Convention, July 2, 1962.

the vernacular, we must constantly pause to remember that in the broad field of civil rights the same are not exclusively limited to the abolition of slavery and other obvious concepts, but are equally applicable to the freedom and independence, both of thought and action, of every citizen of the United States, regardless of his ancestry, race or creed. In its broadest perspective, "civil rights" refers to those rights and privileges which are guaranteed by law to each person, regardless of race, religion, color, ancestry, national origin, or place of birth: the right to work, to education, to housing, to the use of public accommodations, health and welfare services and facilities, and the right to live in peace and dignity, without discrimination or segregation. They are the rights which Government has the duty to defend and expand.[7]

Civil rights in its proper perspective is as broad as each individual daily problem of each American citizen. Anti-discrimination laws are inevitable to protect employment rights.[8] Strides forward have been made with the development of federal law to terminate racial and religious discrimination in employment, and particular activity has been noted in this field by programs of the National Labor Relations Board.[9] In the field of personal endeavor and achievement there have been advances, but still wide gaps exist caused by discriminating practices.[10] Discrimination and impoverishment are more than coincidents, and are often found among non-whites.[11] Equal rights and job discrimination are also found in the field involving the employment of men as well as women. By no means does civil rights limit itself to color and sex, inasmuch as discrimination during the advent of automation has become

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[7] LESKES, THE CIVIL RIGHTS STORY 3 (1961).

[8] Kovarsky, *Racial Discrimination in Employment and the Federal Law,* 38 ORE. L. REV. 54 (1958).

[9] Note, *Racial and Religious Discrimination in Employment and the Role of the NLRB,* 20 MD. L. REV. 219-32 (1961).

[10] Pressler & Fundler, *Discrimination in Union Membership: Denial of Due Process under Federal Collective Bargaining Legislation,* 12 RUTGERS L. REV. 543-56 (1958).

[11] Slaiman, *Discrimination and Low Incomes,* AMERICAN FEDERATIONIST 17-19 (1961).

particularly prevalent with the relieving of job opportunities because of age discriminations.[12]

In the popular mind we too often associate civil rights with the quest of the colored race to achieve equality under the law. While this phase of civil rights is entirely proper and is most assuredly a vital, living necessity in the development of freedom, liberty and equality in this Nation, it is not limited to any one particular race or creed, but is completely applicable to each citizen, each with his own problem, and whether that citizen be Irish, Polish, or some other nationality, and whether that citizen was born on the right or the wrong side of the tracks, and regardless of whether that citizen, through no fault of his own, but by predetermination of the Divine Creator is associated by background, environment, or by his own choice, with a creed or belief to which bigotry, suspicion, fear, misunderstanding or hatred by his fellow man may attach.

While not an end in itself, the struggle of the Negro for civil rights is graphic of the civil rights problem at hand and the attainment of which is, or should be, the goal of every citizen of a democratic government. The development of the Negro's civil rights from the Emancipation Proclamation to the integration of the University of Mississippi in 1962, by the enrollment of James Meredith as a student in that formerly all white institution of higher learning, is the dramatic fight for civil liberty.

Three months and two days following the birth of the State of West Virginia, President Abraham Lincoln arose at a Cabinet meeting and read from a manuscript before him: "all persons held as slaves within any state, or designated part of a state, the people thereof shall then be in rebellion against the United States, shall be then, thence forward and forever free. . . ." Thus the drama began to prevent our Nation from being "half slave and half free." The struggle continues in the classrooms in all sections of our Nation, in the legislative chambers

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[12] Note. *Age Discrimination in Employment: Legislative Collective Bargaining Solutions,* 53 NW. U.L. REV. 96-108 (1958); Note, *Age Discrimination in Employment: An FEPC Misfit,* 61 YALE L.J. 574 (1952).

of the lawmaking bodies, aboard the transportation facilities of our Nation, in the voting registrars' offices of our Nation, and in the chambers of the Supreme Court of the United States.

THE ROLE OF THE FEDERAL GOVERNMENT

The story involving the development of freedom for all Americans began as President Lincoln first read the Emancipation Proclamation to his Cabinet on September 22, 1862, shortly after an opportune victory at Antietam. Of the many milestones recorded during the past century in the development of civil rights, particularly as pertains to the rise of the Negro from slavery to equality, historians generally agree that the two principal achievements are:

First: The war amendments to the Constitution, particularly the fourteenth, ratified in 1868, which defined citizenship and extended the equal protection of law to all persons. The thirteenth amendment gave force to the Emancipation Proclamation by truly freeing the slaves. The fifteenth amendment established voting rights for the Negro, thus placing the franchise of freedom in the hands of all persons.

Second: *Brown v. Board of Educ.*,[13] the United States Supreme Court decision of May 17, 1954, which reversed the long-standing rule of "separate but equal" schools. Historians universally agree that the 1954 decision set a new standard of opportunity.

Other milestones considered by many to be exceedingly important include the Supreme Court decision of 1944, *Smith v. Allwright*,[14] which opened previously all white primary elections to Negroes; Executive Order No. 8802, issued by President Franklin D. Roosevelt in 1941, barring discrimination in factories with defense contracts; and the Civil Rights Act of 1875, later declared unconstitutional, but which dared to call for the protection of the rights of Negroes as any other American citizens.

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[13] 347 U.S. 483 (1954).
[14] 321 U.S. 649 (1944).

To review the broad concept of a subject such as civil rights adequately, it is a regrettable requirement that resort to generalities interspersed with specifics is requisite. Civil rights were the very roots of the formation of our Nation, as well as the birth of West Virginia.

The Constitution and the Bill of Rights, conceived at a time when many Americans feared above all a strong and possibly tyrannical central government, contain no reference to federal protection of civil rights. Each state, with its own constitution and usually its own bill of rights, exercised sole jurisdiction over the civil status of its inhabitants. In 1833, Chief Justice Marshall declared specifically that the first ten amendments, constituting the Federal Bill of Rights, were not binding on the various states in the decision of *Barron v. Baltimore*.[15] From the framing of the Constitution to the Civil War, the realm of civil rights was thus left wholly to the states. After the Civil War, however, a legislative program for the federal guarantee of racial equality took form. Developed in terms of Northern ideals and politics and modified by Southern ideals and politics, this program has been thwarted as well as supported by the Supreme Court.

The first move in the program was the adoption by Congress and the states of the thirteenth amendment, December 18, 1865, abolishing slavery and involuntary servitude, and giving Congress the power to enforce the amendment by appropriate legislation. But, in view of the tremendous problem involved in setting up immediately a free labor system in the war-torn South, and also in view of the famous *Dred Scott*[16] decision of 1857 which declared in effect that even free Negroes were not necessarily full citizens, the Southern states passed a series of "Black Codes." These codes usually required Negroes to work for a white master, to carry a permit in crossing county boundaries, and to undergo apprenticeships. Such offenses as vagrancy were severely punished. To combat this Southern

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[15] 32 U.S. (7 Pet.) 242, 250 (1833).
[16] 60 U.S. (19 How.) 393 (1857).

move, the Congress passed in 1866 the first Civil Rights Act.

The Civil Rights or Enforcement Act of April 9, 1866,[17] affirmed that all persons born in the United States were citizens, and it endeavored to put members of all races on equal footing regarding their rights to sue, to make and enforce contracts, to lease, sell, hold, and convey real and personal property. It further secured to all persons the right to the full and equal benefit of all laws and proceedings for the security of persons and property. Severe penalties were prescribed for violations, and the President was given the power to use land and naval forces for the purpose of enforcement.[18]

Of two other statutes passed at approximately the same time, one made it a federal crime to kidnap or carry away a person with intent to place him in slavery (Slave Kidnapping Act, May 22, 1866),[19] and the other defined "involuntary servitude" (Peonage Abolition Act of March 2, 1867).[20]

Since the constitutionality of the first Civil Rights Act was sharply contested, Congress prepared the fourteenth amendment and submitted it to the states two months later. The first section of the amendment provided:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Southern states initially refused to ratify this amendment. On July 28, 1868, the amendment was finally ratified,

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[17] 14 Stat. 27 (1866), entitled "An Act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication."

[18] CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 37-38 (1947).

[19] 14 Stat. 50 (1866).

[20] 14 Stat. 546 (1867).

but Reconstruction continued. The Southern resistance to this took the form of renewed opposition to Negro suffrage through Ku Klux Klan activities.

The North then moved to protect suffrage rights very specifically through the fifteenth amendment, ratified March 30, 1870, which provided:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Congress was given the power to enforce the article by appropriate legislation. Congress also attempted to check the Klan by several other general Civil Rights Acts.

The Civil Rights or Enforcement Act of May 31, 1870, amended by an Act of February 28, 1871,[21] protected the right to vote by providing federal machinery to supervise state elections and prescribing severe penalties for interference with voting in state and federal elections which stemmed from race or color discrimination. It became a felony for two or more persons to conspire to interfere with the free exercise by any citizen of any right granted him by the Constitution or the laws of the United States.

The Ku Klux Klan or Anti-Lynching Act of April 20, 1871,[22] penalized action which, under color of law, deprived persons of their civil rights. It also provided penalties for conspiracy to overthrow the government or to prevent the execution of its laws, and authorized the President to use military force in the suppression of unlawful action when the states were unable or unwilling to halt either interference with civil rights or with the government's processes to secure them.

The last legislation was passed in 1875, after some Southern states had begun to pass segregation statutes.

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[21] 16 Stat. 140 (1870), as amended, 16 Stat. 433 (1871), entitled "An Act to enforce the Rights of Citizens of the United States to vote in the several states of this Union and for other Purposes."

[22] 17 Stat. 13 (1871), entitled "An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes."

The Civil Rights Act of March 1, 1875,[23] guaranteed to Negroes equal accommodations with whites in all inns, public conveyances, theaters, and other places of amusement. Refusal by private persons was made a misdemeanor and injured parties were given the right to sue for damages in court.

These general Civil Rights Acts leave little doubt that these measures sought to give the federal government power to protect individuals from discrimination by the states or by other individuals. The supporters of this legislation apparently expected to retain power themselves by disenfranchising white Southerners and by winning the freedmen permanently to the Republican Party.[24]

Constitutionally speaking, these measures meant drastic changes, materially altering the balance of state and federal power. The Supreme Court, in interpreting the acts, was most influenced by the traditional federal-state balance. It therefore construed them as narrowly as possible or rejected them as unconstitutional. In 1872, in *The Slaughterhouse Cases*,[25] the Supreme Court limited the fourteenth amendment by pointing out that there were two kinds of citizenship—state and federal—and that the fourteenth amendment referred only to the privileges and immunities of United States citizens. The Court therefore refused to "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."

The next important decision was in *The Civil Rights Cases*[26] in which the Court held that the 1875 Civil Rights Act was largely unconstitutional because the Court construed the fourteenth amendment as prohibiting only state, not individual, action. The Court gradually elaborated this distinction, deciding that the conspiracy section of the first Civil Rights Act could not be used to protect citizens from individual, non-official interference with the following rights:

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[23] 18 Stat. 335 (1875), entitled "An Act to protect all citizens in their civil and legal rights."

[24] 1 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 45 (1950).

[25] 83 U.S. 36 (1872).

[26] 109 U.S. 3 (1883).

the right of peaceable assembly,[27] the right not to be lynched,[28] the right to organize unions,[29] or the right to remain within a state.[30] Nor did the rights protected under the due process clause include the right to vote in state elections,[31] or the right to run for state office.[32] In short, as former Attorney General Francis Biddle has pointed out:

> The application of criminal sanctions to the protection of civil rights has come to be restricted mainly to cases in which State officials participate, or misuse their power, or to situations involving rights granted directly to individuals and guaranteed against individual infringement by the Federal Constitution or laws. For many years such rights were few in number, limited for the most part to those granted by the Thirteenth Amendment, and to rights under such laws as homestead acts and other federal land laws.[33]

Beginning in 1873, Congress also weakened the force of civil rights legislation by issuing the Revised Statutes of 1873 which divided the civil and the criminal procedures for protection of civil rights. In 1877, Congress attempted to repeal many of these remaining provisions of previous civil rights legislation but President Hayes vetoed the effort. In 1894, however, thirty-nine sections of the Revised Statutes dealing with federal protection of the right to vote were repealed under President Grover Cleveland.[34] In 1909 another codification, in the preparation of the Criminal Code, reduced still further the original legislation.[35] Moreover, the word *willfully* was inserted without explan-

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[27] United States v. Cruikshank, 92 U.S. 542 (1875).
[28] United States v. Powell, 151 Fed. 648 (N.D. Ala. 1907), *aff'd*, 212 U.S. 564 (1908).
[29] United States v. Moore, 129 Fed. 630 (N.D. Ala. 1904).
[30] United States v. Wheeler, 254 U.S. 281 (1920).
[31] Green v. Mills, 69 Fed. 852 (4th Cir. 1895).
[32] Taylor v. Beckham (No. 1), 178 U.S. 548 (1900).
[33] Biddle, *Civil Rights and the Federal Law in Safeguarding Civil Liberty Today*, in THE EDWARD L. BERNAYS LECTURES OF 1944 131. This lecture provides a brief and objective survey of federal civil rights legislation.
[34] 28 Stat. 36 (1894).
[35] 35 Stat. 1088 (1909).

ation, making one provision read "whoever under color of law . . . willfully subjects. . . ." [36]

For the past thirty years, there have been efforts by some Congressmen to enact more federal laws to protect civil rights. The proposals have included anti-lynching bills, anti-poll tax bills, and peacetime Fair Employment Practices legislation. In 1948, even after the impetus provided by the report, *To Secure These Rights*, from President Truman's Commission on Civil Rights, and even after the President personally requested a comprehensive program including anti-lynch, anti-poll tax, anti-segregation, and FEPC legislation, no important legislative action was taken.

The development of civil rights, insofar as criminal sanctions and statutes are concerned, has been grounded on Title 18, U.S.C., Sections 241 [37] and 242. Section 241 is aimed at a criminal conspiracy to injure, oppress, or intimidate citizens (not aliens) in the exercise of federally secured rights and privileges. These rights are not enumerated in either section 241 or 242. They are to be found in various statutes and in certain portions of the Constitution, notably in the first eight amendments and in the fourteenth and fifteenth amendments. The rights protected by section 241 are comparatively few in number.

The chief utility of section 241 for the enforcement of statutory rights has been as a criminal penalty for otherwise helpless statutes. The Homestead Laws, which provide machinery for obtaining title to land in the public domain on compliance with certain conditions, do not contain specific criminal provisions penalizing interference with the

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[36] Criminal Code of 1909, § 20, 35 Stat. 1092. See also 18 U.S.C. § 242 (1958).

[37] Section 241 reads as follows: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5000 or imprisoned not more than ten years, or both."

right which the statutes grant. However, the Supreme Court has held that running a homesteader off his land, being a deprivation of the right acquired under the statute, is punishable under section 241, provided a conspiracy is involved.[38] This theory appears applicable to any case of intimidation of a person who has personal rights under federal law. Under the Social Security laws, the Fair Labor Standards Act and other statutes, benefits are conferred on persons or protection is afforded them against lawless interference.

The Constitution deals primarily with relationships between the federal and state governments and between these governments and private persons. Therefore, abuse by one private individual of another gives rise to a deprivation of a constitutional right in comparatively few instances. Hence, section 241 has only limited application to the conduct of private persons. In the absence of special facts, the ordinary outbreak of mob violence or vigilante activity directed against minorities, soap box orators, religious groups or others is not within the section. Such aggressions may appear to constitute deprivations of the rights to liberty or life, freedom of speech, freedom of assembly, freedom of religion, freedom from unlawful searches and seizures, or other invasions of personal rights mentioned in the Constitution. But these rights are rights against official action only and do not extend to the private behavior of one individual towards another. This situation is perhaps best summed up by Cushman, in his book entitled *Safeguarding Our Civil Liberties.*[39]

In *United States v. Mosley*[40] decided in 1915, the Supreme Court, speaking through Mr. Justice Holmes, said, "The source of this section (241) in the doings of the

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[38] United States v. Waddell, 112 U.S. 76 (1884).

[39] CUSHMAN, SAFEGUARDING OUR CIVIL LIBERTIES 45 (1943): "Broadly speaking it is the State and not the Federal government which can prevent this kind of abuse [private deprivation of civil liberties]. No individual can possibly violate the federal Bill of Rights which begins with the words: 'Congress shall make no law . . .' and has been held to restrict only the Federal government. Nor can an individual violate the 14th Amendment which clearly says 'no state . . .' shall do the things forbidden."

[40] 238 U.S. 383 (1915).

Ku Klux and the like is obvious and acts of violence obviously were in the minds of Congress. . . . But this section dealt with Federal rights and with all Federal rights, and protected them in the lump. . . ."[41] Until the decision in *Williams v. United States*[42] in 1951, it was thought that the rights "protected in the lump" included not only the comparatively few secured against private invasion but also those which the Constitution (principally the first eight and the fourteenth and fifteenth amendments) secures against deprivation by state or federal officers acting in their official capacities. However, in the *Williams* case, the Supreme Court divided 4-4 on the question as to whether this section could reach a conspiracy of officials acting under "color of law." Four members of the Court, in an opinion by Mr. Justice Frankfurter, held that the application of section 241 is limited to those rights which Congress can secure against invasion by private persons. In this opinion the applicability of the section has been apparently narrowed to such few situations as involve deprivations by private persons, such as the right to vote in federal elections,[43] the right of a voter in a federal election to have his ballot fairly counted,[44] the right to be free from mob violence while in federal custody,[45] the right to assemble and discuss federal problems,[46] the right to testify in the federal courts,[47] the right to inform a federal officer of a violation of federal law,[48] the right to furnish military supplies to the federal government for defense purposes,[49] the right to enforce a decree of a federal court by contempt proceedings,[50] the right, as a federal

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[41] *Id.* at 387.
[42] 341 U.S. 70 (1951).
[43] *Ex parte* Yarbrough, 110 U.S. 651 (1884).
[44] United States v. Saylor, 322 U.S. 385 (1944); United States v. Classic, 313 U.S. 299 (1941); United States v. Mosley, 238 U.S. 383 (1915).
[45] Logan v. United States, 144 U.S. 263 (1892).
[46] See United States v. Cruikshank, 92 U.S. 542 (1875); Powe v. United States, 109 F.2d 147 (5th Cir.), *cert. denied*, 306 U.S. 679 (1940).
[47] Foss v. United States, 266 Fed. 881 (9th Cir. 1920).
[48] *In re* Quarles, 158 U.S. 532 (1895); Nicholson v. United States, 79 F.2d 387 (8th Cir. 1935); Hawkins v. State, 293 Fed. 586 (5th Cir. 1923).
[49] Anderson v. United States, 269 Fed. 65 (9th Cir.), *cert. denied*, 255 U.S. 576 (1920).
[50] United States v. Lancaster, 44 Fed. 885 (C.C.W.D. Ga. 1890).

officer, not to be interfered with in the performance of his duties,[51] and the right to be free to perform a duty imposed by the federal constitution.[52]

Section 242 is aimed at infringement of federally-secured rights by the wrongful action of state or federal government officials.[53] At the outset, it will be observed that two distinct offenses are defined by this section: (1) The wilful subjection of any inhabitant, under color of law, to the deprivation of rights, privileges, or immunities secured by the United States Constitution and laws; and (2) The wilful subjection of any inhabitant, under color of law, to discriminatory pains or punishments on account of race, color, or alienage.[54] Unlike section 241, section 242 is not a conspiracy statute and may be violated by a single individual. Further, the protection of section 242 is not limited to citizens and, so far as the first offense referred to above, the section's protection extends to all inhabitants of any state, territory, or district, regardless of race or class identification.

To be in violation of section 242, the act resulting in deprivation of federally-secured rights must be done "wilfully." In defining the word "wilfully," the Supreme Court has stated in *Screws v. United States*[55] that it is not enough that the wrongdoer have a general bad purpose or an evil intent to do wrong. He must have at the time he commits the offense a specific intent to deprive the victim of a federal right which has been made specific either by "the express terms of the Constitution or laws of the United States or the decisions interpreting them."

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[51] McDonald v. United States, 9 F.2d 506 (8th Cir. 1925); United States v. Patrick, 54 Fed. 338 (C.C.M.D. Tenn. 1893).

[52] Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91 (8th Cir. 1956).

[53] Section 242 reads as follows: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1000 or imprisoned not more than one year, or both."

[54] United States v. Classic, 313 U.S. 299, 327 (1941).

[55] 325 U.S. 91, 104 (1945).

The act forbidden can be violated in the first instance only by persons occupying public office—federal, state, or municipal—or persons who exercise governmental powers. The gist of the offense defined by section 242 in each case is the deprivation of a right secured by the Constitution or laws of the United States. Among the more important of the rights secured are those defined in the fifth and fourteenth amendments, *i.e.*, the right not to be deprived by either a state or the federal government of life, liberty, or property without due process of law, and the right not to be deprived at the hands of a state of the equal protection of the laws.

The majority of prosecutions under this section have been concerned with the deprivation of liberty. Liberty includes personal security[56] as well as freedom from physical restraint. It also includes freedom of speech and the press,[57] freedom to assemble peaceably,[58] to petition the government,[59] to pursue a lawful calling,[60] to express and exercise religious beliefs,[61] to establish a home,[62] and to be secure therein from unlawful searches and seizures.[63] The right to due process in this connection includes the right to a fair trial, which means a real, not a sham or pretended, hearing,[64] the right not to be tried by ordeal or summarily punished other than in the manner prescribed by law,[65] the right to be free from prison brutality—a right possessed even by convicts in state prisons,[66] the right not to be compelled

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[56] Lynch v. United States, 189 F.2d 476, 479 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951).

[57] De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[58] Hague v. CIO, 307 U.S. 496 (1939).

[59] U.S. CONST. amend. I.

[60] Truax v. Raich, 239 U.S. 33 (1915).

[61] Cantwell v. Connecticut, 310 U.S. 296 (1940); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[62] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[63] Wolf v. Colorado, 338 U.S. 25 (1949).

[64] Moore v. Dempsey, 261 U.S. 86 (1923).

[65] Screws v. United States, 325 U.S. 91 (1945).

[66] United States v. Jackson, 235 F.2d 925 (8th Cir. 1956); United States v. Walker, 216 F.2d 683 (5th Cir. 1954), *cert. denied*, 348 U.S. 959 (1955); United States v. Jones, 207 F.2d 785 (5th Cir. 1953).

to confess to an offense,[67] the right of a defendant in criminal cases to be represented by counsel,[68] and the right to a jury from which members of the defendant's race have not been purposely excluded.[69]

The foregoing rights are secured against federal, state and local officials alike and any intentional interference with them by public officials may be punished under section 242. It must be kept in mind, however, that section 242 may also be utilized to punish official interference with rights secured against infringement by private individuals. For example, the section is applicable to an official who deprives a person of the right not to be held as a slave, or the right to vote at a federal election, or the right of access to federal courts,[70] or the right to inform federal officers concerning federal offenses,[71] or the right to be a witness in the federal courts.

In addition to the rights enumerated above, the first eight amendments include certain rights secured only as against infringement by the federal government. An example of this is the right not to be twice put in jeopardy for the same offense. Section 242 also reaches a state official who wilfully acts so as to deprive a person of the equal protection of the laws.

Official separation of races on a public transportation system denies equal protection of the laws.[72] In *Lynch v. United States*,[73] it was held that the phrase "equal protection of the laws" includes the right of a prisoner to protection from the officer having him in charge and also a right to be protected by such officer against injuries by third persons. In other words, if an officer wilfully turns a prisoner over to a mob or wilfully permits a mob to take a prisoner from his custody, he is guilty of violating

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[67] Williams v. United States, 341 U.S. 97 (1951).
[68] Gideon v. Wainwright, 31 U.S.L. Week 4291 (U.S. Mar. 18, 1963).
[69] Smith v. Texas, 311 U.S. 128 (1940).
[70] *Ex parte* Hull, 312 U.S. 583 (1941).
[71] *In re* Quarles, 158 U.S. 532 (1895).
[72] Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).
[73] 189 F.2d 476, 479 (4th Cir.), *cert. denied*, 342 U.S. 831 (1951).

section 242. Thus, the *Lynch* case supports the proposition that wilful official action and wilful inaction, resulting in the denial of equal protection, may be penalized under the section. There seems to be no doubt but that the theory of this case would apply in other instances.

Since 1884, it has been clear that the provisions of section 241 secure and protect the right granted by article I, section 2, of the Constitution to vote in federal elections.[74] In 1915, the *Mosley*[75] decision extended the protection of the section to the right to have one's vote honestly counted. In 1941 the Court, in *United States v. Classic*,[76] included within the constitutional guarantee the right to vote and to have the vote honestly counted in a primary election involving candidates for federal office, where such primary is an integral part of the election machinery or success therein is equivalent to election. Also, said the Court, the right to participate in such a primary is a right secured by both section 241 and section 242.

A most important and far-reaching result of the *Classic* decision is that it led to a re-examination by the Supreme Court of the "white primary" system which, for a long time, had allegedly been used in the Southern states as a device to deprive Negroes of an effective voice in the electoral process. Prior to *Classic*, the Court, in *Grovey v. Townsend*,[77] had held that the exclusion of a Negro voter from a party primary, pursuant to political party regulations, deprived him of no right guaranteed by the fourteenth or fifteenth amendments. After the *Classic* decision, the Supreme Court recognized that primary and general elections had been fused into a single instrumentality. The Court, therefore, overruled *Grovey v. Townsend* by its decision in *Smith v. Allwright*,[78] and held that racial discrimination by a political party adopted, enforced, or permitted by a state is state action forbidden by the fourteenth and

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[74] *Ex parte* Yarbrough, 110 U.S. 651 (1884).
[75] United States v. Mosley, 238 U.S. 383 (1915).
[76] 313 U.S. 299 (1941).
[77] 295 U.S. 45 (1935).
[78] 321 U.S. 649 (1944).

fifteenth amendments. This decision opened the way for Negroes to vote in primary elections.

The courts have resisted any and all attempts to evade the plain implications of the *Allwright* decision. Following that decision, the State of South Carolina repealed all of its primary laws and thus attempted to leave the matter of holding primaries and the qualifications to vote therein entirely to the discretion of political parties or groups. But the Court of Appeals for the Fourth Circuit held that a primary under such auspices is, nevertheless, one of a two-step election process and that, consequently, the exclusion of Negroes from such primary because of party rules is state action and constitutionally forbidden.[79]

President Franklin D. Roosevelt may be said to have inaugurated much of the present interest and active executive policies toward racial equality. He strongly upheld the right of every citizen to vote and to enjoy civil equality regardless of race or religion. In 1939 he established a Civil Rights Section in the Department of Justice, which has been active in many of the criminal civil rights prosecutions since that time. President Harry S. Truman gave added impetus to the move for federal protection of civil rights by his own strong advocacy of that position. His was the first administration to seek full federal entry into the civil rights field with a comprehensive legislative program.

Executive actions have been most effective within the executive branch itself. In 1941 President Roosevelt established a Committee on Fair Employment Practices to promote the fullest utilization of all available manpower and to eliminate discrimination in federal employment. Executive Order 8802 (1941), reinforced by Executive Order 9346 (1943), prohibited discrimination by any company holding defense contracts. In July 1948, President Truman set up a Fair Employment Practices Board in the Civil Service Commission to review complaints of discrimination.

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[79] Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

President Eisenhower evidenced a similar desire for equality in federal employment. In January 1955, the President's Committee on Government Employment Policy was set up to study and reinforce this aim.[80] Thus, both within the federal government and in private work on government contracts, the executive branch has acted to eliminate discrimination.

The integration of the Negro into the armed services represents another executive policy to end discrimination. Throughout the Second World War, limited integration policies were adopted by the services separately, as exemplified in particular by unified officer candidate schools.

The Supreme Court made a dramatic entrance into the area of civil rights with the *Brown v. Board of Educ.*[81] decision of May 17, 1954. The *Brown* decision overruled *Plessy v. Ferguson*[82] and stated that "in the field of public education the doctrine of 'separate but equal' has no place. Separate education facilities are inherently unequal." With this decision, which affected the segregated school systems of seventeen states, the Supreme Court moved to the center of the civil rights controversy. Although accepted in the North as long overdue and perhaps in the border states as inevitable, this decision has been resisted in the deep South with increasing fervor as a move to destroy states' rights and the Southern way of life. Moreover, in a series of other decisions, the Court has come to insist that separate treatment based on race cannot constitutionally be enforced by any state agency. The more important cases dealing with equal protection of the laws and civil rights in recent years are summarized below.

A. Voting rights.

1941: *United States v. Classic*[83] overruled *Newberry v. United States*,[84] the Court declaring for the first time

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[80] Exec. Order No. 10590 (1955).
[81] 347 U.S. 483 (1954).
[82] 163 U.S. 537 (1896).
[83] 313 U.S. 299 (1941).
[84] 256 U.S. 232 (1921).

that Congress had the power to provide for federal regulation of state primaries in which candidates for Congress are nominated.

1944: In *Smith v. Allwright*,[85] the Supreme Court decided that the "White Primary" was unconstitutional and that the fifteenth amendment included the right to become a member of a political party and vote in its primary elections.

Another decision, *United States v. Saylor*,[86] indicated that the stuffing of ballot boxes in favor of one candidate amounted in effect to a conspiracy, depriving citizens who voted for another candidate of the federal right to have their ballots "counted, certified, recorded, and given full value and effect."

1960: In *United States v. Thomas*,[87] the Court confirmed a lower court decision ordering the registrar of Washington Parish, La., to restore the names of Negro citizens which had been challenged and stricken to the voting rolls.

B. Protection from police brutality.

1945: *Screws v. United States* [88] represents one of the most important of the cases involving civil rights. A Negro prisoner was beaten to death by a sheriff, deputy sheriff, and local police officer. No state or local action was started. The Attorney General undertook prosecution under section 52 of the Criminal Code and the Supreme Court, although divided over the meaning of the word "wilfulness," agreed that such action by state officials was action "under color of" state law and therefore a federal offense. This decision has opened the way for federal protection against police brutality.

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[85] 321 U.S. 649 (1944).
[86] 322 U.S. 385 (1944).
[87] 362 U.S. 58 (1960).
[88] 325 U.S. 91 (1945).

C. Restrictive covenants.

1948: In *Shelley v. Kramer*[89] and *Hurd v. Hodge*,[90] the Court held that while racially restrictive covenants among individuals were not unlawful, they were nevertheless unenforceable in any state or federal court.

1953: No white co-covenanter could be sued for damages in breaking a restrictive covenant.[91]

D. Segregation in the schools.

1950: The constitutionality of separate but equal schools has been questioned for almost ten years now as various Supreme Court decisions have defined the limitation of the doctrine. In *Sweatt v. Painter*,[92] the Court held that a segregated law school could not be considered equal. In *McLaurin v. Oklahoma State Regents*,[93] the Court further held that when a Negro student was admitted to a formerly white state graduate school because the Negro institution had no courses in his field, the state institution could not seat him separately or segregate him from his fellow students in any way.

1954: In the well-known *Brown v. Board of Educ.*,[94] the Supreme Court held that separate schools are inherently unequal and therefore deprive those forced to attend them of the equal protection of the laws guaranteed by the fourteenth amendment.

1955: On May 31, 1955, the Supreme Court laid down the rules for enforcement of the *Brown* opinion, stating that steps should be taken "as are necessary and proper to admit pupils to public schools on a racially non-discriminatory basis with all deliberate speed." The district courts were given the authority to uphold the decision in a manner consistent with local conditions and problems.[95]

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[89] 334 U.S. 1 (1948).
[90] 334 U.S. 24 (1948).
[91] Barrows v. Jackson, 346 U.S. 249 (1953).
[92] 339 U.S. 629 (1950).
[93] 339 U.S. 637 (1950).
[94] 347 U.S. 483 (1954).
[95] Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

1957: In one of its latest decisions, *Pennsylvania v. Board of City Trusts*,[96] the Supreme Court held that, despite the founder's will, Girard College in Philadelphia could not refuse to admit Negroes as long as it was administered by an organ of the city government. Such discrimination amounted to state denial of equal protection of the law and therefore was in violation of the fourteenth amendment.

1958: *Cooper v. Aaron*[97] confirmed the decision of the Circuit Court of Appeals for the Eighth Circuit, denying a request by the School Board of Little Rock, Arkansas, that the operation of their desegregation plan be suspended for two and one-half years in view of violent popular objections. The Court held unanimously that "the Constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature."

1958: *Shuttlesworth v. Board of Educ.*[98] confirmed that the Alabama School Placement Law could not be regarded as unconstitutional on its face.

E. Segregation in interstate commerce.

1946: In *Morgan v. Virginia*,[99] the Supreme Court held invalid a Virginia statute requiring segregation on interstate buses passing through the State.

1956: In *South Carolina Elec. & Gas Co. v. Flemming*,[100] the Supreme Court dismissed an appeal from the Court of Appeals for the Fourth Circuit which declared a South Carolina law requiring segregation on local buses unconstitutional under the equal protection clause.

F. Segregation in the District of Columbia.

1953: The Court held in *District of Columbia v. John*

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[96] 353 U.S. 230 (1957).
[97] 358 U.S. 1, 16 (1958).
[98] 162 F. Supp. 372 (N.D. Ala.), *aff'd*, 358 U.S. 101 (1958).
[99] 328 U.S. 373 (1946).
[100] 351 U.S. 901 (1956).

R. Thompson Co.[101] that an 1873 act of the Legislative Assembly of the District which prohibited discrimination on grounds of race or color in eating places remained still valid despite non-use. Although the act was passed while the District retained some local self-government, it had not been repealed by Congress and therefore remained in full force in the absence of further congressional action.

G. Public recreational facilities.

1955: In *Mayor & City Council of Baltimore v. Dawson,*[102] the Court affirmed without opinion or citation a ruling of the Court of Appeals for the Fourth Circuit that racial segregation on public beaches was a denial of equal protection of the law as outlined in the *Brown* case.

1955: The Court also extended this holding to public golf courses in *Holmes v. City of Atlanta.*[103]

H. Trial procedure.

1957: *Eubanks v. Louisiana* [104] involved the indictment for murder of a Negro in a parish in which Negroes had been systematically excluded from grand jury duty. A judgment of the Louisiana Supreme Court, sustaining the indictment, was reversed.

1959: The Supreme Court declined to review the decision of the Fifth Circuit Court of Appeals in the case of *Harpole v. United States* ex rel. *Goldsby,*[105] ordering the retrial of a Negro who had been convicted of murder by a Mississippi jury from which Negroes had been systematically excluded. Since Mississippi jurors are chosen from lists of qualified electors, this case has a bearing on all convictions of Negroes in those Mississippi counties that have no registered Negro voters.

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[101] 346 U.S. 100 (1953).
[102] 350 U.S. 877 (1955).
[103] 350 U.S. 879 (1955).
[104] 356 U.S. 584 (1957).
[105] 263 F.2d 71 (5th Cir. 1959).

THE CIVIL RIGHTS ACT OF 1960

In 1957, a four-part civil rights program was submitted to Congress, providing for the creation of a bipartisan commission of a Civil Rights Division (replacing the earlier created Civil Rights Section) in the Department of Justice, and the amendment of existing laws to safeguard personal and voting rights of minorities through civil procedures like the injunction.

On April 1, the full House Judiciary Committee reported a new bill, H.R. 6127, containing the proposals of the administration. The majority report stated that the bill merely substituted civil proceedings for criminal proceedings without creating any new crimes or new state or federal powers. "In the field of civil rights, the Federal Government must assume the ultimate responsibility for the protection of individuals when state and local enforcement and protection of such rights fail." [106]

Two minority reports criticized the measure as an "unlimited grant of power to Federal authorities, abandonment of the concept of State's sovereignty, and eradication of trial by jury." Section III, giving the Attorney General power to institute civil actions in the name of the United States against persons engaged in, or about to be engaged in, depriving another of the equal protection of the laws, was described as "truly shocking." [107]

After approval by the Judiciary Committee, the measure was referred to the Committee on Rules and debate began on June 5, 1957. Controversy centered around an effort to attach a jury trial amendment to the Bill to insure that persons accused of violating injunctions sought by the Attorney General on the grounds that rights were being denied would not be sentenced for contempt by a judge without recourse to a jury. The jury trial amendment was defeated on a roll call vote of 251 to 158. On June

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[106] See House Committee on the Judiciary, *Report on Civil Rights to Accompany* H.R. 6127 H.R. REP. No. 297, 85th Cong., 1st Sess. (1957).
[107] *Id.* at 45, 60.

18, 1957, the Civil Rights Bill passed the House by a vote of 286 to 126.

The Senate debate on civil rights began officially on July 8. The Senate debate centered principally around section III of the measure, which provided:

> Whenever any persons have engaged or there are reasonable grounds to believe that any persons are about to engage in any acts or practices which would give rise to . . . [a denial of the equal protection of the laws], the Attorney General may institute for the United States . . . a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.

Opinion on this section was divided. Many Senators believed that such a provision would give the Attorney General too much personal power in bringing suits against private individuals for an offense, the denial of equal protection of the laws, which by its very nature could be only loosely defined. Supporters of section III pointed out that no new offenses were listed, that the only change was to use civil rather than criminal proceedings in enforcing the already existing law. On July 24, the vote was taken on an amendment sponsored by Senators Anderson (D-N.M.), Aiken (R-Vt.) and Case (R-S.D.) to eliminate section III. The amendment was accepted, and section III was deleted by a vote of 52-38.

The next landmark in the debate was the vote on a "jury trial amendment" sponsored by Senators Kefauver (D-Tenn.), O'Mahoney (D-Wyo.) and Church (D-Idaho). The amendment provided that jury trials would be available where defendants who had violated injunctions were charged with criminal rather than civil contempt of court. In other words, in civil contempt cases where a defendant could at any time purge himself of contempt by complying with a court order, the judge could sentence without a jury, but in criminal contempt cases, where a severe punishment could be inflicted for past and irremediable disobedience to the court's orders, a defendant could request a jury trial. On August 2, the vote was taken and the O'Mahoney-

Kefauver-Church amendment was passed by a vote of 51-42. To the original amendment providing jury trials in criminal contempt cases, a provision was added providing that Negroes could not be eliminated from federal court juries even if they were not registered voters and thus not eligible as jurors under state law.

The Civil Rights Bill was passed by the Senate on August 7, 1957 by a vote of 72-18. This was the first civil rights legislation since 1875. After Senate passage of the Civil Rights Act, the question of approval by the House was raised. Since the House had defeated both of the amendments—to eliminate section III and to add jury trials—which the Senate had accepted, the question of a joint conference to iron out differences arose. On August 13, the House rejected alternative moves to send the bill to conference or to accept Senate alterations. Action was thus left up to the House Rules Committee.

On August 21, following an announcement from the President that he would accept a compromise, such was proposed, namely: In criminal contempt cases judges, without juries, would be able to sentence offenders up to ninety days in jail or a fine of $300; if the judge believed a stronger penalty would be wise, he could impanel a jury in which case penalties as high as six months in jail or $1,000 could be imposed. Furthermore, the jury trial provision was applied to the terms of the Civil Rights Act alone.

This suggestion, with the limitation of judge-imposed sentences to forty-five days, was accepted by the leaders of both parties. The climax to the debate was a filibuster of 24 hours and 22 minutes by Senator Strom Thurmond (D-S.C.) against the bill.

The President signed the bill on September 9. He had acquiesced in the deletion of section III because he implied that there were certain aspects of it that he had not been aware of, but he stood firm in opposing a jury trial amendment that would mar the "effectiveness" of the right-to-vote measure.

When the 86th Congress convened in January 1959, the number of developments which had occurred since the

enactment of the 1957 law gave indications that the 86th Congress would receive additional civil rights legislation. The Commission on Civil Rights had run into a number of legal challenges in its efforts to investigate the denial of voting rights. It was argued that the Commission's life ought to be extended beyond the September 9, 1959 deadline. The Civil Rights Division of the Department of Justice was encountering difficulties in its efforts to enforce Negro voting rights. The one suit that had been brought, directed against the registrars of Terrell County, Georgia, was dismissed in federal district court on the ground that the Civil Rights Act of 1957 was unconstitutional. The decision was appealed to the Supreme Court and eventually overruled. A second action, brought on February 6, 1959 against the registrars of Macon County, Alabama, was stymied by the resignation of the county's registrars. A government attempt to make the State of Alabama a defendant in the suit was rejected by the federal district court and the Circuit Court of Appeals. On appeal, the Supreme Court ordered reinstatement of the suit on the basis of section 601(b) of the 1960 Act, which had been signed by the President only ten days before the Court's decision on May 16, 1960. These experiences were widely regarded as an indication that further legislation was needed in order to assure the effectiveness of the Civil Rights Division of the Department of Justice.

School desegregation continued to be a major controversy. By January 1959, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina and Virginia were still standing firm against any desegregation. In all of these states, there appeared a readiness to sacrifice the public school system in preference to accepting racially mixed schools. As a result, there was sentiment in the 86th Congress toward legislative action.

Racial tension had, on several occasions, erupted into violence. In addition to mob action in connection with school desegregation, there had been a number of bombing attacks on schools, houses of worship and private residences. In the four years preceding January 1959, four schools, seven churches, and four Jewish religious centers—as well

as numerous private residences—had been bombed. Many members of Congress believed that federal legislation was needed to combat it.

In the course of the month of January, a considerable number of bills dealing with civil rights were introduced in both chambers. House action started in Subcommittee No. 5 of the Judiciary Committee. On August 20, 1959, the full House Judiciary Committee reported a "clean" bill (H.R. 8601). From the Judiciary Committee, the bill went to the House Rules Committee, which took no action on it for the remainder of the first session of the 86th Congress. A discharge petition failed to get enough signatures to bring the civil rights measure to the floor of the House before Congress adjourned on September 15, 1959.

In the Senate, meanwhile, the Constitutional Rights Subcommittee of the Senate Judiciary Committee reported a skeleton bill to the full committee on July 15, 1959. The bill contained only two provisions: one to require the preservation of voting records, and the other to extend the Civil Rights Commission until January 1961. The Judiciary Committee did not complete its consideration of the bill in time to bring the measure to the floor before adjournment.

After the 86th Congress reconvened on January 6, 1960, House proponents of civil rights legislation made determined efforts to gather the necessary 219 signatures to discharge the Rules Committee from further consideration of the civil rights bill. By February 18, 1960, the House Rules Committee cleared the bill for debate on the floor of the House. This development came three days after the Senate had started its scheduled civil rights debate, exactly as had been promised during the first session of the 86th Congress by Majority Leader Lyndon Johnson and Minority Leader Everett Dirksen.

The Senate took up the civil rights issue, as scheduled, on February 15, 1960 by opening to civil rights amendments an unrelated House-passed bill, dealing with the leasing of an unused building at Fort Crowder, Mo., to serve as a temporary school for the town of Stella, Mo. By this parliamentary device, the Senate leadership was able to disregard the minor civil rights measure before the

Judiciary Committee since July 15, 1959, and provided a means to bring a more complete civil rights program directly to the floor of the Senate.

The Senators from nine Southern states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia) were unalterably opposed to the civil rights proposals under discussion and invoked the Senate rules allowing unlimited debate to the fullest extent possible. This strategy resulted in a stalemate which lasted until March 24, when the Senate dropped the bills then before it in order to take up the House measure. All in all, the Senate debated civil rights for thirty-seven days (February 15 to April 8) and held around-the-clock sessions for nine days (February 29 to March 8). The nine-day period was interrupted by only two recesses, and was marked by one unbroken session lasting 82 hours and 2 minutes (March 2 to 5). At the end of this period, a bipartisan coalition of pro-civil rights Senators attempted to break the stalemate by invoking the cloture rule. Their petition was defeated by a vote of 42 to 53, which was 22 votes short of the necessary two-thirds of the Senators present and voting.

The Senate debate during the period produced few concrete results. Liberal attempts to broaden the bill, as well as Southern attempts to weaken it, were voted down. On March 17 the Senate adopted a broad anti-bombing provision dealing with all types of bombing attacks as well as with the transportation of explosives across state lines. This was the only section of the Senate bill on which agreement could be reached.

The House took up its bill (H.R. 8601) on March 10. Since the bill as reported by the Judiciary and Rules Committees contained no voting provision, the House was primarily concerned with adding a voting registration plan to the bill under discussion.

A voting referee plan became the subject of a three-sided controversy. It was attacked by Southern House members, who sought to eliminate or weaken it, and by advocates of stronger civil rights legislation, who favored the registrar proposal or a plan calling for the appoint-

ment by the President of federal enrollment officers in areas of voting discrimination. It was favored by many of the liberal House members, who objected to the exclusively judicial character of the referee plan. The three-cornered nature of the controversy almost led to the rejection of the entire voting provision of the civil rights bill. In the end, however, Northern House liberals decided to support the referee plan, thus assuring its passage. Before doing so, the liberals pressed successfully for the adoption of a strengthening amendment, providing for the provisional acceptance of ballots cast by persons who had applied for registration to a voting referee twenty or more days before the election, and whose application had been challenged and was still pending. In cases where the application had been filed less than twenty days before the election, the applicant could be permitted to vote at the discretion of the court. The amendment also restored some measure of the referee's power to supervise voting and ballot counting.

After narrowly escaping an amendment that would have limited its effect to federal elections, the voting referee provision was adopted by the House on March 23 by a vote of 295 to 124. One day later, the House passed H.R. 8601, as amended, by a vote of 311 to 109.

As soon as the House completed action on H.R. 8601, the Senate dropped its own bill and took up the House measure. It was referred to the Judiciary Committee with instructions that it be reported back to the Senate no later than midnight, March 29. The Judiciary Committee held hearings, and wrote amendments to every section of the bill. The full Senate began consideration of H.R. 8601 on March 30. The debate, most of which dealt with the voting referee plan, lasted until April 8.

On April 8, the Senate passed H.R. 8601 by a vote of 71 to 18, and sent it back to the House for concurrence in the changes that had been made. The bill was cleared by the House Rules Committee on April 19, and passed by the House on April 21. The final vote was 288 to 95. The act was signed by the President on May 6, 1960.

Many states and communities followed the lead of Congress in development of equal rights and opportunities. Prohibiting segregation in housing in urban renewal operations has become a prime source of equality legislation.

The first really comprehensive anti-discrimination housing law enacted was the Colorado Fair Housing Act of 1959.[108] This Act prohibits unlawful discrimination in the sale, rental or leasing of all housing accommodations (with the exception of owner-occupied dwellings), where such housing was erected with public assistance. It covers financial institutions as well as those persons who aid or abet in any housing discrimination. Any oral or written inquiry or record concerning race, creed, color, sect, nationality origin, or ancestry is outlawed.

Connecticut's anti-discrimination statutes[109] guarantee "all persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accommodation, resort, or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed or color of the applicant therefor, shall be a violation of the provisions of this section. Any discrimination, segregation or separation on account of race, creed, or color, shall be a violation of this section. . . ."

It is generally conceded that the test of the Connecticut statutes applies to "all of the forms of publicly assisted housing accommodations or building lots . . . . which include urban renewal programs, publicly assisted housing, and would likewise apply to private housing, provided that such private housing is . . . one of three or more housing accommodations or building lots, all of which are located on a single parcel of land. . . ."

In addition to the two foregoing states, California, Idaho, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New Hampshire, New York,

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[108] COLO. REV. STAT. §§ 69-7-1 to -7 (1959).
[109] Gen. Stats. of Conn. Laws of 1961, Public Act 472, § 1.

Oregon, Pennsylvania, Rhode Island, Virgin Islands, Washington and Wisconsin have enacted statutes prohibiting discrimination, in varying degrees, in housing.

Many cities also have coped with the problem of discrimination in housing. Included among these cities that have enacted ordinances prohibiting discrimination in housing are Los Angeles, California; Denver, Colorado; Des Moines, Iowa; New York City; Cleveland, Ohio; Dayton, Ohio; Hamilton, Ohio; Toledo, Ohio; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; and Providence, Rhode Island.[110]

Action against discrimination in housing reached its climax on November 20, 1962 when President Kennedy, after exhaustive and comprehensive study and analysis, issued Executive Order No. 11063, directing the full weight of the federal government against discrimination in housing and related facilities, which utilized, under existing laws of the United States, federal financing assistance, directly or indirectly.[111]

THE CURRENT FEDERAL TREND

In addition to the Executive Order banning discrimination in housing, the calendar years 1961 and 1962 reflect a remarkable growth in the field of individual equality and freedom. The keynote of progress in the field of civil rights during these two years was sounded by President Kennedy during the campaign of 1960, when he said:

I believe in an America where religious intolerance will steadily end—where all men and all churches are treated as equal—where every man has the same right to attend or not attend the church of his choice—where there is no anti-Catholic vote, no block voting of any kind—and where Catholics, Protestants and Jews, at both

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110 A comprehensive catalog of state statutes and local ordinances prohibiting discrimination in housing is found in INTER-GROUP RELATIONS SERVICE, OFFICE OF THE GENERAL COUNSEL, U. S. HOUSING AND HOME FINANCE AGENCY, STATE STATUTES AND LOCAL ORDINANCES AND RESOLUTIONS PROHIBITING DISCRIMINATION IN HOUSING AND URBAN RENEWAL OPERATIONS (rev. ed. 1961).

111 Exec. Order No. 11063 (1962).

lay and pastoral level will refrain from those attitudes of disdain and division which so often have marred their works in the past.

At the conclusion of the calendar year 1961, a report of the Attorney General of the United States to the President of the United States on the activities of the Department of Justice in the field of civil rights was made, which included summaries on voting, employment, transportation, schools and other matters of general interest in the field of civil rights, which report indicates clearly the increasing activity of the federal government in this area.

Climaxing two years of progress by the Department of Justice—and in a sense finalizing a century of development —the Attorney General of the United States, on January 26, 1963, reported to the President on the subject of civil rights, which in part is as follows:

For those only interested in headlines, rioting and violence at the University of Mississippi overshadowed the civil rights field and painted 1962 as a year of resistance by the South to law and the orders of our courts. The historian, however, will find, on the contrary, that 1962 was a year of great progress in civil rights, in large measure because of the responsibility and respect for law displayed by the great majority of the citizens of the South. In 1962, the United States took major steps toward equal opportunity and equal rights for all our citizens and in every area of civil rights—whether voting, transportation, education, employment, or housing.

Voting. The Attorney General's report is to the effect that voting is the most significant civil rights problem. It is the policy of the administration in this sensitive area to consult with local officials in an effort to secure voluntary compliance with the law. During the Kennedy administration, officials in twenty-nine counties in Southern states have made voting records available to the Department of Justice—without the need for court action. Many other counties have ceased to enforce a policy of segregated balloting in voluntary compliance with a court decision in one county.

In the past two years, twenty-three voting suits have been filed and sixty-two voting records inspections have been

undertaken. On July 28, 1960, Negroes voted in East Carroll Parish, Louisiana for the first time since Reconstruction. Negro registration in Bullock County, Alabama, has risen from a total of five in September 1961 to more than one thousand. Between late 1960 and the present, the number of Negroes registered in Haywood County, Tennessee, has risen from none to over two thousand.

It seems clear that significant progress has been made and will continue to be made. In 1962, Congress adopted the anti-poll tax constitutional amendment, but unfortunately, did not enact legislation forbidding the discriminatory use of voting qualification tests. Additional legislation is necessary to insure voting freedom—especially in those areas where large numbers of Negroes are being deprived of their right to register and vote because of racial bias.

Transportation. The report of the Attorney General indicates his belief that at the present time, segregation in interstate commerce has ceased to exist. There are no segregated airport facilities in the nation. Only in Jackson, Mississippi, is systematic segregation at interstate rail and bus facilities attempted, and legal action is already in progress to halt that practice. The report emphasizes that the great progress in this area is largely the result of voluntary compliance with law and regulations by local officials and citizens.

Education. In 1962, the number of desegregated school districts increased from 912 to 972. In each of these districts, desegregation was accomplished without incident. Federal activity in the admission of James Meredith to the University of Mississippi has been well-documented. Where negotiations with local officials have failed, suits have been instituted regarding Prince George County, Virginia; Huntsville and Mobile, Alabama; Gulfport and Biloxi, Mississippi; and Bossier Parish, Louisiana.

The report singled out Prince Edward County, Virginia, for special attention, pointing out that its public schools have been closed since 1959 in order to avoid court desegragation orders. Fifteen hundred of the eighteen hundred school-age Negro children in the county are without an

education. The Court of Appeals for the Fourth Circuit has been requested to order the schools opened promptly without racial segregation.

Employment. The Department points out that its policy of seeking qualified personnel regardless of race has resulted in notable gains for Negroes in the offices of United States Attorneys and Marshals in the Nation's ninety-two judicial districts. Of thirty-two Negro Assistant United States Attorneys appointed during this administration, sixteen were appointed in 1962. Of fourteen Negro Deputy United States Marshals appointed in this administration, eleven were appointed in 1962. There were ten Negro attorneys in the Department of Justice at the beginning of the administration; there are now more than seventy.

Other Areas. The Department has also been active in regard to the problem of "sit-in" convictions, desegregation of hospitals built with federal financial assistance, employment discrimination, police brutality and other suspected discriminatory practices.

The report concluded:

1962 was a year of progress for the United States in the field of civil rights. This is not to say the problems are disappearing. They remain, and they remain difficult—not only in the South, with open discrimination, but throughout the country where Negroes are the victims of school "resegregation," bias in housing or employment or other facets of society. Ugly incidents like the Mississippi riot may occur again.

But we are accelerating our progress. Again, let me say this acceleration occurs in large measure because of the emerging spirit of the South. In 1962 this spirit was not the brutal one of rioting and violence at the University of Mississippi. The spirit was that exemplified in Georgia last week by Governor Carl E. Sanders, in his inaugural address. "We revere the past," he said. "We adhere to the values of respectability and responsibility which constitute our tradition." Then he added, "We believe in law and order and in the principle that all laws apply equally to all citizens."

Possibly the greatest achievement of the months since January 1961, has been the establishment of a new and positive attitude in the Nation. There has been created among federal policy makers a sense of obligation to civil rights, and new, higher standards against which to measure that obligation. Decisions made and procedures formed will certainly provide a built-in alertness to the problems and to the opportunities for advance. Perhaps as important as anything else, there is an air of understanding toward the civil rights movement, which makes possible the discussion of civil rights as a national concern and not merely a narrow, limited, so-called color line issue.

This spirit of obligation is evident in the government's drive to recruit and advance Negro civil servants, an action which is not only important in itself but which will do much to assure momentum. Other substantial actions, large and small, include:

a) President Kennedy's correction of the Civil War Centennial Commission;

b) the Department of Interior's order making non-discrimination in recreational use a condition of purchase of forest reserves offered to state and local governments;

c) Secretary of Interior Udall's insistence that the Washington Redskins either hire Negro players or not use the capitol's new stadium;

d) the ordering of a Yellowstone Park concessionaire to hire qualified Negroes;

e) a Defense Department directive forbidding the use of military police to "quell affrays" on behalf of local authorities in support of segregation "or other forms of racial discrimination"; local commanders are instructed to monitor carefully any legal actions against servicemen growing from enforcement of discrimination, and to provide legal assistance if necessary to assure due process;

f) the requiring of civil defense training carried on under Defense Department auspices to be non-segregated;

g) a Department of Defense memorandum of November

7, 1961, expressing concern over the small number of Negro officers, and directing attention be given to their recruitment;

h) the instruction of Peace Corps trainees in the extent and causes of discrimination.

These acts illustrate a seriousness of purpose. The administration's use of executive powers has brought new vitality to the civil rights struggle, and new hope that America may soon overcome this old dilemma. The qualities which seem to be most characteristic of the administration's program during 1961-1963 are as follows:

a) Enforcement of federal laws and defense of federal authority have been vigorous.

b) A concern for true civil rights has been built into the federal government, and should give steady movement to a broad civil rights advance.

c) In the South, the administration has had almost no goal except compliance with federal law. It has not, in schools or any other area, exerted its influence in behalf of integration, beyond respect for law.

d) The administration has developed strong and effective policies in the field of contractor employment.

The housing issue is an appropriate concluding note for a study of the concept of executive action, and what has been accomplished by it. For housing, more than any other issue, raises the fundamental questions. Here looms the true civil rights problem, namely, whether this nation wants to confront and solve the racial conflict that has bedeviled and tortured our history. And in the problem of housing is the question of where a family may live and raise its children. Government can give no higher service than the creation of environments in which the Nation's individuals can live with each other in trust and good will.

The First Nine Months — a report of the President's Committee on Equal Employment Opportunity, issued January 15, 1962, a summarization of Executive leadership — is a report in which heartening results are found. In

its first nine months of operation, the President's Committee on Equal Employment Opportunity has made significant progress toward insuring equal employment opportunity, without regard to race, creed, color or national origin, both in government employment and in government contract employment.

Without discounting the importance and development of civil rights as achieved through the numerous "Prayer Marches" of Albany, Georgia, "Freedom Rides," etc., by far the most explosive and perhaps the most misunderstood incident occurring during the past two calendar years, is the difficulties surrounding the admission of James Meredith as a student of the University of Mississippi during the latter part of September and the first of October, 1962. In an address to the Yale Law School Association of Washington, D. C., on November 20, 1962, Burke Marshall, Assistant Attorney General, Civil Rights Division, pointed out quite clearly the immense importance of the federal government's participation in the litigation of *Meredith v. Fair*:

> Whatever the cost in bitterness and injury to persons and property, I think that it is a tribute to this nation's respect for the law—unmatched in history and unmatched in any other country—that the decision by an individual to assert his rights under the law could by itself invoke the great exercise of judicial and executive authority which was finally called upon to enforce the rights of James Meredith.[112]

The pursuit of a goal of individual equality during these past two years has not been mere whim or fancy, or a matter of temporary expediency. Rather there has been a progression of conviction and idealism. Attorney General Robert F. Kennedy, in addressing the American Jewish Congress on October 28, 1962, drew attention to this deep democratic conviction, as he said:

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[112] Mr. Marshall's narrative of the events which led to the admission of James Meredith to the University of Mississippi have generated such great interest that his speech has been substantially reproduced in an Appendix to this article.

The confrontation between the United States and the Soviet Union is in reality a confrontation of all people who believe in human dignity and freedom with those who believe the State is Supreme. It is that fact, not the drama of the particular moment, which is of real significance.

In our society, laws are administered to protect and expand individual freedom, not to compel individuals to follow the logic other men impose on them.

The purpose of these ideals, and indeed, the reason for them, is not of recent discovery, as is reflected in an address by the Attorney General at Law Day Exercises of the University of Georgia Law School, on May 6, 1961, where he said:

[T]he time has long since arrived when loyal Americans must measure the impact of their actions beyond the limits of their own towns or states. For instance, we must be quite aware of the fact that 50% of the countries in the United Nations are not white; that around the world, in Africa, South America and Asia, people whose skins are a different color than ours are on the move to gain their measure of freedom and liberty.

. . . .

When parents send their children to school this fall in Atlanta, peaceably and in accordance with the rule of law, barefoot Burmese and Congolese will see before their eyes Americans living by the rule of law.

WEST VIRGINIA TODAY AND CIVIL RIGHTS

During the past two years West Virginia has not been unmindful of its heritage in this all-encompassing field of civil rights; the Mountain State has not rested upon its historic laurels and has not failed to keep abreast of progress in this basic quest for human rights, consistently searching out neglected areas needing attention.

The West Virginia Advisory Committee (in its 1961 report to the Commission on Civil Rights) based its report on studies conducted by its subcommittees on housing, local administration of justice, and education. In addition, the Committee obtained up-to-date voter registration statistics broken down by race.

In the study of administration of justice, the West Virginia Advisory Committee surveyed the instrumentalities of law enforcement agencies, court administrative organizations, prosecuting attorneys' agencies and penal institutions. In analysis, the West Virginia Committee recognized "that . . . concerning the penal institutions . . . token integration has been undertaken but that substantial progress in this area has not been made."

In the field of law enforcement,

the Subcommittee was advised that each applicant for employment (with the Department of Safety (State Police)) was given every consideration and that no Negro applicants had ever been rejected by reason of race. The Subcommittee suggests that this picture of employment is not consistent with the proposition that discrimination in employment does not exist in this department, and submits that this situation commends itself to the immediate attention of the Commission and its State Advisory Committee. . . . It is urged that this Committee actively encourage the elimination of what appears to be an employment barrier for Negroes in the Department of Public Safety.

The West Virginia Advisory Committee, through the use of extensive questionnaires and personal interviews, was able to particularize patterns of desegregation — integration as being evident in the school systems of the various counties. Patterns of development which emerged from this study indicate the following course of integrated education in West Virginia:

1. School system is completely desegregated, with reassignment of Negro teachers on the basis of qualifications and needs of the system. Negro students attend the school nearest their homes. Race is not a factor in assigning children to special schools.

2. School system completely desegregated, but the Negro teachers have been reassigned only to certain schools within the school system. Race is not a factor in assigning children to special schools.

3. Negro students are permitted to attend schools nearest their homes, but no Negro teachers have been reassigned and distributed throughout the system.

4. Negroes are not prevented from attending "white" schools, but neither are they encouraged to do so. The staffs of the Negro schools have been left intact and assigned only to the former Negro schools.

5. Negro teachers have been reassigned experimentally and token numbers of Negro students have been accepted in former white schools.

In the field of voting in West Virginia, it would appear from the estimated figures obtained from the West Virginia Secretary of State that the white voting population in West Virginia, as of May 1961, was 1,013,595 white registered voters, as compared with 49,802 Negro voters.

Employment practices in the Mountain State with regard to Negro workers reflected, to the Advisory Committee, that Negroes employed constituted 9.4% of all employees in agencies under State auspices, a proportion which is higher than the Negro percentage population (5.7%), but slightly lower than the percentage of Negroes in the national labor force. The Committee concluded: "In terms of numerical representation, the situation of the State agencies with regard to the use of Negro workers seems favorable . . . the findings indicate the possibility that Negro workers were being selected for different types of jobs than their white counterparts."

It appeared to the West Virginia Committee that "Negro workers were found at levels compromising the semi-skilled, service, and unskilled jobs." Negro worker performance was evaluated by the Committee to be satisfactory in terms of job efficiency, regularity and dependability. 82% to 88% of the agencies evaluated the Negro workers as either the "same" or "better" than white workers.

In concluding its evaluation and study of the Negro employment picture in West Virginia, the Committee found "some practical difficulties are being faced by the agencies, however, in the fuller use of Negro workers. About 30% of the agencies mentioned difficulties deriving from their experience, most prominent among which were finding qualified Negro applicants, and placing Negro workers in

jobs which would match their level of skill, education and experience."

To the observer of the West Virginia effort, the population statistics, by race, for 1950 and 1960 are especially revealing.

The following is a chart of population statistics for West Virginia by race:

	1950	*1960*	*Percent Decrease*
TOTALS	2,005,552	1,860,421	7.2
White	1,890,282	1,770,133	6.4
Nonwhite	115,270	90,288	21.7
Negro	114,867	89,378	22.2
Indian	160	181	.....
Japanese	46	176	.....
Chinese	99	138	.....
Filipino [1]	.....	105	.....
All other	98	310	.....

[1] Not available

The foregoing statistics demonstrate that the nonwhite population has been departing from West Virginia at a rate exceeding three times the departure of the white population. Observers indicate that this exodus of both white and nonwhite population is attributable to mechanization and non-development of the natural resources and industries of West Virginia.

During the 1961 session of the West Virginia Legislature, further advances of a solid, permanent nature were made with the creation of a Human Rights Commission.[113] Heralded as an advance in the field of individual liberties, the Human Rights Commission legislation has not been without criticism, particularly the elimination from the Commission of subpoena, investigative and other enforcement powers, originally included in the bill creating the

[113] W. VA. CODE ch. 5, art. 11 (1961).

Commission. It would seem that an analysis of criticism of the West Virginia Human Rights Commission legislation is to the effect that it permits the Commission only to "consider" complaints of racial, religious or ethnic discrimination in employment and places of public accommodation, and to some it would seem better to have "more teeth" placed in the hands of the Human Rights Commission. Proponents of the existing legislation point out, however, that the methodical, unemotional, deliberate and studious approach to individual liberty in West Virginia, as afforded by the existing legislation, creates a more objective atmosphere in which objective forums for evaluation and study can be held, without the risk of radical approaches to a concerning problem.

Opponents as well as proponents of the existing West Virginia legislation agree that West Virginia's lawmakers have taken a proper step, and have advanced the cause of human equality in a positive manner. It is not likely that an immature thrust can or will be made toward civil rights questions presented for solution.

It is hoped that the early history of West Virginia will serve as a forceful guide to the necessity of civil rights development in the future in all areas of the Union. It is felt that the progress of civil rights in West Virginia—perhaps the most basic element of West Virginia's existence—has given to the Mountain State a well-rounded philosophy of human rights. Respectable authority confirms that without the philosophic basis of human rights which is West Virginia's heritage, West Virginia could not have overcome the seemingly insurmountable obstacles to its existence. Most assuredly, West Virginia could not have developed its political and governmental structure to the extent that West Virginia today is one of the few areas in the Nation which has a minimum of current civil rights problems.

During its period of existence, West Virginia has faced the determinative problems of individual liberty and within the concept of its creation has quickly and affirmatively answered these problems. It would be foolhardy to contend that the history of West Virginia is devoid of instances

of civil rights hypocrisy. It would also be foolhardy not to comment that West Virginia has had less civil rights hypocrisy than most areas of the Nation. West Virginia's development has been grounded upon solid concepts of individual liberties, and the minimal hypocrisy through the years has quickly been dissipated; basic answers and determinations have been sought.

Where other areas are now passing through the agonizing and torturous growing pains of civil rights incidents, West Virginia has suffered these tribulations, but in the last 100 years, and with the profit of Civil War tragedies, West Virginia's citizens have emerged more experienced, more mature, and perhaps more objective to the problems that are now being resolved in other areas, sometimes with emotional bitterness and conflict, but more often with consideration, concern and perhaps more importantly, with conscience.

A Course for the Future

It is, however, not enough that we pride ourselves on today's achievements or yesterday's accomplishments, but it is more important that we take a long and serious look into the future to ensure that the experiences and hardships of yesteryear, and of the present, will not be repeated; that the goals of our Republic can be achieved in every remaining area; that the accomplishments of the past can be preserved to the future.

As we approach the beginning of the second one hundred years of West Virginia's existence, it is not only proper and natural but very important that we look, as best we can, into the second century. Unless we can resolve this number one domestic problem of civil rights early in this second century, not only will democracy completely bog down, but the Christian principles upon which true democracy is founded will have failed in their mission and the civilization of man will be returned to the earliest pages of recorded history.

Believing, however, that the experiences of yesteryear will be the foundation for the judgments of tomorrow, it

seems certain that each political subdivision of the Union will join with West Virginia during this new century and the United States will assume a commanding leadership for the world in the expansion of individual liberty and equality, regardless of any past or present limitations. We cannot enter this second century believing that continued effort, sacrifice and hardship are unnecessary for the fullest achievement of these goals. There are other and further considerations that must be faced with realism.

First: For as long as there are people, there will be individual problems involving personal rights of liberty and equality. These rights, now well established within the concept of our Constitution and existing laws, will be in a sense expanded but not so as to create an imbalance of individual rights as compared with individual responsibilities and obligations.

It is reasonable to presume that the second century of West Virginia's existence will see the Nation—indeed, perhaps every nation of the world—solving most of the basic, as distinguished from the particular or individual, civil rights problems. The present and future generations of America will commence this new century seeking to mark a new reach into freedom—an unparalleled thrust towards full realization of equal opportunity for all American citizens. The effort toward achievement of this goal will cause the United States to remain a world leader, an example for developing nations of the world to strive for in the achievement of individual freedom and equality.

Second: During the coming century, in every area where freedom has its deepest meaning to the individual—in his job, in his neighborhood, his school or college, his community facilities and accommodations, and in his participation in the democratic processes—determined efforts, coupled with renewed vigor, will bring American practices ever closer to American ideals. The broad hopes of the mid-twentieth century generation will evolve from dreams and visions to action and finally fulfillment. The vision of an America where intolerance and segregation is a memory, and where every American has a free and equal

chance to realize his own individual talents and possibilities, will become a fact.

Meaning and effect will be given to the thoughts of the present Attorney General, Robert F. Kennedy, who, in a speech at the Seattle World's Fair, August 7, 1962, said: "We cannot stand idly by and expect our dreams to come true under their own power. The future is not a gift; it is an achievement. Every generation helps make its own future. This is the essential challenge of the present."

Third: During the coming century, the major responsibility for developing these rights and responsibilities to fruition will rest most heavily upon the legal profession. It is the members of the legal profession who, through words and conduct, daily convey to the rest of the community an understanding of the meaning of the rule of law and of the importance of an independent judicial branch in our democratic society. It is the responsibility of the legal profession during the coming century to point out to the many honest and tolerant people of the world who think that civil rights problems are the creation and plaything of the liberals, that this is not true, but rather that civil rights problems are national, economic, social and legal problems.

We cannot hope to enter into this new century with the illusion that basic social, economic, philosophical and political questions have all been laid at rest; that these future issues will not leave our communities deeply divided; that these issues will not continue to arouse our deepest emotions; that these issues and their resolution—one way or the other—will not write the future history of our country and, in fact, of the world.

Fourth: It would seem, with the realization that most of the basic, fundamental civil rights problems of all citizens will be settled during the coming one hundred years, that there is presented a further obligation to the legal profession. That duty is to raise the level of public discussion of the cases that come before the courts on the fundamental problems of individual dignity, and for us, as lawyers, to

point out the subtlety of the questions presented to the courts, the inherent limitations of every judicial decision, and the differences that are apparent to us between the "edicts of Solomon" and the decisions of the courts under the laws of our land. Fortunately, for the development of a true democratic society, the growth of our law historically has each decision confined to the specific facts and the specific procedure that frames the issues, thus presenting the pertinent question of law. The legal profession can do much to make it clear that there are few, very few, cases where the decisions from our courts can or should give answers to questions that are all clear, all one way, or all the other. Whatever our differences may be on any of the substantive issues, we surely share a common conviction that we do a disservice to the cause of freedom if we turn away from the teaching and habit of voluntary compliance with decisions written into law by established constitutional instrumentalities.

Fifth: Of at least equal, and perhaps paramount magnitude, the legal profession has the obligation to vigorously impress upon those for whom rights, privileges, equality and dignity are achieved that they must assume those rights with an awareness of their attendant and equally important obligations and responsibilities.

It will be a hollow victory for individual dignity, and will be the certain destruction of the democratic civilization of the world, if our system of government (1) provides the full opportunity of education, and we do not become learned; (2) maintains and provides an independent judiciary, and we flout the rule of law; (3) maintains and provides free elections and the right to participate, but we forfeit that franchise of freedom by inaction on election day; (4) provides protection to life and property, and we chose to join mob "justice"; (5) assures equal job opportunity, and we fail to fairly bargain and fail to enthusiastically perform assignments in the true spirit and meaning of cooperative undertaking; (6) guarantees religious freedom, and we refuse to participate in or recognize the necessity and courage of religious conviction; (7) provides equal

housing opportunities, but as individuals, we fail to better our environment and improve our way of life, commensurate with the opportunities available; or (8) provides relief from occasions of economic oppression, and we employ these programs as a means of greater dependence with no thought of self improvement or the future use of individual initiative and personal usefulness to either self, family or Nation.

In short, as we obtain the basic rights inherent to each individual in a free society, if we do not buttress those rights with an enthusiastic acceptance of the accompanying personal, individual obligations, then the framing of the Constitution, the legislative processing of civil rights laws, the War Between the States, the ravaging and hardships in West Virginia's history, and the human misery and suffering of more than a century in these United States will have been in vain, and we will have lost the heritage of our nation. The legal profession's responsibility in the coming century will be to develop an awareness of the meaning of hard-won individual liberties, plus an eternal vigilance for new horizons of human dignity to be sought after and conquered.

APPENDIX

The following is the text of an address by Assistant Attorney General Burke Marshall, Civil Rights Division, given to the Yale Law School Association of Washington, D.C., on November 20, 1962:

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The event which put the machinery of our law into motion was the private decision of James Meredith in January of 1961 to apply for admission to the University of Mississippi. It was his decision — not that of any organization — and it was made wholly without consultation with any part of the government.

Whatever the cost in bitterness and injury to persons and property, I think it is a tribute to this Nation's respect for the law — unmatched in history and unmatched in any other country — that the decision by an individual to assert his rights under the law could by itself invoke the great exercise of judicial and executive authority which was finally called upon to enforce the rights of James Meredith.

His decision resulted in the case of *Meredith v. Fair,* which was filed on May 31, 1961 against the Board of Trustees and other officials of the University of Mississippi. They were represented by the legal officers of the State of Mississippi. As is clear from the

subsequent history of the case, the University and the State had their full day in court, not once but a number of times.

The only defense available, and the only defense raised, was that the University of Mississippi was not a segregated institution; that the University officials stood ready to admit any qualified Negro; and that their refusal to admit Meredith had nothing whatsoever to do with his race. During the proceedings witness after witness for the University took the stand under oath and testified to this effect. This was the reason, and the only reason, ever put to the courts for denying Meredith admission to the University.

Meredith sought first to enter in the summer session of 1961, and then again in the fall session of that same year. Delays sought by the attorneys for the State and the University were effective in preventing any decision in the case until December 12. On that date the District Court denied a motion for preliminary injunction, finding as a fact that the University of Mississippi was not segregated.

Counsel for Meredith then made an effort to speed up the legal processes. They asked the Court of Appeals for the Fifth Circuit to reverse and require the lower court to enter a preliminary injunction in time to permit Meredith's admission to the term of the University beginning on February 6, 1962. They were unsuccessful. On January 12, 1962, the Court of Appeals denied any interim order, but reversed and remanded with instructions to the District Court to hold a prompt hearing.

On February 3, after a full trial, Judge Mize again decided that Meredith had failed to prove that the University was segregated. Counsel for Meredith made a further effort to obtain from the Court of Appeals an order requiring Meredith's admission during that term of the University. Again they failed. On February 13, the Court of Appeals denied Meredith's motion for injunction pending appeal.

One of the issues raised on the record was whether the University had properly denied admission to Meredith because he registered to vote as a resident of Hinds County, Mississippi, when in fact he was a resident of Attala County. In early June, while this question was pending before the Court of Appeals, a criminal action based upon these same facts was instituted against Meredith in Hinds County for making a false registration application. This was the first of four criminal actions brought against Meredith by local government units in the State of Mississippi on this charge. On June 13, the Court of Appeals issued an injunction in aid of its jurisdiction prohibiting the prosecution of the criminal proceedings against Meredith.

The Court of Appeals finally decided the case on its merits on June 25, 1962, more than a year after the case was filed. Its opinion by Judge John Minor Wisdom of Louisiana noted what everyone in the State of Mississippi then knew, and every one in the United States now knows, that the University of Mississippi, under the policies of the State of Mississippi, was a segregated institution which would not admit any Negro without a court order. The court found that the charge of wilful, false voter registration by Meredith was frivolous. It remanded the case to the District Court with instructions to issue the injunction asked for in the complaint.

This order was issued shortly before the summer session at the University of Mississippi began. Counsel for Meredith made another effort to expedite the processes of the courts to permit Meredith to enter the University at that time. The Court of Appeals rejected this request also, denying a motion that its mandate issue immediately.

In due course the mandate of the Court of Appeals issued. On July 18, Judge Ben Cameron of the Fifth Circuit granted a stay on motion of the defendants, without notice to counsel for Meredith, without a record, without notice to the panel of the Court of Appeals which had sat on the appeal, and without any publication. The stay was discovered only by reason of a routine inquiry made to the District Court asking when the court's order would issue in accordance with the mandate.

There followed a most unusual sequence of orders.

On July 27, the Court of Appeals vacated Judge Cameron's stay, recalled its mandate and issued a new mandate requiring a more specific order for Meredith's admission to the University in September. On July 28, the Court of Appeals also issued its own injunction pending prompt issuance of, and compliance with, the injunction of the District Court.

On the same day Judge Cameron stayed the order of the Court of Appeals of the previous day. Again this was done without notice. And on July 31, Judge Cameron stayed the court's order of July 28.

On August 4, the Court of Appeals vacated the two latest stays by Judge Cameron and reinstated its own orders. Two days later Judge Cameron issued another stay staying all prior orders of the Court of Appeals.

After this fourth stay, it was apparent that Judge Cameron would not follow the opinions of his own court. An application to vacate Judge Cameron's stays was filed in the Supreme Court with Mr. Justice Black — the Justice designated for many years to review matters from the Fifth Circuit. The Attorney General of the State of Mississippi filed an opposition. The Solicitor General of the United States received a request from the Clerk of the Court that the Department of Justice file a memorandum setting forth our views on the power of Judge Cameron to issue the stays he did, and on the power of Mr. Justice Black, as a single Justice, to set them aside.

On August 31, in accordance with the request from the Court, we filed our memorandum. This was the first time that the executive branch of the Government had anything to do with the proceedings. The memorandum gave our legal opinion that Judge Cameron's stays were unauthorized and that Mr. Justice Black had full power, acting alone, to set them aside. On September 10, Mr. Justice Black acted. He issued an order setting aside the stays issued by Judge Cameron and enjoining the respondents from interfering with compliance with the orders of the Court of Appeals. Although he did not have to do so, Justice Black noted in his memorandum that he had in fact consulted with each other member of the Court, and that his action had their unanimous concurrence.

This order of the Court marked the effective end of the litigation in terms of Meredith's right to enter the University of Mississippi this fall. The precise issue before Justice Black was whether the orders

of the court should become effective before the September term of the University began, or whether they should be stayed, as Judge Cameron alone had thought, until the Supreme Court could act on a petition for certiorari after its October Term started. The only question presented at any time during the litigation was whether the University of Mississippi was a segregated institution, and whether Meredith was denied admission to it because he was a Negro. Both were questions of fact which the Court would not ordinarily review.

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During the next 20 days the federal government made every effort to accomplish this. The Attorney General and finally the President held numerous conversations with the officials of Mississippi and their lawyers in continuing efforts to bring about peaceful compliance with the courts' orders.

On September 13, three days after the Supreme Court's order, Governor Barnett — himself a prominent lawyer — proclaimed his defiance of federal law. In a televised speech he invoked the doctrine of interposition, calling upon all officials of the State to refuse to submit to whatever obligations were placed upon them by federal court orders as a result of the *Meredith* case. As a result, in keeping with the twin obligations to protect the integrity of the orders of the courts, but to do so under the law and without force if possible, the Department of Justice for the first time entered the litigation as a friend of the court to assist it in making its order effective.

On September 20, the regular registration day for transfer students, Mr. Meredith, accompanied by a token and symbolic number of officers of the court, went to Oxford, Mississippi, to register in the University under the court order. He was personally rejected by the Governor, who had been designated by the Board of Trustees of the University to act on behalf of the University.

We immediately instituted civil contempt proceedings against the University officials and the Board of Trustees in the District Court and then in the Court of Appeals. These were successful in accomplishing their purpose, which was to make clear to the University that it had an inescapable obligation that could not be delegated to political officials, to comply with the orders of the court. The Board of Trustees of the University pledged in open court that they would accept and keep Meredith as a student.

The next day Meredith, again accompanied by a small number of federal officials, went to Jackson, Mississippi, in accordance with the specific direction of the court, to register as a student. The Registrar was physically prevented from making himself available to perform this ministerial function. Again Meredith was personally confronted by Governor Barnett and refused permission to attend the University.

Another effort was made the next day to attend classes in Oxford. A symbolic show of force was attempted; Chief Marshal McShane tried to push his way through state police officers onto the University grounds. This was done to make plain to the state officials the inevitable consequences of their course of action. Meredith and the federal officials were turned away by physical force by state police under the personal direction of Lt. Governor Johnson.

On the following day, an arrangement for a larger show of force, ending in acceptance by the State of the court orders, was called off at the last minute because of the danger of extreme violence.

We instituted civil contempt proceedings against the Governor and the Lt. Governor. On September 28, the Court of Appeals gave the Governor, at the suggestion of the Department of Justice, until the morning of October 2 to cease his interference with compliance with the orders of the courts.

Following that, after calling off one arrangement agreed to on Saturday, Governor Barnett agreed to an arrangement for Sunday, September 30, which was in fact carried out, to have Mr. Meredith taken to the University of Mississippi by a large number of deputy marshals. This arrangement was made because the alternative to both the State and the federal government was the likelihood of an armed clash of great magnitude on Monday, the following day — October 1.

The federal government was not completely successful in avoiding violence in this episode. But it did finally avoid what seemed for a time inescapable — a direct confrontation of force by federal troops against the people and government of the State of Mississippi.

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