

**NEW YORK
LAW SCHOOL**

NYLS Law Review

Vols. 22-63 (1976-2019)

Volume 59

Issue 1 *Remembering the Dream, Renewing the Dream: Celebrating the 50th Anniversary of Dr. Martin Luther King, Jr.'s 'I Have a Dream' Speech and the March on Washington*

Article 7

January 2015

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JOHN G. STEWART

Senior fellow of the National Academy of Public Administration and recipient of the National Public Service Award from the National Academy and the American Society for Public Administration

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Recommended Citation

JOHN G. STEWART, *When Democracy Worked: Reflections on the Passage of the Civil Rights Act of 1964*, 59 N.Y.L. SCH. L. REV. (2014-2015).

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JOHN G. STEWART

When Democracy Worked: Reflections on the Passage of the Civil Rights Act of 1964

59 N.Y.L. SCH. L. REV. 145 (2014–2015)

ABOUT THE AUTHOR: John G. Stewart was legislative director and a legislative aide to Senator (D-MN) and Vice President Hubert H. Humphrey (1962–1969). He holds a Ph.D. in political science from the University of Chicago and a B.A. degree from Colgate University. He was director of communications of the Democratic National Committee (1971–1973) and director of the Democratic Policy Council (1969–1973). He served as staff director of the U.S. Senate Subcommittee on Science, Technology, and Space (1977–1979). He was assistant general manager, manager of Planning & Budget, and vice president of Economic and Community Development of the Tennessee Valley Authority (1979–1994). In 1995, he was the founding director and Fulbright Professor at the Georgian Institute of Public Affairs in Tbilisi, Georgia. He is a senior fellow of the National Academy of Public Administration and recipient of the National Public Service Award from the National Academy and the American Society for Public Administration. His prior publications include: *ONE LAST CHANCE: THE DEMOCRATIC PARTY, 1974–76* (1974) and *WITNESS TO THE PROMISED LAND* (2005), in addition to a number of journal and magazine articles. He is presently active in a variety of social and economic justice issues in the Knoxville, Tennessee area where he resides with his wife, Nancy Potter Stewart.

An earlier version of this article first appeared on a Word Press site and is available at <http://witnessstodemocracy.wordpress.com/tag/civil-right-legislation/>.

I. BACKDROP

In almost no time at all, a half century flew by and we reached the fiftieth anniversary of the March on Washington for Jobs and Freedom that gathered on the National Mall the day of August 28, 1963. This event triggered a realization that this was a special time—one of turmoil but also of great accomplishment. Since I found myself, quite unexpectedly, in the middle of these events a half century ago, I felt an obligation to record what happened and how—at least to moving the historic Civil Rights Act of 1964 through the United States Senate. After that remarkable triumph, in 1968 I wrote my Ph.D. dissertation at the University of Chicago on *The Challenge of Senatorial Party Leadership*, including most of the details from my Senate vantage point. But I felt a more readable and accessible version might be welcomed. So I recorded these reflections in the hope that others would find them interesting and, perhaps, even compelling, at a period when democratic government seemed to be woefully inadequate to the times.

All manner of special events were planned to mark this important moment in the life of the United States. These events included another March on Washington, this time from the Lincoln Memorial—the site of the 1963 March—to the Martin Luther King, Jr. Memorial, which was unveiled in 2011 on the banks of the Tidal Basin, about one mile away. Recognizing the King Memorial was appropriate because King provided the most memorable moment of the 1963 March with his iconic “I Have a Dream” speech. President Barack Obama spoke from the steps of the Lincoln Memorial as the culmination of the fiftieth anniversary observance.

One was struck, of course, by the iconic symbolism of an African American president delivering the principal remarks at the same place where King’s words of hope had galvanized a nation a half century earlier. Obama took King’s message and translated it into the language and challenges of today’s America—in many ways quite different, but also strikingly similar, in the qualities of citizenship that were summoned.

The commemoration of the March on Washington was just the first event in what has been a momentous year of fiftieth anniversaries related to the passage of the Civil Rights Act of 1964. The legislation proposed by President John F. Kennedy in June 1963 made its way through the House of Representatives, eventually passing in February 1964, only to encounter in the Senate the entrenched opposition of the Southern Democrats, the longest filibuster in Senate history, the need somehow to enlist the support of conservative Republicans, and the requirement to reject any amendments that would weaken the House-passed bill. There have been at least a half-dozen occasions for other fiftieth anniversary moments in the bill’s passage through the Senate, such as it becoming the Senate’s pending business after an initial filibuster, achieving “cloture” that halted the Southern Democratic filibuster, final passage of the bill after surviving a flood of debilitating amendments, acceptance of the Senate-passed bill by the House (thereby avoiding the need to take the bill to conference), and President Lyndon B. Johnson signing the historic legislation on July 2, 1964.

This challenging legislative agenda, moreover, was addressed against the backdrop of growing racial unrest on the one hand, and a growing outcry for congressional action from a coalition of religious, labor, community, and political groups on the other. The

margin for anything less than total victory was small, indeed. It is no exaggeration to suggest that American democracy was facing its sternest challenge since the slow, agonizing slide toward the civil conflict that took place in the 1840s and '50s—culminating in the Civil War of the 1860s.

I had the good fortune to be present in the Senate as these historic events unfolded. As Senator Hubert H. Humphrey's (D-MN) legislative assistant for domestic issues, I was the person on his staff who would work most closely with him during the Senate's consideration of the civil rights legislation. And since Majority Leader Michael Mansfield (D-MT) had asked Humphrey to assume the duties and responsibilities of floor manager of the House-passed bill, I also had to reach out regularly to staff persons of other senators, both Democrats and Republicans, who were working closely with Humphrey, as well as to the staff of the majority policy committee that followed the legislation for Mansfield. These duties, in turn, made me someone who the civil rights leaders on the outside of Congress wanted to see, along with a growing number of religious leaders, church groups, labor leaders, and community activists of all shapes and sizes. Finally, my position in the crossroads of all these interested leaders and parties, both inside and outside of Congress, made me a target of journalists and commentators, both print and electronic, covering the bill's progress. In short, I had the good fortune to be right in the middle of things.

We recently came to a moment when the story of the Civil Rights Act of 1964 was once again newsworthy; fifty-year anniversaries tend to do that. Since I was directly involved in the activities that were the subject of this attention, it makes sense to record once again my recollections and thoughts of what actually happened and why.¹

II. NO MARGIN FOR ERROR

With that backdrop on the record, where should one start to commemorate this fiftieth anniversary? What observations are appropriate? Since my involvement was directly the result of my relationship with Humphrey, it seems necessary to note that his assignment as floor manager was an event of culmination—he had been relentlessly pushing for congressional action on civil rights ever since his arrival in the Senate in 1949. That was preceded, first, by his courageous speech to the 1948 Democratic National Convention advocating inclusion of significant civil rights

1. I need not do this with the detail I provided in my Ph.D. dissertation from the University of Chicago, *Independence and Control: The Challenge of Senatorial Party Leadership* (1968) (unpublished Ph.D. dissertation, University of Chicago) (on file with author), that is largely reprinted in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 321 (Robert D. Loevy ed., 1997), or the memorandum of daily activities that I dictated during the actual debate that is also included in the Loevy volume. I should also mention TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964* (2014). Purdum is a political correspondent for *Vanity Fair* and *Politico*. I can testify to the book's historical importance and accuracy in bringing to life this special moment in American political and legislative history. A second volume of note is CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* (2014). Risen is an editor of the Op-Ed pages of *The New York Times* and presents another compelling account of how this legislation defied all odds and became what many consider the nation's most significant legislative accomplishment.

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provisions in the party's platform that pitted President Harry S. Truman against New York Governor Thomas Dewey, and, second, by his progressive record as mayor of Minneapolis (1945–1948) where he established a city-wide Equal Employment Opportunity Commission, among other initiatives.

Humphrey's Democratic Convention speech and the Convention's adoption of the more forceful civil rights platform plank precipitated the departure of most Southern Democratic delegates, led by Senator Strom Thurmond of South Carolina (then a Democrat), and the creation of the Dixiecrat Party that challenged Truman in the Deep South. The latter result proved to be an unexpected benefit for Truman: Freed from the traditional posture of seeking conservative Southern Democratic votes, Truman trained his rhetorical fire on Dewey and the "do-nothing" Republican Eightieth Congress, eventually winning an unexpected victory and a second term as president.

During the presidential race, Humphrey was winning an equally unexpected victory in his race for the Senate, the first Democrat in Minnesota history to manage that feat. He arrived in Washington, fresh from his electoral victory and his tenure as mayor, clearly identified as an articulate advocate of expanded civil rights for minority citizens. He even merited a *Time* magazine cover—cast as a Midwest whirlwind descending on the nation's capital. However, the Senate was still an institution almost totally controlled by Southern Democrats with years, indeed decades, of seniority, and these Southern bulls had little time and almost no use for the brash newcomer from Minnesota.² Nonetheless, even in these difficult early years, Humphrey was writing and introducing civil rights bills of all sorts, knowing full well that the likelihood of their passage was essentially nil. When a Congress completed its business and adjourned *sine die*, Humphrey would gather up his spurned civil rights measures, edit them, add to them, and prepare them for reintroduction in the next Congress. He did this throughout the 1950s.

In these years, Humphrey also joined with the small bipartisan band of pro-civil rights senators in efforts to amend Senate Rule XXII, the provision that spelled out how a filibuster against pending legislation could be ended by invoking "cloture," a decision that required the affirmative vote of sixty-seven senators. These primarily liberal senators knew that even if a majority favored a civil rights bill in the future, its passage would be made almost impossible by the expected Southern Democratic filibuster, where senators would talk on and on making it impossible for the majority to assert its will.³

2. See *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Jan. 15, 2015). As is spelled out in detail in his autobiography, it took Humphrey a good part of his first six-year term to win personal respect and, in some instances, real friendship with the Southerners. HUBERT H. HUMPHREY, *THE EDUCATION OF A PUBLIC MAN: MY LIFE AND POLITICS* (Doubleday 1976) (1991).

3. There is no provision for the "previous question" in the Senate Rules or a rule of germaneness. Senators can talk as long as they desire and about any subject whatsoever, regardless of the pending business, unless defeated by the adoption of a motion for cloture, which requires three-fifths of the Senate. See Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 467–69 (2011).

Humphrey became assistant majority leader, or whip, in 1961 and Mike Mansfield was chosen as majority leader to succeed Johnson who had been elected vice president. Kennedy was president and his election coincided with a growing sense of activism among African Americans, especially younger people. The early 1960s were a time of the Freedom Rides into the Southern states and the shocking violence against the Freedom Riders that broke out along the way, especially in Alabama and Mississippi.⁴ Sit-ins at lunch counters in North Carolina and Tennessee generated more civil disruption. Campaigns to secure voting rights across the South similarly were the targets of violence and intimidation. In 1962, Kennedy proposed legislation to outlaw literacy tests that were often used to disenfranchise voters, but the Southern Democrats launched a filibuster and the legislation was abandoned. Earlier, in 1957 and 1960, then-Senate Majority Leader Johnson had won some initial, but limited, victories. Even here, the Southern Democrats had successfully blocked passage of any significant legislation using the filibuster or the threat thereof.

During these years, Humphrey was quietly and privately urging the president to propose more comprehensive legislation that would address key areas of discrimination, such as access to hotels, restaurants, and public facilities including parks and public swimming pools, travel in interstate commerce, voting rights, and employment. The president felt the time was not right to propose such far-reaching legislation; opposition from Southern Democratic Committee chairmen would endanger other elements of the administration's legislative agenda. Nonetheless, throughout 1961 and 1962, Humphrey quietly kept encouraging Kennedy to act. All this changed in 1963.

That year, the campaign for voting rights waged by King and the Southern Christian Leadership Conference in Birmingham, Alabama in April and May galvanized the moral outrage of the nation. Bombs destroyed the Birmingham motel room where King was staying, as well as the home of King's brother. Television coverage of police dogs and fire hoses dispersing young protestors, many of elementary-school age, coupled with mass arrests of youthful demonstrators that filled the city jail, finally provided the impetus Kennedy needed to follow the path that Humphrey and others had been urging. Kennedy spoke to the nation on June 11, 1963 and announced he would send to Congress the most comprehensive and enforceable civil rights bill in America's history. The next evening, a Ku Klux Klan extremist murdered Medgar Evers, the National Association for the Advancement of Colored People (NAACP) field secretary in Mississippi. In the fall, another bomb exploded in the 16th Street Baptist Church in Birmingham, killing four young girls attending Sunday school.

4. See generally Marian Smith Holmes, *The Freedom Riders, Then and Now*, SMITHSONIAN, Feb. 2009, available at <http://www.smithsonianmag.com/history/the-freedom-riders-then-and-now-45351758/?no-ist>; RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (abr. ed. 2011). See also Alan Gartner & Christopher Ferreira, *A State of Action*, 59 N.Y.L. SCH. L. REV. 95 (2014–2015).

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Despite the administration's commitment to push for comprehensive legislation, coupled with the reality of continuing violence, the bill moved slowly through the House of Representatives in late summer and fall of 1963. But once again, violence reconfigured the situation. The assassination of President Kennedy on November 22, 1963 and the assumption of Johnson to the presidency made the bill's enactment more essential, as well as more likely, than ever, given Johnson's intimate knowledge of the institution and its members.

As 1963 came to an end, the robust and skillful prodding of Johnson and the cooperation of key Republican leaders in the House, such as Representative William McCulloch (R-OH) and Representative Charles Halleck (R-IN), made the bill's emergence from the House all but certain. Moreover, its key provisions in regard to public accommodations, equality in employment opportunity, disbursement of federal funds, voting rights, and public education were, if anything, more encompassing and forceful than the bill Kennedy initially sent to Congress. In a failed attempt by Rules Committee Chairman Howard Smith (D-VA) to derail the legislation, even "sex" was added as a category protected from discrimination. Since Republican members had provided crucial votes in the bill's strengthening and ultimate passage, the Republican leadership (McCulloch, in particular) made it very clear that they would be unwilling to consider a bill materially compromised by the Senate.

In other words, the challenge of having to overcome a Southern Democratic filibuster and the inability of compromising to accomplish that task left Senate leaders with a seeming impossibility. The leaders would need to assemble the sixty-seven votes needed to stop the filibuster, by imposing "cloture," with a significant portion of those votes having to come from conservative Republicans who had never voted for anything like that before—and were unlikely to do so now in view of the enlarged federal power contained in the House-passed bill. Yet, failing to pass the comprehensive bill proposed by Kennedy, strongly endorsed by Johnson, and materially strengthened by the House, would plunge the nation back into renewed violence and despair. Democracy truly was on trial.

That was the situation confronting Humphrey when he acceded to Mansfield's request that he function as the bill's floor manager. Yet, despite the nearly impossible nature of the assignment, Humphrey was delighted to accept it. He had, in many ways, worked his entire political life to be in this place. His courageous speech at the 1948 Democratic Convention; his longshot election to the Senate the same year; his dogged introduction and promotion of civil rights bills for more than a decade in the face of Southern Democratic hostility and scorn; and his behind-the-scenes encouragement of Kennedy to seize the moment and move forcefully on civil rights, combined to provide a firm foundation and ample incentive for accepting this historic assignment.

III. TELL 'EM ABOUT THE DREAM, MARTIN

With Kennedy's bill slowly making its way through the House during the summer of 1963—mired in seemingly endless hearings before the Judiciary

Committee—the reality of the oft-discussed but never executed March on Washington forced its way onto the agenda of the congressional and executive branch leaders. It had first been proposed by A. Philip Randolph, president of the Brotherhood of Sleeping Car Porters, and his associate, Bayard Rustin, back in 1941 as a way to pressure President Franklin D. Roosevelt to provide equal treatment for Negroes in jobs and employment in the burgeoning war-related industries. When FDR tried, but failed, to get Randolph to cancel the march, he issued an executive order banning discrimination in all aspects of the national defense and federal employment. Whereupon Randolph called off the march but held open the possibility of organizing a future march if conditions warranted.

By 1963, in light of the violence in response to the various civil rights actions across the South, coupled with the hesitancy of the Kennedy administration to respond forcefully against this violence and intimidation, Randolph and Rustin dusted off the 1941 plans. They enlisted the support of all the major civil rights leaders, organizations, religious denominations, and allies, such as the United Auto Workers (UAW) and other labor unions, and announced that the March on Washington for Jobs and Freedom would take place in late August 1963. They planned to bring 100,000 marchers to Washington and petition the White House and Congress to take prompt action in support of civil rights legislation and jobs.

In the wake of the violent disturbances in Birmingham and in response to the Freedom Rides, official Washington—the executive branch, Congress, and the media—expressed great concern that similar civil violence would break out in the streets of Washington. Kennedy kept his distance, as did key members of his administration. Opponents of congressional action on civil rights announced they would not be pressured by “mobs” in the street; proponents worried publicly that attempts to pressure congressional members would only backfire and make passage more difficult. Despite these concerns, Randolph made clear there would be no cancellations this time around. Washington had better get ready.

Amidst all this commotion, Humphrey never flinched. I think it is fair to say that initially he shared some concerns of those who feared that excessive pressure on Southern Democrats would only give them another excuse not to support the legislation. But after meeting with Randolph, Rustin, Roy Wilkins and Clarence Mitchell (NAACP), Whitney Young (National Urban League), Joe Rauh (Americans for Democratic Action (ADA), representing the Leadership Conference on Civil Rights (LCCR)), and others, Humphrey publicly supported the March and worked to allay fears among his fellow Senate Democrats. After Kennedy’s June 11 speech to the nation, he talked about how the March could become an asset in building support for the legislation.

Indeed, he decided that a reception for those traveling from Minnesota needed to be organized. Given the schedules of the Minnesotans, it appeared that a breakfast on the day of the March would be appreciated and he set me to the task of organizing it. Since we did not have a budget to pay for a standard breakfast at a Washington hotel (running \$10–\$15 per person even in those days), my wife Nancy and I hit upon the idea of holding the breakfast at our downtown church, First Congregational

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United Church of Christ. The minister, Reverend David Colwell, and the moderator, Oscar Stradinger, enthusiastically endorsed the idea, so Nancy and I started organizing it. As I recall, about forty Minnesotans showed up, along with Humphrey and his colleague, Senator Eugene McCarthy (D-MN). Church members cooked pancakes and sausages for the travelers.

Humphrey, of course, talked to his fellow Minnesotans about the grand expression of democracy that was about to unfold and how fortunate we were to participate. We left First Church as a body and marched down 9th Street NW and then cut over to the National Mall. Humphrey was euphoric to be with his friends, heading to what he confidently predicted would be a resounding triumph on behalf of jobs and freedom.

As we walked, we were concerned that few people were walking along with us. It was still relatively early in the day, to be sure, and people were straggling in, but there did not appear to be the great throng of people we had expected. But as we walked down the Mall towards the Lincoln Memorial where the speeches would be delivered, the crowds began to build. The closer we got to the Lincoln Memorial, the more people there were. Many people carried signs produced by the UAW proclaiming “March on Washington for Jobs and Freedom” and other hand-drawn signs. We were struck immediately by the good, even celebratory, mood of the crowd. Some of our fellow marchers were singing freedom songs. Others chanted, “Pass the bill!” or “Jobs and freedom now!” All were in high spirits as we walked along. Strangers would embrace strangers—handshakes and hugs aplenty. So far as we could see, violence was the last thing on anyone’s mind.

Humphrey, of course, was in his element. He was recognized by many and reached out to as many marchers as possible. At one point he scooped up a young girl and gave her a big hug. The girl looked faintly terrified, but her mother was delighted and snapped one picture after another. We eventually reached the Lincoln Memorial to find that a very substantial crowd had indeed assembled and was continuing to grow. Humphrey vanished into the crowd, perhaps to greet some of the dignitaries who were arriving. The rest of us sat on the side of the Reflecting Pool, took off our shoes, and dabbled our feet in the water, waiting for the program to begin.

The power and prominence of King’s “I Have a Dream” oration has, through the years, overshadowed—indeed all but obliterated—the stellar lineup of speakers who preceded King on the podium. The great contralto, Marian Anderson, began the program by singing the national anthem, recalling the time in 1939 when First Lady Eleanor Roosevelt had invited Anderson to sing at the Lincoln Memorial, after the Daughters of the American Revolution had refused to permit her to sing a concert in Constitution Hall because of her race. The Catholic Archbishop of Washington, the Very Reverend Patrick O’Boyle, offered the invocation and Randolph made opening remarks, recalling the decades-long struggle to make the March on Washington a reality. Dr. Eugene Carson Blake of the National Council of Churches spoke, along with Rabbi Joachim Prinz of the American Jewish Congress. The principal civil rights leaders, including Roy Wilkins and Whitney Young, all had their turn, as did Walter Reuther of the UAW. John Lewis of the Student Nonviolent Coordinating

Committee delivered a fiery speech that had been toned down at the last minute by more cautious colleagues. Myrlie Evers, the widow of the murdered civil rights leader, offered tributes to a line-up of “Negro Women Fighters for Freedom.” Mahalia Jackson sang. The March organizers had put together a program both multi-racial and ecumenical with established leaders and those just coming to public view. It was a well-crafted and highly effective line-up. All of us applauded and cheered loudly.

But all the speeches and musical presentations were forgotten when Martin Luther King, Jr. came to the podium. The initial portions of the Speech were the final product of an effort by King’s advisors to provide a draft, and it had all the earmarks of a group project. Nonetheless, King delivered it well and powerfully. Then, all at once, he seemed to shift gears to a higher plane. It is reported that while King was speaking, Mahalia Jackson shouted out, “Tell ’em about the dream, Martin!” Whatever the motivation, King began speaking with increased energy, using powerful metaphor and, drawing on familiar scripture, with cadences developed from years of speaking from Negro pulpits:⁵

I have a dream today . . . I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low. The rough places will be made plain, and the crooked places will be made straight. And the glory of the Lord shall be revealed, and all flesh shall see it together. This is our hope. This is the faith that I go back to the South with. With this faith we will be able to hew out of the mountain of despair a stone of hope. With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood. With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day.

This will be the day when all of God’s children will be able to sing with new meaning. “My country, ’tis of thee, sweet land of liberty, of thee I sing. Land where my fathers died, land of the pilgrim’s pride, from every mountainside, let freedom ring.”⁶

The crowd, now estimated to be about 250,000, just erupted. Many marchers broke down in tears. People hugged each other. Folks cheered and cheered. In the midst of this bedlam, Randolph returned to the podium to lead the multitude in the Pledge of Allegiance and Dr. Benjamin Mays, president of Morehouse College, King’s alma mater, offered the benediction.

It was over. And what a moment it was. The numbers, the good spirit and affability of the crowd, the near-total absence of violence (only one person was arrested), the multi-racial character of the marchers, the substance of the speeches,

5. For a more complete description of King’s speech, see James Reston, *I Have a Dream . . . : Peroration by Dr. King Sums Up a Day the Capital Will Remember*, N.Y. TIMES, Aug. 29, 1963, at 1.

6. Martin Luther King, Jr., *I Have a Dream*, NAT’L ARCHIVES, 1963, available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>.

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and the drama of King's closing remarks all combined to make the experience far more significant and powerful than anyone thought possible.

Over in the White House, about a half mile away, President Kennedy, the attorney general, and the White House staff had been nervously watching the proceedings on television. Along with many in Congress, they feared the worst as Kennedy had refused to meet with the civil rights leaders prior to the March. Now, in the aftermath of what everyone judged to be a remarkably positive moment in the civil rights drama, Kennedy wanted to congratulate the leaders personally. Word was passed that they were invited to the Oval Office immediately. They hustled over and met with Kennedy, accepting his congratulations for a highly successful event, one that would surely contribute positively to the ongoing effort to enact the pending legislation.

IV. BIPARTISAN COOPERATION AND FAIR PLAY WERE ESSENTIAL

The euphoria of the March quickly dissipated, however, when the action returned to the House of Representatives. I was not directly involved in the House consideration and passage, but I was, of course, an intensely interested observer. And this is what I observed: The administration wanted to stick as closely as possible to the bill that Kennedy sent to Congress because they thought it represented a significant breakthrough in dealing with severe limits to the rights of citizenship faced by most African Americans and the accompanying physical violence to individuals seeking to exercise those rights.

The civil rights forces, led by the LCCR, were working hard to expand the scope of the pending legislation, especially in the areas of access to public accommodations, equal employment opportunity, and the authority of the attorney general to act in the instance of civil rights violations (the old "Part III" provision of the Civil Rights Act of 1957 that was lost to a compromise engineered by then-Majority Leader Johnson).

At the same time, moderate Republicans, led by Representative McCulloch, wanted to assert the party's long-standing association with minority rights and opportunity going back to Lincoln and the Emancipation Proclamation, along with the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution adopted in the aftermath of the Civil War. They clearly wanted to avoid being cast by Democrats as opponents to strengthened legislation. The Democratic leadership had the task of balancing their long-standing association with the civil rights community (since FDR) with maintaining sufficient Republican votes to constitute an overall majority, since a significant chunk of the nominal Democratic majority came from the South and was certain to oppose the legislation. Without strong Republican backing, the legislation would fall short.

A detailed account of how these conflicting objectives and political cross-currents played out in the House is beyond the scope of this recollection, but this much can be said: The final product that passed the House in February 1964 was significantly stronger than the legislation Kennedy had initially submitted, principally in provisions for access to public accommodations and equal employment opportunity enforcement. Moreover, commitments to moderate Republicans necessary to secure

House passage, given by House Democratic leaders and President Johnson, gave the Senate leaders almost no leeway to search for compromises in the House-passed bill that could help produce sixty-seven votes to invoke cloture and bring the expected Southern Democratic filibuster to an end.

Following the March on Washington, in August, hearings before the Judiciary Committee, chaired by Representative Emanuel Celler (D-NY), droned on into September with no end in sight. During this period, the civil rights forces, both inside and outside of Congress, were diligently working to strengthen Kennedy's bill. The administration, led by Attorney General Robert Kennedy, was trying to sustain a more moderate bill, in collaboration with McCulloch.

By early October, to everyone's surprise, the pro-civil rights activists prevailed in a series of votes in Celler's Judiciary Subcommittee and a greatly strengthened bill was reported to the full Judiciary Committee. The focus now shifted to a complicated series of negotiations and parliamentary maneuvers with the objective of finding a way to moderate the subcommittee's bill to make it more acceptable to the full House and, presumably, the Senate, without generating a full-scale rebellion from the civil rights activists. With help from an unexpected source—Minority Leader Charles Halleck (R-IN)—the full Judiciary Committee made what the administration believed were essential modifications while retaining much of what the subcommittee had done.

Before the full House could vote, however, the compromise bill had to survive the bitter opposition and crafty parliamentary tricks of Representative Howard W. "Judge" Smith of Virginia, the cantankerous Southern Democratic chairman of the House Rules Committee. Before the legislation actually reached the House Rules Committee, the unthinkable happened. President Kennedy was shot and killed by Lee Harvey Oswald in Dallas, Texas on November 22, 1963. Former Senate Majority Leader and then-Vice President Johnson assumed the presidency and quickly made passage of the Civil Rights Act his principal legislative objective. He told a joint session of Congress:

[N]o memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought . . . It is time now to write the next chapter—and to write it in the books of law. I urge you . . . to enact a civil rights law so that we can move forward to eliminate from this nation every trace of discrimination and oppression that is based upon race or color.⁷

Presidential eloquence notwithstanding, Smith did his best to stop the civil rights bill in its tracks by bottling it up. His well-worn tactic of simply doing nothing, perhaps leaving Washington for an extended period "to take a vacation," seemed likely to delay full House action for weeks, if not longer. But the House Rules Committee provided that three members of a committee could demand the chairman to convene the committee and that, after three days of inaction, a majority of the committee could order a meeting to be scheduled on a specific date. A coalition of

7. Tom Wicker, *Johnson Bids Congress Enact Civil Rights Bill with Speed; Asks End of Hate and Violence*, N.Y. TIMES, Nov. 28, 1963, at 20.

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Republican and Democratic Rules Committee members, led by the conservative Representative Clarence Brown (R-OH), forced Smith's hand. He agreed to begin hearings in early January. Ten days of hearings were necessary before Smith finally bowed to the inevitable and called for the vote to send the legislation to the House floor on January 30, 1964. The motion carried easily.

Floor consideration of legislation in the House could not be more different from what happens in the Senate. House rules and traditions are directed toward reaching a decision within a specific period of time and in a manner predetermined by the Rules Committee. The Senate, while it does not lack for rules, can stretch a decision out for as long as senators are physically able to stand and talk. The opportunities for stalling and dilatory tactics are boundless. These differences were starkly evident when the House began floor consideration of the legislation on January 31, 1964.

Once the House adopted the "rule" reported by the Rules Committee, the two parties began ten hours of debate divided equally between them. This time was controlled, in turn, by the chairman and ranking minority member of the Judiciary Committee, Celler and McCulloch, respectively. Most of the debate took place in what is called the "Committee of the Whole House on the State of the Union" or, more simply, the "Committee of the Whole." Most amendments to legislation are offered and considered in the Committee of the Whole. Since there are no recorded votes at this point, the opportunity exists for great mischief. For example, a member who would vote one way on a recorded vote has the opportunity to vote the opposite way on an amendment with no one having documented proof of this deception.

The civil rights forces were properly fearful that much of the good work performed by the Judiciary Committee could be undone in the Committee of the Whole. To counter this possibility, the civil rights forces set up a three-pronged ad hoc whip system that: called members' offices when votes on amendments were taking place (only a ten-minute window existed for the members to reach the House floor and vote); button-holed them directly in the hallways, elevators, cafeterias, and other public spaces to get them to the House floor; and used dozens of citizen volunteers stationed in the balcony to identify and memorize how each member voted by observing their conduct on the House floor (no written notes in the balcony were permitted). The members soon realized that the traditional opportunity for Committee of the Whole mischief had been nullified.

As the House considered the legislation, title-by-title, amendments offered by opponents, mostly representatives from the South, were defeated one after another. The bill, as reported by the Judiciary Committee, suffered almost no substantive damage. As the discipline created by the three-pronged whip system worked with increasing effectiveness, the Southern Democratic opponents became increasingly discouraged and, in the end, all but surrendered.

The most memorable moment took place when Smith shuffled to the podium and, without advance warning to anyone, offered an amendment that added the category of "sex" to the list of prohibited discriminations in employment. Celler made an initial effort to oppose the amendment until a spontaneous bipartisan coalition of five female members spoke in support. When McCulloch had the good

sense to say nothing, the amendment passed overwhelmingly. Smith had proposed the amendment because he believed it would create general confusion among the bill's advocates and likely be rejected by the Senate. This would, in turn, force the Senate-passed bill into a conference with the House and open up a whole new chapter of delaying opportunities. Smith, in short, was throwing sand in the gears and hoping the whole civil rights engine would eventually grind to a halt.⁸ Only one other amendment of substance was added: the creation of a Community Relations Service to help local communities and citizens deal with issues arising from implementation of the act.

Thus it was on February 10, 1964, after nine long days on the House floor, that the legislation emerged in remarkably robust shape. Not one of the strengthening provisions added by Judiciary had been removed or watered down. The vote on final passage was 290 to 130, with 152 Democrats and 138 Republicans voting for the bill and 96 Democrats and 34 Republicans (almost all from the South) voting against. President Johnson was elated with the outcome. But he also sounded a cautionary alarm to those who would now be entrusted to getting this very significant bill over the almost impassable barrier of a Senate filibuster.

As the Senate prepared to begin this epic struggle, several elements were clear. First, the three-pronged whip system had paid off handsomely. Second, bipartisan collaboration was essential; neither party standing alone had sufficient votes to prevail. Third, the active role assumed by Johnson in winning House passage would be much harder to replicate in the Senate due to the personalities involved. And fourth, due to the promises extracted by McCulloch and then ratified by Johnson as the price for Republican support, the traditional path of compromise and watering down key provisions followed by the Senate in considering prior civil rights bills⁹ was no longer available.

V. YES, LYNDON, LIBERALS CAN COUNT

Humphrey clearly understood the difficult situation he faced. In a memorandum he dictated about his role as floor manager, Humphrey observed: "I had to make up my mind as to my mental attitude and how I would conduct myself. I can recall literally talking to myself, conditioning myself to the long ordeal. I truly did think through what I wanted to do and how I wanted to act."¹⁰

One key objective Humphrey embraced at the outset involved the organization of the pro-civil rights forces and the maintenance of bipartisan collaboration every step

8. How the Senate dealt with Judge Smith's crafty bucket of sand is discussed in more detail later in these recollections. *See infra* Part VI.

9. This was the case in both 1957 and 1960. *See Civil Rights Act of 1957*, EISENHOWER PRESIDENTIAL LIBR., http://www.eisenhower.archives.gov/research/online_documents/civil_rights_act.html (follow "Civil Rights Act of 1957" hyperlink) (last visited Jan. 15, 2015); *Today in 1960: The Civil Rights Act of 1960 Is Signed into Law*, THOMSON REUTERS LEGAL SOLUTIONS BLOG (May 6, 2011), <http://blog.legalsolutions.thomsonreuters.com/legal-research/today-in-1960-the-civil-rights-act-of-1960-is-signed-into-law/>.

10. CARL SOLBERG, HUBERT HUMPHREY: A BIOGRAPHY 222 (1984).

of the journey. Johnson had chided Humphrey about the liberals' chronic state of disorganization and their seeming inability to deal with the nuances of what was unfolding around them. "You liberals like to make great speeches," Johnson observed, "but you are not so great when it comes to counting votes. This time you can't afford to be out-maneuvered by Dick Russell [D-GA]."¹¹ Humphrey was determined to prove Johnson wrong.

Senator Thomas Kuchel (R-CA), a moderate who served as assistant minority leader to Senator Everett Dirksen (R-IL), was appointed minority floor leader. From the earliest moment, Humphrey and Kuchel vowed to work together on all aspects of the upcoming debate. The presence of moderate to liberal senators in the Republican ranks¹² meant that any effort with a chance to prevail had to rely on both parties. Simple arithmetic disclosed why this was so.

In 1964, sixty-seven votes were needed to shut off a filibuster.¹³ If the Southern Democratic leader, Senator Russell, could convince just fifteen senators drawn from the ranks of about thirty-six conservative Republicans and border and far-west Democrats, and combine these with his Southern bloc of nineteen senators, the filibuster could be kept alive indefinitely. This, in turn, would either kill the civil rights legislation altogether or force major weakening amendments.

Or, to view the challenge from the perspective of the pro-civil rights forces, every one of the twelve senators identified as "crucial" in a survey by the Senate's leadership staff would be needed to shut off the filibuster. Nine conservative Republicans and three conservative Democrats comprised the group identified as "crucial." How in heaven's name could we get all of these conservative senators to vote for cloture? Given the sorry history of all prior attempts to stop a filibuster during consideration of civil rights legislation, few observers thought it possible.

Before the Senate debate began on March 9, 1964, Humphrey, in collaboration with Kuchel, decided on a number of actions to sustain the bipartisan pro-civil rights forces and acquire the sixty-seven votes needed to stop the expected filibuster. First, he assigned to individual senators, so-called "captains," responsibility for each of the bill's major titles.¹⁴ Kuchel, in consultation with Dirksen, made comparable assignments on the Republican side. Second, Humphrey created a special whip system to help senators

11. Richard Brevard Russell, Jr., a Democratic senator from Georgia, was the recognized leader of the Southern Democratic opposition. *See* GILBERT C. FITE, RICHARD B. RUSSELL, JR., SENATOR FROM GEORGIA 239–40 (1991).

12. Prominent moderate to liberal senators included Kuchel, Jacob Javits (NY), Clifford Case (NJ), Leverett Saltonstall (MA), Hugh Scott (PA), Kenneth Keating (NY), Margaret Chase Smith (ME), and John Sherman Cooper (KY).

13. Today this number has been reduced to sixty votes. *See* RICHARD S. BETH & VALERIE HEITSHUSEN, FILIBUSTERS AND CLOTURE IN THE SENATE 9 (2013).

14. For example, Humphrey appointed:

[Senators] Hart (MI) for Title I (voting rights), Magnuson (WA) for Title II (public accommodations), Wayne Morse (OR) for Title III (desegregation of public facilities and the attorney general's powers), Paul Douglas (IL) for Article IV (school desegregation), Edward Long (MO) for Title V (Civil Rights Commission), John Pastore (RI) for Title VI (cutoff of federal funds), Joseph Clark (PA) for Title VII

respond promptly to quorum calls that the Southern Democrats would likely initiate. With a majority of fifty-one senators needed for a quorum, the Democrats pledged to produce thirty-five and the Republicans pledged fifteen. Staff assistants of six senators agreed to telephone the offices of five or six senators to alert them to impending quorum calls. The system worked: Throughout the debate, which lasted more than three months, the pro-civil rights forces failed to produce a quorum only once.

Third, senators would be assigned on a rotating basis to monitor the Senate floor throughout the debate to guard against sudden parliamentary maneuvers by the Southerners and occasionally pepper the filibusterers with questions. Humphrey also planned to spend several hours each day personally debating the bill. Fourth, the civil rights forces would publish a daily newsletter (an idea that I had conceived in this pre-Facebook, pre-Twitter era). This mimeographed broadside would be distributed each morning to all senators, providing them with a schedule for the day, a list of floor monitors, and rebuttals to Southern Democratic arguments. More generally, it dramatized the impression of organization and effectiveness.

Finally, a bipartisan daily meeting of key senators and their assistants was held to review recent events and plan for the upcoming day. Twice a week lobbyists from the LCCR (usually the NAACP's Clarence Mitchell and the ADA's Joe Rauh) would be invited to attend the meetings for exchange of intelligence and agreement of upcoming actions. I had a direct hand, working with Humphrey, in devising this plan of action. It was meant to refute Johnson's assumption that the pro-civil rights forces would, in the end, fall apart and screw things up. It was devised to help the pro-civil rights forces sustain the pressure on the Southern Democrats no matter how long the debate lasted. It was also devised to achieve the bipartisan coalition that was absolutely essential to victory.

One factor loomed large in Humphrey's planning: the support of Senator Dirksen, the conservative but flamboyant leader of the Republican minority.

The twelve senators identified earlier as holding the balance of power on any cloture vote—most of them conservative Republicans—would determine whether a civil rights bill would pass the Senate and what kind of bill it would be. Since these senators had never before supported anything like the pending legislation, traditional appeals for support were likely to fall short. A special and unique strategy would be needed for each one. This strategy began—and more than likely would end—with Dirksen, a highly visible and speechifying figure who fancied his place in history.

President Johnson knew this. Senator Humphrey knew this. And Senator Dirksen also knew this. So, in a manner totally absent in today's Senate, Humphrey, the liberal Democrat, spent a great deal of time talking privately with Dirksen, the conservative Republican, while praising him publicly on such television programs as *Meet the Press*. In a subsequent commentary, I reported that Humphrey said he was arranging all the spotlights on stage in a way that Dirksen, in the end, could not

(equal employment opportunity), and Thomas Dodd (CT) for Titles VIII, IX, X, and XI (Community Relations Service and miscellaneous provisions).

March 6, 1964, CIVIL RIGHTS DOCUMENTATION PROJECT, http://www.civilrightsactof1964.org/1964_march.htm (follow "Right Arrow" hyperlink to March 6, 1964) (last visited Jan. 15, 2015).

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resist. “When Everett steps into those spotlights,” Humphrey observed, “we will be able to get ourselves a civil rights bill.” And to my observation that perhaps he had praised Dirksen a bit excessively on *Meet the Press*, Humphrey responded, “John, believe me, there is no way you can praise Everett to excess.”

Finally, there were other key elements to this special and unique strategy devised by Humphrey and his allies. He was determined to conduct the debate in a fair and open manner. Humphrey would later recall: “I made up my mind early that I would keep my patience. I would not lose my temper and, if I could do nothing else, I would try to preserve a reasonable degree of good nature and fair play in the Senate. No parliamentary tricks.” There was a specific reason to act this way: Humphrey and Mansfield wanted the undecided senators—the “crucial twelve”—to come to believe that the opponents had been given their “shot,” a full and fair opportunity to make their case. There would come a time when their opposition arguments would have been heard by the Senate and by the nation. At this point, further stalling would be pointless. Then it would be time to vote to shut off debate, and then to vote on the bill. It would be difficult to imagine an attitude more different from what takes place today on the Senate floor.

A final element in the strategy was to assign a prominent role to the major religious denominations—Protestant, Catholic, and Jewish. It was simply the case that the conservative Republicans who held the balance of power were insulated against the traditional forces lobbying in support of civil rights, such as labor unions, civil rights organizations, and other “liberal” advocates. But almost all of the senators went to church or synagogue. When delegations of churchgoers, led by clergy, marched into their offices on Capitol Hill or into their home offices, or telephoned, wrote letters, or dispatched telegrams, these conservative Republicans had no choice but to pay attention. Senator Russell said it better than anyone when he railed against the flood of “priests, rabbis, bishops, ministers, deacons, pastors, and stated clerks” who descended on them to lobby on behalf of the bill.

Thus, as the House debate wound on and on, Humphrey and his allies were getting ready for the bill. When it finally arrived, it was the most meticulous and focused preparation that I ever witnessed during my years in the Senate. For the first time, the pro-civil rights forces were better organized and better prepared than their Southern Democratic opponents. Only the Southern Democrats hadn’t yet figured that out.

VI. FINALLY, THE PENDING BUSINESS

Before full-scale debate on a bill can begin, it has to be “motioned up” from the Senate calendar of legislation. In this instance, the majority leader intoned, “Mr. President, should the Senate proceed to the consideration of H.R. 7152, the Civil Rights Act of 1964?” This motion to consider is almost always approved by unanimous consent as a matter of routine. However, the motion to consider is a debatable motion so it was not surprising that Senator Russell, chief opponent of the House-passed bill, objected to Senator Mansfield’s motion on March 9, 1964. At

that moment, the Southern Democrats launched a “mini-filibuster” on the motion to consider.¹⁵

Even though the substantive bill was not before the Senate for debate at this juncture, the Southern Democrats immediately began attacking the bill itself. The pro-civil rights forces found it necessary to respond—and they did. Humphrey spent a considerable amount of time on the Senate floor, peppering the Southern Democrats with questions or responding to their attacks. He was joined by other leaders of the pro-civil rights forces.

Though spirited, the debate was always civil. At moments, it became downright chummy. Nearing the point of recess on March 12, 1964, for instance, Representative Willis Robertson (R-VA) (father of televangelist Pat Robertson), having just ridiculed every title in the bill, walked over to Humphrey and proffered a small confederate flag for his lapel. Humphrey accepted the flag graciously and praised Robertson for his “eloquence and his great knowledge of history and law but also for his wonderful . . . gentlemanly qualities and his consideration to us at all times.” Robertson then delivered the Southerners’ ultimate compliment: “I told the Senator (Humphrey) that if it had not been for the men from Wisconsin and Minnesota, when Grant finally came down into Virginia, we would have won. . . . We could not whip them.” Arm in arm, Humphrey and Robertson then retired to Robertson’s office for some early evening refreshment.

Lobbyists of all persuasions were also busy during this period. One afternoon while I was working at my desk in the new Senate Office Building (now the Dirksen Senate Office Building), the receptionist came into my office. “There is a woman in the waiting room who seems pretty excited and she is demanding to see the Senator. Humphrey’s in a committee meeting and won’t be back to the office for several hours. But she will not leave until she talks to someone about the civil rights bill. Will you see her? . . . please!”

Well, that was part of my job so I said, “Sure, by all means, send her in.” Whereupon the door burst open and this very excited woman charged in, looking like she was ready to run me over. She immediately started to interrogate me to find out whether or not I would do as a substitute for Humphrey. Apparently I passed the test because she pulled up a chair and let me have it, full force.

“You know the House added ‘sex’ to the employment discrimination section and we’ve heard that some senators want to remove that amendment. I’m here to tell you, and to tell Senator Humphrey, that would be a very grave mistake. A very grave error. We will not stand still for anything like that! The amendment must stay in the

15. See John G. Stewart, *The Civil Rights Act of 1964: Tactics I*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 211, 214–19 (Robert D. Loevy ed., 1997). The Civil Rights Act of 1964, as enacted by the House on February 11, 1964, was still residing on the Senate calendar as this mini-filibuster proceeded. This recounting also leaves out several complex parliamentary encounters that enveloped the civil rights legislation even before it got on the Senate calendar where Senator Mansfield could move to make it the Senate’s pending business. *Id.* These encounters are explained in excruciating detail in my discussion of the legislation found in *Civil Rights Act of 1964: Tactics I*, but for the purposes of this recollection they can be overlooked.

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bill! It is one of the most important steps forward in support of American women that has ever happened. It must not be lost.”

Well, the monologue went on like that for at least thirty minutes. I listened and took notes since my visitor really had no interest in what I had to say. Her purpose was to make clear that a horrible fate awaited any senator who would try to remove the “sex” category in Title VII.

Finally, when my visitor got up to leave, I asked for her name. Going out the door she turned and shouted, “Betty Friedan, and don’t you forget it.”

Whew. This encounter happened just as *The Feminine Mystique* was sweeping the nation. I never have forgotten my introduction to its author. When I told Humphrey of my encounter, I offered this word of advice, “Senator, do not have any thoughts about removing Judge Smith’s sex amendment from the bill. If you do, you will encounter an enraged Betty Friedan. Believe me, Senator, you do not want that to happen. Trust me on this one.” He did, and the sex amendment stayed. It was, indeed, a very positive addition from the most unlikely of sources.

Despite the spirited exchanges on the floor, days passed without any apparent progress in securing a vote on the motion to proceed to the consideration of H.R. 7152. During this period of procedural limbo, the pro-civil rights forces faced its initial test of will. Even though H.R. 7152 was still officially on the Senate calendar and not the Senate’s pending business, some senators began to get restless at the continuing deadlock caused by the Southern Democratic filibuster. Some of these senators began to talk openly of trying to invoke cloture on the motion to consider. “It’s time to move things along,” was the complaint. “Let’s get things rolling.” There even were news reports that Dirksen, Humphrey, and Kuchel had agreed to seek cloture the following week of March 24.

The group of staff assistants assigned to nearly full-time work on H.R. 7152 unanimously believed this would be a grave mistake. To seek cloture on anything but the entire bill (and not just on the “motion to consider”) would risk losing enough of the “crucial twelve” senators to fall short of the necessary sixty-seven votes. This, in turn, would raise the real danger of compromise with the Southern Democrats, the jettisoning of key parts of the House bill, deadlock in conference, and possibly loss of the bill itself. Accordingly, the staff assistants fanned out across the Senate side of Capitol Hill, seeking their respective bosses, and passing along a plea not to agree to a premature vote on cloture. Of special importance in this effort were Charlie Ferris and Ken Teasdale who staffed the Democratic policy committee and reported to Mansfield. Humphrey and Kuchel quickly agreed not to pursue cloture on the motion to consider and, in the end, so did Mansfield. The filibuster continued into its third week—with no end in sight.

Then, without advance warning, the Southern Democrats simply stopped talking. It appears, in retrospect, that Russell had concluded that continuing the filibuster on the motion to consider for much longer would likely alienate the key undecided senators who were needed by both sides. In this sense, Russell validated the belief of the pro-civil rights forces that letting the opponents have a full and unimpeded opportunity to state their case would, eventually, win over the “crucial twelve” needed

for cloture. To avoid this situation, Russell himself had to demonstrate some willingness to move forward. Thus on March 26, 1964, the motion to proceed to the consideration of H.R. 7152 passed by the margin of 67-15 without further debate.

Finally, nine months after Kennedy addressed the nation in June 1963, the civil rights bill was the Senate's pending business.

VII. SENATOR DIRKSEN'S SPECIAL WATER

The focus now shifted to solving the puzzle of how to line up the twelve or so votes needed to invoke cloture on the full bill without accepting weakening amendments. And, as we all knew from the beginning, this meant dealing with Senator Everett McKinley Dirksen.

When the Senate's consideration began in March, it quickly became clear that while Dirksen did not know exactly what he wanted to do, he wanted to do something, and something significant. Early in the debate he talked about various formulations, usually focused on Title II (public accommodations) and Title VII (employment discrimination). At one point he appeared to believe that fundamental reworking of the amendments were required; at other times he declared to Humphrey that only minor changes were needed. During this period from the end of March into mid-April, Humphrey made it a point to talk with Dirksen just about every day: encouraging, commenting, and suggesting. And always flattering. Senator Mansfield and President Johnson did the same.

After several forays to the Republican senators' weekly luncheons with potential amendments, Dirksen assured Humphrey that only a few modifications to the House bill would be needed. He also suggested in early May that interested senators from both parties, along with representatives from the Justice Department, meet in his office to hammer out a final agreement. Thus it was that the pro-civil rights senators were greatly surprised, and alarmed, when Dirksen's staff passed out a mimeographed package of some seventy amendments to H.R. 7152, divided into three classes: Class A for minor changes, Class B for more substantive changes, and Class C for major changes to Title II and Title VII.

Meanwhile, on the Senate floor a major battle had broken out over the issue of jury trial amendments, a staple of past civil rights battles, relating to whether anyone charged with criminal contempt under the terms of the act would be guaranteed a jury trial. The pro-civil rights forces were concerned that an all-white Southern jury would be unlikely to find such defendants guilty. Southern Democrats did not want to give such authority to unelected federal judges. The pro-civil rights forces knew it was essential that they prevail if votes on the jury trial amendments were held. A series of amendments and perfecting amendments were offered by Mansfield and Dirksen on the one hand, Senators Herman Talmadge (D-GA) (acting for Russell) and Hugh Scott (R-PA) on the other. After a couple of ill-managed roll-call votes that had the Senate chamber in near chaos, the amendments were defeated and the filibuster resumed. The jury trial interlude reflected the stark reality that the sixty-seven votes for cloture were not in hand. Moreover, the seventy-amendment package

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produced by Dirksen further suggested that reaching the necessary accommodations to secure his active support of cloture would be difficult indeed. It was at this juncture that I dictated the following passage into the journal I was keeping:

For the record, there is a definite lack of urgency and lack of direction to the civil rights forces at present. Humphrey is frustrated and blocked in by Mansfield. Kuchel is frustrated and boxed in by Dirksen. If there was some way to get this operation off dead-center, I believe we could move along in good style. I think the basic strength to pass the bill is in the Senate if it can be activated, focused, and moved along. But at the moment there is no real movement, and there is no real determination to get this movement. . . . I hope we can have some sort of answer this week or at least some sort of indication that we will eventually get such an answer.

I think one must fully appreciate the profound difficulties in getting this bill underway and keeping up a head of steam. Nobody really seems concerned except the few committed leaders. . . . [I]t will be somewhat of a major miracle if the pro-civil rights forces can get themselves back in order and push ahead with some degree of resolution and determination. Of course, the Southerners have their problems and, in the end, (their problems) are probably even more profound than ours. But right now, ours look pretty profound.

While the filibuster continued, the real action had moved into Dirksen's minority leader office off the Senate floor. Each morning the staff members from the key pro-civil rights senators, both Democratic and Republican, joined by key Justice Department leaders, principally Burke Marshall and Nick Katzenbach, came together to work through the Dirksen amendment package. From time to time, one of the principal senators would swing through. Agreements were easily worked out on Class A amendments and most of the Class B amendments were also resolved. But not surprisingly, the Class C amendments to Title II and Title VII were much tougher to work out since they were the heart of the legislation.

During one of these sessions, just before the noon hour, I got up from the conference table and walked over to Senator Dirksen's desk, on which had been placed a crystal pitcher filled with ice and a clear liquid—presumably water. I was thirsty and figured the minority leader could spare a glass of water. As I picked up the pitcher and a glass, a chorus of voices erupted from Dirksen's staff, saying, in essence, "Stop! Don't touch that pitcher! Put down that glass! That is Senator Dirksen's 'special water!'" At about this moment, the clear scent of juniper berries wafted up from the pitcher and I, as one who enjoyed a martini as much as the next fellow, understood. So, I obeyed orders, put down the glass and pitcher, and resumed my place at the table, still thirsty. A little later, Dirksen himself burst into the office, headed for his desk, poured himself an ample glass of "special water," and headed back to the Senate floor, presumably fortified for whatever encounters awaited.

I want to note the atmosphere that prevailed in Dirksen's conference room. This was a gathering of about fifteen persons (not counting senators when they stopped by): Republicans and Democrats, liberals, moderates, and conservatives; executive branch representatives, some who had worked on civil rights matters for years, others

who were new to the game. The attitude, shared by all, was, despite important differences in approach, one of “we’ve got to get this done and we’ve got to do it right.” The consequences of falling short were understood by everyone. Failure was not an acceptable option as far as those in the Dirksen negotiations were concerned.

This informal gathering of senators and key staff functioned in many ways like a Senate committee during a legislative “mark-up.”¹⁶ Amendments were brought up, discussed, often altered or adjusted in one way or another, and either accepted or set aside for the time being. There were no votes, as such, but important decisions were made every day, principally by unelected staff or executive branch personnel. This informal arrangement had the great advantage of not being a public event. We agreed not to talk to others, including the press and concerned interest groups, until a full agreement had been reached. This permitted all sorts of approaches to be raised, discussed, changed, rejected, or accepted without triggering an uproar on the outside from one side or the other. Of course, the LCCR and other civil rights groups were strongly opposed to this approach. They wanted to be consulted at every turn. Their distress was heaped upon Humphrey, Kuchel, and other pro-civil rights senators. But we figured that if the founding fathers could fashion the United States Constitution out of the public eye, that provided sufficient precedent for the Dirksen negotiations. So that is how we operated.

The fundamental impasse centered on Title VII dealing with equal employment opportunity. Dirksen wanted to address employment discrimination largely through voluntary action of individual employers. He wanted state agencies, such as the one in Illinois, to have ample time to resolve individual complaints before the federal executive could be involved. And he wanted the burden of proof to rest with the individual complainant, not the alleged discriminating employer. The pro-civil rights forces of both parties had a fundamentally different perspective. They were concerned that it would take several years to deal with discrimination disputes one company at a time if the complainant also carried the burden of proof and the associated legal services. They wanted to be able to address discrimination in a geographical area, not just with an individual business; if all employers were in the same boat, so to speak, there would be additional incentives to comply voluntarily. They also wanted to limit the time state agencies would have to resolve a specific case. Most importantly, they wanted the employer to carry the burden of proof that the alleged discrimination did not take place.

After most of the issues in the Class A and Class B amendments had been resolved, Dirksen’s support for cloture appeared to depend on breaking this impasse over Title VII. The stakes could not have been higher. We were all fully aware that unless the filibuster could be ended, the entire bill would be in jeopardy. In this extremely tense environment, one of the most unexpected developments of the entire struggle took place. The Dirksen staff lawyers proposed a way to resolve the impasse. It was an artful solution that had eluded everyone else: namely, that the U.S. government be given authority to initiate action only where there existed a “pattern or practice of massive resistance in any geographical area.” The Justice Department

16. See Stewart, *supra* note 1.

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attorneys agreed this was a workable approach that did not weaken the bill; indeed, it improved on the version passed by the House. It was established later in the debate that “pattern or practice” could also refer to repeated violations by a single business establishment. “Pattern or practice” were the magic words that saved the day.

The next day the principals reassembled in Dirksen’s office to sign off on the entire package. At one point Senator Joseph Clark (D-PA), stamped out of the meeting declaring that we had sold out to Dirksen. No one else seemed to share that conclusion, so the meeting continued. But Clark’s departure illustrated the reality that Humphrey had potential problems on the Left if too much was conceded to Dirksen. (Indeed, some suggested that Clark’s abrupt departure had been orchestrated in advance to make that exact point.) It was agreed that Mansfield and Dirksen would offer a comprehensive substitute bill, incorporating the agreements that had been reached. Dirksen pledged his support for cloture on the entire bill, not on any single title, and opined that he could corral enough Republicans to reach sixty-seven. All the principals, and some of the staff, shook hands and prepared to face the outside world.

Humphrey, in particular, could no longer avoid the representatives of the LCCR, principally Joe Rauh and Clarence Mitchell. Given the sorry history of prior civil rights legislation, Rauh and Mitchell were sure the House-passed bill had been fatally compromised in order to win Dirksen’s support. Humphrey and Burke Marshall of the Justice Department walked them through the Mansfield-Dirksen substitute amendment, title-by-title, line-by-line. Rauh and Mitchell, prepared to raise hell along with the roof, found themselves largely agreeing with the changes that had been made. They said they wanted to study the substitute more closely overnight but did not see any showstoppers. Humphrey audibly exhaled a sigh of relief. Marshall just smiled, as was his wont.

Marshall and Dirksen’s staff representatives then hustled over to the House of Representatives and explained the changes to McCulloch, Celler, and others, stressing that no “sell-outs” had taken place in the Senate and that, if anything, the House-passed bill had been strengthened in a number of ways. A similar report was delivered by the Justice Department officials to President Johnson. There is no evidence that he strongly disagreed with the changes or would oppose them, but he did tell Humphrey that he still preferred the House-passed bill. Could that reflect the reality that unlike with prior bills’ passage, in which he was often the dominant and decisive force, Johnson had been minimally involved in the bill’s progression through the Senate?

VIII. FOR THE FIRST TIME IN HISTORY

With victory seemingly within reach, Dirksen now met with the Republican conference to explain what he had agreed to do and how he would need support of the nine Republican senators who made up most of the “crucial twelve.” But, human nature being human nature, several senators grumbled that Dirksen was getting too far ahead of his conservative senators and needed to be brought down a peg or two. In particular, Senator Bourke Hickenlooper (R-IA) declared he was not ready to vote

for cloture and he thought a significant number of other Republicans shared this position. He indicated he had changes to propose before he could support the minority leader. To further complicate matters, Dirksen fell ill and could not come to his office for several days. It appeared, all at once, that the great victory, nearly in hand, was now falling apart.

Humphrey and Kuchel said this could not be allowed to happen. They actively explored ways to bring Hickenlooper and his conservative supporters on board. With a cloture vote in sight, Hickenlooper claimed that seventeen Republicans would now withhold their support unless they could receive unanimous consent to vote on three additional amendments. Mansfield, Humphrey, Kuchel, and Dirksen agreed to Hickenlooper's request. Russell also had no choice but to allow these votes even though it meant suspending the filibuster. Dirksen recovered his health sufficiently to get to the Senate and resume twisting arms. With the cloture petition now filed, calling for the critical vote on June 10, the Senate accepted a reworked version of the jury trial amendment now proposed by Senator Thruston Morton (R-KY) and defeated one amendment by Senator Norris Cotton (R-NH) dealing with Title VII and one by Hickenlooper dealing with Title IV, school desegregation. In the end, the Republican renegade senators primarily wanted to demonstrate that Dirksen was not the only Republican senator determining the fate of the civil rights bill. The minority leader was perhaps taking his press clippings a bit too seriously. The renegades wanted to be seen and heard—and they were.

Having made that personal point, Hickenlooper announced he would support cloture and urge his renegade supporters to do likewise. The final push to win this critical vote now kicked into high gear. Humphrey took charge in the Senate, calling the undecided conservatives, especially western Democrats. Johnson reportedly made several calls and is said to have convinced venerable Senator Carl Hayden (D-AZ) to withhold his vote until the roll call was concluded. If the pro-civil rights forces needed one more vote, Hayden would vote "aye." If his vote was not needed to win, he would vote "nay." Humphrey also arranged for Senator Clair Engle (D-CA), incapacitated with a brain tumor, to be brought to the chamber by ambulance. Late in the evening of June 9, Humphrey called Johnson to say they had the votes to win. Johnson said he hoped that was true but that it would still be difficult down to the wire.

The national importance of the vote was dramatized by the decision by CBS News to station Washington correspondent Roger Mudd outside the Senate on the Capitol lawn. In these days, before live television coverage of the Senate, Mudd was to communicate to the nation how each senator voted by receiving that information from the press gallery via telephone and then manually posting each vote on a large score sheet sitting on an easel. Inside the Senate chamber, the staff assistants (me included) were asked to leave the Senate floor, so we headed to a nearby room to watch Mudd's performance. Humphrey, meanwhile, slipped a note to his friend, Senator Philip Hart (D-MI), predicting sixty-nine or seventy affirmative votes. When his name was called, Senator Engle, unable to speak, pointed to his eye to indicate his "aye" vote. As the roll was called, Humphrey kept score on his own tally sheet.

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The tally turned out to be seventy-one to twenty-nine, a margin far greater than anyone could have imagined just a week earlier. Of the twelve senators identified in mid-February as “crucial,” nine voted for cloture and three were opposed. The victory ultimately was achieved from a combination of the nine “crucial” senators and seven originally classified as “reasonably sure against,” including Senators Howard W. Cannon (D-NV), A.S. Mike Monroney (D-OK), J. Howard Edmondson (D-OK), Ralph Yarborough (D-TX), Roman Hruska (R-NE), and Carl Curtis (R-NE).

The Senate, for the first time in history, had shut down a filibuster against a civil rights bill that had not been watered down or compromised out of existence. Now, the second phase of the battle began. And it began immediately. Senate rules provide that any amendment introduced prior to cloture qualifies to be called up after cloture. Approximately 560 amendments were so qualified. In addition, each senator had the right to speak for an hour in the post-cloture period. The time taken up with roll call votes associated with these amendments, usually about twenty minutes per roll call, was not charged against a senator’s hour allocation. In other words, if every senator used his hour for debate, and if all 560 amendments were called up for a vote, an enormous amount of time—something in the range of 280 hours—would be needed to reach the point of voting on final passage.

Another factor soon became evident. In the drive toward cloture, we had planned and strategized in meticulous detail. The pro-civil rights forces had never been better prepared. But we had failed to make serious plans or develop sustainable strategies for the post-cloture period. Moreover, if one of the hostile anti-civil rights amendments managed to win approval, there would be no way to fix the problem with another amendment because only those amendments introduced before the cloture vote could be acted on. There was, literally, zero tolerance for error.

Just as these hard facts of life were settling in on the leadership, especially Humphrey, all hell broke loose. Senator Sam Ervin (D-NC), a conservative, called up the so-called “double jeopardy” amendment, and it prevailed by the narrow margin of forty-nine to forty-eight. Few senators, maybe not even Ervin, had any idea what its real impact would be, but the Justice Department experts sitting in the balcony quickly discerned serious problems. Their concern focused on the possibility that someone acquitted of a civil rights violation by a sympathetic Southern court could then be shielded from subsequent federal enforcement action.

The nightmare of passing a damaging amendment without recourse had taken place as the first order of business after cloture. But not so fast: Senate staff discerned that Ervin had mistakenly offered the amendment to the House-passed bill, not the Mansfield-Dirksen substitute that would be adopted just prior to the bill’s final passage. So while Ervin had achieved an unexpected victory, it would be short-lived. His amendment would be lost when the Mansfield-Dirksen substitute replaced the House-passed bill. Through little more than happenstance, the catastrophe of the Senate passing a damaging amendment when it could not be remedied with a subsequent amendment had been narrowly avoided. A bullet had been dodged. Nonetheless, the commotion that surrounded the Ervin kerfuffle provided a serious jolt to the floor leadership. A mistake like this could not be permitted again.

To further complicate Humphrey's situation, he had just received word from his wife, Muriel, that their son, Bob, had been diagnosed with lymphatic cancer and was hospitalized in Minnesota. Humphrey desperately wanted to be with his family. But he knew he could not easily hand off his responsibilities as floor manager to anyone else. What should he do? The near-disaster with the Ervin amendment convinced Humphrey that he had no choice but to stay in Washington and continue as the bill's floor manager. It was a wrenching decision. Strain and worry were deeply etched on Humphrey's face. He frequently went to the Democratic cloakroom to receive telephone calls from Muriel regarding Bob's condition. I suffered right along with Humphrey, knowing the terrible pressure he was facing on the floor and with his son.¹⁷

If truth be told, at this point Humphrey was not really in control of things on the Senate floor. There was no prearranged order in which amendments would be called up. Little analysis had been performed on most of the offerings, and thus it was hard to discern in a moment or two the amendment's real impact. Senators were coming up to Humphrey for instructions on how to vote. In many cases, Humphrey did not know what to tell them. I surely didn't. Humphrey was as rattled as I had ever seen him.

Mansfield wisely called for a recess. The pro-civil rights forces regrouped in Mansfield's office to decide how to proceed when the Senate reconvened. Two different approaches were advocated. The traditional liberal senators, such as Clark and Hart, proposed a strategy of total opposition to any and all Southern Democratic amendments. "Just vote 'nay,'" said Clark, "and move on. This business has run on too long already." On the other hand, Mansfield, and to a lesser degree Humphrey, opposed the strategy of "Just say no." Mansfield pointed out that if you push senators too far they eventually revolt, perhaps extending the debate for a longer time than if a somewhat more conciliatory approach were followed. Humphrey agreed. "If we can give a little here, without doing any substantive damage to the legislation, the Southerners may tire of the process more quickly and we can save time in the end," he said.

A final decision on these divergent strategies was never reached. When the Senate went back into session, Humphrey started off by negotiating an amendment with Senator Russell Long (D-LA). Ervin's ill-fated double-jeopardy amendment was rewritten by the Justice Department to render it harmless, and Mansfield asked for unanimous consent to permit its introduction by Ervin to the Mansfield-Dirksen substitute. Consent was granted, whereupon the neutered version passed overwhelmingly. Senator Jack Miller (R-IA), a conservative, bounded out of the Republican cloakroom with a sheath of amendments—all innocuous—and asked Humphrey if he would accept them. Humphrey looked at them briefly and then said to Miller, "They look OK to me, Jack, but we'd better see what Dirksen thinks." It was, by now, late in the afternoon and Dirksen had consumed more than one glass of his "special water." He squinted at Miller's amendments briefly and then turned to Humphrey and in his stentorian voice announced, "Oh, Hubert, Hubert, we can't accept these. These are nothing but cheese-

17. Bob Humphrey fully recovered.

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parings.” Miller actually hung his head and shuffled back into the Republican cloakroom, thoroughly chastened by his own leader.

The amendments kept coming and coming. In most cases they were quickly voted down. A few were accepted. A few more were rewritten to make them unobjectionable and were added by unanimous consent to the Mansfield-Dirksen substitute. After a while, a pattern developed: An objectionable Southern Democratic amendment would be offered, briefly explained for a minute or two, and then defeated. There were very few instances of Southern Democrats taking advantage of Humphrey’s willingness to be reasonable and to look for an acceptable compromise. Had they seized this opportunity, the possibility of inflicting real damage might have been theirs.

Most of the amendments were coming from Long, Ervin, and Strom Thurmond. At one point Thurmond announced he had many more and planned to offer them all, even if he knew they stood no chance whatever of being accepted. It might take days to exhaust his supply.

Sitting directly behind Humphrey were the key Southern Democratic old bulls, Dick Russell, Lister Hill of Alabama, Jim Eastland of Mississippi, and John Sparkman of Alabama. Following yet another amendment from Thurmond, Russell leaned forward and spoke into Humphrey’s ear, “Hubert,” he said, “how in hell can we shut up that fool Thurmond? He is going to wreck us all!” Humphrey replied to Russell that he had no idea of how to shut Thurmond up. “Dick, I’ve been trying to do that for years and nothing seems to work.” “That’s what I figured,” said Russell.

One evening after many senators had been well lubricated, Eastland offered a motion to adjourn that had not been cleared with the floor leaders, which they opposed. When two Republicans voted “aye” on the motion, Dirksen went ballistic. He dispatched a covey of pages to intercept the two errant senators—Peter Dominick (R-CO) and Edwin Mechem (R-NM)—and had them physically escorted back to the Senate chamber. Dominick quickly changed his vote to “nay.” When Mechem appeared, Dirksen grasped him by the collar of his suit jacket, marched him down the center aisle, and bellowed to Mechem, “Now, damn it, vote!” And vote he did with a nearly inaudible, “Nay.”

On Tuesday, June 16, the Senate remained in session from 10 A.M. until midnight and voted on thirty-three amendments, what was then an all-time record for roll call votes in one calendar day. The next day, June 17, Thurmond made his long-awaited announcement that he would offer his final amendment. When it lost, as it was certain to do, the Southern Democratic opposition to the Civil Rights Act of 1964 effectively came to a conclusion.

The next day was used entirely for speeches—most self-congratulatory and a few that forecast the demise of the republic upon the bill’s implementation. On June 19, the leaders made their closing remarks. Humphrey cribbed his from Benjamin Franklin upon the conclusion of the U.S. Constitutional Convention. He declared that he would “consent to this measure because I expect no better and because I am not sure it is not the best.” The bill passed by the extraordinary margin of seventy-three to twenty-seven.

IX. A SPECIAL MOMENT, INDEED

Following the obligatory photo opportunities and comments for reporters, the pro-civil rights senators and principal staff persons met in Mansfield's office to raise a few glasses of champagne. Humphrey, with his family all in Minnesota at his son's bedside, asked if I would like to have dinner with him at Paul Young's, in those days one of Washington's most popular eateries, located across from the Mayflower Hotel on Connecticut Avenue. On the way out the ground-level door under the Senate steps, Humphrey encountered what to me is one of the most memorable moments of the entire adventure. There, at least three hours after the final Senate vote stood several hundred citizens, of all racial and ethnic persuasions, to thank and applaud the senators for what had been achieved. This was not an organized demonstration. This was a gathering of citizens who, in their individual capacities, wanted to come to the Capitol and express their gratitude for what had been done. When they spotted Humphrey, they erupted in a mighty roar of unrestrained cheering. "Thank you, Senator, thank you! Justice for all! Thank you, thank you! God bless you!"

Humphrey climbed up on the steps and addressed the crowd, thanking them for their support, praising their commitment to justice, and forecasting better days ahead for America. He then charged into the crowd to shake hands. I don't think he missed one person.

America had lived up to its oft-stated but oft-overlooked promises of justice and human dignity. A special moment, indeed, when democracy worked.

H.R. 7152 then returned to the House for its consideration of the Senate changes. The Senate leaders and the Justice Department executives had done their work well and had made clear to the House leadership, especially McCulloch, that the Senate-passed version improved the House bill in many respects and weakened it in no significant way. There was no reason for a conference committee to resolve what "differences" existed. The House was prepared simply to accept the Senate bill in every detail. On July 2, the House voted 289-126 in favor of H.R. 7152, as amended.

In contrast to what passes for the legislative process today, the substance of the legislation and its capacity to address urgent problems of the nation had prevailed above party or regional considerations or the traditional jealousies that currently divide the members of our bicameral legislature. Will we ever see such days again? One has to hope we will.

The completed act was rushed down Pennsylvania Avenue to the White House. Johnson scheduled a televised signing ceremony for that very evening. Congressional leaders joined hands and locked arms with the nation's civil rights leaders in a never to be forgotten celebration of democracy. I can only add, "Amen."

X. AFTERWORD: A RARE MOMENT

In this period of national dysfunction and gridlock in Washington, it is important to see the Civil Rights Act of 1964 not only as the legislation that took a great leap forward in correcting many of the areas of discrimination and injustice in America—such as employment, public accommodations, public facilities, spending of federal

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dollars, education, and voting—but that key parts of our democracy—Congress, the presidency, the executive branch, and the public—were able to tackle the most contentious and difficult issue of post-World War II America and come to a successful and peaceful outcome.

The courageous and creative actions in the streets and rural byways, sustained by civil rights workers for many years, were essential to galvanize the nation's understanding that something had to be done. They brought the issue to the threshold of Congress for action. And in ways few forecast or thought possible, Congress responded. Key elements of this response are worthy of attention today.

Proponents largely ignored the conventional wisdom that passage of a robust and enforceable civil rights bill through the Senate was impossible. Their full attention was focused on how to make the impossible possible.

Bipartisanship mattered. Without recognition that the nation's interests took precedence over narrow political or ideological interests, the legislation would have foundered. Both parties, liberals and conservatives, were needed and, in the end, they responded.

Fairness and openness for all sides was a reality. Proponents and opponents had the opportunity to make their case.

Careful plans were made and followed. The scattershot liberals remained focused and delivered when it mattered.

Outside groups, especially religious leaders, were listened to and taken seriously.

Pro-civil rights leaders in the Senate, such as Humphrey, were ready to share the credit. Dirksen emerged in the media as the ultimate savior, even though he was the leader of the minority party and had no prior record as a champion of civil rights and racial justice.

The leaders were patient and let the process unfold naturally. They let things percolate until victory was certain. The notion of holding "test votes" on cloture, today's standard practice, was never seriously considered.

Leaders kept their word. Pledges to the House leaders by the Senate leaders and the president that their bill would be protected were redeemed in full, and then some.

It was, in sum, a rare moment in American history when the ideal of democracy was achieved. To have been present and to have participated in this moment of democracy remains, even a half century later, a source of great pride and personal fulfillment.