

Fall 2010

# Presidential Leadership and Civil Rights Lawyering in the Era Before Brown

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## Recommended Citation

Dodd, Lynda G. (2010) "Presidential Leadership and Civil Rights Lawyering in the Era Before Brown," *Indiana Law Journal*: Vol. 85: Iss. 4, Article 14.

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# Presidential Leadership and Civil Rights Lawyering in the Era Before *Brown*<sup>†</sup>

LYNDA G. DODD<sup>\*</sup>

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## INTRODUCTION

On June 29, 1947, President Harry Truman stood before a crowd of over 10,000 civil rights activists and spectators gathered at the foot of the Lincoln Memorial.<sup>1</sup> He called on the country to “keep faith with our Nation’s historic principles” by eliminating “the last remnants of the barriers which stand between millions of our citizens and their birthright.”<sup>2</sup> After bluntly stating that “[t]here is no justifiable reason for discrimination because of ancestry, or religion, or race, or color,”<sup>3</sup> Truman proclaimed the nation could not afford to

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1. ALONZO L. HAMBY, *MAN OF THE PEOPLE: A LIFE OF HARRY S. TRUMAN* 433 (1995).

2. Address Before the National Association for the Advancement of Colored People, 1947 PUB. PAPERS 311, 312 (June 29, 1947).

3. *Id.* at 312.

wait another decade or another generation to remedy these evils. We must work, as never before, to cure them now. . . .

The way ahead is not easy. We shall need all the wisdom, imagination, and courage we can muster. We must and shall guarantee the civil rights of all our citizens.<sup>4</sup>

By delivering the first presidential address to delegates attending the annual convention of the National Association for the Advancement of Colored People (NAACP), Truman went far beyond the efforts of any previous President to endorse the cause of civil rights. His advocacy, moreover, did not end with one speech. Truman backed up his rhetoric by launching an unprecedented attempt to apply the full force of the President's office to promote civil rights.

This Article examines the Truman administration's efforts to reform civil rights enforcement policies. In doing so, it contributes to scholarship examining the role of presidential leadership in supporting the federal courts and shaping legal doctrines. In recent years, constitutional scholars in the legal academy have enriched their doctrinal scholarship by incorporating into their work the broader political dynamics shaping constitutional development.<sup>5</sup> These law professors have drawn extensively on scholarship in political science examining the role of "the national governing coalition"<sup>6</sup> and governing "regime"<sup>7</sup> in the development of constitutional law.<sup>8</sup> Political scientists have emphasized the importance of critical elections and changing party coalitions<sup>9</sup> in reshaping presidential policy priorities

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4. *Id.* at 312–13.

5. *See, e.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

6. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); *see also* TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999).

7. *See, e.g.*, Cornell Clayton & David A. May, *A Political Regimes Approach to the Analysis of Legal Decisions*, 32 POLITY 233 (1999); Howard Gillman, *Elements of a New 'Regime Politics' Approach to the Study of Judicial Politics* (paper presented at the Annual Meeting of the American Political Science Association, August 2004) (on file with the author).

8. For a critical review of this literature, see Paul Frymer, *Law and American Political Development*, 33 LAW & SOC. INQUIRY 779, 793 (2008) (reviewing *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch eds., 2006)) ("[E]xceptional . . . [accounts of law and American political development] combine an understanding of the judicial decision as a dependent variable with a subtle understanding of how both political and judicial structures, and the historical development of these structures, operate as independent variables. They recognize that judicial decision making is the confluence of factors both internal and external to the Supreme Court.").

9. *See, e.g.*, JOHN B. GATES, *THE SUPREME COURT AND PARTISAN REALIGNMENT: A MACRO- AND MICROLEVEL PERSPECTIVE* (1992); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); William Lasser, *The Supreme Court in Periods of Critical Realignment*, 47 J. POL. 1174 (1985).

in areas such as judicial appointments.<sup>10</sup> Others have shown how party leaders often seek to defuse political conflicts by encouraging courts to intervene.<sup>11</sup>

This partisan regime approach has also been applied to studies examining the development of civil rights enforcement policies. In his influential book, *Rethinking Roosevelt on Race*,<sup>12</sup> political scientist Kevin McMahon uses a “presidency-focused perspective” to examine civil rights history. McMahon argues that Roosevelt, through judicial nominations and the creation of the Civil Rights Section (CRS) in the Department of Justice,<sup>13</sup> laid the groundwork for civil rights advances by implementing a “hidden hand strategy,” thus avoiding direct confrontations with Congress, especially the recalcitrant southern bloc in the Senate.<sup>14</sup> On this basis, McMahon concludes that Roosevelt deserves credit for serving as a principal catalyst for civil rights reforms.<sup>15</sup>

This Article evaluates these claims regarding presidential leadership, especially with respect to the development of a support structure for civil rights. Much of this new regime politics literature has been influenced by scholarship examining the role of institutional order and conflict in structuring the incentives and opportunities of political actors. As a variant of the historical branch of new

10. For the leading “presidency-focused” account, see KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004). For scholarship describing judicial appointments as opportunities for “partisan entrenchment,” see RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138 (Ronald Kahn & Ken I. Kersch eds., 2006).

11. See, e.g., KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007) (explaining how Presidents often support judicial power out of partisan self-interest rather than any principled stance concerning proper judicial authority); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993) (showing how party leaders have encouraged judicial review of controversies that may otherwise damage the party’s regime power by splitting apart a fragile electoral coalition).

12. MCMAHON, *supra* note 10.

13. Attorney General Frank Murphy established the Civil Liberties Unit in the Criminal Division of the Department of Justice in 1939. For the political scientist Robert Carr, this initiative reflected a shift from conceiving of civil rights as a “shield” against government infringement, to thinking of rights as a “sword” to be invoked by the government to prosecute both public and private actors who infringe civil rights. On the metaphor of “shield” and “sword,” see ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 3–24 (1947); see also *Pollock v. Williams*, 322 U.S. 4, 8 (1944) (introducing the metaphor of sword and shield).

In 1941, when Victor Rotnem became the chief of the unit, he changed the name to the “Civil Rights Section.” He hoped to prevent the public from confusing their work with that of the ACLU, and also to avoid association with “radical” causes. CARR, *supra* at 24 n.35.

14. MCMAHON, *supra* note 10, at 102–04.

15. *Id.*

institutionalism,<sup>16</sup> “American political development” (APD) scholarship is “*polity centered*,” foregoing explanatory privilege to either social interests or the state and looking instead at what is up and running, which is the full array of organized interactions between the two.”<sup>17</sup>

In this literature, the institutional *capacity* of Presidents and the executive branch has been well explored.<sup>18</sup> Presidents enjoy many independent sources of power in which to pursue their goals. They can exploit “the possibility of unilateral presidential action,” such as by issuing executive orders.<sup>19</sup> They can guide policies through their management and oversight of subordinate officers in the executive branch. Presidents are the only elected officials with a national constituency; through their speeches and the publicity given to their informal and official actions, they are well-placed to set agendas and shape public opinion.<sup>20</sup> They may choose to use all of these resources to build new coalitions, working with interest groups to promote innovative policy agendas cutting across existing partisan cleavages.<sup>21</sup>

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16. For an overview of historical institutionalism and its relationship to new institutionalist methodologies, see Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996). See also Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC’Y 5 (1998); Paul Pierson & Theda Skocpol, *Historical Institutionalism in Contemporary Political Science*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 693 (Ira Katznelson & Helen V. Milner eds., 2002).

17. KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 80 (2004) (emphasis added).

18. Both McMahon’s work on Roosevelt’s civil rights legacy and Keith Whittington’s book on the relationship between presidential leadership and judicial interpretive authority were influenced by Stephen Skowronek’s APD scholarship on the presidency. In his book, *The Politics Presidents Make*, Skowronek explains the *variable* impact of the presidency on the American political system. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993). The role of the President, he argues, depends on the configuration of parties and interests throughout the broader political regime. This approach shows that the power and influence of the presidency is not uniform throughout history. Instead, he argues, it is possible to distill, from a series of case studies of the regime dynamics operating in different presidencies, some more *general* principles regarding the *conditions* and *nature* of presidential power. The presidency is thus placed by Skowronek in “political time” and not categorized simply by chronology. *Id.*

19. Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSP. ON POL. 495, 496, 498–500 (2003); see also WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003); KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* (2001).

20. For leading assessments of the rhetorical presidency, see GEORGE C. EDWARDS III, *ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT* (2003); GEORGE C. EDWARDS III, *THE STRATEGIC PRESIDENT: PERSUASION & OPPORTUNITY IN PRESIDENTIAL LEADERSHIP* (2009); SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* (4th ed. 2007); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987); Benjamin I. Page & Robert Y. Shapiro, *Presidential Leadership Through Public Opinion*, in *THE PRESIDENCY AND PUBLIC POLICY MAKING* 22 (George C. Edwards III, Steven A. Shull & Norman C. Thomas eds., 1985); Whittington & Carpenter, *supra* note 19, at 501.

21. See, e.g., WHITTINGTON, *supra* note 11, at 19–22 (emphasizing the constraints

My main concern is that much of the regime politics literature on the courts, and the presidency-focused research in particular, focuses too much attention on one side of the interactive process and insufficiently credits the role of civil rights leaders who pressured Presidents to use these institutional resources and their persuasive authority to promote civil rights.<sup>22</sup> Presidents are so often targets of social movements precisely because they have valuable resources at their disposal. Approaches that center the analysis on the institutional resources of the presidency, however, slight the work of groups organizing and calling for presidential leadership and can produce seriously distorted portraits of the dynamics of social and constitutional change.

This assessment of President Truman's civil rights policies therefore emphasizes the crucial role of civil rights groups, especially the NAACP.<sup>23</sup> Part I describes the wartime mobilization of the civil rights community. Civil rights groups pursued a multipronged agenda that included both direct action protests and insider lobbying, litigating private civil rights claims and publicizing complaints about the Justice Department's commitment to civil rights prosecutions. All of these strategies helped bring about an impressive increase in the size and clout of the NAACP.

In the postwar period, the NAACP confronted unprecedented challenges—from housing and employment discrimination in the northern states to mob violence and voter intimidation in states across the South. Part II examines how the increasingly powerful NAACP and other civil rights groups responded to these challenges through their efforts in the spring and summer of 1946 to persuade Truman to address an outbreak of racial violence.

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imposed by this role of coalition leader); Benjamin Ginsburg & Martin Shefter, *The Presidency and the Organization of Interests*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 311 (Michael Nelson ed., 2d ed. 1988); Mark A. Peterson, *The Presidency and Organized Interests: White House Patterns of Interest Group Liaison*, 86 *AM. POL. SCI. REV.* 612 (1992); Whittington & Carpenter, *supra* note 19, at 501–02.

22. In his book, McMahon suggests that the presidency-focused approach “is not inconsistent” with approaches focusing on the role of civil rights groups, like the NAACP, in pressing for action. MCMAHON, *supra* note 10, at 208–09. Even so, he does minimize their role.

23. For institutional histories of the NAACP focusing on the pre-*Brown* era, see GILBERT JONAS, *FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909–1969* (2005); 1 CHARLES FLINT KELLOGG, *NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, 1909–1920* (1967); PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* (2009); Beth Tompkins Bates, *A New Crowd Challenges the Agenda of the Old Guard in the NAACP, 1933–1941*, 102 *AM. HIST. REV.* 340 (1997); August Meier & Elliott Rudwick, *Attorneys Black and White: A Case Study of Race Relations Within the NAACP*, 62 *J. AM. HIST.* 913 (1976); August Meier & John H. Bracey, Jr., *The NAACP as a Reform Movement, 1909–1965: “To Reach the Conscience of America,”* 59 *J. S. HIST.* 3 (1993). For more on the NAACP's desegregation litigation campaign, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987). For a call to political scientists to conduct more research on the work and impact of the NAACP, see Rick Valelly, *The NAACP Nobody Knows*, in *THE FUTURE OF POLITICAL SCIENCE: 100 PERSPECTIVES* 159 (Gary King, Kay Lehman Schlozman & Norman H. Nie eds., 2009).

In highlighting the role of the civil rights community in the pre-*Brown* era, this Article also builds upon recent scholarship on “the long civil rights movement.”<sup>24</sup> During this era, as the Truman administration was confronted with the full force of civil rights groups’ demands, the agenda for reforming and improving the civil rights enforcement apparatus was still very much in flux.

Part III focuses in particular on the work of President Truman’s Committee on Civil Rights (PCCR) to explore these debates regarding the optimal methods of enforcing civil rights. Truman formed the PCCR primarily to study and remedy the problems with existing civil rights enforcement mechanisms. The leading Reconstruction Era federal criminal civil rights provisions, 18 U.S.C. §§ 51–52,<sup>25</sup>

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24. For more on this literature, see Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005) (examining the formative years of the civil rights movement prior to *Brown v. Board of Education*, 347 U.S. 482 (1954)). For recent work by legal historians, see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007) (contrasting the respective efforts of the NAACP and the federal government in promoting labor rights during the 1940s); Risa Lauren Goluboff, “*Let Economic Equality Take Care of Itself*”: *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. Rev. 1393, 1399 (2005) (describing the NAACP’s formation of its postwar agenda and the causes and consequences of its shift from labor to desegregation cases); Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941*, 93 J. AM. HIST. 37 (2006) (describing the competition during the 1930s among the mainstream African American civil rights bar and the International Legal Defense lawyers); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 264–65 (2005) (examining civil rights lawyering between World War I and World War II and uncovering an agenda that encompassed diverse strands, including local black attorneys’ pursuit of “racial uplift” and “intra-racial” development).

25. Section 51 targeted conspiracies by all “persons” to violate “any right or privilege secured to [citizens] by the Constitution or laws of the United States,” which were punishable by a fine of not more than \$5,000 and imprisonment for up to ten years. 18 U.S.C. § 51 (1946) (current version at 18 U.S.C. § 241 (2006)). The provision was based upon Section 6 of the Enforcement Act of May 31, 1870, 16 Stat. 140 (1870). It was incorporated into the Revised Statutes of 1874, Section 5508, 1 Rev. Stat. 1073 (1875), and was later incorporated in a reworded section of the Criminal Code of 1909, Act of Mar. 4, 1909, Pub. L. No. 60-350, ch. 432, § 19, 35 Stat. 1088, 1092 (1909). After another reorganization of the *United States Code* in 1926, it was found at 18 U.S.C. § 51 (1926). In June 1948, Public Law 80-772 removed from § 51 a provision barring those convicted under the section from holding public office, and the citation was changed to 18 U.S.C. § 241. Act of June 25, 1948, Pub. L. No. 80-772, ch. 13, § 241, 62 Stat. 683, 696 (1948). In 1968, Public Law 90-284 increased the maximum fine from \$5000 to \$10,000 and authorized life sentences for murder convictions. Interference with Federally Protected Activities, Pub. L. 90-248, § 103(a), 82 Stat. 73, 75 (1968) (codified as amended at 18 U.S.C. § 241 (1970)). In 1994, Public Law 103-322 authorized life sentences, as well as the death penalty, for a broader range of violent crimes, and substituted “[t]hey shall be fined under this title” for “[t]hey shall be fined not more than \$10,000.” Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, §§ 60006(a), 330016(1)(L), 108 Stat. 1796, 1970, 2146 (1994) (codified as amended at 18 U.S.C. § 242 (1994)).

Section 52 subjected those acting “under color of law” to violate “willfully” the “rights, privileges or immunities secured or protected by the Constitution and laws of the United States” to a fine of up to \$1000 and imprisonment of not more than one year. 18 U.S.C. § 52

were by 1946 considered to be ineffective bulwarks against racial violence. The CRS—a special unit in the Criminal Division of the Justice Department—was still in its first decade and had experienced serious challenges in its efforts to revive these criminal statutes.<sup>26</sup> The private civil rights bar, with the NAACP litigators leading the way,<sup>27</sup> was in the 1940s just beginning to recognize the potential of civil suits for damages—what are today known as “constitutional tort” lawsuits—to enforce constitutional rights.<sup>28</sup> As soon as the PCCR was established, much of its attention focused on reforms to strengthen the Justice Department’s enforcement powers.<sup>29</sup> Although the open-ended charge to the PCCR permitted a far more wide-ranging exploration of racial inequality in a variety of domains—federal and private employment, public and private housing, education, and segregation in transportation and places of public accommodation—Part III focuses on the PCCR’s efforts to identify the optimal method of enforcing civil rights.<sup>30</sup>

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(1946) (current version at 18 U.S.C. § 242 (2006)). The provision was derived from section 2 of the Civil Rights Act of April 9, 1866. Act of Apr. 9, 1866, ch. 30, § 2, 14 Stat. 27 (1866). It was reauthorized in sections 16 and 17 of the Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140, 144 (1870) (passed to base its authority on the newly ratified Fourteenth Amendment). In 1874, it was placed in section 5510 of the Revised Statutes, Section 5510, 1 Rev. Stat. 1074 (1874), and then in a reworded section 20, which included the significant addition of the word “willfully,” in the Criminal Code of 1909, Act of Mar. 4, 1909, Pub. L. No. 60-350, ch. 432, § 20, 35 Stat. 1088, 1092 (1909). After the 1926 reorganization of the *United States Code*, it was located at 18 U.S.C. § 52 (1926). In June 1948, the section was replaced with 18 U.S.C. § 242. Act of June 25, 1948, Pub. L. No. 80-772, ch. 13, § 24, 62 Stat. 683, 696. Public Law 90-284, passed by Congress in 1968, also amended § 242 to authorize life sentences for murder convictions. Interference with Federally Protected Activities, Pub. L. No. 90-248, § 103(b), 82 Stat. 73, 75 (1968). The 1994 revisions in Pub. L. 103-322 authorized both life sentences and the death penalty for a broader range of violent crimes and eliminated the maximum penalty of \$1000, allowing for full discretion in the determination of an appropriate monetary penalty. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 330016(1)(H), 60006(b), 108 Stat. 1796, 1970, 2146 (1994).

26. On the early history of the CRS, see JOHN T. ELLIFF, *THE UNITED STATES DEPARTMENT OF JUSTICE AND INDIVIDUAL RIGHTS, 1937–1962* (1987).

27. The most significant constitutional tort case of this era was the white primary case *Smith v. Allwright*, 321 U.S. 649 (1944).

28. Section 1983 is still the primary vehicle citizens may use to vindicate their constitutional rights against state and local government officials and municipalities:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (2006). Originally part of the Civil Rights Act of 1871 (the “Ku Klux Klan Act”), Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13,13 (1871), this provision was incorporated into the Revised Statutes of 1874 as section 1979. Section 1979, 1 Rev. Stat. 348 (1875). After another reorganization of the *United States Code* in 1926, the citation changed to 8 U.S.C. § 43 (1926). Today, it is located at 42 U.S.C. § 1983 (2006). Throughout this Article, I will use the modern citation, § 1983.

29. See *infra* Part III.

30. For a thorough, insightful account of the inner workings of the PCCR, see William



Initially, I had expected to find in the reports and testimony presented to the PCCR some sense of competition or rivalry between the governmental and the private civil rights bar. The evidence shows just the opposite. In 1946 and 1947, as the PCCR completed its study, New Deal–influenced notions of the government as guardian and protector had not yet diminished. The records of the PCCR reveal that nearly everyone who testified or otherwise presented their views—civil libertarians, civil rights activists, and NAACP lawyers alike—looked upon the federal government as the most important source of protection.<sup>31</sup> In the thousands of pages of civil rights organizations’ letters, witness testimony, PCCR transcripts, and in the final report itself, there are only a few scattered references to constitutional tort litigation managed by the private civil rights bar.<sup>32</sup> Neither the value of independent “private attorneys general” nor demands to improve “access to justice” had yet emerged on the agenda.<sup>33</sup> Even the NAACP lawyers who had reason to know that the CRS had been an unreliable partner in the past were hopeful that the Justice Department could be transformed and that the federal government would finally brandish an effective “sword” to protect civil rights.<sup>34</sup>

Such ambitions were quickly dashed. By creating the PCCR, endorsing its report, and calling for civil rights reforms in a series of important speeches, Truman showed that he was far more willing than Roosevelt to exercise leadership on civil rights. But his willingness to publicly *endorse* reform was not sufficient to ensure its success. For this reason, Part IV assesses the impact of Truman’s exercise of

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E. Juhnke, *Creating a New Charter of Freedom: The Organization and Operation of the President’s Committee on Civil Rights, 1946–1948* (Oct. 1974) (unpublished Ph.D. dissertation, University of Kansas). Juhnke offers an indispensable analysis of the PCCR’s decision-making process, but he neither devotes much attention to an evaluation of the substantive legal challenges hindering the Justice Department’s civil rights enforcement policy, nor does he focus on the debates concerning the relationship between governmental and private enforcement of civil rights—the central concern of this Article.

31. See, e.g., *infra* notes 179–96.

32. See, e.g., *infra* notes 234–38.

33. It would take nearly two more decades before these notions took hold. On the development of the “public interest bar lobby,” see Thomas Miguel Hilbink, *Constructing Cause Lawyering: Professionalism, Politics and Social Change in 1960s America* (2006) (unpublished Ph.D. dissertation, New York University). Although they differ slightly over the reasons why, political scientists studying private enforcement of statutory rights since the 1970s have demonstrated that by then there had developed a strong policy preference for private (rather than governmental) enforcement. Cf. THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* (2002) (interest group mobilization); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (fragmented political institutions); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 835 (2008) (divided government).

34. On the NAACP’s complaints regarding the Justice Department’s hesitancy in enforcing constitutional rights, see, for example, SULLIVAN, *supra* note 23, at 241–42, 270–71, 295. See also KLARMAN, *supra* note 23, at 241, 250–52 (discussing the Justice Department’s resistance to prosecuting voter intimidation and mob violence cases); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 79–80, 98–99 (2001) (focusing on the NAACP’s futile attempts to have the Justice Department help dismantle the white primary in the South); *infra* note 186.

presidential leadership. Political scientists Keith Whittington and Daniel Carpenter offer “an empirical method” for evaluating the impact of presidential leadership: “Whenever presidential or bureaucratic action—action that is not prompted or induced by legislative action—is a historically necessary condition for the *existence, time, or form* of institutional change, then some measure of executive power exists . . . .”<sup>35</sup> By this standard, there are only two significant policy innovations for which the PCCR was likely a necessary condition: the executive order endorsing the end of segregation in the military<sup>36</sup> and the new *amicus curiae* policy for the Department of Justice.<sup>37</sup> The military desegregation order was certainly an important, historic exercise of presidential leadership. The PCCR did not, however, produce significant *institutional* innovations for the role of the federal government in prosecuting civil rights cases. None of the criminal prosecution reforms recommended by the PCCR to strengthen CRS’s enforcement powers were enacted by Congress during Truman’s administration.<sup>38</sup> Private rights organizations like the NAACP and the American Civil Liberties Union (ACLU) were left on their own to fight civil rights litigation battles with little assistance from the government lawyers in the Justice Department beyond their contribution of occasional (and often very influential) *amicus* briefs.

## I. THE DAWNING OF A NEW CIVIL RIGHTS ERA

### A. World War II and the Mobilization of African Americans

During World War II, Gunnar Myrdal wrote that the war would likely serve as a “stimulant” for civil rights;<sup>39</sup> he was convinced that there would be “a redefinition of the Negro’s status in America as a result of this War.”<sup>40</sup> Other historians have described the war as a “turning point” in race relations, a time when “[t]he seeds of the protest movements of the 1950s and 1960s were sown.”<sup>41</sup>

The war provoked an unprecedented level of “civil rights consciousness.”<sup>42</sup> When Roosevelt established the Fair Employment Practices Committee (FEPC) in

35. Whittington & Carpenter, *supra* note 19, at 502 (emphasis in original).

36. Exec. Order No. 9081, 13 Fed. Reg. 4313 (July 30, 1948). Given A. Philip Randolph’s role in leading protests for the desegregation order, I am more certain of the claim that the PCCR’s intervention was essential for adoption of the *amicus* policy. On Randolph’s role in pushing for the executive order, see *infra* note 296.

37. On the role of the PCCR in ratifying the calls—from the NAACP and other civil rights attorneys—for a more lenient *amicus* policy in the Solicitor General’s office, an endorsement that triggered an abrupt change in the government’s *amicus* practice, see, e.g., *infra* notes 244–45.

38. On the failure of the Civil Rights Act of 1949, see *infra* text at notes 322–29. The Truman administration did expand its budget request for 1950 to allow the CRS to increase the number of its attorneys, but Congress rejected the request. See *infra* text at note 330.

39. 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 756 (1944).

40. *Id.* at 997.

41. CHARLES E. SILBERMAN, CRISIS IN BLACK AND WHITE 65 (1964).

42. Peter J. Kellogg, *Civil Rights Consciousness in the 1940s*, 42 HISTORIAN 18 (1979); see also Richard M. Dalfiume, *The “Forgotten Years” of the Negro Revolution*, 55 J. AM.

1941, he placed “racial discrimination on the national agenda for the first time since Reconstruction.”<sup>43</sup> Wartime mobilization accelerated the calls for change. When African American soldiers called up for duty were confronted with segregated units and discriminatory practices, civil rights leaders organized in protest.<sup>44</sup> In the NAACP’s journal, *The Crisis*, the military’s treatment of black soldiers was described as a frontal assault on their status as citizens: “[T]his is no fight merely to wear a uniform. This is a struggle for status, a struggle to take democracy off of parchment and give it life.”<sup>45</sup> In 1942, liberal writers and activists joined with black leaders in challenging this state of affairs in an influential special edition of the *Survey Graphic*.<sup>46</sup> Black leaders also railed against the hypocrisy of fighting Nazi persecution abroad while ignoring racism and discrimination at home.<sup>47</sup> Reports of racial violence—including gruesome accounts describing the 1942 lynching of Cleo Wright in Sikeston, Missouri, a series of violent clashes on military bases, and extensive coverage of the 1943 Detroit race riots—captured the world’s attention.<sup>48</sup> Government officials grew increasingly worried about the harm such events inflicted on America’s image abroad, and civil rights leaders sought to capitalize on their concern.<sup>49</sup> In the years leading up to the war, African American newspapers’ circulation numbers had doubled, and, through their coverage of racial injustice and civil rights initiatives, they had become powerful shapers of black public opinion.<sup>50</sup>

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HIST. 90 (1968). Writing in 1968, Dalfume emphasized that the convention among historians is to begin accounts of the civil rights movements in 1954 or later. Dalfume, *supra* at 91; see also Hall, *supra* note 24, at 1239–42 (discussing the pivotal roles of the postwar internal migrations, “race-coded” New Deal programs, World War II, and the G.I. Bill of Rights).

43. Hall, *supra* note 24, at 1248. For more on the role of A. Philip Randolph in pressuring Roosevelt to issue the executive order establishing the FEPC, see DANIEL KRYDER, *DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II* 53–66 (2000); PAULA F. PFEFFER, *A. PHILIP RANDOLPH, PIONEER OF THE CIVIL RIGHTS MOVEMENT* 45–90 (1990).

44. DESMOND S. KING, *SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT* 111–41 (1995).

45. Dalfume, *supra* note 42, at 92 (quoting *For Manhood and National Defense*, 47 *CRISIS* 375 (1940)).

46. *Color: The Unfinished Business of Democracy*, 31 *SURVEY GRAPHIC* (1942). This special issue was edited by Alain Locke, and it included articles by A. Philip Randolph, Walter F. White, Pearl Buck, Sterling A. Brown, and John A. Davis, among others.

47. Dalfume, *supra* note 42, at 94 (citing *Lynching and Liberty*, 47 *CRISIS* 209 (1940)). For more on W.E.B. Du Bois’s powerful and iconoclastic editorials in *The Crisis*, see DAVID LEVERING LEWIS, *W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963*, at 463–70 (2000).

48. JOHN MORTON BLUM, *V WAS FOR VICTORY: POLITICS AND AMERICAN CULTURE DURING WORLD WAR II* 199–206 (1976); Dominic J. Capeci, Jr., *The Lynching of Cleo Wright: Federal Protection of Constitutional Rights During World War II*, 72 *J. AM. HIST.* 859 (1986); Harvard Sitkoff, *Racial Militancy and Interracial Violence in the Second World War*, 58 *J. AM. HIST.* 661, 669, 673–75 (1971).

49. Sitkoff, *supra* note 48, at 675–78; see also PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 172–77 (1999).

50. LEE FINKLE, *FORUM FOR PROTEST: THE BLACK PRESS DURING WORLD WAR II* 51–52 (1971); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL*

During the war, the *Pittsburgh Courier* sponsored a “Double V” campaign calling for a fight for democracy on two fronts, abroad and at home.<sup>51</sup> As the war progressed, demands by black leaders for a greater share of public services and employment opportunities—especially the grassroots mobilization of the March on Washington Movement (MOWM), led by A. Philip Randolph—prompted the Roosevelt administration to take some action against racial discrimination in government contracts and employment.<sup>52</sup> An editorial in the *Pittsburgh Courier* proclaimed: “What an opportunity the crisis has been . . . for one to persuade, embarrass, compel and shame our government and our nation . . . into a more enlightened attitude toward a tenth of its people!”<sup>53</sup>

### B. The Growth of the Civil Rights Infrastructure

It was also a time of rapid expansion for the NAACP. Benefitting from the mobilization of the MOWM, as well as a string of important victories in *Smith v. Allwright*<sup>54</sup> and other cases, the NAACP entered an unprecedented phase of growth from 1940 to 1946, gaining more than seven hundred branches and increasing its membership from “just over 50,000 to nearly 450,000.”<sup>55</sup>

When the war ended, the public was swept up by an enthusiasm borne of victory and an appreciation for new opportunities ahead. White liberal civic leaders and intellectuals in increasing numbers called attention to the need for racial justice.<sup>56</sup> Civil rights leaders hoped this spirit could be channeled to achieve true democracy and real freedom at home.<sup>57</sup> The forces of reaction, however, were ready to hold those hopeful impulses in check. During the war, the pace of African Americans’ migration to the North increased dramatically, creating new stresses in urban centers that were temporarily mitigated by the jobs available due to wartime mobilization. After the war, these tensions were unleashed.

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RIGHTS IN THE NORTH 47–48 (2008) (observing that in the early 1940s African American newspapers likely reached nearly one-third of the adult black population in the United States, resulting in “a virtual web of information about black life, politics, and grassroots protests that linked ordinary readers, activists, and leaders”). The leading African American newspapers—dailies like the *Atlanta Daily World* and large-circulation weeklies like the *Pittsburgh Courier*, *Chicago Defender*, *Cleveland Call & Post*, *New York Amsterdam News*, *Afro-American*, and *Norfolk Journal & Guide*—were so influential that the Roosevelt administration debated whether their critical commentary during wartime could be deemed seditious. See generally PATRICK S. WASHBURN, A QUESTION OF SEDITION: THE FEDERAL GOVERNMENT’S INVESTIGATION OF THE BLACK PRESS DURING WORLD WAR II (1986).

51. KLINKNER & SMITH, *supra* note 49, at 164.

52. Dalfiume, *supra* note 42, at 98 (describing the MOWM as “one of the most significant—though today almost forgotten—Negro protest movements”); see also SUGRUE, *supra* note 50, at 73–76.

53. Dalfiume, *supra* note 42, at 96–97 (alteration in original).

54. 321 U.S. 649 (1944).

55. SUGRUE, *supra* note 50, at 40.

56. Kellogg, *supra* note 42, at 18–20.

57. JOHN EGERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH 4–5 (1994) (describing the end of the war as a “rare and momentous turning point in American history,” presenting, especially for the South, an opportunity to cross “from darkness into light”).

## II. CIVIL RIGHTS ENFORCEMENT CHALLENGES UNDER TRUMAN

*A. Truman's First Year in Office*

There was much that remained to be done, as Truman would soon discover when, on April 12, 1945, he was unexpectedly thrust into the presidency upon Roosevelt's death. From the beginning, Truman seemed more amenable than his predecessor did to taking a more active, public role in promoting the rights of African Americans.<sup>58</sup> In September, Truman delivered his first postwar message to

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58. Historians have offered competing judgments regarding whether Truman experienced a *personal* conversion with respect to racial equality or acted from narrowly political concerns. On the question of Truman's motives, see HAMBY, *supra* note 1, at 640–41 (rejecting interpretations concluding that Truman was merely a “cynical opportunist”); William E. Leuchtenburg, *The Conversion of Harry Truman*, AM. HERITAGE, Nov. 1991, at 55 (suggesting that, while Truman never fully escaped his prejudices, he genuinely embraced the call for full and equal constitutional citizenship). I follow the approach of Desmond King, who has urged focusing attention on Truman's public record. See Desmond King, *The Longest Road to Equality: The Politics of Institutional Desegregation Under Truman*, 6 J. HIST. SOC. 119, 128 (1993) (calling these debates “unilluminating” and suggesting that what is most important is that Truman took measures bold enough to cast light on the full extent of racial hierarchies and that this “[e]xposure was necessarily the catalyst to termination”).

Among those historians highlighting the political motives for Truman's civil rights initiative, there are competing views regarding the President's commitment. Many historians have highlighted domestic factors: the upsurge in racial violence in 1946, the lobbying of civil rights groups, and the improved electoral clout of African Americans in the Democratic Party. See, e.g., WILLIAM C. BERMAN, *THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION* (1970) (civil rights lobbying and African American electoral clout); MICHAEL R. GARDNER, *HARRY TRUMAN AND CIVIL RIGHTS: MORAL COURAGE AND POLITICAL RISKS* 19 (2002) (rise in violence); DONALD R. MCCOY & RICHARD T. RUETTEN, *QUEST AND RESPONSE: MINORITY RIGHTS AND THE TRUMAN ADMINISTRATION* 43, 52 (1973) (rise in violence); SUGRUE, *supra* note 50, at 97–98 (“systematic political pressure” of civil rights groups).

Other scholars have called attention to “the Cold War imperative”—the concern that America maintain an image abroad as a well-functioning democracy to compete successfully with the Soviet Union. For scholarship emphasizing the links between the “Cold War imperative” and civil rights, see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); KLINKNER & SMITH, *supra* note 49, at 202–41; Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

There is no reason why these interpretations need to be regarded as competing accounts. It seems fairly evident that *both* domestic concerns and foreign relations shaped Truman's civil rights program. In any case, it is likely a distortion to present these explanations as truly severable. Civil rights leaders, for example, when lobbying for new legislation or government assistance, often claimed that America's image abroad, so crucial in the struggle against communism, was suffering because of mistreatment of blacks at home. See generally JONATHAN ROSENBERG, *HOW FAR THE PROMISED LAND?: WORLD AFFAIRS AND THE AMERICAN CIVIL RIGHTS MOVEMENT FROM THE FIRST WORLD WAR TO VIETNAM* 156–84 (2006).

In response to the “Cold War imperative thesis,” another group of historians has recently argued that the Cold War *harm*ed the civil rights cause far more than it helped: “[s]een through the optic of the long civil rights movement, however, civil rights look less like a

Congress.<sup>59</sup> In the speech, which he viewed as “a combination of a first inaugural and a first State of the Union message,”<sup>60</sup> he included a call for a permanent FEPC.<sup>61</sup> That he chose to promote the policy in what he viewed as a pivotal speech, designed to stake out his fundamental commitments and policies to Congress and the nation, demonstrated that Truman was willing to fight publicly for a more robust civil rights program.<sup>62</sup>

Through appointments to the Court and the Justice Department, Truman put in place a judicial policy broadly supportive of civil rights. In his first year in office, Truman appointed two new Supreme Court Justices. Upon Owen Roberts’s retirement on July 5, 1945, Truman chose Republican Harold Burton of Ohio, an active member of the NAACP, to fill his seat.<sup>63</sup> To explain why he chose a Republican to fill the only seat unoccupied by a Roosevelt appointee, Truman said he wished to preserve the Court’s political balance.<sup>64</sup> When Chief Justice Stone

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product of the Cold War and more like a casualty.” Hall, *supra* note 24, at 1249. To support her claims regarding the costs of the Cold War for civil rights, Hall highlights three setbacks attributable to Cold War–generated fears. The first is African American leaders’ efforts to turn to the United Nations after its founding in 1945 in order to invoke UN treaties that emphasized positive economic rights. *Id.* at 1249–50. Their work was thwarted by the Department of State, which, in an attempt to zealously defend the distinction between civil liberties and economic benefits, smeared the UN human rights apparatus for being a part of a supposed Soviet agenda. *Id.* Second is the Dixiecrats’ rebellion against Truman’s civil rights program in which they “perfected a combination of race- and red-baiting that defeated the South’s leading New Deal politicians in the critical election of 1950 and, ten years later, allowed segregationists to claim that the civil rights movement was ‘communist inspired.’” *Id.* Finally, during the red scare of the 1950s, progressive activists and politicians of all stripes—“from veterans of the black-labor-left alliance, to local NAACP officials, to gay teachers, to national civil rights leaders”—were caught up by federal- and state-level investigations and targeted for public scorn. *Id.*; KLINKNER & SMITH, *supra* note 49, at 231–32. The most thorough account of the Cold War’s costs for the civil rights movement is CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003).

59. HAMBY, *supra* note 1, at 362.

60. *Id.* at 363 (quoting 1 HARRY S. TRUMAN, MEMOIRS BY HARRY S. TRUMAN: YEAR OF DECISIONS 482–83 (1955)).

61. Special Message to the Congress Presenting a 21-Point Program for the Reconversion Period, 1945 PUB. PAPERS 263 (Sept. 6, 1945). Despite this public endorsement, Truman refused to act boldly to support the FEPC’s actions against the discriminatory hiring practices at the Capitol Transit Company in Washington, D.C. In December 1945, in an attempt to send a public message of protest in response to Truman’s failure to act, Charles Hamilton Houston resigned from the FEPC. SULLIVAN, *supra* note 23, at 310–11. Clarence Mitchell (who would in 1946 be appointed the head of the NAACP’s new Department of Labor) took away from this episode the lesson that those proclaiming “liberal convictions” must be held to account so that “the spoken word will be followed by concrete action.” *Id.* at 311.

62. For more on Truman’s ultimately unsuccessful advocacy on behalf of a permanent FEPC, see MCCOY & RUETTEN, *supra* note 58, at 21–33.

63. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 21–26 (1999).

64. *Id.* at 23.

died in April of 1946, Truman turned to his Treasury Secretary and friend, Fred Vinson of Kentucky, to fill the position.<sup>65</sup>

Truman's appointments in the Justice Department were also highly scrutinized. Although Attorney General Francis Biddle was reportedly horrified by Truman's decision to appoint Tom Clark as his replacement, Clark was responsive to requests for civil rights investigations.<sup>66</sup> In general, the new Attorney General supported the civil rights enforcement program, but he remained skeptical about the adequacy of the legal foundations for federal prosecutions, particularly in cases involving private actors. Soon after his appointment, Clark delivered a speech assessing the achievements of the CRS since its creation. It was a pessimistic and somewhat defensive speech focusing on the difficult challenges existing civil rights statutes and constitutional doctrines presented to federal prosecutors.<sup>67</sup> Other leaders in the Justice Department were similarly cautious. The new head of the CRS, Turner Smith, a moderate from Georgia, made it a priority to encourage state and local officials to act first, before sending in federal investigators.<sup>68</sup> The resources of the CRS remained meager, and its lawyers' ability to intervene was viewed to be sharply curtailed after the decision in *Screws v. United States*,<sup>69</sup> but Smith (sometimes after being prodded to do so by Clark) nevertheless did authorize investigations in a series of racially motivated, violent crimes that gained nationwide attention in 1946.<sup>70</sup>

#### B. 1946: Racial Violence and Calls for Justice

On February 23, 1946, in Columbia, Tennessee, war veteran James Stevenson and his mother complained to a store clerk about inadequate service. When the store employee assaulted Stevenson's mother in anger, Stevenson responded by pushing the clerk through a storefront window.<sup>71</sup> Both Stevenson and his mother

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65. *Id.* at 26–33; see also GARDNER, *supra* note 58, at 165–70 (evaluating Truman's nomination of Vinson as part of a successful strategy to promote civil rights).

66. FRANCIS BIDDLE, IN BRIEF AUTHORITY 365–66 (1962); HAMBY, *supra* note 1, at 307.

67. Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 175–78 (1947). In his assessment of the history of federal criminal enforcement, Clark argued that the notion of the federal government as having power to protect against violations of civil rights had reached a "peak" with the Radical Republicans in Congress in the 1860s and early 1870s. *Id.* Since then, the "pendulum" began moving away and there began a steady "whittling away"—through cases like *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruikshank*, 92 U.S. 542 (1875); and the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)—in the understanding of federal authority over criminal prosecutions for civil rights violations. Clark, *supra* at 177–79. As Clark assessed the current prospects for enforcement, he concluded that "the application of Sections 51 and 52 is greatly limited. Rights which are federally secured are few in number; fewer still are secured against invasion by individuals." *Id.* at 180.

68. ELLIFF, *supra* note 26, at 211–12.

69. 325 U.S. 91 (1945) (requiring prosecutors to demonstrate that violations of civil rights were done "willfully").

70. ELLIFF, *supra* note 26, at 211–12, 216–22, 224–35.

71. *Killing of Negroes Is Protested Here*, N.Y. TIMES, Mar. 2, 1946, at 26.

were arrested and were released on bail after a prominent black businessman and community leader arrived to assist them.<sup>72</sup> After a mob had arrived at the jail, the African Americans living in an area of town called “Mink Slide” by local whites feared a lynching was in the offing; later that evening, four policemen assigned to patrol in that neighborhood were wounded by a sniper’s bullets.<sup>73</sup> In response, the police confiscated weapons and rounded up over one hundred African Americans residing in Mink Slide, including many leading members of the community.<sup>74</sup> Two of the men rounded up were, according to NAACP reports, “machine-gunned to death” by Tennessee troopers at the local jail.<sup>75</sup>

After receiving word of the Columbia riot, the NAACP’s national office took immediate and forceful action. Walter White sent a telegram to Truman, urging the administration to investigate this “cold-blooded” and “wanton double murder” and warning that “our Government cannot in decency sit idly by in these circumstances.”<sup>76</sup> Under pressure from an NAACP-led publicity campaign,<sup>77</sup> the Attorney General agreed to impanel a grand jury,<sup>78</sup> and on March 7, he issued a directive to all U.S. Attorneys, asking them to watch for “symptoms of increasing intolerance.”<sup>79</sup> Clark hoped to *prevent* disorders, so he called on the U.S. Attorneys to work with local officials, to remind them of their responsibilities, and to assure them of the federal government’s willingness to intervene should they fail to perform their duties.<sup>80</sup>

72. WALTER FRANCIS WHITE, *A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE* 311–12 (1948).

73. *Id.* at 312.

74. *Disorders Halted in Tennessee City*, N.Y. TIMES, Feb. 27, 1946, at 29.

75. *Killing of Negroes is Protested Here*, *supra* note 71.

76. *Id.*; see also MCCOY & RUETTEN, *supra* note 58, at 44 (“The Columbia incident touched off widespread protests from Negroes and liberals . . .”); WHITE, *supra* note 72, at 311–12 (describing the NAACP’s publicity campaign); Venice T. Spraggs, *Charge Justice Dept. Ducks Action on Columbia*, CHI. DEFENDER, Mar. 23, 1946, at 1 (describing the mobilization of the civil rights community, including large delegations from labor and civil rights groups demanding action from the Justice Department).

77. SULLIVAN, *supra* note 23, at 313.

78. The federal grand jury never issued indictments, choosing instead to deliver a sharply critical “report” offering their own ideas about who to blame—they chose an “avowed communist press”—for the incident. *Jury ‘Whitewashes’ Riot*, PITT. COURIER, June 22, 1946, at 17; see also Walter White, *People, Politics and Places: Columbia Whitewash*, CHI. DEFENDER, June 22, 1946, at 15. The NAACP’s legal defense work in the state-court system was exemplary. Twenty-five African Americans were indicted, but twenty-three were eventually acquitted at trial, and two others were granted a retrial. WHITE, *supra* note 72, at 311–21 (describing the NAACP’s defense work). For a fascinating account of the Columbia riots and their aftermath, see GAIL WILLIAMS O’BRIEN, *THE COLOR OF THE LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH* 180–244 (1999) (describing the respective roles of the Justice Department and the NAACP). Mark Tushnet also discusses the complexities of the federal investigation and Thurgood Marshall’s own brush with “the law” in Columbia. TUSHNET, *supra* note 23, at 52–54; see also WHITE, *supra* note 72, at 319–21.

79. ELLIFF, *supra* note 26, at 216.

80. *Id.*



In late June, just prior to his state's primary elections, the U.S. Senator from Mississippi, Theodore Bilbo,<sup>81</sup> delivered a radio address calling on all "red-blooded Anglo-Saxon" men to "resort to any means to keep hundreds of Negroes from the polls . . . . And if you don't know what that means, you are just not up on your persuasive measures."<sup>82</sup> Although *The New York Times* somewhat mildly described the speech as one of the "strongest 'white supremacy' statements of his . . . campaign for [reelection],"<sup>83</sup> Senator Bilbo's admonition to his fellow "red-blooded Anglo-Saxon[s]"<sup>84</sup> was an unmistakable call for violence. He delivered the speech just hours after the NAACP made public an affidavit alleging voter intimidation by an African American war veteran and college student, Etoy Fletcher, who had charged that he was seized, stripped, flogged, beaten, and threatened with murder for attempting to register to vote on June 6 in Brandon, Mississippi.<sup>85</sup> The Senator, it seems, fully endorsed these tactics.

In July 1946, four African Americans were lynched on a country road near Monroe, Georgia.<sup>86</sup> One of the victims, Roger Malcolm, had previously accused his employer of insulting his pregnant wife.<sup>87</sup> The two fought over the matter; Malcolm

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81. A notoriously racist opponent of civil rights, Senator Bilbo spearheaded a filibuster in early 1946 to derail Truman's effort to form a permanent FEPC. The National Negro Council of Washington referred to these anti-FEPC speeches when calling on Truman to send federal troops to protect African American voters during Mississippi's upcoming primary elections. *Negroes Ask Vote Guard*, N.Y. TIMES, May 19, 1946, at 18 (reporting that the National Negro Council telegraphed Truman for the assistance, citing Bilbo's recent "slurs" on Mississippi's nearly 100,000 African American veterans in his anti-FEPC speeches).

82. *Bilbo Urges Mississippi Men to Employ 'Any Means' to Bar Negro Men from Voting*, N.Y. TIMES, June 23, 1946, at 30.

83. *Id.*

84. *Id.*

85. *Id.*; see also Hodding Carter, *'The Man' from Mississippi—Bilbo*, N.Y. TIMES, June 30, 1946, at SM7; *U.S. Airls Vote Intimidation in Mississippi*, WASH. POST, June 25, 1946, at 3 (announcing a Justice Department investigation, following the NAACP's submission of Etoy Fletcher's affidavit); *Youth Flogged; He Tried to Vote in Bilbo's State*, N.Y. AMSTERDAM NEWS, June 29, 1946, at 4. After his reelection on July 5, Senator Bilbo called for new state laws limiting African American voting rights. *Bilbo Pushes Vote Curb*, N.Y. TIMES, July 6, 1946, at 16. Some members of the Senate refused to vote to seat him in response to his incitement of racial violence during his reelection campaign. Milton Caniff, *The Congress: That Man*, TIME, Jan. 13, 1947, at 21. Because Bilbo had been diagnosed with cancer, his credentials were allowed "to lie on the table," while he returned to Mississippi for treatment. *Id.* Bilbo died the following year of throat cancer, ending the standoff. *Id.*

86. For more on the Georgia lynchings, see LAURA WEXLER, *FIRE IN A CANEBRAKE: THE LAST MASS LYNCHING IN AMERICA* (2003); Wallace H. Warren, *'The Best People in Town Won't Talk': The Moore's Ford Lynching of 1946 and Its Cover-Up*, in *GEORGIA IN BLACK AND WHITE: EXPLORATIONS IN THE RACE RELATIONS OF A SOUTHERN STATE, 1865–1950*, at 266 (John C. Inscoc ed., 1994). See also DUDZIAK, *supra* note 58, at 18–23; EGERTON, *supra* note 57, at 365–69.

87. WHITE, *supra* note 72, at 323 ("The facts discovered by our [NAACP] investigators revealed a sordid background of twisted, sadistic sexuality. One of the lynched Negroes had become involved in a fight with a white man over the attentions which the latter had been

injured him with a knife and was arrested.<sup>88</sup> On the day of his release, he left the jail with his wife, along with his wife's sister and her husband, George Dorsey, a war veteran still in uniform.<sup>89</sup> The group believed that they were being taken to live and work for Dorsey's employer, a wealthy local farmer.<sup>90</sup> Instead, they were transported directly to an armed mob, ready and waiting for vengeance.<sup>91</sup> All four were shot, the bodies so riddled with bullets they were left unrecognizable.<sup>92</sup>

In the *Washington Post*, this lynching was viewed to be "the most shocking and flagrant example of lawless violence since the end of the war."<sup>93</sup> Letters of protest poured in to the *Atlanta Constitution*, including one from a seventeen-year-old Morehouse College student, Martin Luther King, Jr.<sup>94</sup> Journalist Oliver Harrington claimed that "[t]he Georgia lynchings were only part of the highly organized conspiracy to put the returned Negro veteran in his place."<sup>95</sup> In response to the public outcry, Attorney General Clark—with Truman's approval and the assistance of the Assistant Attorney General in charge of the Justice Department's Criminal Division, T. Lamar Caudle of North Carolina—sought to prosecute this case under federal civil rights laws, but there appeared little likelihood that federal prosecutors could bring those responsible to justice.<sup>96</sup>

paying to the Negro's wife.").

88. *Two Wives Die with Mates in Mass Lynching*, CHI. DAILY TRIB., July 27, 1946, at 3.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Marquis Childs, *Washington Calling: Civil Rights*, WASH. POST, Dec. 14, 1946, at 6.

94. EGERTON, *supra* note 57, at 368.

95. DUDZIAK, *supra* note 58, at 20. The Georgia lynchings were widely covered in the African American press. See, e.g., *FBI Ordered Not to Abandon Lynching Investigation*, AFRO-AM. (Balt.), Oct. 12, 1946, at 10; *Georgia Massacre Arouses Nation; Action Demanded*, AFRO-AM. (Balt.), Aug. 3, 1946, at 1; *Money and Protest of Lynchings Flood NAACP National Office*, ATLANTA DAILY WORLD, Aug. 15, 1946, at 1; *Money and Protests Pour into NAACP Against Mobs*, NORFOLK J. & GUIDE, Aug. 17, 1946, at 3; *Truman Orders Federal Probe*, AFRO-AM. (Balt.), Aug. 10, 1946, at 10.

96. Cabell Phillips, *Civil Rights Statutes Fail in Lynching Cases*, N.Y. TIMES, Aug. 4, 1946, at 77 (explaining that the federal civil rights statutes cover very few categories of crimes and impose minimal penalties, and emphasizing further that, even when prosecutions are brought, "[d]eeply ingrained local prejudices are not altered by the fact that the jury is sitting under Federal rather than local authority"); Dillard Stokes, *Court Drive to Smash Klan Mapped by U.S.*, WASH. POST, Aug. 1, 1946, at 1 (reporting that the CRS had been in charge of the campaign for months).

FBI agents worked in Monroe for over five months and brought nearly one hundred witnesses before a grand jury to no avail. See Ellen Maguire, *Series Puts Cold Cases on the Front Burner; 'Murder' Seeks Justice for Victims of Jim Crow Era*, WASH. POST, Oct. 6, 2008, at C7. One witness, Lamar Howard, was brutally beaten after testifying before the grand jury. Hyde Post, Andy Miller & Peter Scott, *Myths, Fears Abound*, ATLANTA J.-CONST., May 31, 1992, at A1 (special retrospective series). When questioned about the case by reporters for the *Atlanta Journal-Constitution* nearly five decades after the incident, Howard asked that his address and photograph not be included in their reporting. *Id.*

In 2000, Georgia Governor Roy Barnes ordered the case reopened, and the Georgia Bureau of Investigation is still actively pursuing the investigation. Marcus K. Garner, *Evidence Sought in 1946 Lynching*, ATLANTA J.-CONST., July 2, 2008, at B5. Documentary

In the midst of this wave of violent attacks on African Americans, civil rights groups pressed the Truman administration for action. The National Lawyers Guild sharply rebuked Attorney General Clark for his weak enforcement efforts in a resolution passed at its tenth annual meeting.<sup>97</sup> A delegation of civil rights activists traveled to the White House and the Department of Justice on July 29 to demand that federal troops be sent to Georgia—emphasizing that the recent lynchings, former Georgia Governor Eugene Talmadge’s primary victory,<sup>98</sup> and Senator Bilbo’s recent incitement would likely inspire racial violence across the country unless Truman took strong action.<sup>99</sup> The next day a group of women from the National Association of Colored Women marched in front of the White House with banners proclaiming, “Speak! Speak! Mr. President!”<sup>100</sup>

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filmmaker Kevin Beauchamp worked with the FBI on a film about the case, *Murder in Black and White*, which aired in late 2008. See Maguire, *supra*.

97. *Lawyers Guild Assails Clark*, L.A. TIMES, July 8, 1946, at 4.

98. Like Bilbo, Talmadge warned African Americans against voting, even after the white primary system was abolished in Georgia. See KARI FREDERICKSON, *THE DIXIECRAT REVOLT & THE END OF THE SOLID SOUTH, 1932–1968*, at 54 (2001). Talmadge’s exhortations were taken seriously. When Macio Snipes, an African American veteran, cast the sole black vote in his county, he was ambushed and murdered the very next day—and the lesson was not lost on his neighbors. EGERTON, *supra* note 57, at 365.

99. *71 Groups Call Lynching Case Mass Meetings*, CHI. DAILY TRIB., July 30, 1946, at 9; *1000 Call on Truman to Act Against Mobs*, CLEV. CALL & POST, Aug. 3, 1946, at 1A; *Action Asked in Lynching*, L.A. TIMES, July 30, 1946, at 2; *Ga. Lynching Protests Storm Nation’s Capitol*, N.Y. AMSTERDAM NEWS, Aug. 3, 1946, at 2; *Truman Orders Lynchers Found, Voices Horror at Georgia Crime*, N.Y. TIMES, July 31, 1946, at 1.

100. *700 Women Marched in Lynch Protest Parade*, ATLANTA DAILY WORLD, Aug. 6, 1946, at 1.



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**Members of the National Association of Colored Women picket the White House on July 30, 1946.**

In August, a lynch mob in Minden, Louisiana tortured and murdered another African American veteran, former Army Corporal John C. Jones.<sup>101</sup> The perpetrators of the attack were indicted by a federal grand jury for conspiring to violate Jones's civil rights under § 51, but they were all eventually acquitted.<sup>102</sup> An even larger white mob, estimated to include up to 2500 men, wreaked havoc in Athens, Alabama, trampling and clubbing nearly one hundred African Americans in a riot that broke out after a fight occurred between two white soldiers and an African American man.<sup>103</sup>

101. *Negro in Louisiana is Beaten to Death*, N.Y. TIMES, Aug. 16, 1946, at 23.

102. *Freed in Flogging Case, 5 Louisiana Men Acquitted of Violating Negro's Civil Rights*, N.Y. TIMES, Mar. 2, 1947, at 63.

103. *Militia Alert to Prevent New Mob Violence*, WASH. POST, Aug. 12, 1946, at 1; *Negroes Mobbed in Alabama Town*, N.Y. TIMES, Aug. 11, 1946, at 12.

## III. THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS

*A. Under Pressure: Truman Creates a Committee*

As these reports of violent attacks poured in, the civil rights community continued to mobilize.<sup>104</sup> Joining with over forty other civil rights, veterans, religious, and labor organizations, leaders of the NAACP formed the National Emergency Committee Against Mob Violence (NEC). At its inaugural meeting in New York in August, the group—led by Walter White, who was doubtful that this effort would produce any real results—decided to send a delegation to meet with President Truman and to prevail upon him to take action, and at the very least, to make a strongly worded public statement against the violence to produce some useful publicity.<sup>105</sup> The meeting was finally scheduled for September 19.<sup>106</sup>

At the meeting, the NEC delegation delivered a statement to the President, suggesting that the recent outbreak of racial violence was “[u]nchecked” and complaining that the Justice Department had failed to make arrests or to gain convictions in the Georgia lynchings.<sup>107</sup> The delegation emphasized the seriousness of the situation and the damaging consequences of the Justice Department’s failure to enforce civil rights, stating “mob violence can do more to injure our country at home and abroad than any other single evil.”<sup>108</sup>

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104. See, e.g., Louis Lautier, *15,000 March to Lincoln Shrine to Mourn Victims of Mob Rule*, NORFOLK J. & GUIDE, Aug. 10, 1946, at B1 (noting that, for this memorial service sponsored by the Southern Conference for Human Welfare, “one third of the orderly crowd was white”); *Demand Ouster of Tom Clark*, CHI. DEFENDER, Aug. 31, 1946, at 12 (reporting that the Southern Negro Youth Conference blamed delays on “Texas Tom Clark”); *NAACP Calls Nat’l Emergency Meet*, CLEV. CALL & POST, Aug. 17, 1946, at 12B (describing a meeting with a coalition of forty-nine national organizations in New York, featuring Isaac Woodard as speaker). For more on the Southern Conference for Human Welfare and the Southern Negro Youth Conference, see PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* 67, 99–101, 106–08, 115, 149–68, 194–247, 273–75 (1996).

105. WHITE, *supra* note 72, at 330 (stating that he “frankly doubted that our efforts on this occasion would be any more rewarding than had been those we had made with any of Truman’s predecessors”). On the preliminary events leading to the creation of the PCCR, see Juhnke, *supra* note 30, at 31–32.

106. In addition to White, the NEC delegation included James Carey of the Congress of Industrial Organizations, Leslie Perry of the NAACP, Frederick E. Reissig of the Federal Council of Churches, Boris Shiskin of the American Federation of Labor, and Channing Tobias of the Stokes-Phelps Fund. See MCCOY & RUETTEN, *supra* note 58, at 47; *President Pledges Anti-Lynch Bill Aid*, ATLANTA DAILY WORLD, Sept. 22, 1946, at 1; Juhnke, *supra* note 30, at 33.

107. Juhnke, *supra* note 30, at 33.

108. *Id.*; see also BERMAN, *supra* note 58, at 50–51; MCCOY & RUETTEN, *supra* note 58, at 47–48; WHITE, *supra* note 72, at 330–32.



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**Members of the National Emergency Committee Against Mob Violence meeting with President Truman, September 19, 1946. Above, left to right, are Leslie Perry, Washington, D.C., representative of the NAACP; Boris Shishkin, AFL, Frederick E. Reissig, Federal Council of Churches; President Truman; Walter White, executive secretary, NAACP; James Carey, secretary, CIO; and Dr. Channing Tobias.**

The delegation urged the President to improve federal enforcement efforts, to call Congress into special session to pass antilynching legislation, and to speak out to the public to condemn racial violence.<sup>109</sup> At the end of their presentation, the President exclaimed, “My God! I had no idea it was as terrible as that! We’ve got to do something!”<sup>110</sup> Visibly disgusted by the delegation’s reports, Truman was particularly appalled by their stories of atrocities committed against African American war veterans.<sup>111</sup> The President’s face “distorted in horror” when they recounted the story of Isaac Woodard.<sup>112</sup>

On February 12, 1946, Woodard, an African American soldier who had just received his release from service, boarded a Greyhound bus to return home to New York from Camp Gordon in Georgia. During the trip, his bus driver became outraged by Woodard’s delay at a rest stop and called the local police in South Carolina to complain that Woodard was disturbing the peace. When the officers arrived to arrest Woodard for disorderly conduct and transport him to the local jail, they assaulted him, gouged out his eyes, and left him unconscious in his jail cell until the following morning.<sup>113</sup>

109. Juhnke, *supra* note 30, at 33.

110. WHITE, *supra* note 72, at 331.

111. GARDNER, *supra* note 58, at 22.

112. Juhnke, *supra* note 30, at 34.

113. GARDNER, *supra* note 58, at 17–18. See generally KLINKNER & SMITH, *supra* note 49, at 207. The Woodard beating received national publicity within a few months of the beating, as soon as groups like the NAACP learned of the incident, so it is somewhat implausible that Truman had never heard of the story before his September meeting with the

Isaac Woodard's story clearly struck a nerve with the President, and he was fully engaged in the remaining discussion concerning possible methods for dealing with the rise in violence. The members of the delegation emphasized to Truman the need for his leadership.<sup>114</sup> Truman offered a skeptical retort: "Everyone seems to believe that the president by himself can do anything he wishes to on such matters as this. But the president is helpless unless he is backed by public opinion."<sup>115</sup> During the meeting, White recalled, "[n]umerous ideas were proffered, analyzed, and discarded as being either impractical or inadequate."<sup>116</sup> Truman's assistant, David K. Niles, suggested the creation of a committee to investigate the condition of civil liberties and to recommend an agenda for reform.<sup>117</sup> The President quickly endorsed the proposal.<sup>118</sup> Members of the NEC delegation, however, were not persuaded. They raised the objection that a commission could not act quickly enough to stem the current wave of violence.<sup>119</sup> The members were concerned that it would give both the President and Congress an excuse for inaction.<sup>120</sup> Truman

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NEC delegation. See, e.g., EGERTON, *supra* note 57, at 362–63; SULLIVAN, *supra* note 23, at 320 (describing the NAACP-led campaign to publicize the case); WHITE, *supra* note 72, at 325–27 (observing that Orson Welles devoted several national broadcasts to calls for justice on Woodard's behalf); cf. MCCOY & RUETTEN, *supra* note 58, at 45 (citing a July 18 letter from R.R. Wright, "probably the nation's most prominent black banker," to Truman, describing the Woodard attack as "a disgrace unheard of in any other country in the world"). That same year, Woody Guthrie recorded a song about the incident, "The Blinding of Isaac Woodard." See Woody Guthrie, *The Blinding of Isaac Woodward*, reprinted in WOODY GUTHRIE, *BORN TO WIN* 229 (Robert Shelton ed., 1967).

The Department of Justice filed criminal charges in the Woodard case soon after the NEC meeting, but a few months later a federal jury in South Carolina acquitted the police chief after fewer than thirty minutes of deliberations. See *Chief of Police Acquitted in Man's Blinding*, WASH. POST, Nov. 6, 1946, at 2 (describing Police Chief Lynwood Shull's claim that he struck Woodard only once in self-defense after they began struggling for a blackjack and Woodard's claim that he was struck because he did not answer "yes, sir" when asked a question); *Police Chief Bonded in Beating of Negro*, N.Y. TIMES, Sept. 29, 1946, at 20; *Policemen Held for 'Torturing' Negro Veteran*, CHI. DAILY TRIB., Sept. 27, 1946, at 10. Although the NAACP and National Lawyers Guild criticized the CRS for failing to obtain a conviction, CRS chief Turner Smith blamed the post-*Screws* requirement that they prove that the violation was "willful." CARR, *supra* note 13, at 161–62; see also WHITE, *supra* note 72, at 325–27 (describing the NAACP's efforts to obtain charitable donations for Woodard and his family, after both the federal criminal case and civil suit against the Greyhound Bus Company proved unsuccessful).

114. Juhnke, *supra* note 30, at 34.

115. WHITE, *supra* note 72, at 331.

116. *Id.* at 331–32.

117. BERMAN, *supra* note 58, at 51.

118. See *id.* Truman and Niles (who, along with Jonathan Daniels, had previously proposed to Franklin Roosevelt a national citizens' committee to address racial problems, but Roosevelt rejected the proposal) likely discussed this option before the NEC meeting. See *id.* at 43–44; MCCOY & RUETTEN, *supra* note 58, at 49–50; Juhnke, *supra* note 30, at 36, 39. There is also some evidence that Justice Department lawyers had been lobbying for some sort of executive commission to study the federal civil rights enforcement machinery. See ELLIFF, *supra* note 26, at 236.

119. See Juhnke, *supra* note 30, at 36.

120. *Id.* With their skeptical response, the NEC delegation expressed a commonly held view of presidential commissions: they are useful political cover for Presidents, who

responded to these concerns by promising to establish the committee through an executive order and to direct the group to act expeditiously in order to complete its report by January 1947, before the opening of the Eightieth Congress.<sup>121</sup>

Truman was far less receptive to the delegation from another coalition of civil rights groups, The American Crusade to End Lynching. The group arranged a protest in Washington D.C. on September 22, when over 1500 delegates from the member organizations launched what they called a one hundred day crusade to end the racial violence.<sup>122</sup> In a rally at the Lincoln Memorial, the singer Paul Robeson delivered a speech calling for a “new emancipation.”<sup>123</sup> The next day, when Robeson led a delegation to meet with Truman and Niles, Truman was turned off by Robeson’s combative posture.<sup>124</sup> Robeson told the President, “If the government does not do something about lynching, the Negroes will.”<sup>125</sup> Robeson warned the President that if the violence was not curbed, the “restiveness” might “require foreign intervention.”<sup>126</sup> Truman shook his fist and exclaimed, “That sounds like a threat!”<sup>127</sup> The meeting ended on a bitter note, with Truman clearly angered by threats to bring international attention to the recent violence.<sup>128</sup>

Leading African American newspapers publicized this meeting, leaving the impression that the President was wavering on the lynching crisis.<sup>129</sup> Yet Truman

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typically choose as members of the commissions establishment figures whose delay and inaction can be excused by a supposed need for more thorough investigation. On the history and efficacy of presidential commissions, see Hugh Davis Graham, *The Ambiguous Legacy of Presidential Commissions*, PUB. HIST., Spring 1985, at 5, 19. See generally MICHAEL LIPSKY & DAVID J. OLSON, COMMISSION POLITICS: THE PROCESSING OF RACIAL CRISIS IN AMERICA (1977); THOMAS R. WOLANIN, PRESIDENTIAL ADVISORY COMMISSIONS: TRUMAN TO NIXON (1975).

121. Juhnke, *supra* note 30, at 36.

122. *Id.* at 37.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. See MCCOY & RUETTEN, *supra* note 58, at 48. Dudziak describes how Robeson and other radical critics of the Truman administration were later punished with passport restrictions due to their advocacy of international action. DUDZIAK, *supra* note 58, at 10, 61–63, 77.

129. *Can't Hit Lynching, Truman to Robeson*, N.Y. AMSTERDAM NEWS, Sept. 28, 1946, at 1 (quoting Robeson’s statement to the paper—responding to the contretemps and hinting at his rivalry with White’s NEC—that “now is not the time for excessive politeness”); *Truman and Robeson in Word Battle at White House*, PITT. COURIER, Sept. 28, 1946, at 1; *Truman Balks at Lynch Action*, CHI. DEFENDER, Sept. 28, 1946, at 1 (claiming that Truman “emphatically refused to take the initiative to end mob violence and the spread of terrorism in America”); *Truman Irked When Robeson Claims U.S. Lynching Same as Axis Crimes*, CLEV. CALL & POST, Sept. 28, 1946, at 1A; *White House Delegation Hands President Plea Against Lynch Evil over Nation*, ATLANTA DAILY WORLD, Sept. 24, 1946, at 1 (quoting one white activist, Aubrey Williams, who reportedly told Truman that “[f]ederal action to date amounts to practically nothing”). *But cf. May Issue Order for Group to Study Lynching*, NORFOLK J. & GUIDE, Oct. 12, 1946, at 1B (citing unconfirmed sources reporting that Truman was considering establishing a presidential commission); *President Considers Anti-Lynch Commission*, CHI. DEFENDER, Oct. 5, 1946, at 1 (same).



had not changed his mind about the need for action. Instead, his plans grew even more ambitious. He had written to the Attorney General on September 20 that he was "much alarmed" by the stories of the recent attacks and lynchings, and that he thought it was "going to take something more than the handling of each individual case after it happens—it [was] going to require the inauguration of some sort of policy to prevent such happenings."<sup>130</sup> Rather than establish a commission on mob violence or lynching as the NAACP and NEC had expected, Clark sent Truman a memorandum on October 11 supporting the proposal and including a suggested draft of an executive order establishing a committee on civil rights.<sup>131</sup> Truman heeded Clark's advice and began selecting and recruiting potential members,<sup>132</sup> waiting until after the November midterm elections to announce his plans.<sup>133</sup>

On December 5, 1946, Truman issued Executive Order 9808 to establish the President's Committee on Civil Rights.<sup>134</sup> The preamble called attention to the recent rise in racial violence, describing as one of the problems to be addressed "the action of individuals who take the law into their own hands and inflict summary punishment and wreak personal vengeance" and asserting that such behavior "is subversive of our democratic system of law enforcement and public criminal justice, and gravely threatens our form of government."<sup>135</sup> The PCCR's key responsibility was to examine "in what respect current law-enforcement measures" at every level of government "may be strengthened and improved to safeguard the civil rights of the people" and then to offer a written report of its findings and recommendations to the President.<sup>136</sup>

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130. Letter from President Harry S. Truman to Attorney General Tom Clark (Sept. 20, 1946), in *THE PAPERS OF DAVID K. NILES* (Box 26, Harry S. Truman Library).

131. Juhnke, *supra* note 30, at 41.

132. *Id.* at 38; MCCOY & RUETTEN, *supra* note 58, at 50. After Niles told White that the President was working on plans to appoint a committee, White offered some suggestions for possible members. *Id.* Six of the members Truman chose to serve on the PCCR had been included on White's list. Juhnke, *supra* note 30, at 41.

133. The 1946 midterm elections were calamitous for the Democratic Party. FREDERICKSON, *supra* note 98, at 52. The Republicans took over both the House and Senate, and these electoral defeats, when coupled with evidence of black voter defections, might have led some observers to conclude that Truman's civil rights policies were crafted in response to these challenges. Instead, the administration records clearly show that Truman began planning for the civil rights committee well before the midterm elections. *See, e.g.*, MCCOY & RUETTEN, *supra* note 58, at 50–51; Juhnke, *supra* note 30, at 41–42.

134. Exec. Order No. 9808, 11 Fed. Reg. 14,153 (Dec. 5, 1946).

135. *Id.*

136. *Id.* *The New York Times* placed its coverage of the order on page twenty-six. John B. Morris, *Truman Creates Civil Rights Board*, N.Y. TIMES, Dec. 6, 1946, at 26. The *Washington Post*, at least, gave Truman's order front-page treatment. Alfred Friendly, *Truman Sets Up Committee on Safeguarding Civil Rights*, WASH. POST, Dec. 6, 1946, at 1 (calling Truman's executive order "unexpected"). The African American press provided extensive front-page coverage. *See, e.g.*, Louis Lautier, *Because Freedom from Fear Is Threatened, Civil Rights Body Named*, NORFOLK J. & GUIDE, Dec. 14, 1946, at 1; *Truman Appoints Committee on Civil Rights*, ATLANTA DAILY WORLD, Dec. 7, 1946, at 1; *Truman Hits Hate Groups, Appoints Committee on Civil Rights Law*, AFRO-AM. (Balt.), Dec. 14, 1946, at 1; *Truman to Combat Lynch Evil*, CHI. DEFENDER, Dec. 14, 1946, at 1 ("Mr. Truman's move was motivated by petitions from numerous organizations throughout the

The fifteen-member committee was led by Chairman Charles E. Wilson, the president of General Electric,<sup>137</sup> and the other members included leaders from business,<sup>138</sup> labor,<sup>139</sup> religious,<sup>140</sup> academic,<sup>141</sup> charitable,<sup>142</sup> and civil rights organizations.<sup>143</sup> Prominent civil rights leaders from the legal community included Sadie T.M. Alexander, city solicitor of Philadelphia,<sup>144</sup> and Morris L. Ernst, a

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country.”); *Will Draft Recommendations for Changes in Federal Law*, CLEV. CALL & POST, Dec. 14, 1946, at 1A.

137. Walter White later wrote in his memoir that he suggested Wilson for chairman during the NEC meeting with Truman. WHITE, *supra* note 72, at 332. Although Wilson’s appointment was greeted with some criticism by labor groups, there may have been a strategic gain because “the appointment of a tough conservative . . . added respectability to the committee’s deliberations that only few men in America could have equaled.” Juhnke, *supra* note 30, at 47.

138. At just thirty-eight years old, Charles Luckman was the head of Lever Brothers, the second largest soap manufacturer in the United States. Juhnke, *supra* note 30, at 48.

139. James Carey was the Secretary-Treasurer of the CIO and the head of the CIO’s Committee to Abolish Racial Discrimination. Only thirty-five years old, Carey was one of the more outspoken members of the PCCR. *Id.* at 49. The second labor representative was Boris Shishkin, an economist for the AFL and an advocate for a permanent FEPC. *Id.* at 50.

140. Rabbi Roland Gittelsohn had recently received national acclaim for a stirring sermon he delivered as a marine chaplain in the campaign of Iwo Jima. *Id.* at 55–56. In the sermon, Rabbi Gittelsohn observed that because marines of all races and creeds died together, anyone who “lifts his hand in hate” will render their “bloody sacrifice” a “hollow mockery.” *Id.* at 56. He closed by asking the living to join him and to “dedicate ourselves”—so that their deaths should not be in vain—to “the birth of a new freedom” for all. *Id.*; see also DUDZIAK, *supra* note 58, at 10.

Bishop Francis J. Haas had previously served on the National Labor Board and the National Recovery Administration. Juhnke, *supra* note 30, at 57. Roosevelt had appointed Haas chair of the FEPC in 1943, and he was a member of the board of directors of the NAACP. *Id.* A former dean of the School of Social Science at Catholic University of America, he was the author of numerous books on labor issues. *Id.*

Bishop Henry Knox Sherrill was the presiding bishop of the Episcopal Church in America. *Id.* at 57–58.

141. John Dickey was the president of Dartmouth College. Juhnke, *supra* note 30, at 50. Frank P. Graham, the president of the University of North Carolina, was considered a leader in higher education, and as a southerner, he offered some much needed regional balance to the PCCR. *Id.* at 51.

142. Prominent African American civil rights reformer Channing Tobias was the oldest member of the committee at age sixty-five. *Id.* at 53. He served on the board of directors of the NAACP, and since 1945 had served as director of the Phelps-Stokes Fund. *Id.* Francis P. Matthews was a member of the executive committee of the National Conference of Catholic Charities and was viewed to be a moderate conservative. *Id.* at 55.

143. Dorothy M. Tilly, a field secretary for the Southern Regional Council, was a well-known antilynching and civil rights reformer. *Id.* at 58. Franklin D. Roosevelt Jr., the fourth child of Franklin and Eleanor Roosevelt, helped organize the liberal group, Americans for Democratic Action (ADA), in 1947. *Id.* at 58–59.

144. When Alexander received a Ph.D. in economics from the University of Pennsylvania in 1921, she became the first African American woman to earn a doctoral degree in the United States. *Id.* at 52. See generally Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the Legal Profession, 1925–1960*, 87 CORN. L. REV. 1405 (2002).

lawyer for the ACLU.<sup>145</sup> The staff for the committee was led by Robert K. Carr, the chair of the Department of Government at Dartmouth College.<sup>146</sup> *The Nation's* Robert Bendiner referred to the PCCR as "Noah's Ark" because it included two corporate heads, two labor leaders, two college presidents, two African Americans, two women, two southerners, and so on.<sup>147</sup> Overall, it appears that Truman chose a diverse group of individuals—establishment figures and activists, conservative businessmen and liberal reformers. At the same time, as one member later recalled, "[i]t was a typically Truman kind of committee, not very far out on the edges."<sup>148</sup>

Truman delivered an informal message to the group on January 15, 1947.<sup>149</sup> Declaring that he wanted "our Bill of Rights implemented in fact,"<sup>150</sup> Truman made it clear that he considered its task to be an extraordinarily important one with the potential to usher in real change.<sup>151</sup> Members of the PCCR left the meeting and immediately began to organize their research.

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145. Ernst was the most prominent, nationally known lawyer serving on the PCCR. Juhnke, *supra* note 30, at 54. As a lawyer for the ACLU, he had developed his reputation through his work on a number of high-profile censorship and obscenity cases. *Id.* Ernst also served as lead counsel for a number of important § 1983 cases, including *Hague v. CIO*, 307 U.S. 496 (1939), and, later in his career, *Monroe v. Pape*, 365 U.S. 167 (1961).

146. *Truman Group Appoints Carr; Plans Mammoth 'Rights' Probe*, CHI. DEFENDER, Feb. 15, 1947, at 1. Professor Carr had spent the previous two years in Washington, D.C., conducting research evaluating the Civil Rights Section of the Department of Justice. *Id.* It is worth noting that his book, *Federal Protection of Civil Rights: Quest for a Sword*, is based on his independent research conducted prior to his service on the PCCR. CARR, *supra* note 13, at vii.

147. Robert Bendiner, *Civil Rights—Fresh Start*, NATION, May 10, 1947, microformed on RECORDS OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, PAPERS OF HARRY S. TRUMAN, Reel No. 4:178 (William E. Juhnke ed., 1984) [hereinafter PCCR PAPERS]. Barton Bernstein attributes the joke to Philleo Nash, Truman's advisor. Barton J. Bernstein, *The Ambiguous Legacy: The Truman Administration and Civil Rights*, in POLITICS AND POLICY OF THE TRUMAN ADMINISTRATION 269, 307 n.13 (Barton J. Bernstein ed., 1970).

148. Juhnke, *supra* note 30, at 60 (quoting PCCR member John Dickey).

149. Felix Belair Jr., *Truman Asks Move to Check Bigotry*, N.Y. TIMES, Jan. 16, 1947, at 1; see also *President Recognizes Big Job for His Civil Rights Committee*, ATLANTA DAILY WORLD, Jan. 19, 1947, at 1; *Truman Asks 'Action' on Civil Rights*, CHI. DEFENDER, Jan. 25, 1947, at 1; *Truman Slaps Klan, Calls for New Civil Rights Statute*, AFRO-AM. (Balt), Jan. 25, 1947, at 2.

150. Remarks to Members of the President's Committee on Civil Rights, 1947 PUB. PAPERS 98 (Jan. 15, 1947).

151. Historian William Leuchtenburg appraises the President's leadership role in 1946 and concludes that "Truman had acted as Roosevelt, confronted by the dreadful race riots in World War II, had not." WILLIAM E. LEUCHTENBURG, THE WHITE HOUSE LOOKS SOUTH: FRANKLIN D. ROOSEVELT, HARRY S. TRUMAN, LYNDON B. JOHNSON 167 (2005) (noting Truman's "powerful influence" on the committee's work, due to his rejection of any anti-civil rights appointees to the committee, his decision to give the committee "carte blanche," his "strong encouragement for a forthright stand," and his refusal to interfere once he learned of its recommendations).

*B. Civil Rights Enforcement Policies: Proposals for Reform*

The PCCR also sent out a press notice inviting all interested citizens and organizations to send written communications to the committee.<sup>152</sup> As a result, for the next nine months, the PCCR members and staff reviewed memos and other input from over 250 individuals and organizations, including many civil rights leaders and scholars.<sup>153</sup>

Walter White of the NAACP responded to Carr's early requests for information about the NAACP's work and for lists of other civil rights organizations the PCCR

152. The press release stated:

‘The President’s Committee on Civil Rights can only accomplish the objectives outlined in the president’s directive if it truly represents the wishes of the people of this country,’ stated Mr. Charles E. Wilson, chairman of the committee. ‘No group is capable of interpreting the rights of a free people without adequate expression from all who constitute our democracy,’ he added. To that end, the committee earnestly requests that all individuals and groups having a concern with civil rights address to the committee in Washington, D.C., written communications indicating their activities and views.

Juhnke, *supra* note 30, at 69. Members of the PCCR agreed not to discuss matters before it until the final report was delivered. However, they were inundated with requests for statements on various events of concern to the civil rights community. For the most part, the PCCR successfully resisted this pressure, which reached a fever pitch after Willie Earle was lynched in South Carolina in the spring of 1947. Earle, an African American who had been arrested for stabbing a cab driver, was lynched by a group of forty to fifty white residents of Greenville, South Carolina. Federal prosecutors successfully indicted thirty-one men, and the case went to trial in May 1947. In the trial, the defense attorneys did not bother to submit any exculpatory evidence or offer any witnesses. Instead, they attacked the federal investigators for “meddling” in local matters. The prosecution amassed much damning evidence—including the statements of twenty-six defendants. Yet on May 21, 1947, *all* the defendants were acquitted. EGERTON, *supra* note 57, at 371–73; FREDERICKSON, *supra* note 98, at 58–63.

Newspapers across the country covered the Earle case, including front-page coverage in *The New York Times* and *Washington Post*, and the acquittal was broadly condemned by the public. See, e.g., *11 South Carolina Taximen Admit Sharing in Lynching*, WASH. POST, Feb. 21, 1947, at 1; *23, of 27 Held, Admit Greenville Lynching*, N.Y. TIMES, Feb. 21, 1947, at 4; *31 Go to Trial Today in Lynching; Case is Unprecedented in South*, N.Y. TIMES, May 12, 1947, at 1; *All 28 Acquitted by Lynch Jurors in South Carolina*, N.Y. TIMES, May 22, 1947, at 1; *Negro Taken From S.C. Jail and Lynched*, WASH. POST, Feb. 18, 1947, at 1; *President Truman’s Civil Rights Committee Watches S.C. Lynching*, ATLANTA DAILY WORLD, Feb. 23, 1947, at 1; *Truman’s Civil Rights Committee ‘Deeply Disturbed’ By Lynching*, CLEV. CALL & POST, Mar. 1, 1947, at 9B; see also Juhnke, *supra* note 30, at 76–78, 117–20 (discussing media coverage and Gallup poll results showing strong disapproval of the Greenville acquittals and national support for a federal lynching law, and the pressure on the PCCR to respond). The *Chicago Tribune* offered thorough and unusually irate coverage. See, e.g., *28 Acquitted in Lynching*, CHI. DAILY TRIB., May 22, 1947 at 1; *Defense Sings of ‘Old South’ in Lynch Trial*, CHI. DAILY TRIB., May 21, 1947, at 1; *Hold 25 Cabbies in Lynching of Holdup Suspect*, CHI. DAILY TRIB., Feb. 21, 1947, at 13; *Unmasked Mob Lynchs Negro Holdup Suspect, Forces Jailor to Unlock Door to Cell*, CHI. DAILY TRIB., Feb. 18, 1947, at 16.

153. William E. Juhnke, *Editor’s Introduction*, at 5, available at [http://library.lexisnexis.com/ksc\\_assets/catalog/10739\\_TrumanCommCivilRts.pdf](http://library.lexisnexis.com/ksc_assets/catalog/10739_TrumanCommCivilRts.pdf).

might wish to write with requests for their input.<sup>154</sup> Guy Johnson of the Southern Regional Council was one of the few civil rights leaders to focus on the need to improve private enforcement of civil rights by recommending that the PCCR advocate for improving access to justice for the poor and indigent.<sup>155</sup>

The PCCR also worked closely with leaders of the Justice Department. Carr first requested input from the chief of CRS, Turner Smith, who met with the PCCR and staff on February 6. Their initial requests were direct and to the point, encouraging Smith to explain what legislative reforms would be of most help, to consider drafting possible legislation, and to explain his priorities for reform.<sup>156</sup> Smith demurred somewhat when he insisted that constitutional obstacles were more significant compared to statutory ones, though he did make sure to emphasize the CRS's "bête noire": the Supreme Court's recent introduction of a "willfulness" requirement in federal civil rights prosecutions under § 52.<sup>157</sup> Smith also denied, rather implausibly, that the CRS was understaffed: "My trouble is not personnel. Our real difficulty is legal trouble. . . . not personnel or policy. We have seven

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154. Letter from Robert Carr, Executive Secretary, PCCR, to Walter White, Executive Secretary, NAACP (Feb. 13, 1947), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 4:239; Letter from Walter White, Executive Secretary, NAACP, to Robert Carr, Executive Secretary, PCCR (Feb. 17, 1947), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 4:240–42; Letter from Walter White, Executive Secretary, NAACP, to Robert Carr, Executive Secretary, PCCR (Mar. 12, 1947), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 4:228–29.

155. Letter from Guy Johnson, Southern Regional Council, to Robert Carr, Executive Secretary, PCCR (Apr. 3, 1947), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 4:617–20.

I am convinced that there is a great need for a system of free or inexpensive legal service for the poor or ignorant who, legally or illegally, frequently get deprived of their personal or property rights. Even though the federal government may not be able to do much about this in a direct way, it is probable that strong recommendations on this subject from your Committee might move the American Bar Association and the state bar associations to take voluntary action toward remedying the situation.

*Id.* at Reel No. 4:619. Given Johnson's interest in civil cases, it is odd that in his testimony on May 14 before a closed session of a subcommittee of the PCCR he did not recommend support for litigation under § 1983 (then § 43), even though he focused on two problems—abuse of police power and voting rights—which could be remedied through constitutional tort litigation. *See* Proceedings of the Committee—Transcripts: May 14–15, 1947, *microformed on PCCR PAPERS, supra* note 147, at Reel No. 6:802–18 (testimony of Guy B. Johnson).

156. Minutes of the Meeting of the Full Committee—February 5 and 6, 1947, *microformed on PCCR PAPERS, supra* note 147, at Reel No. 5:806–21 (testimony of Turner Smith).

157. *Id.* at Reel No. 5:806–07 (referring to *United States v. Screws*, 325 U.S. 91 (1945), and suggesting that one way to deal with the vagueness problem troubling Justice Douglas in that case might be to revise § 52 to list the specific rights that are protected under it); *see also id.* at Reel No. 5:814 (recommending raising the monetary penalty from \$1000 to a minimum of \$10,000 and possibly applying it against the entire community, rather than the convicted perpetrator).

attorneys and the whole department to draw from.”<sup>158</sup> Later that month Smith sent a memo on civil rights issues “which appear[ed] to be of principal public concern.”<sup>159</sup> During the past year, Smith wrote, “[w]ell over one-half of the written and personal complaints this Section has received . . . have involved lynching incidents.”<sup>160</sup> He noted that the other issues producing large volumes of citizen complaints included Ku Klux Klan activity, white primary barriers,<sup>161</sup> police brutality, and discrimination on “buses, trains, and public places,” and throughout the memo he repeatedly referred to lack of jurisdiction under §§ 51–52 to justify inaction by the CRS.<sup>162</sup>

In the remaining Justice Department testimony, there was extensive discussion of the challenges confronting the CRS. Victor Rotnem, the former head of CRS, met with the group in a closed session on April 3,<sup>163</sup> as did the Attorney General.<sup>164</sup> Rotnem recalled how unpredictable federal grand juries were, and he suggested that some of the CRS’s greatest successes occurred after it had hired southern attorneys to lead these prosecutions.<sup>165</sup> Clark was interested in learning whether the PCCR had yet identified a constitutionally permissible way of crafting a statute that would allow for criminal prosecutions of private individuals engaged in mob violence.<sup>166</sup> Although he expressed some optimism about the prospects for innovative statutory or constitutional reforms, he also advised the PCCR not to lose sight of its larger responsibility to educate the public about civil rights: “Law enforcement largely depends on the communities. You can’t legislate morals in the people; you have to educate morals into people.”<sup>167</sup>

158. *Id.* at Reel No. 5:818. The following day, in a private conference meeting with Robert Carr and his CRS colleagues, Smith admitted there was a need for more CRS staff. *See* Conference Between Mr. Carr, Mr. Smith, Mr. Folsom, and Mr. Hubbard (Feb. 7, 1947), *microformed on* PCCR PAPERS, *supra* note 147, at Reel No. 2:212 (a report summarizing the conference).

159. Letter from Turner L. Smith, Chief, Civil Rights Section to the President’s Committee on Civil Rights (Feb. 21, 1947), *microformed on* PCCR PAPERS, *supra* note 147, at Reel No. 2:177–82.

160. *Id.* at Reel No. 2:177.

161. In his memo, Smith excused CRS’s failure to take the lead in prosecuting voting rights cases, by observing that these white primary cases presented cutting-edge legal questions that were unsuitable for prosecution, particularly given § 52’s willfulness requirement. *Id.* at Reel No. 2:180.

162. *Id.* at Reel No. 2:177–82 (also mentioning discrimination against Japanese Americans, Mexican Americans, and Jehovah’s Witnesses).

163. Proceedings of the Committee—Transcripts: April 3 and 15, 1947, *microformed on* PCCR PAPERS, *supra* note 147, at Reel No. 5:1298–1321 (testimony of Victor Rotnem).

164. *Id.* at Reel No. 5:1235–69 (testimony of Tom Clark).

165. *Id.* at Reel No. 5:1301–02, 1307–08.

166. *Id.* at Reel No. 5:1236–37.

167. *Id.* at Reel No. 5:1237; *see also id.* at Reel No. 5:1240–41 (identifying uncooperative juries as a central obstacle and again emphasizing the need for an education campaign). Professor Robert Cushman of Cornell University also emphasized the potentially transformative impact of the PCCR’s work during his testimony. *See id.* at Reel No. 5:1275–76, 1289 (testimony of Robert Cushman).

In March, the *Washington Post* published an editorial calling on the PCCR to hold public meetings and to allow leading civil rights groups—including the ACLU, NAACP, the American Jewish Congress, and the American Anti-Defamation League—to share their “wealth of experience in the problems of maintaining civil rights” because “[t]heir knowledge and their opinion ought to be made available not only to the committee but to the American people as well.”<sup>168</sup> The editorial went on to emphasize that private organizations might be even more willing “to point . . . to defects in the administration of the present civil rights statutes by the Department of Justice which the President’s committee, created by the sponsorship of the department, might be reluctant to emphasize.”<sup>169</sup> In conclusion, the *Post* argued: “Both as critics and as guides, the private agencies in the field can make a significant contribution to public understanding of the civil rights problem. Their voices should be heard.”<sup>170</sup> This editorial must have annoyed members of the PCCR given how closely they were working with all of these groups and how receptive they had been to public input.

Indeed, plans for public hearings were already well underway. On April 17, the PCCR held its first public session to hear testimony from the NAACP and other civil rights organizations.<sup>171</sup> The meeting surely disappointed those expecting to hear blistering denunciations of the government. Rather hopefully, most of the civil rights leaders’ testimony offered impressively comprehensive agendas. Walter White’s public testimony was broadcast on the Mutual Broadcasting System, and he used his opportunity before the PCCR to speak in general terms to appeal to the nation’s conscience.<sup>172</sup> He began by comparing the recent rise in violence to Hitler’s Germany and suggesting that “his spirit lives in America today.”<sup>173</sup> The postwar “rise of bigotry,” White warned, was “one of the surest ways of bringing in Communism into the United States.”<sup>174</sup> He suggested that the current climate of “greed, fear, and hate . . . hatred of minorities” exemplified a common pattern in the United States—to give “lip service” to civil rights during national emergencies, but then “as soon as the war is over . . . go back into the old ways of hatred, of divisive tactics, more vicious even than those exhibited before the war.”<sup>175</sup> This was not a very soothing, politic piece of testimony. White raised the stakes further by describing the work of the PCCR as “the most important single job facing America today” and concluding that, if Congress and the public fail to heed its

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168. *Civil Rights Committee*, WASH. POST, Mar. 25, 1947, at 6.

169. *Id.*

170. *Id.*

171. On April 17, the PCCR also heard from the Lester Granger of the National Urban League who had already submitted memoranda on the topic of his testimony: the need to address discrimination in employment, housing, public services, health care, and education. *See Proceedings of the Committee—Transcripts: April 17, 1947, microformed on PCCR PAPERS, supra* note 147, at Reel No. 6:48–80 (testimony of Lester Granger); Letter from Lester Granger, National Urban League, to Shane MacCarthy, Department of Labor (March 6, 1947), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 4:444–61.

172. *Proceedings of the Committee—Transcripts: April 17, 1947, microformed on PCCR PAPERS, supra* note 147, at Reel No. 6:81–93 (testimony of Walter White).

173. *Id.* at Reel No. 6:81.

174. *Id.* at Reel No. 6:81–82.

175. *Id.* at Reel No. 6:82–83.

recommendations for reform, then “I see no hope for the preservation of democracy.”<sup>176</sup> In the final portion of his remarks offering recommendations for “certain steps” to take, White focused on the most powerful barrier to reform—the procedural hurdles in the Senate. After comparing the filibuster by “a small handful of wilful and bigoted men” to Russia’s veto power in the United Nations, he called for a reform of the cloture rule.<sup>177</sup> Without this reform, he concluded, “there is in my opinion not the ghost of a chance of the enactment of any remedial legislation which this committee or anybody else can recommend.”<sup>178</sup>

Thurgood Marshall began by observing that the concept of “civil rights” is ill defined, but the major theme of his testimony was that blacks in the south *depend* upon “the Federal Government for protection of basic civil rights,” because “[o]nly the Federal Government can act effectively to protect minorities in the enjoyment of their civil rights.”<sup>179</sup> And to explain why it was in the nation’s interest to act, Marshall reminded the PCCR that discrimination “continues to weaken our status as a true world power.”<sup>180</sup> He then proposed a congressional statute banning discrimination “by any governmental agency subject to the jurisdiction of the United States,” which would apply to the administration of laws, public employment, *and* funding programs.<sup>181</sup> Violations would be enforced through a civil damages provision.<sup>182</sup> Marshall likely proposed the civil damages provision out of concern that the federal government would not provide adequate enforcement resources as, he observed, had been the case with the its enforcement of voting rights.<sup>183</sup> He pointedly stated that while there may be “need for additional legislation

176. *Id.* at Reel No. 6:83. White included one optimistic caveat—pointing to the examples of the NAACP’s prior battles for federal antilynching legislation and the FEPC and suggesting that sometimes even failed lobbying campaigns can help spur productive changes in society. *Id.* at Reel No. 6:83–86.

177. *Id.* at Reel No. 6:85–86.

178. *Id.* White concluded his remarks by offering an outline of the rest of the NAACP’s agenda: antilynching legislation, a federal ban on the poll tax, a permanent FEPC, a comprehensive antidiscrimination law for Washington, D.C., and executive orders calling for antidiscrimination policies in federal employment and the military. *Id.* at Reel No. 6:87–93.

179. *Id.* at Reel No. 6:95–97, 104 (testimony of Thurgood Marshall). Most of the experts testified in favor of a stronger federal enforcement policy. Charles Hamilton Houston was a rare dissenter: “[T]he objective, it seems to me, should be self-help instead of federal dependency. . . . The present performance of the Federal Government in the witch hunt against Communists, and its fight against labor, gives me no belief that the Federal Government . . . is the repository of all wisdom . . . .” Proceedings of the Committee—Transcripts: May 14–15, 1947, *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 6:960–61 (testimony of Charles Hamilton Houston); *see also id.* at Reel No. 6:964–65, 970–71 (criticizing the Justice Department’s enforcement record).

180. Proceedings of the Committee—Transcripts: April 17, 1947, *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 6:101 (testimony of Thurgood Marshall).

181. *Id.* at Reel No. 6:105. Marshall also proposed a statute banning segregation in Washington, D.C., because “[t]he government itself must set the example for the rest of the country.” *Id.* at Reel No. 6:105–06.

182. *Id.* at Reel No. 6:105.

183. *Id.* at Reel No. 6:106 (stating that the constitutional power to protect voting rights in federal elections “has not been used with as much zeal as is necessary”).



by the Federal Government” to protect civil rights,<sup>184</sup> “unless they are effectively and zealously administered, they will be meaningless.”<sup>185</sup> He then mentioned the FEPC as one example of “a weak agency with insufficient staff, funds, and authority to really accomplish the task for which it was created.”<sup>186</sup> He urged the PCCR not to repeat that mistake in its recommendations, and he called for “an administrative agency fervently devoted to giving full protection to civil rights of all.”<sup>187</sup> During the questions period, members of the PCCR first asked Marshall to say more about proposals to improve §§ 51 and 52—an issue that had always remained at the top of their agenda—but he declined, after acknowledging the potential constitutional problems involved in omitting the “willful” language in § 52, to offer a specific reform proposal.<sup>188</sup> Instead, emphasizing the need for improved enforcement of the existing statutes, Marshall urged the PCCR to consider a recommendation elevating the CRS to a separate section of the Justice Department as one way to improve the federal government’s enforcement apparatus.<sup>189</sup> At the end of the session, Marshall raised the issue of the potential synergies between civil cases under § 1983 and government prosecutions under §§ 51 and 52. Using the white primary litigation to illustrate his point, he observed that it was often possible to first obtain a ruling that governmental conduct was unconstitutional in a civil case, then indirectly gain compliance with the ruling through government threats to prosecute.<sup>190</sup> Given these dynamics, Marshall told the committee, he had in the past often encouraged the Justice Department to file amicus briefs in these civil cases, but he noted that the government had thus far “refused” to do so.<sup>191</sup>

In June, President Truman delivered his keynote address to the delegates of the NAACP’s National Convention.<sup>192</sup> The White House put a great deal of effort into the preparation of Truman’s remarks. Although his staff urged caution, the President was determined to deliver a strong speech.<sup>193</sup> Truman reached out to

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184. *Id.* at Reel No. 6:111. In his testimony, Marshall also endorsed the NAACP’s longstanding legislative agenda for new antilynching, fair employment, and antidiscrimination in interstate travel statutes. *Id.* at Reel No. 6:106–09.

185. *Id.* at Reel No. 6:111.

186. *Id.* Marshall conceded that the members of the FEPC made the most of what limited authority they did have, working with “fervor and intensity” to promote rights. *Id.* at Reel No. 6:112. Although he was not so impolitic as to directly criticize the Justice Department, it does appear as though Marshall was attempting to draw a contrast here.

187. *Id.*

188. *Id.* at Reel No. 6:113–15.

189. *Id.* at Reel No. 6:116, 122.

190. *Id.* at Reel No. 6:141.

191. *Id.* at Reel No. 6:142.

192. MCCOY & RUETTEN, *supra* note 58, at 73.

193. *Id.* Truman had told his sister that he “wished [he] didn’t have to” deliver the speech, and he knew “Mamma” would not like the speech because he was planning to quote “old Abe.” HAMBY, *supra* note 1, at 433 (quoting Letter from President Harry S. Truman to Mary Jane Truman (June 28, 1947)). Even so, he wrote, “I believe what I say and I’m hopeful we may implement it.” *Id.* Truman’s private letter to his sister lends credence to Walter White’s recollection of the speech. After the speech, White recalled in his memoir, the President turned to him and said, “I said what I did because I mean every word of it—

Walter White for advice about the speech, and PCCR staff, including Robert Carr, assisted with the drafting.<sup>194</sup> Given Carr's involvement, it is not surprising that Truman emphasized the role of the federal government in enforcing civil rights: "The extension of civil rights today means, not protection of the people *against* the Government, but protection of the people *by* the Government," which should act as a "friendly, vigilant defender of the rights and equalities of all Americans."<sup>195</sup> Mindful of the damage racial violence caused to America's image abroad, Truman called on the country to "get its own house in order" in order to fight totalitarianism with all its strength.<sup>196</sup>

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and I am going to prove that I do mean it." WHITE, *supra* note 72, at 348.

194. See MCCOY & RUETTEN, *supra* note 58, at 73.

195. Address Before the National Association for the Advancement of Colored People, *supra* note 2, at 311 (emphasis in original).

196. *Id.* at 312; see also Gerald G. Gross, *Truman Holds Civil Rights a Key to Peace*, WASH. POST, June 30, 1947, at 1; 'Gov't Must Insure Rights to All'—Truman, ATLANTA DAILY WORLD, July 1, 1947, at 1; George Streater, *Truman Demands We Fight Harder to Spur Equality*, N.Y. TIMES, June 30, 1947, at 1; *Truman Asks Action 'Now' on Racism*, CHI. DEFENDER, July 5, 1947, at 1; *Truman Seeks Improved Laws on Civil Rights*, CHI. DAILY TRIB., June 30, 1947, at 21. For accounts emphasizing that the PCCR was receiving advice from the Department of State to highlight the international dimensions of the civil rights problem, just as Truman began preparing his NAACP speech, see Steven R. Goldzwig, *Inaugurating the Second Reconstruction: President Truman's Committee on Civil Rights*, in CIVIL RIGHTS RHETORIC AND THE AMERICAN PRESIDENCY 83, 88–111 (James Arnt Aune & Enrique D. Rigsby eds., 2005); Garth E. Pauley, *Harry Truman and the NAACP: A Case Study in Presidential Persuasion on Civil Rights*, 2 RHETORIC & PUB. AFF. 211, 225 (1999).



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**President Truman speaking at the National Convention of the National Association for the Advancement of Colored People on June 29, 1947.**

Truman's NAACP speech was delivered just one day before the PCCR met for a crucial meeting at Dartmouth College to make substantive decisions about recommendations for the report. Although the PCCR agenda memo did not include any references to § 1983 litigation, it did include a number of proposals to introduce civil remedies—including damages, injunctive relief and cease-and-desist orders—that could be enforced by the federal government.<sup>197</sup> During this discussion, the members endorsed a proposal to elevate the CRS to a separate

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197. Agenda for Policy Meeting—President's Committee on Civil Rights—June 30–July 1, 1947, *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 5:765.

“Division on Civil Rights” in the Department of Justice.<sup>198</sup> Attorney General Clark and former CRS head Victor Rotnem had both testified in opposition to this proposal because they felt the lawyers working on civil rights cases needed to have the close cooperation and assistance of all the staff in the criminal division.<sup>199</sup>

The PCCR also discussed the policy for filing amicus briefs in civil cases to which the federal government was not a party. The CRS amicus policy had been the subject of some debate in earlier hearings. In his testimony before the PCCR, Victor Rotnem mentioned the amicus brief strategy in civil damages cases as a way of securing Justice Department input on important cases brought “usually by one of the great groups, the Civil Liberties Union or the NAACP.”<sup>200</sup> He told the committee that the Solicitor General often turned down their request to file an amicus brief in civil rights cases.<sup>201</sup> When the Attorney General was asked to explain why the CRS did not submit amicus briefs more often in private litigation, Clark argued that the government should intervene in those cases “rarely.”<sup>202</sup> “The ends sought by private litigants,” he then explained, “are frequently not such as should be sought or sanctioned by the Government.”<sup>203</sup> It appears that the PCCR members did not find this argument persuasive, and their proposals for greater amicus involvement would soon persuade the Justice Department to alter its policy.

Given the rise in violence leading to the creation of the PCCR, it is not surprising that they tried to be bold and creative in their discussion of antilynching proposals. For example, they discussed whether to propose “communal liability” for damages—a civil remedy for mob violence once extensively debated by the Reconstruction Congress.<sup>204</sup> In the end, they chose a less innovative, but more legally viable, approach—the use of a new antilynching statute to criminally prosecute public officials who failed to protect the accused from mob violence.<sup>205</sup> The PCCR also advocated strengthening the federal criminal provisions covering

198. Proceedings of the Committee—Transcripts: (Processed) June 30–July 1, 1947 (Hanover Meetings), *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 6:1169–71.

199. Proceedings of the Committee—Transcripts: April 3 and 15, 1947, *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 5:1255–56 (testimony of Tom Clark) (characterizing the proposal as unnecessary but agreeing that elevation to division status would increase prestige); *id.* at Reel No. 5:1317–19 (testimony of Victor Rotnem). Rotnem also predicted that the creation of a Civil Division would give “crack-pots” license to pester the government for all kinds of help and they already had enough problems dealing with the “nut” mail. *Id.* at Reel No. 5:1311–12, 1317.

200. *Id.* at Reel No. 5:1305.

201. *Id.* at Reel No. 5:1305–06.

202. Letter from Tom Clark, Attorney General, to Robert Carr, Executive Secretary, PCCR (July 10, 1947), *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 2:595–99.

203. *Id.*

204. Proceedings of the Committee—Transcripts: (Processed) June 30–July 1, 1947 (Hanover Meetings), *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 6: 1158–62.

205. TO SECURE THESE RIGHTS: THE REPORT OF PRESIDENT HARRY S. TRUMAN’S COMMITTEE ON CIVIL RIGHTS 173 (Steven F. Lawson ed., 2004) [hereinafter TO SECURE THESE RIGHTS].

private individuals who conspired to deprive the accused of their constitutional rights.<sup>206</sup>

Once the members of the PCCR decided on the policy agenda, they left it to the staff to write a draft of the report.<sup>207</sup> The PCCR planned to gather for a final meeting in September to review the draft and make final changes. This late meeting date left the staff just eight weeks to write the report—an ominous assignment given the importance that the rhetoric and argument of the report would have in persuading the country to support the PCCR's proposed agenda. Robert Carr and his staff eventually became so discouraged that they enlisted the assistance of Robert Cushman, the distinguished professor of government at Cornell University, to help transform the draft into a more literary product.<sup>208</sup> One member of the staff later recalled, "Cushman virtually rewrote the whole thing. . . . He saved the report."<sup>209</sup>

During the final rounds of meetings in September, the PCCR members reviewed the staff draft and offered suggestions for revision. A few members became alarmed at its negative tone. Dorothy Tilly, a reformer from Atlanta, offered some indication of their qualms: "The report is too belligerent," she advised Carr on September 8. She continued: "It is rather vicious as it raises a 'whip-hand' against the South. . . . [I]t will be rejected by the South and the South knows how to REBEL."<sup>210</sup> Indeed, these concerns about the tone of the report caused the final sessions to be more acrimonious than anyone had anticipated. Charlie Luckman thought the report dwelt too much on "the bad," and would produce "a depressing effect" on its readers.<sup>211</sup> Others agreed that the report focused excessively on the negative aspects of the country's civil rights record.<sup>212</sup> Sadie Alexander took up Carr's defense. She pointed out that their assignment from the President was "not . . . to go out and find out what good has been done."<sup>213</sup> Instead, Truman had asked them "to find out what had to be done to correct any evils."<sup>214</sup>

The section of the draft discussing the role of the CRS was very critical. This section referred to an "overwhelming . . . picture of hesitating, indecision, and basic timidity."<sup>215</sup> The draft criticized all aspects of the CRS—from staffing levels, to statutory barriers, to inadequate cooperation from the FBI and local U.S. attorneys.

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206. Proceedings of the Committee—Transcripts: (Processed) June 30–July 1, 1947 (Hanover Meetings), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 6:1143–49.

207. Juhnke, *supra* note 30, at 153.

208. *Id.* at 155.

209. *Id.* (quoting from Juhnke's interview with Rachael Sady, PCCR staff member (June 29, 1972)).

210. Letter from Dorothy Tilly to Robert Carr (Sept. 8, 1947), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 3:145–46. After the report was published, Tilly and her family endured bombing and other threats. EGERTON, *supra* note 57, at 563; LEUCHTENBURG, *supra* note 151, at 179–80.

211. Proceedings of the Committee—Transcripts: September 12–13, 1947, *microformed on PCCR PAPERS, supra* note 147, at Reel No. 7:178–79.

212. *Id.* at Reel No. 7:178–93.

213. *Id.* at Reel No. 7:181.

214. *Id.*

215. Juhnke, *supra* note 30, at 172 (quoting Carr's first draft of the section on the CRS) (omission in original).

In this meeting, Morris Ernst of the ACLU offered a strong defense of the Justice Department, expressing his concern that such harsh language would undercut the prestige of the CRS.<sup>216</sup> Carr refused to back down at this point. Arguing that all of the criticisms in the draft report could be “documented fully,” he insisted that these criticisms were necessary.<sup>217</sup> Other members of the PCCR agreed with his assessment. James Carey of the CIO argued that no one could deny that the CRS “[has] failed very definitely, or we would not have this Committee at all.”<sup>218</sup> Carr agreed to rewrite the section on the CRS to mention the organization’s achievements and to soften the language a bit, but all of the specific criticisms remained.<sup>219</sup>

### C. The Report of the President’s Committee on Civil Rights

There was considerable speculation about the report in the days leading up to its publication. One PCCR member spoke to a *Washington Post* reporter and told her to expect “a cubic foot of dynamite.”<sup>220</sup> The group issued its report, entitled *To Secure These Rights*, on October 29, 1947.<sup>221</sup> Truman issued a statement immediately after the report’s release in which he referred to the report’s title, recalled the title’s words’ origins in the Declaration of Independence, and expressed his hope that the report could serve as a “charter of human freedom in our time.”<sup>222</sup>

216. Proceedings of the Committee—Transcripts: September 12–13, 1947, *microformed on PCCR PAPERS*, *supra* note 147, at Reel No. 7:432.

217. *Id.* at Reel No. 7:441; *see also id.* at Reel No. 7:433–40.

218. *Id.* at Reel No. 7:445.

219. Because of this final disagreement over the CRS section, the PCCR scheduled one more emergency meeting for review of the final draft before sending the report to the President. Juhnke, *supra* note 30, at 175–76.

220. Mary Spargo, *Sweeping Overhauling of Civil Rights Law Likely Next Session*, WASH. POST, Oct. 19, 1947, at B3; *cf.* James Edmund Boyack, *Truman Receives Strong Charter of Civil Rights*, PITT. COURIER, Nov. 1, 1947, at 5 (describing rumors of the report’s proposals); *Draft New Civil Rights Laws*, CHI. DEFENDER, Sept. 20, 1947, at 1 (describing alternative rumors); Louis Lautier, *Civil Rights Committee Report Said to Be Weak*, AFRO-AM. (Balt.), Oct. 4, 1947, at 13 (reporting rumors suggesting the committee is about “to bring forth a mouse”).

221. *TO SECURE THESE RIGHTS*, *supra* note 205.

222. Statement by the President Making Public a Report by the Civil Rights Committee, 1947 PUB. PAPERS 479, 480 (Oct. 29, 1947); *see also* Anthony Leviero, *Guardian for Civil Rights Proposed by Truman Board; Report Asks End of Biases*, N.Y. TIMES, Oct. 30, 1947, at 1; Marjorie McKenzie, *Pursuit of Democracy: Report of President’s Committee on Civil Rights Far Exceeds Expectations*, PITT. COURIER, Nov. 8, 1947, at 8; Sam Stavisky, *Need for Guarantee of Equal Rights to All Emphasized in Report to Truman*, WASH. POST, Oct. 30, 1947, at 1 (describing the report as “176 pages of social dynamite”); *Truman Hopes Civil Rights Committee Report Will Be ‘An American Charter of Human Rights in Our Time,’* CLEV. CALL & POST, Nov. 8, 1947, at 1B.



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**President Truman receives a report from his Special Committee on Civil Rights. Left to right are: Rev. Francis J. Haas; Rabbi Roland G. Gittelsohn; Sadie T. Alexander; James B. Carey; Franklin Delano Roosevelt, Jr.; M.E. Tilly; Channing H. Tobias; Charles E. Wilson; Boris Shiskin; Charles Luckman; and Francis P. Mathews.**

The report was divided into four parts. The first two parts followed a structure similar to Myrdal's *American Dilemma*: Part I described the "American heritage" of freedom and equality,<sup>223</sup> and Part II, the longest section of the report, described the current state of civil rights in the country.<sup>224</sup> The report's description and condemnation<sup>225</sup> of the country's "failures" in making "the ideals of freedom and equality . . . a reality"<sup>226</sup> offered a vivid and comprehensive portrait of the causes and consequences of racial injustice—from mob violence and police brutality, to naturalization requirements, voting restrictions, discrimination in the armed services, employment discrimination, segregated schools, equal access to housing and health care, and discrimination in public services and accommodations.<sup>227</sup>

223. TO SECURE THESE RIGHTS, *supra* note 205, at 49–54.

224. *Id.* at 55–125.

225. *See, e.g., id.* at 158 ("The pervasive gap between our aims and what we actually do is creating a kind of moral dry rot which eats away at the emotional and rational bases of democratic beliefs.")

226. *Id.* at 46.

227. *Id.* at 61–72 (rights of safety and security); *id.* at 72–75 (naturalization); *id.* at 75–80 (voting rights); *id.* at 80–84 (military); *id.* at 89–97 (employment discrimination); *id.* at 97–101 (education); *id.* at 101–04 (housing); *id.* at 104–07 (health care); *id.* at 107–11 (public

Part III focused on the federal government's role in protecting civil rights,<sup>228</sup> including the revised section on the work of the CRS,<sup>229</sup> and Part IV, designed to be easily severable for independent publication in newspapers and pamphlets, offered a succinct summary of the PCCR's recommendations for reform.<sup>230</sup>

After forcefully declaring that the federal government "must take the lead in safeguarding the civil rights of all Americans,"<sup>231</sup> the report made clear that important national interests—in protecting America's image abroad and in ensuring economic growth—supported the PCCR's call for its leadership.<sup>232</sup> Although the prior language criticizing the CRS was considerably softened, the report retained the core criticisms of CRS: insufficient personnel, uncooperative local U.S. Attorneys, and the FBI's ineffective methods of investigating civil rights cases.<sup>233</sup>

Interestingly, the drafters of the PCCR report only very briefly referred to the use of constitutional tort litigation as an alternative approach to civil rights enforcement.<sup>234</sup> After acknowledging the "obvious limitation[s]" of "the criminal penalties as a means of enforcing public policy with respect to civil rights," the PCCR advised "that we should resort to a wide variety of sanctions—old and new."<sup>235</sup> They noted that one of these alternatives is the use of civil suits "to supplement criminal sanctions in securing the enforcement of civil rights," and acknowledged that "the suit for damages . . . [has] been used in a few notable instances by imaginative attorneys to seek civil redress for persons whose civil rights have been encroached upon."<sup>236</sup> Although the PCCR dismissed the potential of private civil rights suits, on the grounds that the use of these suits "has depended upon the initiative of the individual victim, since he has the burden of invoking them,"<sup>237</sup> the report did emphatically call for Department of Justice "intervention by means of briefs amicus curiae in private litigation where important issues of civil rights law are being determined."<sup>238</sup>

Even when the PCCR acknowledged the advantages of civil cases, it preferred "giv[ing] the government itself greater power to use civil sanctions."<sup>239</sup> Assuming that the government would have more resources at its disposal, the PCCR concluded that "[t]he potential use of civil sanctions in civil rights cases is very great."<sup>240</sup> For example, in cases involving "longstanding denials" of rights, "a civil action will accomplish results when criminal prosecution will not, because a jury which might be reluctant to convict a defendant in a criminal prosecution for a

services and public accommodations).

228. *Id.* at 126–57.

229. *Id.* at 139–50.

230. *Id.* at 158–85.

231. *Id.* at 126.

232. *Id.* at 127–28, 160–67.

233. *Id.* at 144–48; *see also id.* at 149 (describing the CRS as a "sincere, hardworking, but perhaps overcautious agency").

234. *Id.* at 152 (mentioning the use of § 1983 in only a few pages of a 176 page report).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 168.

239. *Id.* at 153 (emphasis added); *see also id.* at 168 (recommending new federal legislation granting the CRS authority to issue civil sanctions).

240. *Id.* at 153.



violation of civil rights might not hesitate to afford relief in the form of a civil penalty.”<sup>241</sup>

Robert Carr, looking back on the PCCR’s deliberations, emphasized that the committee never focused on an “exclusive means of safeguarding civil rights.”<sup>242</sup> There was no need to choose among federal criminal prosecutions, civil sanctions, educational reforms, equal employment opportunity, housing policies, or health care access as if “they were rival and mutually exclusive means of reaching the goal. All [were] necessary.”<sup>243</sup> While the PCCR was undoubtedly dissatisfied with the work of the CRS to date, the committee remained hopeful that, with adequate resources and statutory authority, the federal government’s sword of criminal enforcement could become a ready weapon in the fight to secure civil rights.

#### IV. REACTION AND REVOLT: TRUMAN’S CIVIL RIGHTS AGENDA

##### A. *The New Amicus Policy*

The day after the report was released, the Justice Department decided to file an amicus brief in support of the NAACP’s position challenging restrictive covenants in *Shelley v. Kraemer*.<sup>244</sup> This change in amicus policy is one of the unheralded achievements of the PCCR.<sup>245</sup> During deliberations regarding the report, members

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241. *Id.*

242. Robert K. Carr, *To Secure These Rights*, N.Y. TIMES, Jan. 22, 1950, (Magazine), at 11, 11.

243. *Id.*

244. 334 U.S. 1 (1948); see CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 168–74 (1959); see also ELLIFF, *supra* note 26, at 254–59; MCCOY & RUETTEN, *supra* note 58, at 211; MCMAHON, *supra* note 10, at 188.

245. Most scholars who do acknowledge the significance of these amicus briefs do not trace their origins to the PCCR. One historian assigned credit for the adoption of the amicus policy to lawyers acting independently in the Solicitor General’s office. See, e.g., Bernstein, *supra* note 147, at 296–97, 303. Other scholars have emphasized that the new policy was implemented with the full support of the Truman administration, including Truman’s Attorneys General (all three of whom signed on to briefs). None of these scholars describe the initial reluctance of most Justice Department lawyers to endorse an increased amicus role when these lawyers were questioned about their approach by the PCCR. See, e.g., BERMAN, *supra* note 58, at 73–75; DUDZIAK, *supra* note 58, at 91; ELLIFF, *supra* note 26, at 246, 251, 254–59; MCCOY & RUETTEN, *supra* note 58, at 211–12; MCMAHON, *supra* note 10, at 188.

In 1987, the *Harvard Law Review* published an oral history interview of Philip Elman, a member of the Solicitor General’s office who wrote many of these briefs. See Philip Elman, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817 (1987) (interview conducted by Norman Silber). Elman recalled that the PCCR “was taken very seriously in the Solicitor General’s office.” *Id.* at 817; see also VOSE, *supra* note 244, at 168 (stating that some outside pressure was necessary to convince the Truman administration to develop its amicus policy); ‘Rights’ Report Called Great Historical Paper, AFRO-AM. (Balt.), Mar. 4, 1950, at 15 (describing a 1950 speech by Solicitor General Philip Perlman, in which he praised the influence of the PCCR report and attributed the “unprecedented” amicus policy to “the new concept of government leadership in protecting civil rights”).

of the PCCR regularly asked CRS officials, Attorney General Clark, and members of the Solicitor General's office to explain the Justice Department's amicus policy. Members of the PCCR repeatedly broached the topic and suggested that, given the limited effectiveness of the criminal statutes, the talents and resources of the Justice Department should be used to lend support to the civil cases being brought by private groups like the NAACP. Although Justice Department officials were somewhat defensive about their poor prior record with amicus activity in testimony before the PCCR, the report appears to have made an impact—and some of the most important contributions the federal government would offer in future years would come from briefs filed in support of the NAACP and other civil rights plaintiffs.

### B. The PCRR Report's Public Reception

Civil rights leaders offered the PCCR report their highest praise. Walter White called *To Secure These Rights* "the most courageous and specific document of its kind in American history."<sup>246</sup> The usually reticent Roy Wilkins remarked that it was "more than [he] had dreamed possible."<sup>247</sup> Thurgood Marshall confidently predicted that "[t]he Report of the President's Committee on Civil Rights will go down in history as one of the most important documents yet produced in this field. . . . The problem of the Negro and other minority groups is now before the public in a manner never equaled before."<sup>248</sup>

The reaction in the African American press was more mixed. An editorial in the *Chicago Defender* declined to gush about the report's potential impact or to attribute to the President any special transformative powers, suggesting only that "this report gives some evidence that *our cause* is marching on."<sup>249</sup> Others in the African American press directly addressed the daunting political challenges

246. LEWIS, *supra* note 47, at 529. Given the report's warm reception among civil rights advocates and law professors, news of Du Bois's international protest petition must have seemed jarring. After spending much of 1947 spearheading a coalition of groups planning to file a letter of grievance, *An Appeal to the World*, with the newly formed United Nations Commission on Human Rights, Du Bois was pressured by Walter White to delay publicizing the filing until after the publication of *To Secure These Rights* in October. When the PCCR's report garnered such positive reviews, Du Bois regretted that he had missed his moment, even though he had managed to leak the letter a few weeks prior to the PCCR report's publication. He attempted to publicize the *Appeal*, traveling to more than twenty countries as part of this effort, but his strategic choices and independent style worsened the strains in his relationship with White—which would deteriorate further as a result of Du Bois's championing of Henry Wallace's candidacy in the 1948 election—and eventually contributed to his dismissal from the NAACP in September 1948. ANDERSON, *supra* note 58, at 93–112, 140–44; *see also* DUDZIAK, *supra* note 58, at 43–46 LEWIS, *supra* note 47, at 528–35; *Appeals to UN on Bias in America*, N.Y. AMSTERDAM NEWS, Oct. 18, 1947, at 1; *Document for U.N. Cites Denial of Freedom in America*, AFRO-AM. (Balt.), Oct. 25, 1947, at 3; *Negroes to Bring Cause before U.N.: Statement Charges that South Offers Greater U.S. Threat than Soviet Activities*, N.Y. TIMES, Oct. 12, 1947, at 52.

247. LEWIS, *supra* note 44, at 529.

248. *Civil Rights Draft Hailed Nationally*, ATLANTA DAILY WORLD, Nov. 2, 1947, at 1.

249. *The Call to Freedom*, CHI. DEFENDER, Nov. 8, 1947, at 14 (emphasis added).

confronting any effort to introduce new civil rights legislation. The prominent black journalist Lem Graves called on his readers to hold Congress responsible: "The Pittsburgh Courier will leave no stone unturned to get a reply from the men and women in Congress . . . For Negroes of America, their 1948 political issue has been found!"<sup>250</sup> Gordon B. Hancock, a professor, minister, and influential syndicated columnist, offered a more cynical view of the prospects for reform:

For political purposes the report of the Civil Rights Committee serves finely; but as a solution of current problems it is merely a gesture . . . A government that has stubbornly refused to enact anti-lynching measures; that suffered the FEPC to die ingloriously; that has back-tracked on the anti-poll tax proposals need not be counted on to implement the Civil Rights Committee's Report.<sup>251</sup>

The report also received ample analysis in law reviews, where leading academics acknowledged its significance and potential impact. Noted legal scholar Thomas Emerson described the report as a "magnificent achievement," a "courageous" defense of American ideals and a "bold" accounting of the country's departures from them.<sup>252</sup> Felix S. Cohen observed that the PCCR "has received a well-deserved accolade of praise from the civilized."<sup>253</sup> In the *Harvard Law Review*, Thomas H. Eliot called the report "a brave and effective attack on Jim Crowism, and a compelling demand that the power of government be fully used in that offensive."<sup>254</sup> He was struck by the fact that "the whole emphasis" of the report "is on more governmental action, and chiefly by the central Government at that."<sup>255</sup>

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250. Lem Graves, Jr., *Nation's Civil Liberties Hypocrisy Blasted! Freedom Charter Challenges*, PITT. COURIER, Nov. 8, 1947, at 1.

251. Gordon B. Hancock, *The Point: The Truman Civil Rights Committee Report Called Merely a Gesture*, NORFOLK J. & GUIDE, Nov. 15, 1947, at 9. By the end of 1948, Gordon Hancock would change his mind about Truman's motives. See, e.g., Gordon B. Hancock, *The Point: Truman's Courage*, NORFOLK J. & GUIDE, Apr. 3, 1948, at 8 (calling Truman a "towering giant" for his "[d]isplay of [m]oral [c]ourage"); Gordon B. Hancock, *Truman Victory, President Is a Moral Hercules*, AFRO-AM. (Balt.), Nov. 27, 1948, at B8 ("[I]nstead of cry-babying and apologizing for his civil rights stand, he came out fighting . . . [He is] a fearless champion of civil rights—for colored people also."); see also RAYMOND GAVINS, *THE PERILS AND PROSPECTS OF SOUTHERN BLACK LEADERSHIP: GORDON BLAINE HANCOCK, 1884–1970* (1977).

252. Thomas I. Emerson, *Book Review*, 97 U. PA. L. REV. 144, 144–47 (1948) (reviewing *TO SECURE THESE RIGHTS*, *supra* note 205 and CARR, *supra* note 13). Emerson described the Justice Department as "probably the most ineffective of any modern nation." *Id.* at 146.

253. Felix S. Cohen, *Review*, 57 YALE L.J. 1141, 1141 (1948) (reviewing *TO SECURE THESE RIGHTS*, *supra* note 205). Cohen criticized the report for focusing its recommendations on "irrelevant" calls for legislation, when many of the reforms proposed could be implemented by executive order (e.g., desegregation of the military, desegregating public institutions in Washington D.C., etc.). *Id.* at 1143.

254. Thomas H. Eliot, *Book Review*, 61 HARV. L. REV. 899, 902 (1948) (reviewing *TO SECURE THESE RIGHTS*, *supra* note 205). Eliot cautioned that this perception of the federal government as a protector of rights slights the threats that the government itself continues to pose to civil liberties. See *id.* at 899–90.

255. *Id.* at 899.

Yet other observers' reactions revealed that, just as the PCCR issued its report championing leadership by the Justice Department, the enthusiasm for federal action through criminal prosecutions was beginning to wane. Lawyers from the Commission on Law and Social Action in the American Jewish Congress, for example, argued that "[d]uring the nine years of the Section's timid and unimaginative life, private groups have put it to shame by winning without its help notable court decisions determining basic legal principles,"<sup>256</sup> and emphasized the "wide gap between the results of the puny efforts of the Civil Rights Section and the job which really needs to be done."<sup>257</sup>

One quality that is most striking about these debates among civil rights advocates is the absence of competition. There was no sense of rivalry between the private civil rights bar and the Department of Justice. Civil rights lawyers, especially in the NAACP's legal department, often expressed a great deal of frustration with the federal enforcement effort, but their frustration was due to their sense that there was far more work to do than their own capable lawyers could handle. The NAACP wanted the CRS lawyers to do as much as possible.<sup>258</sup> The NAACP's position supporting a greater federal role is perhaps not so surprising, given that the organization was overwhelmed with requests for legal advice. According to Thurgood Marshall, 1947 was "the busiest legal year in the history of the NAACP."<sup>259</sup> Marshall was so busy during the spring of 1947, he wrote to Robert Carr repeatedly to ask for extra time to prepare a legal memorandum for the PCCR, but he was eventually forced to admit—due to the ongoing trial in the Texas lawsuit that would eventually produce the favorable Supreme Court ruling in *Sweatt v. Painter*,<sup>260</sup> as well as two trials in South Carolina challenging the white primary and segregated law schools—he would be unable to add written testimony to supplement his witness statement from the hearing on April 17.<sup>261</sup>

One goal of the PCCR was to make use of its final report in a broad public education campaign. The PCCR ordered 25,000 copies of the report, which it distributed to the press, federal and state officials, diplomats, and civic organizations.<sup>262</sup> With the support of a number of civil rights groups, the members

256. Will Maslow, *Review*, 57 *YALE L.J.* 1149, 1150 (1948) (reviewing CARR, *supra* note 13) (footnote omitted).

257. Joseph B. Robison, *Book Review*, 61 *U. CHI. L. REV.* 196, 197 (1948) (reviewing CARR, *supra* note 13).

258. William Juhnke offers a similar assessment regarding the absence of competition, observing that the individuals and groups who sent in written comments or offered testimony were "uniformly in favor" of increased governmental responsibility for civil rights. Juhnke, *supra* note 30, at 83; *see also id.* at 108–09 (noting that "there was little emphasis by civil rights groups appearing before the committee on the limitations of federal power" and that "[t]he notion that the federal government should do more was implicit" in the civil rights groups' testimony).

259. *Outstanding Gains Made During '47 in Race Relations, NAACP Reports*, ATLANTA DAILY WORLD, Jan. 4, 1948, at 1.

260. 339 U.S. 629 (1950).

261. Letter from Thurgood Marshall, Special Counsel, NAACP Legal Defense and Education Fund, Inc., to Robert K. Carr, Executive Secretary, PCCR (May 29, 1947), *microformed on PCCR PAPERS, supra* note 147, at Reel No. 4:206.

262. MCCOY & RUETTEN, *supra* note 58, at 92.

of the PCCR ensured that there was wide distribution of the report across the government and in the states. All told, in William Juhnke's estimation, nearly one million copies of the full report were distributed.<sup>263</sup> Other African American newspapers, including the *Pittsburgh Courier* and *Afro-American*, ran the report in a serial format, and Simon & Schuster printed and sold tens of thousands of copies of the report.<sup>264</sup> The liberal newspaper, *New York PM*, published a version in newsprint that civil rights organizations distributed to local chapters and their members—these orders alone amounted to nearly 400,000 copies of the report.<sup>265</sup> Many groups also created pamphlets using excerpts from the report to highlight the key themes.<sup>266</sup> To support these educational initiatives, the national office of the NAACP asked its local branches to set up discussion groups, lectures, and campaigns, including “civil rights audits” in which local groups surveyed how these communities measured up to the goals of the report.<sup>267</sup> Mutual Broadcasting aired special radio programming, as did other radio outlets.<sup>268</sup> PCCR members and staff continued to accept public speaking engagements to promote the report even after the committee was officially disbanded. Dorothy Tilly, for example, organized a workshop for over 400 community leaders from all over the South after she returned to the Southern Regional Council.<sup>269</sup>

It seems as though everyone was working to promote the report but the President himself, at least publicly. Truman may have wanted to gauge the public's reaction before issuing any formal statement. Political concerns favored coming out in support of a bold civil rights program. Although southern newspapers expressed criticism<sup>270</sup> and letters from southerners flooded into the White House,<sup>271</sup> Truman's advisors—Clark Clifford, James Rowe, and others—were not at this point anticipating a southern revolt. Instead, these advisors' chief concern was the likely candidacy of Henry Wallace, a former Vice President for Roosevelt and Secretary of Agriculture for Truman who had become a vocal critic of Truman's administration. These advisors had warned the President that the election may be decided by African American and Jewish voters in northern cities.<sup>272</sup>

263. Juhnke, *supra* note 30, at 201–02.

264. MCCOY & RUETTEN, *supra* note 58, at 92.

265. *Id.* at 92–93.

266. *Id.* at 93.

267. SULLIVAN, *supra* note 23, at 352–53; *see also, e.g., Civil Rights Audit Taken in N.J. Town*, CHI. DAILY TRIB., Dec. 15, 1947, at 14 (describing audits as diverse teams of researchers who would test whether places of public accommodation discriminated against African Americans).

268. KLINKNER & SMITH, *supra* note 49, at 215.

269. Juhnke, *supra* note 30, at 203–04.

270. The *New Orleans Times-Picayune*, for example, wrote that the PCCR “proposed to extinguish a smoldering and slowly dying fire by drenching it with gasoline.” NEW ORLEANS TIMES-PICAYUNE, Oct. 31, 1947, *quoted in* Monroe Billington, *Civil Rights, President Truman, and the South*, 58 J. NEGRO HIST. 127, 131 (1973).

271. One minister tried to appeal to Truman's political interests: “If that report is carried out you won't be elected dogcatcher in 1948.” Letter from Reverend A.C. Schuler to President Truman (Oct. 30, 1947), *quoted in* Billington, *supra* note 270, at 131.

272. *See* MCCOY & RUETTEN, *supra* note 58, at 97–99; Bernstein, *supra* note 147, at 282–83; James Rowe, Jr., *The Politics of 1948*, in DOCUMENTARY HISTORY OF THE TRUMAN

Truman chose the State of the Union message on January 7, 1948 as the first occasion to offer public remarks on the report.<sup>273</sup> He began the speech with a discussion of civil rights: "Our first goal is to secure fully the essential human rights of our citizens."<sup>274</sup> He stressed that discrimination is "utterly contrary to American ideals of democracy."<sup>275</sup> Declaring that the federal government must play a stronger role, Truman announced that he planned to deliver a special message on civil rights to Congress.

Truman's speech on civil rights was scheduled for the following month on February 2, 1948.<sup>276</sup> He began the speech by arguing that the gap between the ideal and the real described by the PCCR "must be closed."<sup>277</sup> The rest of his remarks focused on the need for a strengthened civil rights enforcement power in the federal government. To that end, the President proposed creating a Civil Rights Division in the Department of Justice, a permanent Commission on Civil Rights, and a Joint Congressional Committee on Civil Rights. He also endorsed efforts to strengthen the civil rights statutes and to provide stronger federal protection against lynching and for voting rights.<sup>278</sup> Although he did not endorse all of the PCCR's desegregation proposals,<sup>279</sup> the President did state in his message that he planned to ask Congress to ban segregation in interstate travel and promised an executive order desegregating the military. Truman ended by once again emphasizing the urgency of the task:

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ADMINISTRATION 29, 35 (Dennis K. Merrill ed., 1995).

273. Annual Message to the Congress on the State of the Union, 1948 PUB. PAPERS 2 (Jan. 7, 1948).

274. *Id.* at 3.

275. *Id.* Truman's emphasis on civil rights, and his claims regarding the incompatibility of civil rights violations with American ideals, did not go unnoticed by the press. *See, e.g.*, Robert E. Cushman, Editorial, *Our Civil Rights Becomes a World Issue*, N.Y. TIMES, Jan. 11, 1948, at SM12 (arguing that "we are becoming aware that we do not practice the civil liberty we preach," and that the nation's failures are damaging its foreign policy aims); Sam Stavisky, *Civil Rights First Goal, Truman Says*, WASH. POST, Jan. 8, 1948, at 5; *Truman Tells 80th Congress U.S. Needs Civil Rights Bill*, ATLANTA DAILY WORLD, Jan. 8, 1948, at 1.

276. Special Message to Congress on Civil Rights, 1948 PUB. PAPERS 121 (Feb. 2, 1948); *see also* Edward T. Folliard, *Calls for Strong Anti-Lynching and Segregation Legislation*, WASH. POST, Feb. 3, 1948, at 1; Louis Lautier, *Truman Urges Strong Civil Rights Laws*, ATLANTA DAILY WORLD, Feb. 3, 1948, at 1; Anthony Leviero, *Anti-Lynching Law, Civil Liberties Unit Sought by Truman*, N.Y. TIMES, Feb. 3, 1948, at 1.

277. Special Message to Congress on Civil Rights, *supra* note 276, at 122.

278. *Id.* Beyond these recommendations for improving the civil rights enforcement machinery, Truman also endorsed a permanent FEPC, a statute prohibiting discrimination in interstate facilities, home rule for D.C., statehood for Hawaii and Alaska, opening up naturalization policy, and remedies for evacuated Japanese Americans. *Id.*; BERMAN, *supra* note 58, at 82–86; MCCOY & RUETTEN, *supra* note 58, at 99–101; *see also* Bernstein, *supra* note 147, at 284–85.

279. *See* Special Message to Congress on Civil Rights, *supra* note 276, at 124, 126. William Juhnke, for example, considered Truman's agenda to be a somewhat watered down version of the PCCR report, primarily because his agenda left out most of the remedies to deal with segregation, such as a model statute for the District of Columbia and federal funding withdrawals from segregated schools and other entities. Juhnke, *supra* note 30, at 126; *see also* MCCOY & RUETTEN, *supra* note 58, at 100.

If we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy. We know the way. We need only the will.<sup>280</sup>

### C. The 1948 Election

If Truman had been concerned about the reaction to his speech in the South, then he had not done enough to avert their wrath.<sup>281</sup> However, it appears that he was genuinely surprised by the extent of the rage expressed by southerners.<sup>282</sup> Soon after the message, southern senators took to the floor of the Senate to voice their hostility.<sup>283</sup> Senator Eastland of Mississippi predicted the destruction of “the civilization and culture” of the South, while Senator Harry Byrd of Virginia warned that Truman’s proposals would amount to “a mass invasion of the states’ rights,” unprecedented in U.S. history.<sup>284</sup> Senator O’Daniel of Texas, predictably, charged that six members of the PCCR were members of communist-front organizations.<sup>285</sup> Soon the Southern Governors Conference, led by South Carolina Governor Strom Thurmond, threatened a revolt and called on Truman to abandon his proposals.<sup>286</sup> Other Democratic members of Congress pledged to join the revolt.<sup>287</sup> Initially, southern supporters of Truman, like House Democratic Leader Sam Rayburn of Texas, believed that the controversy would soon die down, but when it became clear that there was little public support for the civil rights program—Gallup polls released throughout the spring revealed dwindling support for his civil rights

280. Special Message to Congress on Civil Rights, *supra* note 276, at 126.

281. For the most thorough overview of the southern response from the public, the press, state officials, and Congress, see LEUCHTENBURG, *supra* note 151, at 178–92.

282. *Id.* at 178, 190.

283. *Dixie Democrats Threaten Truman Bolt on Race Issue*, L.A. TIMES, Feb. 4, 1948, at 1; John Fisher, *Southern Bloc Rages at Truman*, CHI. DAILY TRIB., Feb. 4, 1948, at 1; Clayton Knowles, *Truman Conciliation of South in Civil Rights Issue Is Denied*, N.Y. TIMES, Feb. 10, 1948, at 1; Anthony Leviero, *Political Feuds Grow on Civil Rights Issue*, N.Y. TIMES, Feb. 8, 1948, at E9; *Southerners Against Civil Rights Proposals, Threaten Party Bolt Because of Truman’s Stand*, ATLANTA DAILY WORLD, Feb. 4, 1948, at 1; C.P. Trussell, *South Threatens Anti-Truman Drive over Civil Rights*, N.Y. TIMES, Feb. 4, 1948, at 1.

284. Juhnke, *supra* note 30, at 210.

285. *Id.* He named James Carey, Morris Ernst, Frank Graham, Boris Shishkin, Henry Sherrill, and Channing Tobias. *Id.* at 218 n.43.

286. See MCCOY & REUTTEN, *supra* note 58, 101–03; Bernstein, *supra* note 147, at 284–86; Harvard Sitkoff, *Harry Truman and the Election of 1948: The Coming of Age of Civil Rights in America*, 37 J. SOUTH. HIST. 597, 602 (1971); Robert C. Albright, *South Urged to Run Own Candidate*, WASH. POST, Feb. 10, 1948, at 1; Marquis Child, *Washington Calling: Southern Revolt*, WASH. POST, Feb. 13, 1948, at 20.

287. Laurence Burd, *Dixie Revolt Joined by 50 in Congress*, CHI. DAILY TRIB., Feb. 21, 1948, at 1 (reporting that participants at the protest meeting considered issuing an “open threat to form a new party if their demands were not met”); see also *Democratic Hopes Fading on Rights Bill*, WASH. POST, Feb. 22, 1948, at M1; John M. Popham, *Debate on ‘Revolt’ Growing in South*, N.Y. TIMES, Feb. 23, 1948, at 2; William S. White, *House Democrats of South Condemn Civil Rights Plan*, N.Y. TIMES, Feb. 21, 1948, at 1.

program, while the President's overall approval rating dropped precipitously<sup>288</sup>—the President's political position became far more dire.<sup>289</sup>

Truman continued to defend his civil rights policy through the 1948 campaign season, despite the risks.<sup>290</sup> But he did temper his advocacy in the weeks leading up to the party convention. He refused to take action to implement those parts of his civil rights program that did not require new legislation, and this delay troubled civil rights advocates.<sup>291</sup> He fought the Americans for Democratic Action (ADA) wing of the party over the civil rights plank, which he had attempted to moderate to stave off a southern revolt and help secure his party's nomination.<sup>292</sup> His efforts failed both with the ADA and with southern Democrats. The ADA wing forced Truman to accept the inclusion of his own civil rights program in the party plank, and Senator Richard B. Russell of Georgia received strong support from the southern delegates at the convention.<sup>293</sup> After the convention, the southern

288. See generally George Gallup, *Poll Shows South's Revolt Against Truman Growing*, L.A. TIMES, March 7, 1948 at 1 (reporting Gallup poll results showing drop in support between January and February, after Truman's Special Message to Congress on Civil Rights); George Gallup, *Rights Program Trims Truman's Dixie Strength*, L.A. TIMES, Apr. 19, 1948, at 14 (same); George Gallup, *Truman Rights Stand Affects South's Rank-and-File Favor*, WASH. POST, Apr. 10, 1948, at 9 (reporting Gallup poll of southerners showing Truman's approval rating dropping from 59% to 35% from 1947 to 1948).

289. *Southerners Plan Senate Filibuster of Rights Program*, N.Y. TIMES, Mar. 7, 1948, at 1; see also MCCOY & REUTTEN, *supra* note 58, at 102–03 (describing the complexity of the southern reaction; a few southerners advocated southern secession from the Democratic Party while most reacted more moderately); Bernstein, *supra* note 147, at 284–85 (discussing southern reaction to Truman's plan). After Truman delivered his special message on civil rights, the White House received streams of letters from southerners filled with emotional tirades about the southern way of life and the dangers of Truman's proposed civil rights legislation. A decent number of supportive letters also trickled in. One Georgia couple wrote, "Although our 'Bilbioists' have made a great stir in the press so that it would seem we are *all* unprogressive . . . nevertheless there are numerous [liberals] among us, and to your program we lend our most sincere support." Letter from Mary L. and William H. Pinson, citizens from Atlanta, Ga., to President Harry S. Truman (Feb. 4, 1948), *quoted in* Billington, *supra* note 270, at 156.

290. Edward T. Folliard, *Truman Defies Southern Revolt as He Reaffirms Civil Rights Stand*, WASH. POST, Mar. 9, 1948, at 1; Anthony Leviero, *Truman Appeals for End of Split in Southern Party*, N.Y. TIMES, Oct. 20, 1948, at 1.

291. See LEUCHTENBURG, *supra* note 151, at 190 (observing that "[i]n seventy-three speeches in June, he mentioned civil rights only once"); Henry Epstein, Letter to the Editor, *To Secure These Rights*, N.Y. TIMES, May 9, 1948, at E8 (criticizing the Truman administration—in particular the head of the Justice Department's Criminal Division, Assistant Attorney General Quinn—for failing to request appropriations from Congress to implement plans to strengthen the CRS).

292. See HAMBY, *supra* note 1, at 446–68; LEUCHTENBURG, *supra* note 151, at 194; MCCOY & REUTTEN, *supra* note 58, at 124–26; Carolyn Dixon & Carl Lawrence, *Civil Rights Program Wins*, N.Y. AMSTERDAM NEWS, July 17, 1948, at 1; Louis Lautier, *Rights Issue Splits Democrats*, NORFOLK J. & GUIDE, July 17, 1948, at 1.

293. LEUCHTENBURG, *supra* note 151, at 193–94 (describing Truman's angry diary entry complaining about the "crackpot amendment" strengthening the civil rights plank and resentfully concluding that "[t]he crackpots hope the South will bolt").



insurgents established the States' Rights' Democratic Party—commonly referred to as the Dixiecrats—with Governor Strom Thurmond of South Carolina as the party's nominee for president.

These developments seemed only to increase Truman's resolve.<sup>294</sup> On July 26, the first day of the special session of Congress, Truman issued two executive orders, one promoting equal opportunity in the federal civil service<sup>295</sup> and the other offering the historic order to desegregate the military.<sup>296</sup> In the final month of the campaign—on October 29, the first anniversary of the PCCR report's publication—Truman delivered a speech in Harlem to an audience of nearly 65,000 people, calling on the public to finish the work begun by the PCCR and to “answer the challenge of totalitarianism” by supporting “the democratic way of life.”<sup>297</sup> To reach these goals, Truman argued, “[o]ur determination to attain the goal of equal rights and equal opportunity must be resolute and unwavering.”<sup>298</sup>

Despite all the predictions of his failure, Truman won the 1948 election, even with defections in the South.<sup>299</sup> Indeed, some observers noted that black voters provided the slim margins for victory in the crucial states of California, Illinois, and Ohio.<sup>300</sup> Historian Harvard Sitkoff has argued that “the campaign of 1948 is a milestone in the coming of age of the civil rights issue. For the first time since the Reconstruction, civil rights occupied a central place on the political stage.”<sup>301</sup> The Democratic National Committee Chairman, Senator Howard McGrath, described

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294. *Id.* at 204 (observing that, despite his wavering on the civil rights plank, Truman “had a firm commitment to upholding the constitutional rights of blacks, and no amount of verbal abuse could shake it”).

295. Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 30, 1948).

296. Exec. Order No. 9081, 13 Fed. Reg. 4313 (July 30, 1948); see Louis Lautier, *President Truman Says Order Intended To Wipe Out Army Jim Crow*, ATLANTA DAILY WORLD, Aug. 1, 1948, at 1; Anthony Leviero, *Presses for Rights, President Acts Despite Split in His Party over Chief Issue*, N.Y. TIMES, July 27, 1948, at 1 (observing that “the two orders were expected to have a thunderbolt effect on the already highly charged political situation in the Deep South”); *Two Executive Orders Issued*, AFRO-AM. (Balt.), July 31, 1948, at 1. On the role of A. Philip Randolph and the Committee Against Jim Crow in Military Service, the African American press, and other civil rights groups in pushing Truman to act, see BERMAN, *supra* note 58, 97–100; DUDZIAK, *supra* note 58, at 84–86; KLINKNER & SMITH, *supra* note 49, at 217–21; MCCOY & RUETTEN, *supra* note 58, at 106–12, 129–31; PFEFFER, *supra* note 43, at 133–49.

297. Address in Harlem, New York, upon Receiving the Franklin Roosevelt Award, 1948 PUB. PAPERS 923, 924 (Oct. 29, 1948).

298. *Id.*; see also Sitkoff, *supra* note 48, at 613 (“The flood of publicity on this speech drowned out all the earlier presidential silence on civil rights [during the previous months of the campaign.]”); *65,000 Harlemites Cheer Truman at Award Rally*, AFRO-AM. (Balt.), Nov. 6, 1948, at A2; *Truman Vows to Stand by Civil Rights Guns*, ATLANTA DAILY WORLD, Oct. 30, 1948, at 1.

299. Thurmond won electoral votes from only four of the eleven states of the former Confederacy: Alabama, Louisiana, Mississippi, and South Carolina. FREDERICKSON, *supra* note 98, at 3; LEUCHTENBURG, *supra* note 151, at 210 (observing that “Truman astonished prognosticators by sweeping all the rest of the South”).

300. If Truman had lost those three states, Dewey would have won the election. See MCCOY & RUETTEN, *supra* note 58, at 143–44; Sitkoff, *supra* note 48, at 613.

301. Sitkoff, *supra* note 48, at 614.

the election victory as a mandate for civil rights reform,<sup>302</sup> and Walter White confidently proclaimed Truman's "determination" to make good on his campaign promises and promote civil rights reform.<sup>303</sup> The President's mood was indeed optimistic. After the election, Truman wrote to Francis Matthews, a former member of the PCCR: "We shall win [the] civil rights battle just as we won the election, I am sure."<sup>304</sup>

#### *D. Stalemate in Congress*

As the postelection euphoria dissipated, it became clear that prospects for civil rights legislation in Congress remained dim, given the existing procedures in the House and Senate. Although the 1948 election brought Democratic majorities to the eighty-first Congress, procedural barriers would in all likelihood allow a Dixiecrat-Republican alliance to obstruct Truman's agenda. On January 5, 1949, in his State of the Union Message to Congress, Truman again called for action on his civil rights program, and there was some evidence that his supporters in Congress recognized the urgent need for procedural reforms.<sup>305</sup> Earlier that week, the House had changed the rules for placing bills on the calendar in order to undermine the power of the Dixiecrat-dominated Rules Committee.<sup>306</sup> With these more favorable House rules in place, all eyes were on the Senate, and cloture reform was next on the agenda.

Since 1917, Rule XXII in the Senate provided that cloture for a "pending measure" could be achieved with a two-thirds vote of those "present and voting."<sup>307</sup> In 1948, Republican Senator Arthur Vandenberg interpreted the rule so that cloture did not apply to motions, only the final bill—a controversial interpretation allowing southerners to filibuster civil rights bills at an earlier stage.<sup>308</sup> In the new eighty-first Congress, Democratic Majority Leader Scott Lucas began considering various options for reform. By February, NAACP leaders grew alarmed by the Democrats' failure to organize in favor of any specific cloture reform, and Walter White called

302. *Election Victory Mandate for 'Rights' Legislation*, AFRO-AM. (Balt.), Nov. 27, 1948, at 3. When asked how he planned to persuade southern Democratic senators to support reform, McGrath responded, "[w]e'll just show them the election returns." *Id.*

303. *President Intends to Push Rights—White*, ATLANTA DAILY WORLD, Dec. 1, 1948, at 1; see also LEUCHTENBURG, *supra* note 151, at 213 ("The president showed his disdain for his southern foes in January 1949 at the inauguration ceremonies, the first desegregated event in the nation's history.").

304. MCCOY & RUETTEN, *supra* note 58, at 148.

305. Annual Message to Congress on the State of the Union, 1949 PUB. PAPERS 1, 1–7 (Jan. 5, 1949); Louis Lautier, *Truman Repeats Demand for 'Rights' Laws*, ATLANTA DAILY WORLD, Jan. 6, 1949, at 1.

306. The prior rule "required a petition signed by 218 members of the House to force a bill out of the Rules Committee; now, any committee chairman could request a vote of the House to place any bill on the calendar that had been in the committee over twenty-four days." MCCOY & RUETTEN, *supra* note 58, at 154 (calling this reform "a decisive victory for the administration" that "promised to facilitate consideration of various progressive measures, including civil-rights bills").

307. MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 52 (2d. ed. 2008).

308. *Id.* at 53.

on local NAACP branches to send telegrams to their senators urging a reform that would allow cloture with a majority vote.<sup>309</sup> Truman declined to intervene at this point; his advisors stressed the need to respect congressional prerogatives.<sup>310</sup> While Senator Lucas continued to ponder an appropriate cloture reform measure, eventually debate centered on a Republican proposal, the Hayden-Wherry Resolution, allowing for cloture to be applied at any stage when approved by two-thirds of those present.<sup>311</sup> This reform proposal was met with a southern filibuster lasting nearly two weeks.<sup>312</sup> On March 3, while the filibuster was underway, Truman finally offered his own views in a press conference, recommending cloture reform that would allow a *majority* vote of those present to suffice for cloture.<sup>313</sup> The President's statement—endorsing a far more lenient rule for cloture—set off even more outcry in the Senate. Senator Lucas meanwhile had been collecting signatures to petition the Senate's new presiding officer, Vice President Alben Barkley, to issue his own ruling on cloture. On March 10, Barkley endorsed a rule applying cloture to motions as well as final measures—in effect circumventing the filibuster against the Hayden-Wherry Resolution while also reversing Senator Vandenberg's prior ruling. Dixiecrat leader, Senator Richard B. Russell of Georgia immediately appealed the ruling, and the next day the Senate overruled Barkley's decision.<sup>314</sup> This attempt to reform the cloture rule failed by a vote of forty-six to forty-one, with twenty-three Republicans joining twenty-three southern and western Democrats<sup>315</sup> to retain the Vandenberg rule permitting filibusters on motions as well as final measures.<sup>316</sup>

After the Barkley ruling was defeated, Senators Hayden and Wherry sponsored a substitute amendment for their cloture proposal. The new proposal reversed course.<sup>317</sup> It *strengthened* the power of the filibuster by requiring a two-thirds

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309. MCCOY & RUETTEN, *supra* note 58, at 172.

310. *Id.* (citing memo by presidential aide Philleo Nash).

311. *Id.* at 171–72.

312. *Id.* at 173.

313. *Id.* at 174; Louis Lautier, *Pres. Truman Stands Pat on Cloture Rule Change*, ATLANTA DAILY WORLD, Mar. 6, 1949, at 1.

314. MCCOY & RUETTEN, *supra* note 58, at 175 (describing the ruling as a “crushing blow for the administration and for civil-rights advocates everywhere”); *see also* HAMBY, *supra* note 1, at 495 (calling the cloture reform vote “a major embarrassment for the president”).

315. The *Pittsburgh Courier* singled out four “northern” Democrats—Senator Carl Hayden of Arizona, Senator Ernest McFarland of Arizona, Senator Guy Gillette of Iowa, and Senator Pat McCarran of Nebraska—noting that if the administration had been able to keep just three of these votes “in line,” the final vote would have been forty-four to forty-three in favor of cloture reform. *Civil Rights Doomed; Big Doublecross; Here's How Senate Upheld Filibuster, Killed Civil Rights*, PITT. COURIER, Mar. 19, 1949, at 1.

316. *Republicans Join Dixiecrats to Prevent End of Filibuster*, AFRO-AM. (Balt.), Mar. 19, 1949, at 1; *see also* MCCOY & RUETTEN, *supra* note 58, at 176 (assigning as much blame to the Republicans for the defeat of the Barkley ruling and concluding that “the debacle highlighted the reluctance of most Republicans to support civil-rights legislation . . . and illustrated the power of a Republican–southern–Democratic coalition”).

317. The sponsors considered it a “compromise” measure due to their desire to accommodate southern senators' preferences and avoid another filibuster on the measure.

majority of the entire membership—not just those present—to achieve cloture. Even worse, the new amendment prohibited applying cloture in future attempts to amend Rule XXII. On March 17, the measure passed easily by a vote of sixty-three to twenty-three—demonstrating that, at this point, Majority Leader Lucas and the Truman administration had very little influence over northern senators in the Democratic caucus.<sup>318</sup>

Despite the cloture reform fiasco, legislation to implement Truman's civil rights program was finally introduced in the Senate on April 28.<sup>319</sup> Senator McGrath introduced four bills. The first bill was another version of a federal antilynching law.<sup>320</sup> The second banned poll taxes in federal elections. The third bill would establish a fair employment practice commission. All three of these bills had been previously introduced in earlier sessions, with each suffering repeated deaths by filibuster.<sup>321</sup> The fourth bill, "the Civil Rights Act of 1949," was the only one to offer entirely new proposals.<sup>322</sup> If passed, this omnibus civil rights proposal would establish a permanent five-member President's Commission on Civil Rights, create a fourteen-member joint Congressional Committee on Civil Rights, and transform the CRS into an independent Civil Rights Division in the Department of Justice.<sup>323</sup> The new Civil Rights Division, with the assistance of greater numbers of specialized FBI investigators, would remain responsible for prosecuting the criminal civil rights statutes, which would be updated and improved under the proposed statute.<sup>324</sup>

In May, when it appeared that congressional leaders were failing to make the civil rights program a top priority, the civil rights community responded with fury.<sup>325</sup> After the NAACP warned of reprisals in the 1950 election, Senator Lucas issued a statement that civil rights remained a priority.<sup>326</sup> But, with the cloture rule in place, the votes simply were not there. Truman threatened to ignore obstructionist Democratic senators when using his patronage and appointment powers (including over lower federal court appointments), but these turned out not to be very effective bargaining tools.<sup>327</sup> The fate of the omnibus civil rights bill was further jeopardized in September by Truman's selection of Senator McGrath to serve as Attorney General, which left Senator James Eastland of Mississippi as

318. MCCOY & RUETTEN, *supra* note 58, at 177.

319. *Id.* at 178.

320. The antilynching law would provide criminal sentences of up to twenty years, or a \$10,000 fine for everyone convicted of lynching or of participating in a lynch mob. Officials who failed to prevent lynchings would be subject to five years' incarceration, or a \$5000 fine. See Clayton Knowles, *Civil Rights Plan Given to Congress*, N.Y. TIMES, Apr. 29, 1949, at 12.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. On May 24, after consulting with Truman, Democratic congressional leaders announced a plan to adjourn by July 31, as long as action had been taken on their top three priorities—consent to the North Atlantic Pact, extension of the Reciprocal Trade Agreement program, and the repeal of Taft-Hartley. MCCOY & RUETTEN, *supra* note 58, at 181.

326. *Id.*

327. *Id.* at 182–83.

chair of the subcommittee in charge of the Senate bill.<sup>328</sup> By the fall of 1949, Truman and leaders in Congress acknowledged that no civil rights legislation was going to pass in the current session of Congress.<sup>329</sup>

#### *E. Truman's Judicial Policy*

Despite this legislative failure, there were other opportunities in 1949 for Truman to advance his civil rights program. In its budget proposal for 1950, the Truman administration requested a funding increase for CRS to increase its staff from seven to fifteen, although that request was ultimately refused by Congress.<sup>330</sup> Judicial nominations provided another opportunity. When Justice Frank Murphy died in July 1949, Truman nominated Tom Clark to serve as the new Associate Justice.<sup>331</sup> Although some liberals objected to Clark's record with the loyalty-security program (Clark's support for the program was one important reason for his selection), the NAACP supported his nomination.<sup>332</sup> When Justice Wiley Rutledge died the following month, Truman chose Sherman Minton, an experienced federal judge and a known liberal, for the nomination.<sup>333</sup> On October 15, William H. Hastie was appointed, first on a temporary basis, to the Court of Appeals for the Third Circuit, the highest judicial seat that had ever been awarded to an African American lawyer.<sup>334</sup> After some squabbling about allegations that he had been associated with communist-front organizations, Hastie was finally confirmed by the Senate in July 1950.<sup>335</sup>

#### *F. The Fate of Civil Rights Reform*

A few months earlier, Robert Carr wrote in *The New York Times* that "the civil rights problem has become," after submission of the PCCR's report, "one of the

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328. *Id.* at 186; see also *The Great Double Cross! Dems Insult Negroes by Naming Mississippi's Eastland Big Boss of Civil Rights Legislation*, PITT. COURIER, Sept. 24, 1949, at 1.

329. Alice A. Dunnigan, *Slow But Sure Death of Civil Rights Predicted*, ATLANTA DAILY WORLD, Oct. 11, 1949, at 3; Louis Lautier, *81st Congress Adjourns Without Passing Single Civil Rights Bill*, AFRO-AM. (Balt.), Oct. 29, 1949, at 3; *The Civil Rights Program*, N.Y. TIMES, Oct. 4, 1949, at 26.

330. BERMAN, *supra* note 58, at 165-66; MCCOY & RUETTEN, *supra* note 58, at 189-90, 199-200.

331. YALOF, *supra* note 63, at 33-35.

332. *Id.*; *Tom Clark Gets NAACP Backing*, AFRO-AM. (Balt.), Aug. 20, 1949, at 9.

333. YALOF, *supra* note 63, at 34-35, 37-38.

334. GARDNER, *supra* note 58, at 152; MCCOY & RUETTEN, *supra* note 58, at 207; *Name Hastie U.S. Judge*, AFRO-AM. (Balt.), Oct. 22, 1949, at 1.

335. *Neglected Nomination*, WASH. POST, July 8, 1950, at 4 (referring to "covert opposition to Judge Hastie's confirmation which finds refuge in vague allegations that he has belonged to 'subversive' organizations"); *Negro Judge Confirmed*, N.Y. TIMES, July 20, 1950, at 32; *Senate Confirms Hastie to Seat on Appeals Court*, WASH. POST, July 20, 1950, at 6.

most bitterly fought issues" in the country's history.<sup>336</sup> Private groups like the National Citizens Commission on Civil Rights were left to lobby at the state and local level to implement some of the reforms recommended by the PCCR.<sup>337</sup> In response to the legislative debacle of 1949, NAACP leaders concluded that a much larger interracial lobbying presence was needed in Congress.<sup>338</sup> Meeting for a three-day conference on January 15, 1950, the National Emergency Civil Rights Mobilization included more than 4000 representatives from over 100 religious, political, and civil rights organizations.<sup>339</sup> Although the gathering did not produce immediate results, the new group sent a signal to Congress that civil rights groups were still mobilizing and preparing to establish a long-term lobbying presence in Washington.<sup>340</sup>

Private mobilization also continued in the courts in 1949, as the NAACP escalated its campaign to end segregation in public facilities. The Truman Justice Department continued its supportive and innovative amicus work, filing an unprecedented brief in *Henderson v. United States*,<sup>341</sup> a case involving segregated railroad dining facilities. Solicitor General Philip Perlman, with the assistance of Attorney General McGrath, offered for the first time the federal government's position that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*<sup>342</sup> was invalid.<sup>343</sup> In the two leading school desegregation cases, *Sweatt v. Painter*<sup>344</sup> and *McLaurin v. Oklahoma*,<sup>345</sup> the Justice Department filed more amicus briefs calling for the overturning of *Plessy*. The Supreme Court handed down unanimous decisions in favor of the government and the NAACP in all three cases on June 5, 1950. Although the Court declined to rule directly on the continued validity of *Plessy*, these cases marked an important advance in the support of the federal government for the civil rights litigation campaign led by the NAACP.<sup>346</sup>

336. Carr, *supra* note 242.

337. *New Group Formed to Aid Civil Rights*, N.Y. TIMES, July 29, 1948, at 23.

338. In reviewing the early collapse of the civil rights program in 1949, Walter White accepted some of the blame, admitting that, after the impressive electoral victory, the NAACP took a successful change of the cloture rule for granted and failed to mobilize and pressure individual senators to support the rule change. Walter White, *Champions or Quitters: Civil Rights Will Tell*, CHI. DEFENDER, Mar. 26, 1949, at 7.

339. MCCOY & RUETTEN, *supra* note 58, at 190–201; SULLIVAN, *supra* note 23, at 374–75.

340. In 1951, the name of the group was changed to the Leadership Conference on Civil Rights. Roy Wilkins of the NAACP served as its head until 1977. JONAS, *supra* note 23, at 156–57; SULLIVAN, *supra* note 23, at 375. These efforts—combined with the appointment in 1950 of the indefatigable Clarence Mitchell to head the NAACP's Washington Bureau—would ensure that the NAACP would remain a leading voice during the long fight for civil rights legislation. JONAS, *supra* note 23, at 154.

341. 339 U.S. 816 (1950).

342. 163 U.S. 537 (1896).

343. Brief for the United States at 10–11, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25).

344. 339 U.S. 629 (1950).

345. 339 U.S. 637 (1950).

346. ELLIFF, *supra* note 26, at 327–28.

The Court's inhospitable view of federal criminal enforcement of civil rights never waned, however. Indeed, it appeared as though government lawyers would be permanently relegated to the role of amicus in civil rights cases, when, in 1951, the Court offered restrictive constructions of the two leading federal criminal civil rights statutes. The Court considered the scope of both §§ 51 and 52 in a case involving a lumber company's investigation of employee theft.<sup>347</sup> The company had hired a group of detectives who, along with a local police officer, took a group of employees to question them about the thefts, and, after beating them, obtained confessions. This was the first Supreme Court case affording Truman appointees—Justices Burton, Clark, Minton, and Chief Justice Vinson—an opportunity to evaluate the civil rights statutes. The Court upheld the conviction under § 52, and all the Truman Justices, except for Minton, joined the majority opinion written by Justice Douglas which confirmed the strict willfulness requirement introduced in *Screws*.<sup>348</sup> The Court's opinion was divided as to the proper interpretation of § 51, preventing its use as an effective tool to secure Fourteenth Amendment guarantees.<sup>349</sup>

There was by then little hope that the new eighty-second Congress would step in to revise the criminal civil rights statutes and implement Truman's civil rights program. The 1950 midterm elections resulted in an increase in GOP membership.<sup>350</sup> Although the Democrats still narrowly retained control of both houses, the two-seat margin in the Senate was the narrowest since 1933.<sup>351</sup> The Senate Democratic leadership lost their reelection bids. To serve in place of Majority Leader Lucas, Senator Ernest McFarland of Arkansas was chosen, and to replace the Majority Whip Francis Myers, Senator Lyndon B. Johnson of Texas, then considered no friend of civil rights, was named to the position.<sup>352</sup> The NAACP denounced both, and African American journalists considered these results to doom the prospects for any civil rights legislation in the final years of Truman's presidency.<sup>353</sup> In his State of the Union message on January 8, 1951,<sup>354</sup> Truman offered only the briefest reference to civil rights.<sup>355</sup>

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347. *United States v. Williams (Williams I)*, 341 U.S. 70 (1951); *Williams v. United States (Williams II)*, 341 U.S. 97 (1951). Because the Court of Appeals for the Fifth Circuit, in *Williams v. United States*, 179 F.2d 644 (5th Cir. 1950), *aff'd*, 341 U.S. 70 (1951), had sustained Williams's conviction under § 52 and reversed the conspiracy conviction for Williams and other conspirators under § 51, there are two separate reported Supreme Court cases. *Williams I*, 341 U.S. 70 (addressing § 51); *Williams II*, 341 U.S. 97 (addressing § 52).

348. *Williams II*, 341 U.S. at 101.

349. *Williams I*, 341 U.S. at 82; *see also* ELLIFF, *supra* note 26, at 294. Elliff speculates that the Justices were trying to contain opposition to civil rights to preserve the ability to dismantle the separate-but-equal doctrine: "The Justices who disliked the Civil Rights Section's interpretation of the Reconstruction laws may have been trying to minimize Southern hostility to those civil rights aims both the Court and the Administration wanted to advance." *Id.*

350. MCCOY & RUETTEN, *supra* note 58, at 283. The Republicans gained twenty-seven seats in the House, and five in the Senate. *Id.*

351. *Id.* at 283–84.

352. *Id.* at 285.

353. *Id.* Nor did prospects appear brighter in the House, where one of the first votes repealed the "twenty-one day rule" which had prevented the House Rules Committee from

There were other developments that signaled a rise in racial unrest. From 1946 to 1951, the Anti-Defamation League reported a drop in racial and religious bias, but there was a resurgence of racial violence in 1951.<sup>356</sup> Growing tensions—due in part to the judicial invalidation of restrictive covenants and the Truman administration's efforts to push for integrated public and private housing—culminated in a violent backlash.<sup>357</sup> One incident in Cicero, Illinois, received national attention. In July 1951, when an African American couple moved into an apartment in the all white community, a crowd of hostile onlookers grew into a unruly mob.<sup>358</sup> A few local police officers arrived to monitor the situation, but they were overwhelmed: members of the crowd used bricks as weapons, broke open the apartment's windows, ransacked the home, and destroyed the furniture and personal belongings.<sup>359</sup> Governor Adlai Stevenson eventually called up a National Guard unit to protect the family, set up a barricade around the building, and deter the mob from continued loitering.<sup>360</sup> Members of the mob, estimated to have grown to nearly 5000, charged the troops' line and attempted to set the entire building on fire.<sup>361</sup>

Historians Donald R. McCoy and Richard Ruetten describe the Cicero riot as a "harbinger of other extralegal action, particularly the use of bombs to intimidate various minorities."<sup>362</sup> Bombings occurred in Dallas, Miami, California, and on Christmas Day, 1951, a bombing in Mims, Florida killed a respected NAACP statewide officer and former school principal, Harry T. Moore, and his wife.<sup>363</sup> With Walter White warning, "[t]he bomb has replaced the lynchers' rope,"<sup>364</sup> the Moore murders served to mobilize the civil rights community. White and other civil rights leaders met with Attorney General McGrath to urge a federal investigation.<sup>365</sup> For his part, Truman delivered a series of speeches reminding the country of the constitutional principle of equality for all.<sup>366</sup>

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holding up bills. *A Bad Beginning*, N.Y. TIMES, Jan. 5, 1951, at 19.

354. Annual Message to the Congress on the State of the Union, 1951 PUB. PAPERS 6 (Jan. 8, 1951).

355. MCCOY & RUETTEN, *supra* note 58, at 285–86.

356. *Id.* at 292–93 (describing the growing popularity of the Confederate flag as a "symbol of protest").

357. SULLIVAN, *supra* note 23, at 389–90.

358. *Sheriff Defends Negro Family Against Crowd*, CHI. DAILY TRIB., July 11, 1951, at 14.

359. *One of 50 Cops at Housing Row in Cicero Hurt*, CHI. DAILY TRIB., July 12, 1951, at B11.

360. *Troops Fight Cicero Mob*, CHI. DAILY TRIB., July 13, 1951, at 1.

361. *Id.*; see also *Clashes in Illinois Bring Out Troops*, N.Y. TIMES, July 13, 1951, at 38. Justice Department lawyers successfully convicted three of the local policemen for failing to protect the family when white protesters first threatened to riot. MCCOY & RUETTEN, *supra* note 58, at 294.

362. *Id.*

363. *Id.*; SULLIVAN, *supra* note 23, at 412–13.

364. MCCOY & RUETTEN, *supra* note 58, at 294. Roy Wilkins called 1951 "The Year of the Hate Bomb," in a speech at the NAACP's annual convention. See *Year of Hate-Bomb Reviewed at NAACP Annual Conclave*, AFRO-AM. (Balt.), June 28, 1952, at 5.

365. Although the federal government did investigate the Moore killings as well as other racial crimes in Florida, the murderers were never arrested or prosecuted. When the case was



In his State of the Union message on January 9, 1952, Truman simply called on Congress to vote on his civil rights program, but he offered few new arguments to support its urgency.<sup>367</sup> The *Chicago Defender* called the President's address "a disappointing shock to those who had expected an outspoken declaration in face of the reign of terror" in Florida and across the country where bombings had destroyed families, businesses, and religious buildings.<sup>368</sup> In February, at the annual meeting of the Leadership Conference on Civil Rights, Walter White praised Truman for his prior leadership, but he also expressed concern about recent failures.<sup>369</sup> Their attention remained focused on the need to reform the Senate's cloture rule, but that effort failed once again and no new civil rights legislation would be forthcoming in the eighty-second Congress.<sup>370</sup>

Toward the end of his term, Truman delivered a commencement address at Howard University, calling once again for the legislative enactment of his civil rights proposals. In his speech, Truman defended his record on civil rights and urged Democratic Party leaders not to abandon the civil rights platform to placate southern Democrats before the 1952 election: "Our Federal Government must live up to the ideals professed in our Declaration of Independence and the duties imposed upon it by our Constitution. The full force and power of the Federal Government must stand behind the protection of rights guaranteed in the Federal Constitution."<sup>371</sup> In a message from the President read by Walter White during the NAACP's annual meeting, Truman insisted that one day his civil rights program

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reopened in 2004, some of them were posthumously identified, and the case was finally closed in 2006. For an overview of the case, see the materials on the webpage of the Florida Office of the Attorney General, Bill McCollum: Harry Moore Case, [http://myfloridalegal.com/\\_85256CC5006DFCC3.nsf/0/D8342C723F092D8085256F930076651A?Open&Highlight=0,harry,moore](http://myfloridalegal.com/_85256CC5006DFCC3.nsf/0/D8342C723F092D8085256F930076651A?Open&Highlight=0,harry,moore). See also BEN GREEN, *BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA'S FIRST CIVIL RIGHTS MARTYR* (1999).

366. MCCOY & RUETTEN, *supra* note 58, at 295.

367. Annual Message to the Congress on the State of the Union, 1952-1953 PUB. PAPERS 9-17 (Jan. 9, 1952).

368. *Truman Talk Disappointing on Rights*, CHI. DEFENDER, Jan. 19, 1952, at 1.

369. MCCOY & RUETTEN, *supra* note 58, at 299.

370. *Id.* at 299-300.

371. Commencement Address at Howard University, 1952-1953 PUB. PAPERS 420, 424 (June 13, 1952); see also Editorial, *A New Emancipation, Mr. Truman at His Best*, AFRO-AM. (Balt.), June 21, 1952, at 1. Truman spent most of the speech describing achievements in the courts and in state legislatures, as well as executive action on government employment and the desegregation of the military, but he also gave credit to the PCCR and its proposed legislative agenda:

The President's Committee on Civil Rights led the way. The debate over the civil rights program has stimulated much of the progress of the last 5 years. We still need the legislation I recommended to the Congress in 1948. Only two of the recommendations I made in my civil rights program have been adopted so far. I shall continue, in office and out, to urge the Congress to adopt the remainder.

Commencement Address, *supra* at 423. The two recommendations in Truman's original message to Congress were to permit greater self-rule for Guam and Puerto Rico and to pass legislation recognizing the claims of Japanese Americans evacuated and interned during World War II. See also Anthony Leviero, *Truman Demands Civil Rights Based on Federal Power*, N.Y. TIMES, June 14, 1952, at 1.

would be adopted.<sup>372</sup> On October 11, Truman delivered another speech in Harlem to mark the occasion of his receiving a second FDR Memorial Brotherhood Medal.<sup>373</sup> This speech tracked the language of the Howard University address, but with a more sharply partisan tone. He recalled his 1948 campaign speech in Harlem, describing it as “the high point” of that campaign and “one of the most moving experiences of my life.”<sup>374</sup> He admitted that his legislative agenda for civil rights reform had failed, but he was committed to fight on. He urged the crowd to register to vote and to oppose the Republican Party, which was “not interested in equal rights.”<sup>375</sup> The crowd left Truman’s speech and went in droves to registration centers, which remained open until past 2:30 a.m. in order to process all those in line to register.<sup>376</sup> In an important speech in Detroit on October 30, the President offered one final assessment of his civil rights agenda.<sup>377</sup> Claiming that his administration had “awakened the conscience of the Nation,” Truman also acknowledged, “[w]e still have a very long way to go, but this progress is for me one of the great satisfactions of my whole lifetime.”<sup>378</sup>

#### CONCLUSION

Truman’s efforts to enact a new legislative program to revitalize the federal civil rights enforcement apparatus clearly failed. But Presidents have numerous independent bases for advancing their policy priorities, and Truman’s record on civil rights enforcement offers a useful lens to assess recent scholarship on presidential leadership.<sup>379</sup> In evaluating the work of the President’s Committee on Civil Rights, this Article has highlighted the advocacy work of civil rights organizations.<sup>380</sup> Truman’s attention became focused on the civil rights problem because of the mobilization of civil rights groups concerned about the rise of violence after the war ended and the rising political power of African Americans voting in the north. The PCCR was not an isolated group of policy experts offering advice to the President. It was an open presidential commission offering an unprecedented opportunity for the civil rights community to present their

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372. William M. Blair, *Truman Predicts Civil Rights Sway*, N.Y. TIMES, June 25, 1952, at 21.

373. Address in Harlem, New York, 1952–1953 PUB. PAPERS 797 (Oct. 11, 1952).

374. *Id.* at 797.

375. *Id.* at 800.

376. Arnold de Mille, ‘Rights in Danger’—Truman, CHI. DEFENDER, Oct. 18, 1952, at 1.

377. Address at the State Fair Coliseum in Detroit, 1952–1953 PUB. PAPERS 1008 (Oct. 30, 1952); see also MCCOY & RUETTEN, *supra* note 58, at 330 (“[Truman’s] campaign for justice and equality in the fall of 1952 was impressive by the standards of any time or place.”).

378. Address at the State Fair Coliseum in Detroit, 1952–1953, *supra* note 377, at 1008.

379. See *infra* note 12–22, 35.

380. Even Truman’s most celebrated act of independent presidential leadership—his executive order desegregating the military, Exec. Order No. 9081, 13 Fed. Reg. 4313 (July 30, 1948)—is best described as the product of the mobilization of and pressure by civil rights leaders, especially A. Philip Randolph, who threatened to organize African Americans to resist the draft, unless Truman changed the policy. See *supra* notes 36, 296.

comprehensive proposals for reform. Their recommendations were taken seriously.<sup>381</sup>

Indeed, one of the most significant achievements of this reform effort—the PCCR’s recommendation that the federal government begin submitting amicus briefs in support of private civil rights cases—was the product of the forceful testimony of groups like the NAACP, which had for years requested this support from the Justice Department to no avail. The PCCR report’s recommendation that the federal government support these civil rights groups’ litigation efforts had immediate effects. Just days after the PCCR issued its report, the Department of Justice agreed to file amicus briefs in upcoming civil rights cases. This success demonstrates the interactive process of civil rights mobilization and presidential leadership. With Truman’s full backing of their work, the PCCR was able to provide a key, sufficiently prestigious endorsement of the civil rights groups’ request for amicus briefs. At the same time, this reform likely would not have occurred without the initial mobilization and advocacy by civil rights organizations like the NAACP.<sup>382</sup>

This interactive process, especially the NAACP’s constant lobbying of the Truman administration, was an essential prerequisite for these advances. The historian Thomas Sugrue aptly describes the dynamic: “Civil rights activists engaged in an elaborate dance with Truman. He hesitated, they pushed, he gave, they praised, he paused, they pushed for more.”<sup>383</sup> The NAACP understood that presidential leadership and support was not a gift to receive, but rather a goal for which to fight. The civil rights community never relented; the lobbying and publicity strategies in this era conformed to A. Philip Randolph’s advice: “Freedom is never given; it is won. . . . True liberation can be acquired and maintained only when the Negro people possess power; and power is the product and flower of the organization . . . .”<sup>384</sup> Heeding Du Bois’s call for “[p]itiless, blatant publicity,”<sup>385</sup> the NAACP sought to “pound and pound and pound the conscience of America.”<sup>386</sup> Attracting the President’s support was just one part of this broader goal, one that

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381. For a far more negative view of the Truman administration’s efforts to implement the report’s recommendations, see Carol Anderson, *Clutching at Civil Rights Straws: A Reappraisal of the Truman Years and the Struggle for African American Citizenship*, in HARRY’S FAREWELL: INTERPRETING AND TEACHING THE TRUMAN PRESIDENCY 75, 97–99 (Richard S. Kirkendall ed., 2004) (emphasizing Truman’s failure to use independent executive action to transform the Department of Justice).

382. The fact that this massive presidential effort was, in the end, limited to a shift in the Justice Department’s amicus briefing policy is consistent with Whittington’s arguments regarding Presidents’ incentives to support judicial interpretive authority when the avenues for legislative reform are closed. WHITTINGTON, *supra* note 11, at 124–34, 144 (discussing the use affiliated leaders make of the courts to overcome gridlock and to engage in “position taking”). In contrast to Whittington, however, I emphasize here the importance of civil rights groups in helping executive branch officials understand the benefits of the new amicus policy.

383. SUGRUE, *supra* note 50, at 98.

384. KLINKNER & SMITH, *supra* note 49, at 144.

385. SULLIVAN, *supra* note 23, at 322.

386. *Id.* (quoting Walter White, Address to the 1946 Annual Convention of the NAACP (June 30, 1946)).

demanded the full force of the NAACP's organizational strengths and talents. As A. Philip Randolph had argued, "nothing counts but pressure, more pressure, and still more pressure."<sup>387</sup>

Although Truman's civil rights reform agenda was continually rebuffed by Congress, his strong advocacy of civil rights enforcement—especially through widely publicized speeches during the 1948 campaign and throughout his second term—demonstrates the complex power of the "rhetorical presidency."<sup>388</sup> The significance of Truman's unprecedented public advocacy on behalf of civil rights will be too hastily dismissed if only *institutional* criteria for impact are used.<sup>389</sup> The President's words did not have a magically transformative effect, but that does not mean they had no effect. Truman's rhetoric—always emphasizing the need to make the country live up to the promise of its ideals—legitimized the claims of civil rights leaders and left an echo of validation, elevating the stature and power of the civil rights movement in American life and politics and offering hope for further victories ahead.

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387. SUGRUE, *supra* note 50, at 32.

388. *See supra* note 20.

389. *Cf.* Whittington & Carpenter, *supra* note 19, at 502.

