Notre Dame Conference on Civil Rights: A Contribution to the Development of Public Law

Harris Wofford
NOTRE DAME CONFERENCE ON CIVIL RIGHTS:  
A CONTRIBUTION TO THE DEVELOPMENT OF PUBLIC LAW

Harris Wofford, Jr.*

Introduction

On the eve of the Senate debate on civil rights legislation, an experiment in collaboration between law teachers and law makers in the development of public law was conducted by the Notre Dame Law School. Members of Congress and governors, or their staff representatives, from Indiana, Illinois, Wisconsin, Michigan, Ohio and Kentucky were invited to join in a one-day discussion of the recommendations of the Commission on Civil Rights and of pending civil rights bills with law teachers from the major universities in the six-state area.

The contributions of the February 14 Notre Dame conference are in two categories: (1) the form of the meeting, as a new method in the development of public law; and (2) the substantial criticism by the participants of pending legislation and of other proposed federal action to establish and protect civil rights.

I. THE CONFERENCE AS A NEW METHOD IN THE DEVELOPMENT OF PUBLIC LAW

“Our thought,” said Notre Dame Law Dean Joseph O’Meara, “is that, before Congress takes action on this subject, it would be helpful to have as much discussion of the issues as possible between legislators, members of law school faculties and other persons professionally concerned with the problem.”

Five Congressmen, one Senator, one Governor, and the legislative assistants or staff representatives of four Senators, two other Congressmen, and

---

* Associate Professor of Law, University of Notre Dame; Legal Adviser to Rev. Theodore M. Hesburgh, C.S.C., Member, Commission on Civil Rights.

1 As this article goes to press the Civil Rights Act of 1960 has been finally enacted. 106 CONG. REc. 7267-70, 7891-7901 (daily ed., April 8 and 21, 1960). Essentially it is a right-to-vote bill, embodying the Attorney General’s voting referee plan as outlined and analyzed below. Some of the provisions proposed or discussed at the conference were adopted by the Administration in the final revisions of its bill or by the Congress, as indicated below in notes 38, 79, 84, 96-98. The criticism of this bill by the conference should prove useful in its administration and interpretation. Many of the conference’s suggestions for the protection of the right to vote and all of those for assistance to school desegregation and for the achievement of equal opportunity in housing remain pertinent to future legislative, executive and judicial action. See the talk on the 1960 Civil Rights Act, comparing it with the recommendations at the Notre Dame Conference, by Congressman John Brademas. 106 CONG. REc. A3133 (daily ed., April 8, 1960).

2 Senate Majority Leader Lyndon B. Johnson set February 15, 1960, immediately following the Lincoln’s Birthday recess, for the beginning of the 1960 civil rights debate — an ironically appropriate date in the centennial anniversary year of Lincoln’s election as President.


4 Senator Paul Douglas of Illinois.

5 Governor G. Mennen Williams of Michigan.

6 Mr. Joseph Russo, Legislative Assistant to Senator Hartke of Indiana. Mrs. Nancy Murry, Executive Secretary to Senator Proxmire of Wisconsin. Mr. Douglas Anderson, Assistant to Senator Douglas of Illinois. Mr. John Feild, Legislative Assistant to Senator Hart of Michigan.

another Governor, attended the conference. Other public officials present included two members and the Deputy Director of the Civil Rights Commission, the Assistant Deputy Attorney General, the General Counsel of the House Judiciary Committee, and four members of state legislatures.

Facing these public representatives, across a rectangular conference table, were seventeen professors of law from the law schools of the universities of Indiana, Illinois, Wisconsin, Michigan, Kentucky, Chicago, Loyola, Northwestern, Vanderbilt and Notre Dame. Several representatives of private civil rights organizations and other persons professionally interested in the subject were also present, bringing the participants to just over 50.

The conference was not designed to be a debate about the merits of the Court’s desegregation decisions or of the Constitution’s fourteenth and fifteenth amendments. “We have our differences as to method and timing,” said Dean O’Meara in his opening remarks, “but the central idea, the affirmation of equal opportunity for all, is not only part of the American dream but a built-in and essential feature of the fundamental law of the land. That is a postulate of this conference. We are met to consider how best to bring the promise of the Constitution to fulfillment.”

The idea for the regional meeting at Notre Dame came from a somewhat similar conference held at the University of Buffalo on December 19, 1959, at the suggestion and under the chairmanship of Senator Jacob Javits of New York.

8 Mr. Robert J. Fink, Administrative Assistant to Governor Handley of Indiana.
9 Commission Members George M. Johnson, Professor of Law, Howard University Law School; the Rev. Theodore M. Hesburgh, C.S.C., President of Notre Dame; and Deputy Director Berl I. Bernhard.
10 Mr. John D. Callhoun.
11 Mr. William R. Foley.
14 Mr. Vernon Eagle, Executive Director, The New World Foundation; Mr. Herman Edelsberg, Chairman, National Civil Liberties Clearing House; Mr. Harold G. Fleming, Executive Director, Southern Regional Council, Inc.; Mr. Clifford E. Minton, Executive Director, Urban League of Gary, representing the National Urban League; Dr. John A. Morsell, Assistant to the Executive Secretary, National Association for the Advancement of Colored People; Mr. Robert Nelson, Legislative Assistant, Commission on Civil Rights; Mr. Fred Routh, President, National Association of Intergroup Relations Officials; Mr. John A. Scott, Chairman, Indiana State Advisory Committee, Commission on Civil Rights; Mr. John Silard, attorney, Washington, D.C.; Mr. Hal Thurmond, Chairman, Kentucky State Advisory Committee, Commission on Civil Rights; Mr. Adam Yarmolinsky, attorney, Washington, D.C. Members of the Indiana State Advisory Committee of the Civil Rights Commission, students of the law school, and other guests from the University faculty and South Bend attended as observers, as did representatives of the press.
15 Six subjects were discussed at the one-day Buffalo Conference on Federal Civil Rights Legislation: (1) general procedural and enforcement changes including a provision for equitable suits by the Attorney General, (2) employment, (3) voting, (4) assisting school desegregation, (5) bombing and lynching, (6) housing. In addition to Senator Javits, there
To exemplify the dual political-academic focus of the conference, Congressman John Brademas of South Bend joined Dean O’Meara in leading the discussion. The report of the Commission on Civil Rights was before the participants.\(^\text{16}\) Summaries of pending civil rights legislative proposals and background memorandums had also been circulated in advance.\(^\text{17}\) To begin the discussion of each of the three subjects on the agenda — protecting the right to vote, assisting school desegregation, and achieving equal opportunity in housing — there was a short oral introduction by a member of the Notre Dame law faculty. Except for one luncheon talk by Father Hesburgh on the work of the Civil Rights Commission, the rest of the day was spent in free discussion.

The conference was the latest of a series of meetings on public law subjects sponsored by the Notre Dame Law School. In December 1953, the law school held a symposium on “Legislative Investigations,” concentrating on safeguards for witnesses; in April 1958, a symposium on “The Role of the Supreme Court in the American Constitutional System”; and in May 1959, a symposium on “The Problems and Responsibilities of Desegregation.” In April of this year there will be a symposium on “Labor Union Power and the Public Interest.” The papers prepared for each of the meetings have appeared in the *Notre Dame Lawyer,*\(^\text{18}\) and were widely circulated either as a special issue of the *Lawyer* or as reprints. The new feature of the February 14 conference was the free discussion instead of the delivery of papers by guest lecturers.

In order to make the discussion immediately available to all other legislators and key legislative draftsmen, Congressman Brademas and the other legislators present, with the collaboration of a number of their colleagues, printed the full transcript of the conference in the *Congressional Record.*\(^\text{19}\) The proceedings were reprinted from the *Record* to permit wider circulation and to promote further thinking and discussion in the legal profession and among others concerned about civil rights.\(^\text{20}\)

Congressman Brademas, calling the conference “a pioneering effort in the development of public law,” said in closing the session that he hoped Notre

---

\(^\text{16}\) There were four memorandums commenting on or comparing the Commission’s federal registrar plan and the Attorney General’s court-appointed voting referee plan: (1) by Professor Paul A. Freund of Harvard Law School to Senator John Kennedy; (2) by Professors Charles Black, Jr., Thomas Emerson and Louis Pollak of Yale Law School; (3) by Professor G. W. Foster, Jr., of the University of Wisconsin Law School; and (4) by the author. \(^\text{106 CONG. REC. A}1723\) (daily ed., Feb. 29, 1960).

\(^\text{17}\) This transcript and appendices constitute one of the longest documents — Congressman Brademas believes it may be *the* longest document — ever printed in the *Record.*

\(^\text{18}\) Upon request the Notre Dame Law School will supply copies while they last.
Dame "and other law schools throughout the country will carry on this experiment in collaboration between law makers and law teachers."

While there are other ways in which the experiment can be carried on and is being carried on—for instance, through smaller conferences and meetings between law makers and law teachers in Washington rather than on campuses—and while the procedure at the Notre Dame conference could no doubt be improved, the results as indicated in the following summary of the discussion, suggest that this kind of conference should have a recurring place as one of the formal methods of collaboration between law schools and the Congress which are needed if there is to be greater wisdom in the making of our public law.

II. SUMMARY OF THE DISCUSSION

The discussion ranged from disputes about technical legal points in specific bills to agreement on general principles that apply to the whole problem. About two-thirds of the time—over three hours—was devoted to voting rights legislation, on the essential ingredients of which there was a large measure of agreement. While the focus was upon pending legislation, it was recognized that only a few of the proposals considered or suggestions made by the participants stood much chance of enactment in the 1960 session. The points made, particularly in the discussion of housing and school desegregation, may, however, be important items for the agenda of the next Congress and the next Administration.

A. General Principles Applicable to the Whole Problem

As to the whole problem of ending discrimination in all parts of American public life there was agreement that all the powers of the federal government should be—but have not yet been—used effectively and consistently.

21 For instance, it has been suggested that, instead of following a rule of equality under which participants were recognized in the order in which they raised their hands, the issues might have been sharpened if the participants had been more rigorously encouraged to follow the conversation where it led and if those recognized had been asked to respond to the preceding point or question. This would have been easier in a smaller group.

22 Among the probable byproducts of such a conference is a closer and continuing relationship between some of the law teachers and some of the legislators, and a more direct and continuing involvement of the participating law teachers in the particular legislative problems. One of the faculty participants sent Dean O'Meara a copy of a memorandum on voting rights legislation that he prepared for a Senator subsequent to the conference. Another example is the letter on this subject published in the New York Times on Feb. 25 by Prof. Robert Harris, a participant from the University of Michigan Law School. Both of these contained new proposals that grew out of the Feb. 14 discussion. One of the out-of-state participating teachers writes: "It was the most stimulating and productive day I ever spent. Since that day I have been thinking, writing, and talking nothing but civil rights and have progressed further in my thinking than in the last three years."

23 The "idea of the conference," said Governor Williams, "is of extreme importance." Calling this kind of meeting, he said, is "what the President of the United States should have done immediately after the 1954 court decision was made, because if men of good will could gather together in an atmosphere such as this, where the academic ivy could somehow or other restrain the partisan political impulses of the public officials, perhaps some reasonable action could have been taken which would have speeded progress and prevented many of the unfortunate things happening that have happened."

24 The divergence in the approach to problems by the law teachers and the legislators was evident and interesting. At one point Congressman Brademas said that as a non-lawyer he was reminded of Carl Sandburg's line: "Why does the hearse-horse snicker when they carry a lawyer away?"
The United States Government is propelled by three great engines, the legislative, executive and judicial branches. But in civil rights it has been flying on only one engine — the federal judiciary. The need now is to bring into play the great political and persuasive power of the Congress and the Presidency, both of which have heavy constitutional responsibilities in this matter.25

Participants stressed the lack of leadership by the President,26 the undue burden imposed on the federal courts,27 and the unfortunate effect on the South of what has appeared to many southerners to be judicial legislation in this field and of presidential and congressional abdication.28

25 The 14th and 15th Amendments specifically state that the Congress shall have power to enforce the amendments by appropriate legislation. The President is sworn to "take Care that the Laws be faithfully executed." Art. II. Since the Supreme Court's recent interpretations of the equal protection clause involve far-reaching social change in many areas, and since even the clear-cut guarantees of the fifteenth amendment have not been respected in some of these areas, the Chief Executive's problem of enforcing the laws of the land in this matter is far more complicated and requires far more imaginative and creative action than merely sending in troops on occasion. And the Congress, which in 1957 enacted the first civil rights act in 82 years, has barely begun to exercise its responsibility.

26 It is not quite true that there has been nothing between platitudes and bayonets, in view of the executive orders calling for an end to job discrimination in federal employment and on government contracts, and the President's request that Washington, D.C., become a model for school desegregation. But the President has not gone to people or personally intervened in the matter of the right to vote, of the duty to desegregate schools everywhere, or of the need for an end to discrimination in all publicly-assisted housing programs. See Gov. Williams, A Plea to the President, The Reporter (Feb. 16, 1960, p. 24).

27 The burden is not so much in the number of civil rights cases actually litigated, which has been relatively small, but in the continuing policy-making role left to the judiciary in this controversial field. Professor Cramton (Chicago) argued that the federal courts are not "in a position to run the affairs of a great nation, nor should they be put in that position... They are already engaged in the organization and the administration of the school systems, at least in the South. Now the voting proposals are made. I think it's a passing of the buck of the responsibility which belongs on Congress and the Executive. The courts will lose the respect of private citizens if functions which are essentially nonjudicial are heaped on them repeatedly over a period of years." Professor Nathanson (Northwestern) suggested "that there is grave danger that we are separating the federal judiciary from the rest of the community, that we are asking them to bear — to really carry — too much."

While Mr. Yarmolinsky (Washington) stressed "the flexibility and the adaptability of the judicial process," arguing that "equity can accomplish anything... and has accomplished almost anything that the administrative process can accomplish," he agreed that the burden should not be all put on the court. He wished that the executive branch "wanted to play, was willing to play... a leading role" in securing civil rights.

Similarly, Professor Foster (Wisconsin), who saw the need for the exercise of further equitable powers by the judiciary in both the fields of voting and education, noted a caveat: "We have dumped a social revolution into the hands of a small... and so far as I have observed, unusually able and faithful... group of federal judges in the South. For each of these judges in the community in which he sits there is obviously reached some point beyond which he cannot go in pressing the social revolution without destroying his whole utility to the community and the nation as a judge. If some other way existed for bypassing the judiciary in fulfilling our obligations to the Negro, the temptation to jump for it would be great."28

28 Harold Fleming (Southern Regional Council, Atlanta) described the "vacuum" in the South. "There's really been nothing of comparable power and financial backing and vocalism generally to match the calculated campaigns of misinformation on the subject, and nowhere could it come with greater authority and with greater resources behind it than from the executive branch of the government... This job simply cannot be done alone by voluntary agencies and by the courts." Fleming said that reliance on the judiciary "has reached just about a saturation point. I'm not worrying about the overworked federal judges. I am worried about public images and the effect on public opinion that this exclusive reliance on the judiciary... is producing. Someone spoke of the disrepute into which the executive branch... may have fallen. Believe me, in my part of the country it's nothing compared with the disrepute in which the judiciary has fallen — labeling the courts the superschool boards, who I can see now is going to be supplemented by labeling the courts supersupervisory boards. All of that has got to the point that it is essential that the other branches of the government become involved..."
One sign of this abdication is the inconsistency in the federal government, with the Supreme Court declaring the principle of equal opportunity in one area after another while the executive branch, with congressional authority, continues to distribute funds to schools or to housing developers clearly discriminating against Negroes. The participants agreed generally that all the programs of the federal government should follow the constitutional principles enunciated by the Court, but there was disagreement about the timing and method of ending the contradictions.

The role of law as educator was recognized as part of the answer to the objection that legislation cannot change the minds and hearts of men. "Our government is," as Justice Brandeis noted, "the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example." It seemed essential to the participants that all parts of the government do all in their power to make good the guarantees of the Constitution.

B. Legislation to Protect the Right to Vote

"Against the prejudice of registrars and jurors the U.S. Government ap-

29 In his luncheon talk, Father Hesburgh called for "consistency in all the powers of government in this matter," saying that this problem "is not a responsibility of only one part of government." He noted federal aid to institutions which still refuse to follow a policy of nondiscrimination. "I fail to see how the judiciary can clear up this problem if the other two branches of government go quietly along helping those who openly defy the law of the land." The same is true of housing," he said. "Yet here is a matter where the three powers of the federal government are working in dissonance—the judiciary saying nondiscrimination is the law and the others blithely going about paying little attention to the law and even rewarding those who refuse to follow the law."

Father Hesburgh proposed that "all federal funds" have "this simple tag on them: that they must be spent for all the people, that they must be spent in a nondiscriminatory fashion, and that if anyone wants federal funds for either private or public institutions, there is one condition—you have to agree that in using these funds you are going to follow the Constitution of the United States."

30 The problem in both education and housing is that attaching a nondiscrimination condition to all federal aid might result in the defeat of such programs in Congress or in the refusal of some localities to participate in them, when part of the over-all solution requires more and better schools and housing. Herman Edelsburg (Washington) called this "the most perplexing problem of legislative morality" in connection with civil rights. He said he had "seen this device of the antidiscrimination amendment used as the most cynical, amoral parliaments of any in the last ten or twelve years in the American Congress. When Bricker offered his antidiscrimination amendment his purpose was brazen. It was designed to defeat the housing bill to which it was attached, because liberal southerners like Hill and Sparkman and some others would not be able to vote for a housing bill to which was appended an antidiscrimination condition." Edelsburg said that in later efforts along the same line he had "seen southern Democrats lined up on a nonrecord vote, and pulled off the floor, so that they let the antidiscrimination amendment pass, so that thereafter no southerner who wanted the substantive housing legislation would be able to vote for it. They did it as cynically as that."

What do you do in such cases? Edelsburg cited "an ancient saying which is attributed to the Rabbis . . . that the obligation to be just cannot be divorced from the obligation to be practical and effective." He translated this to require "a counting of noses" in any such legislative situation. "Certainly in any Congress in which you can pass both the substantive legislation and the antidiscrimination rider, you should vote for both. It should become a condition of the legislation." If "after counting noses you know that if you tack on the antidiscrimination amendment you will kill the principal legislation so that you will have neither nondiscrimination nor schools nor housing," then, according to Edelsburg, it would not be wrong to enact the legislation without the condition.

31 "Law," said Father Hesburgh, "defining the goals and standards of the community, is itself one of the great changers of minds and hearts." Commission Report, 555. "The law is not merely a command and government is not just a policeman. Law must be inventive, creative, and educational." Id. at 548. See Rostow, *The Supreme Court and the People's Will*, 33 Notre Dame Law. 573, 593 (1958), and the author's article, *The Supreme Court As An Educator*, Saturday Review, Mar. 7, 1959.

pears under present laws to be helpless to make good the guarantees of the U. S. Constitution.”

33 There was no disagreement with this finding of the Commission on Civil Rights. In fact there was a consensus on a number of the elements of new legislation necessary to enable the federal government to make good the guarantee of the right to vote in the fifteenth amendment.  

The various pending plans were considered: the Civil Rights Commission’s recommendation for the presidential appointment of temporary federal registrars, the Attorney General’s proposal for court-appointed voting referees,

33 Commission Report, 133. See also the unanimous finding of the Commission that “it has become apparent that legislation presently on the books is inadequate to assure that all our qualified citizens shall enjoy the right to vote.” Id. at 135. The Attorney General was in agreement that further legislation was necessary to implement and make fully effective the voting provisions of the Civil Rights Act of 1957. See statement of Attorney General Rogers, Jan. 26, 1960, and his testimony on Feb. 5, 1960 before the Senate Rules and Administration Committee. This testimony and a considerable portion of the Commission’s voting report is reprinted in the appendix of the Hearings on Federal Registrars held in January and February 1960 by the Senate Committee on Rules and Administration (hereafter designated “Senate Hearings”), along with two memorandums on the constitutionality of federal legislation on presidential and congressional elections by Henry J. Merry, legal analyst, American Law Division, Legislative Reference Service, Library of Congress. Senate Hearings, 385-473, 645-753.


34 It is arguable whether the federal government under the 1957 act was really quite as “helpless” to make good the guarantee of the right to vote as it appeared to the Commission. The fact is, as the Commission noted with understatement, that the power given to the Attorney General in 1957 to bring civil suits seeking equitable relief in cases of the denial of the right to vote by reason of race, has “not been thoroughly tested.” Commission Report, 132. Only four cases have been brought by the Attorney General — one in Terrell County, Georgia, following an exposure of the situation there by The Washington Post; one in Macon County, Alabama, following the hearing on the situation there by the Civil Rights Commission; one in Washington Parish, Louisiana, begun on the eve of a Commission hearing there; and one in Fayette County, Tennessee, brought after the Commission reported on that situation.

It is “disappointing,” as the Commission stated, that the Attorney General did not test this procedure more than four times in two and a half years. Commission Member Johnson suggests in a footnote to the Report that “reasonable grounds” to believe that citizens are being deprived of their right to vote — the language of the 1957 Act authorizing such injunction suits — exist in all the 16 counties where Negroes constitute a majority of the voting-age population but where no Negro is registered, and in 49 other counties with Negro majorities but fewer than five per cent of voting-age Negroes registered. Commission Report, 132. We would know better how to proceed if the Attorney General had brought suits in at least one of these 16 most extreme cases — or one suit in the state of Mississippi, where the problem appears to be most severe. In Mississippi the Commission reported that there were 14 counties containing about 52,000 voting-age Negroes in 1950 where, at last count, no Negro was registered; in the state at large containing nearly a million Negroes, or 45 per cent of the population, only about four per cent of 1950 voting-age Negroes were at last report registered. Commission Report, 50, 58.

35 There was no discussion of the various proposals for legislation requiring the preservation of voting and voting records. In view of the support for some such provision by the Administration, by Senate Majority Leader Johnson, and by all proponents of civil rights legislation, it was probably assumed that its passage was practically certain. Moreover, while useful, such a provision by itself does not reach the heart of the problem: “the discriminatory application and administration of apparently nondiscriminatory laws,” and the “burden of litigation involved in acting against each new evasion of the Constitution, county by county and registrar by registrar,” to quote the Civil Rights Commission. Commission Report, 133. The records-preservation provisions are found in H.R. 8601, S. 499, S. 957, S. 1617, S. 2391, S. 2722, S. 2785; Senate Hearings, 15-18. See also the Commission’s more far-reaching unanimous recommendation which, unlike the Administration proposal on this point, extended to state as well as federal elections. Commission Report, 137-38.

36 Under the Commission plan, the President would appoint temporary federal registrars in districts where, after complaint from nine or more citizens, the Commission on Civil Rights had found that qualified citizens were being denied their right to vote by reason of their race, color, religion or national origin. The temporary registrar would be designated from among
Senator Hennings' bill for a court or Commission finding of discrimination with the subsequent presidential appointment of enrollment officers,38 and Senator Hart's bill for a Congressional Elections Commission.39 Since the particular ingredients of these plans were for the most part interchangeable,40 and various permutations and combinations of plans were possible,41 it was decided to dis-

existing federal officers or employees in the affected area, such as the U.S. postmaster, attorney or clerk of the federal court. The Commission found that "some direct procedure" such as this, rather than court litigation, was necessary. Commission Report, 139-42; Senate Hearings, 469. 106 Cong. Rsc. A 2013 (daily ed., Mar. 18, 1960).

This recommendation was supported by five of the six Commissioners with former Governor Battle of Virginia dissenting. The Senate Hearings contain much supplemental information and discussion. See especially the testimony on behalf of the plan by Commission Vice Chairman Dean Robert Storey of Southern Methodist University Law School, and the two statements submitted by Commissioner George M. Johnson of Howard University Law School. Senate Hearings, 22, 87, 572; but see 293.

The registrar plan was embodied in a number of bills, including S. 2684, S. 2783, S. 2814, and H. R. 9452, H. R. 10140, H. R. 10328. See Senate Hearings, 12-20.

37 Under the Attorney General's plan, after an initial finding of voting discrimination in a regular suit under the Civil Rights Act of 1957 the Attorney General may ask the court to find whether or not such discrimination is pursuant to a pattern or practice. If the court so finds, then every qualified voter of the disfranchised class who has been denied the right to vote, or the opportunity to register, shall be entitled to a court order declaring him entitled to vote. To assist the court in such registration of a whole class of persons, a voting referee may be appointed by the court to accept applications and report to the court whether the applicants should be entitled to vote.

38 While the Hennings bill had not been made public at the time of the conference, Mr. Silard, who had helped draft the bill, was able to read an explanatory statement just issued by Senator Hennings, and to present the essential points of the plan to the conference. These were: the appointment by the President of federal enrollment officers (another name for federal registrars) upon a court finding in a regular 1957 act voting rights suit by the Attorney General that certain citizens are being denied their right to vote; and a provision that any challenge of such federal enrollments by the state shall be delayed until any such person acquires the opportunity to vote in an election, at which time he should be entitled to vote provisionally, with his ballot impounded while litigation proceeds in federal district court on the challenge. In its final form, the Hennings bill provided for presidential appointment of an enrollment officer upon either (1) the above court finding, or (2) a similar finding by the Civil Rights Commission. 106 Cong. Rsc. 4753, 4838 (daily ed., Mar. 10 and 11, 1960). This combination of the Attorney General's and the Commission's plans was briefly adopted by the House, upon motion of Rep. Kastenmeier, but was then defeated by a coalition of southern Democratic and northern Republican members. 106 Cong. Rsc. 5132-48 (daily ed., Mar. 15, 1960).

39 Senator Hart's plan provided for a full-time three-man congressional elections commission in the legislative branch of the government, empowered to conduct registration and/or elections for Congress in any district where the Commission considers such congressional intervention necessary in order to prevent qualified citizens from being denied their right to vote. This plan was only adopted in S. 2535 and H. R. 9318. See Senate Hearings, 8. See testimony of Senator Hart, id. at 96. See also address by Senator Hart before the University of Virginia Law School Student Forum, Nov. 24, 1959.

40 For example, the Commission's registrar plan, as initially proposed, was limited to federal elections, but as Commissioner Johnson noted in his statement, Senate Hearings, 95, it could be extended to cover state elections, just as the Attorney General's referee plan could be limited to federal elections only. The question of the extent of coverage was therefore treated separately and not in connection with any one plan.

41 One interesting combination provides for both the presidentially-appointed registrar remedy in simplified form for federal elections and the court-referee remedy for all elections, either or both to be used in the discretion of the President. See Senator Javits' amendment of Feb. 11 to S. 2535 by postuel for and S. 3046 introduced by Javits and others. 106 Cong. Rsc. 2338 (daily ed., Feb. 16, 1960). See also the original memorandum outlining this approach by Professors Black, Emerson and Pollak (Yale), reprinted in Senate Hearings, 79-85; and a later memorandum proposing and defending it by 16 professors at the Yale Law School
cuss primarily the criteria of a workable plan. There was general agreement upon the following seven points:

1. In districts where citizens are denied their right to vote by reason of their race or color, there should be some effective federal machinery for the registration of all such disfranchised voters.
2. This federal process of registering disfranchised persons should be no more cumbersome or onerous than the state's existing process of registering other voters.
3. There should be a federal body—either a court or administrative agency or the President—empowered to make a finding as to the existence of voting discrimination in particular districts.
4. Upon such a finding there should be a federal body—either a court or an agent of a court, or an agent of the President, or an agent of some executive, independent or congressional agency—empowered actually to accept and to act upon applications for registration.
5. Such federal registration should be effective for both federal and state elections.
6. To assure that those thus registered will be permitted to vote, enforcement should be available through federal court injunctions.
7. The time for the state to challenge the qualifications of a person thus federally registered should come when the person appears to vote, so that, pending decision on the challenge by the federal courts, his vote can be cast and his ballot impounded and held for subsequent inclusion in the count.

The discussion can best be summarized under each of these points. The first two state the objective agreed upon by everyone. The third and fourth were the points of most dispute in the conference, as in Congress. The seventh was the new point, agreement on which was perhaps the most immediate contribution of the conference.


Another proposed combination provides that after a court finding of pattern or practice of voting discrimination in a suit brought by the Attorney General, the Attorney General may either request the appointment of a court referee to enroll qualified citizens of the disfranchised class, or may notify the President of the court's findings who may then by executive order designate a federal official or employee from the area affected to serve as federal enrollment officer. See Senator Clark's Amendment of Mar. 11 to H.R. 8315, introduced on behalf of 11 others, including Senator Javits and four other Republicans. 106 Cong. Rec. 4890 (daily ed., Mar. 11, 1960).

Of all the proposed combinations this was most likely to be acceptable to the Administration since it required a court finding of pattern or practice, which the Attorney General has insisted upon, and left the discretion of whether then to seek a court referee or a presidential enrollment officer to the Attorney General and the President. An Attorney General who preferred the referee approach would never need to resort to the presidential appointment. But if a southern district judge refused to appoint a referee or appointed the wrong kind of referee, the alternative presidential action would be available.

During the Rules Committee hearings Sen. Keating proposed a full marriage of referee and registrar bills, with both alternatives applied to state as well as federal elections. See draft bill, Senate Hearings, 363-65. Attorney General Rogers opposed this as a "shotgun wedding," and indicated he would oppose any other attempt at combination, unless necessary to get any bill at all. Id. at 363, 367.

42 Senator Douglas, early striking a note that carried throughout the conference, urged "that we regard as secondary the origin of these proposals or the party sponsorship" in order "to obtain as great a degree of unity as possible."
1) *Some Effective Federal Registration Machinery*

All the plans discussed provide for some federal registration machinery in districts where citizens are being denied their right to vote by reason of their race or color. The need for such federal machinery was manifest by the finding of the Civil Rights Commission that “the infringement of this right is usually accomplished through discriminatory application and administration of state registration laws.” Even if court litigation over each instance of discrimination by state registrars were practical, the Commission found that there was no “effective remedy available at present for a situation where the registrars simply resign.” In view of “the delays inherent in litigation, and the real possibility that in the end litigation will prove fruitless because the registrars have resigned,” the Commission recommended “some direct procedure for temporary federal registration.”

Having found that “substantial numbers of citizens qualified to vote under state registration and election laws are being denied the right to register,” the Commission proposed the establishment of a general federal registration system.

43 Some of the bills, following the Commission’s recommendation, deal with denials of the right to vote by reason of color, race, religion or national origin, which is the language of the 1957 act. However, since the Commission found no such denials by reason of religion or national origin, and since the fifteenth amendment is so explicit in prohibiting denial of the right to vote by reason of race or color, the Attorney General’s limitation of the proposed registration plan to denials by reason of race or color appears to be sound.

44 Commission Report, 140. In his luncheon talk, Father Hesburgh described some of the evidence that led to this finding:

There wasn’t a man of us who did not recognize that there were literally millions of people qualified to vote who were not able to vote and probably would not be able to vote for the next President of the United States, much less for their Senators, Congressmen and state officials. We had seen some of these people. These weren’t units to us. They were flesh and blood people. Some of them were veterans with long months of overseas duty and decorations for valor in service. Some of the people were ministers. Some of them were college teachers. Some of them were lawyers, doctors. All of them were taxpayers. Some were mothers of families who were hard-pressed to tell their children what it is to be a good American citizen when they could not vote themselves. All of them were decent, intelligent American people, and yet they could not cast their ballot for the President of the United States.

Some had gone through incredible hardships in attempting to register and had been subjected to incredible indignities. They would go to a court house and instead of going in where the white people registered, they would have to go to a room in the back where they would stand in line from 6:00 in the morning until 2:00 in the afternoon, where only two were let in at a time. Then people with Ph.D’s and Master’s degrees and high intelligence would sit down and copy like a school child the First Article or the Second Article of the Constitution. Then they would be asked the usual questions, make out the usual questionnaire, hand in a self-addressed envelope, and hear nothing for three months. And then they would go back and do it over again, some of them five, six or seven times, some of them standing in line two or three days until their turn came.

All of us . . . knew that something must be done about this situation and as quickly and as simply and as cleanly as possible.

45 Commission Report, 133. Such a situation was found to exist in Bullock and Macon Counties, Alabama, where the great majority of the population was Negro but the great majority of registered voters was white. Commission Report, 92-93, 138, 140.

46 Commission Report, 140-41. See the opinion by the Committee on Federal Legislation and the Committee on the Bill of Rights of the Association of the Bar of City of New York, that this is a necessary and proper objective, and that both the Commission’s registrar plan as embodied in S. 2783 and the Attorney General’s referee plan are constitutional and appropriate. 106 Cong. Rec. 2645 (daily ed., Feb. 18, 1960); Senate Hearings, 55.
available in any district requiring it. It is "a rule of fundamental political equity," Mr. Edelsburg said in commending this conclusion of the Commission, "that where the violations are wholesale and systematic, the remedies cannot be retail and haphazard." However, the problem of devising an effective system of federal registration which complies with state voter-qualification laws, as the Constitution requires, is most complex.

2) A System No More Burdensome For Negroes Than For Whites

The test of an effective federal registration system, it was agreed, is that, in the words of Commissioner Johnson, "the method of registering persons denied their constitutional right to register to vote be no more complicated or cumbersome than the method available to other citizens in the state or district who are registered." Commissioner Johnson added:

It is not equal protection of the laws to require that a Negro being denied his right to vote must spend hours or days or weeks in litigation in order to register. How many white citizens would take the pains to register if it took such an investment of their time—putting aside the additional consideration a Negro in some areas of discrimination would have to give to possible intimidation and economic pressures invited by such protracted litigation?

The difficulties in establishing real equality in registering were shown to be immense. Even with federal machinery fairly applying state qualification laws to previously disfranchised persons there would not be full equality in many areas. For the local registrars might have applied—and might still be applying—state qualification tests to white applicants with great laxity. Even
if all future applicants for registration in districts where federal registration machinery is established were required to register through the federal machinery, the great majority of white voters would already have been registered under the discriminatory state procedures.

Nor could any legislation provide assurance against economic or physical reprisals. Dr. Morsell of the NAACP stressed that all of the proposed federal registration plans are inviting the Negro to try to vote “in a place where for a Negro to vote is a dangerous act.” He said that “the most we can do is to provide him with an ex parte kind of proceeding, where he does not have to sit up and be questioned by hostile state attorneys” in order to register.53

3) A Federal Finding of Discrimination

To invoke the aid of federal registration machinery there must be some finding of racial discrimination in violation of the fifteenth amendment.

Two basic questions arise here. First, the nature of the finding required. Should it be only that “there are reasonable grounds to believe” that certain citizens are being denied their right to vote by reason of their race or color in a particular district? This is the language of Section 131(c) of the 1957 Act, followed in some of the registrar bills.54 Or should it be that certain persons are being so denied their right to vote “pursuant to a pattern or practice,” as the Attorney General’s voting-referee bill provides?

Second, who should make this finding? A federal district court in a voting-rights suit under the 1957 act, filed by the Attorney General, as the Attorney General’s bill provides? Or the Commission on Civil Rights, as the Commission’s Report recommended and most of the federal registrar bills provide? Or the Attorney General, as Congressman Cellier’s registrar bill provides? Or the President of the United States, in his discretion, upon the advice of the Attorney General or the Civil Rights Commission, as the Commission’s Report recommended and most of the federal registrar bills provide? Or the President of the United States, in his discretion, upon the advice of the Attorney General or the Civil Rights Commission, as the Yale proposal embodied in Senator Javits’ bill provides?55

Governor Williams and Congressman Dingell stressed that the whole procedure must be just as simple as possible, “almost self-executing.”56 Other participants agreed with them that the simplicity was gone once the courts enter the picture. Senator Douglas was particularly concerned about the danger of undue delay in requiring a judicial finding, with the probability of subsequent judicial appeal up to the Supreme Court.

Some of the law teachers questioned the need for any initial judicial finding, particularly if the state or persons entitled under state law to challenge the eligibility of voters had a later day in court to make such challenge of federally

53 “But, so far as reprisal goes,” Dr. Morsell added, “when he walks from his home to any building where these things are going on he has incurred the risk of reprisal—and we cannot in anything that we do here remove this danger from him.” For a description of the kinds of intimidation facing some Negroes see article, “Negroes in Black Belt Say Vote Law Won’t Aid Them,” N.Y. Times, Mar. 19, 1960, p. 1, col. 6. And see April series of articles by Harrison Salisbury, especially Fear and Hatred Grip Birmingham, N.Y. Times, April 12, 1960, p. 1, col. 1, and Race Issue Shakes Alabama Structure, N.Y. Times, April 13, 1960, p. 1, col. 6.

54 H. R. 10328 (Brademas) and H. R. 10140 (Lindsay).

55 See Javits bill, supra note 41.

56 Governor Williams said that the required procedure must be designed to encourage “a lot of people in the backwoods who perhaps don’t even know what it means to register”—not just to solve the voting problems of Negro Ph.D’s. 
registered voters.\textsuperscript{57} Others suggested that the basic constitutional finding, sufficient to authorize federal registration machinery under the fifteenth amendment, should be made by Congress as part of a voting rights bill.\textsuperscript{58}

Professor Estep of Michigan contended that a general congressional finding that racial discrimination "pervades the whole election process" would obviate any constitutional necessity for any further actual fact-finding or adjudication in regard to discrimination in a particular district. He went further and suggested that the way to make a clean sweep of the problem was to accept federal registration for all elections everywhere. Because of the racial discrimination found to be inherent in state administration of registration, there would be federal registrars for every voting district who would prepare the election rolls, following state voter-qualification laws, and then turn those books over to state election officials to conduct the elections.\textsuperscript{59}

Those who shared this view that district-by-district adjudication of the existence of discrimination was unnecessary, but who did not consider a universal federal registration system practical, urged favorable consideration of the Yale proposal for the appointment by the President of federal registrars in any county where, after receipt of petitions from at least 50 persons, and after such investigation as he deems appropriate, the President believes that persons are being denied their right to register and vote.\textsuperscript{60} This was proposed as a simpler and more expeditious procedure than either the court finding required in the Attorney General's plan or the finding by the Commission, presumably after due investigation and hearing, required in the Commission's plan.\textsuperscript{61}

Congressman Dingell urged the Congressional Elections Commission approach,\textsuperscript{62} noting that "those who prefer to keep citizens from voting on the grounds of race are first of all well-organized, with extremely intelligent, thor-

\textsuperscript{57} Professor Rodes of Notre Dame said that, in the light of Massachusetts v. Mellon, 262 U.S. 447 (1923), he saw no standing for the states to sue to preserve any tenth amendment rights to the unimpeded supervision of voting registration.

\textsuperscript{58} The Hennings, Javits, and Clark bills all begin with such a general finding, supra, notes 38 and 41.

\textsuperscript{59} Congressman Bray pointed out that in Indiana alone there were about 10,000 state registration officials. For the federal government to take over the registration process everywhere because of the discrimination in a limited number of southern counties was "a tremendous job."

\textsuperscript{60} See Javits bill and memorandums supporting it, supra, note 41. Professor Freund of Harvard agrees that "The President could appoint such Registrars without any hearing at all, if Congress so authorized pursuant to its power under Article I, sec. 4 or the fourteenth and fifteenth amendments." Freund Memorandum, 106 Cong. Rec. A1728 (daily ed., Feb. 29, 1960). See also the original Yale memorandum outlining this approach by Professor Black, Emerson and Pollak, id. at pp. A 1731-A 1734.

\textsuperscript{61} Professor Harris of Michigan said that such simple and direct procedure was required "if this isn't going to be the full employment bill for attorneys and if the limited resources of the NAACP and the Justice Department are ever going to accomplish anything significant." By making the initial decision a product of a civil action in federal court, "we reach all the problems of due process, res judicata, and federal appellate review which are unnecessary if it is handled in a different way," said Professor Harris. The Yale proposal that the President be empowered to appoint a registrar "in any election district where he has reason to believe that citizens are being denied registration," discriminatorily, does not require the finding of a pattern, which Professor Harris argued "would be incredibly difficult . . . as soon as a certain amount of sophistication is brought to disguising the pattern." The Yale approach, he urged, would virtually eliminate all appellate review of the decision to appoint registrars, leaving review solely for the later question of the eligibility of a federally registered voter. See discussion under point 7 below.

\textsuperscript{62} S. 2535 (Hart) and H.R. 9318 (Dingell). See note 39 supra.
oughly competent lawyers, devoted to their cause, who will use every means possible to prevent citizens from voting.” By empowering a congressional commission, upon its own discretionary finding, actually to register persons and, if deemed necessary, to conduct elections, most of the litigation would be avoided. Congressman Dingell contended that if such a commission once acted, and conducted even one election for Congress in one district, “the whole problem of voting would fall.”

As to all these plans it was recognized that at some stage litigation and probably judicial enforcement would be required. At issue was the stage at which court action was desirable or necessary: at the very beginning of the procedure, or as a last resort.

Professor Foster of Wisconsin made a strong case for a judicial approach from the very beginning. He argued that:

[T]he federal courts in the South are going to be involved directly and in detail in any system designed to give Negroes the right to vote. If a specialized federal executive agency is set up (or, as Senator Hart has suggested, an agency responsible to Congress), the South in either case is going to demand judicial review of its fact-finding and of its legal powers. So it seems to me that everyone is going to be better off if we simply start off in court in the first place.63

Mr. Silard, one of the original draftsmen of registrar bills and of the Congressional Elections Commission bill, said he now agreed with the Attorney General that “at some point before a federal mechanism pre-empts the entire state registration machinery for X number of persons” there ought to be an “adjudicatory finding that there is a need for that mechanism.” He asked: “Aren’t the courts really, as the Attorney General said, the appropriate agencies for making a finding that there is a wholesale violation of legal rights?”64 While noting that the subsequent appointment and supervision of registrars need not necessarily be by the courts, he argued that the procedure should “start with the rather established and secure judicial safeguard that a court finally determines there is a pattern or practice or a systematic denial of rights.”

Just how “established” such a judicial procedure is in this area of voting rights is in considerable question in view of the majority opinion of Mr. Justice Holmes in Giles v. Harris.65 In that 1903 case, brought by a Negro for himself and on behalf of 5,000 other Negroes against the Board of Election Registrars of Montgomery County, Alabama, the Court refused to order the registration

---

63 See Foster memorandum in transcript, 106 CONG. REC. A 1728-A, 1731 (daily ed., Feb. 29, 1960). Another argument made for the court approach was that a court proceeding would carry more weight in the white southern mind than a presidential or administrative action, a somewhat ironic point in view of the white southern outcry against judicial legislation and usurpation.

64 Attorney General Rogers contended before the Rules Committee that as to state elections “the only time the Federal Government can interfere under the terms of the fifteenth amendment is when there is a judicial decision that the Constitution has been violated.” He based this proposition on the tenth amendment. Senate Hearings, 368, see also p. 362. But see supra note 57, and see Senator Hennings’ argument that Congress, not the judiciary, was the most appropriate branch for the enforcement of the fifteenth amendment. 106 CONG. REC. 4851 (daily ed., Mar. 11, 1960).

65 189 U.S. 475 (1903).
of the Negroes. Justice Holmes made it clear that he did not think the judicial branch of the government should be used as the primary means of implementing the right of disfranchised Negroes to vote.

In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. ... The bill imports that the great mass of the white population intends to keep the blacks from voting. ... Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to individuals, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the Government of the United States.  

A number of participants agreed with Mr. Justice Holmes that an initial judicial approach in such situations of mass disfranchisement was inappropriate. Since this involved "a problem of continuing education, mixed with a problem of enforcement," Professor Nathanson of Northwestern argued that "the now old-fashioned, but once new, administrative process is the more suitable." Others stressed the delays involved in starting with a court trial and the relative speed with which the Civil Rights Commission proceeded with its investigations and fact-finding.  

Two other pitfalls were pointed out. Mr. Edelsberg said that some of the southern district judges "are suffering from invincible bias in this area," and he concluded that, no matter how carefully their duty under the bill was spelled out, "for those judges no form of legal draftsmanship will do very much good." Requiring such judges to find "a pattern or practice" of discrimination, in addition to the finding of particular cases of discrimination under the 1957 act, provides a second opportunity for any judicial bias against civil rights suits, 

67 Professor Nathanson proposed "grafting on to the educational functions which we already have had exemplified in the Commission and the investigatory functions some further powers of enforcement, which of course for their ultimate sanction will have to have the courts brought in." He said this was the kind of situation in which the administrative process has its best chance of succeeding. Unlike the problem with the Federal Communications Commission, "Here the objective is quite clear. The controlling standard is quite clear. We don't have the problems of formulating a standard out of vague considerations. ... It's more comparable to the job that the National Labor Relations Board had to do when what was an unfair labor practice was fairly clear."

On the other hand, Mr. Yarmolinsky, defending the flexibility of the judicial process, argued that for a system "that's going to be working largely in rural areas—in areas that are not typical of the kind of communities where we find the pat situations where the administrative process is brought to bear—in situations where we're not looking for the kind of expertise that theoretically you get out of the I.C.C. or the F.C.C. or the C.A.B.," he was "inclined to think that it's more natural ... to stick to the judicial process."

68 Professor Freund's memorandum, supra note 60, states that: "The Commission plan seems to be free from the delays and uncertainties inherent in the bringing of law suits by the Attorney General and the progress of such litigation in the district courts and, it must be assumed, on appeal. It should be remembered that this litigation would have to eventuate in orders of the courts before even the stage of registration of voters could be reached." In contrast, the speed with which the Civil Rights Commission, even with its three-to-three regional split in membership, proceeded to act upon complaints filed with it, conduct field investigations, hold hearings, and make unanimous findings of fact is noteworthy. This whole process in regard to six Alabama counties took less than four months from the receipt of the first complaint. Commission Report, 95.
or reluctance to act in them, to manifest itself. However, Mr. Edelsberg added that in his opinion the bulk of the federal southern judiciary would apply a voting rights bill in good faith, and that with a vigorous judge of integrity, prepared to use his contempt powers, the court suit could lead to the wholesale enfranchisement of Negro voters.

Another disturbing argument against relying on court litigation brought by the Attorney General is the disappointing record of the Attorney General, and of the Civil Rights Division of the Department of Justice, in bringing such litigation. If, as Professor Foster of Wisconsin contends, the Department has shown no real life or vigor or imagination in this matter under the 1957 act, why will it do so under a 1960 act? 69

One hopeful answer is that having fathered a voting-referee bill and made large claims for it, the Department will have a vital stake in proving its effectiveness. Moreover, all the arguments to the contrary notwithstanding, those closest to the political situation in Congress said that, in view of the Attorney General’s insistence on a judicial approach, this was now a prerequisite for the enactment of a bill this session. Without Administration and Republican support, no bill was possible. “The unfortunate fact is,” Mr. Edelsberg stated, that “given the present political climate” the only remedies with a chance of congressional enactment “are haphazard and retail.”

Accepting the Attorney General’s judicial approach as politically necessary, Mr. Edelsberg said that the legislative problem was to draft the best bill possible and to try “to make sure that the Negro under it doesn’t have to run a gauntlet, that he is given a kind of protective atmosphere.”

4) A Federal Officer Who Registers Voters

It was agreed that upon the finding of discrimination discussed above some federal officer should be empowered actually to register qualified voters, according to state qualification laws applied without discrimination. 70 There was again sharp disagreement as to whether such an officer should be appointed and supervised by the court, as the Attorney General’s voting-referee bill provides, 71 or by the President, as the Civil Rights Commission recommended and the registrar bills provide, 72 and as the Hennings combination bill provides. 73

69 Professor Foster stated in his memorandum, supra note 63: “Frankly, I am really disappointed that Attorney General Rogers has not fulfilled the promises of those who predicted that he would breathe some real life into his civil rights division. Perhaps he has reasons that I would agree are good reasons if I knew what they were. But the public record of performance of the civil rights division reflects little that is vigorous or imaginative. A livelier Attorney General would have had dozens of these voting cases going, asking in each of them for different kinds of equitable remedies in search of effective solutions to this complex problem. The voting referee idea is a good one. He should have asked courts to set them up long ago. And he should have pressed courts for all sorts of expanded rulings on the scope of class actions in these cases. And so on and so on. But he hasn’t.” See also supra note 33.

70 In every plan except H. R. 9452 by Rep. Celler the federal officer would be a person residing in or near the district affected. In most of the later registrar bills he would have to be living at least within the state involved. In the Administration bills, H. R. 10625 and H. R. 11160, the referee must be a qualified voter in the particular judicial district involved. In H. R. 9452, Rep. Celler would require the federal registrar to live outside the state involved.

71 Supra note 37.

72 Supra note 36.

73 Supra note 38.
The predominant opinion expressed was that even if the initial finding of discrimination should be made by a court, the subsequent operation of federal registration machinery was an administrative task that should be conducted by the executive branch of the government. The possible scale of the operation, involving thousands or hundreds of thousands of applicants, was an argument against thrusting it upon the federal judiciary. The importance of the problem was an argument in favor of making the President responsible for the program.

Most of the arguments against an initial judicial approach were applied to this later stage of actual registration. But aside from these questions, the main concern at the conference was about the procedures to be followed by the federal enrollment officer, by whatever name he is known and by whomever he is appointed.

There was agreement that such an officer should function ministerially and accept and act on applications ex parte. This seemed to be essential if Negro applicants were not to be asked to run a gauntlet of local officials or attorneys seeking to prove through cross-examination the ineligibility of such applicants.

The Assistant Deputy Attorney General, Mr. Calhoun, assured the conference that the Department was willing to have Congress explicitly provide that the referee should function ex parte. The Attorney General had told the Senate Rules Committee that Negro applicants under his plan would not have to go through a formal judicial proceeding before the referee and that there would be no requirement that state officials be invited to attend the referee proceedings, and Deputy Attorney General Walsh had amplified this before the

---

74 The Black-Emerson-Pollak (Yale) memorandum, 106 Cong. Rec. A 1731 (daily ed., Feb. 29, 1960), estimates that there might be 500,000 Negroes to register through a federal registration system (based on a possible increase of 10 per cent of the approximately 5 million voting-age Negroes in the South, of whom 1.2 million were registered in 1956). Such a “substantial administrative task,” says the memorandum, “will require legal and administrative personnel, space and equipment, record-keeping, supervision and coordination. The judiciary is not prepared or equipped to perform a job of this sort.”

75 The Commission stated that: “Because of the importance of the matter, such a temporary federal registrar should be appointed directly by the President of the United States.” Commission Report, 141. Professor Freund considers it “most significant” to bring the President into the process of safeguarding the right to vote. “The Justice plan,” he states, “seems designed to shield the President from any such participation. As a corollary, the Justice plan imposes on the federal courts still further responsibilities. There is reason to believe that the federal judges have been shouldering more than their fair share of responsibility in this general area and that in all fairness the executive branch should lend its weight to the discharge of this national responsibility.” Freund memorandum, supra note 60.

76 If the appointment of a voting referee is left to the discretion of southern district judges, as the Attorney General’s bill provides, how many such judges will exercise that discretion? And how will they exercise that discretion? Whom will they appoint as voting referees? If a biased voting referee were appointed and if that referee should discriminate against Negro applicants, if only through unduly strict or technical application of state qualification laws, the Negro applicants and the Attorney General would be in a real box. A registrar appointed by the President could be under the supervision and control of the Department of Justice. This would not be possible with a referee appointed by an independent federal judge.

77 If Negro applicants are to be put on oath and subjected to cross-examination by attorneys for the state or for the local registrars, few are likely to take advantage of the new procedure. The would-be Negro voter who is prepared to engage in litigation in order to vote already has available remedies. Indeed there is real question what such a Negro litigant would gain by the Attorney General’s procedure if, in final form, it involves a full trial before the court of the question of pattern or practice or discrimination, then a full adversary hearing before the referee, and then court review of the referee’s report and possible appellate review. This would be substituting a three-stage litigation procedure, with appellate review, for the existing one-stage trial and review.
But the conference considered it most important for these details to be spelled out in the bill. It heard with interest from Mr. Calhoun new proposed language designed to do this, which Deputy Attorney General Walsh submitted to the House Judiciary Committee two days later. That February 16 version of the referee bill went a long way to meet the criticisms expressed in the memorandums circulated before the conference and in the February 14 discussion.

Considerable delay would be probable in securing the initial court finding of a pattern or practice of discrimination but the new bill provided for speedy subsequent registration by requiring that an application shall be heard within ten days.

Although the appointment of a referee remained discretionary, the new version of the bill provided that if the court found denials of the right to vote by reason of race or color and pursuant to a pattern or practice, then any person of such race or color resident within the affected area shall . . . be entitled to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under state law to vote, and (2) he has been deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any persons acting under color of law. (Emphasis added).

In the referee bill, as in some of the registrar bills, the applicant must first have tried unsuccessfully to register with local officials, or have been denied the opportunity to do so by the nonfunctioning of local boards. This gives the local officials an opportunity to cease their discrimination and gives the federal government a way of determining when such discrimination has ceased.

But it also means that Negroes must submit themselves to possible indignities, such as those which the Civil Rights Commission found to be inflicted.

78 Senate Hearings, 352. See testimony of Deputy Attorney General Walsh before the House Judiciary Committee, Feb. 9, 1960.

79 The Attorney General’s bill left the procedures before the referee to the discretion of the court, and the Department notified the House Judiciary Committee on February 16th, even while submitting a bill spelling out the procedures, that it was “still of the view that these procedures are better left to the judge.” However, with no mandate in the act for courts to instruct voting referees to act ex parte, it could hardly be expected that many southern judges would give such instructions. And they would be justified in not doing so, for the very Rule 53(c) of the Federal Rules of Civil Procedure said by the act to apply to voting referees clearly contemplates the participation before a master or referee of all the parties to the suit.

Professor Foster had a different concern. He stressed the importance of making sure that the specification of the role of a voting referee not give rise to any inference that district courts should refuse to use similar equitable devices in the enforcement of other federal rights, in the absence of a specific statute.

80 This section does not require that each individual applicant prove that he was deprived of or denied the opportunity to register by reason of race or color. That heavy burden is removed from any applicant of the race or color against whom a pattern or practice of discrimination had been found in the initial trial. Mr. Foley, General Counsel of the House Judiciary Committee, said that this conclusive presumption running in favor of any applicant in the disfranchised class was a most important part of the bill and of much concern to his committee. He wondered whether any problems of due process were involved, particularly when time and new events intervened between the finding of the pattern and a later application claiming the benefit of this conclusive presumption.

81 It also puts heavy judicial pressure on local officials to cease discriminating, for after the initial trial such officials will be under court orders not to deny registration by reason of race. Being thus subject to prosecution for contempt for any refusal which the court finds to be by reason of race, they may not wish to take the risk.
on Negro applicants before many local registration boards. Since white applicants are not confronted by these indignities and need not go through a dual procedure this is a clear case of inequality. As a remedy an alternative provision was favored by many at the conference: wherever the necessary initial finding of discrimination has been made, all members of the class discriminated against — that is, all Negroes in the area involved — should be entitled to apply for federal registration without first having been deprived of the opportunity or denied the right to register by local officials.

Some participants favored the more thorough remedy of requiring all persons, white and Negro, to register through the federal machinery once the finding of discrimination has been made in that district and so long as such discrimination continues. Professor Foster proposed putting such a voting district in receivership for a period of time and giving the referee exclusive jurisdiction to register all applicants in order to assure the equal application of state qualification tests such as literacy.

The Attorney General's revised bill handles this problem by prescribing detailed methods of applying state qualification tests, designed to assure fairness to Negro applicants and to insulate such applicants so far as possible from challenges by state or local officials. In fact, the limitation on the proof that may be submitted by the state or other parties to the original suit as to each individual applicant is so severe that there may be some question whether it leaves

82 Supra note 44. And it also opens the door to issues of fact for the local officials to litigate.

83 Professor Foster was concerned about a possible dual standard of registration. "Local officials will retain the right to register, and some presumably may persist in registering white persons more or less in total disregard of the local registration laws. The referee has the job of considering those persons whom the local officials have turned down. To equalize things the referee, I suppose, should try to match the local officials in disregarding the registration laws. Yet it seems to me an almost impossible task to ask that the referee set a standard which can correspond to that followed by local officials in registering whites to vote." See supra note 52.

84 The February 16th version of the Attorney General's bill provides that "qualified under state law," as applied by the federal voting referee or the court "shall mean qualified according to the laws, customs or usages of the state, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist." (Emphasis added). Professor Foster suggested that to prove such local usages or customs the referee might have to subpoena a sampling of already registered voters to determine what kind of criteria had been employed.

The bill provides that in the ex parte proceeding before the referee the applicant's "statement under oath shall be prima facie evidence as to his age, residence and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of state law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court."

Upon receipt of the referee's report the court, under the revised bill, issues to all parties, including state officials, an order to show cause within ten days why any applicant approved in that report should not be declared qualified to vote. "Upon the expiration of such period, such order shall be entered except as to any applicant named in the report as to whom the state registrar or other appropriate party to the proceeding prior to that time files with the court . . . a statement of exceptions to such report." A hearing as to an issue of fact "shall be held only in the event that the proof in support of the exception discloses the existence of a genuine issue of material fact." In any such hearing, "The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee."
the court with any case or controversy. On the other hand, courts of equity can manage intercontinental railroads and may soon be managing international unions, as part of the broad relief necessary after a full judicial hearing and finding. There is no inherent reason why local registration boards cannot be placed in a kind of judicial receivership.

If the court-appointed referee plan can indeed be designed to function ministerially, then aside from the question of the propriety of requiring the judiciary to take on such a task, the difference between this and the presidentially-appointed referee plan may not be so great as the advocates of each contend.

5) Coverage of Both State and Federal Elections

Although questioned by several participants, it was generally agreed that a federal registration plan should cover state as well as federal elections.

Those who questioned this proposition, which was made so vigorously by the Attorney General, did so because they thought that the plenary power of Congress to regulate federal elections gave stronger constitutional grounds for a speedy, effective, nonjudicial federal registration machinery.

Most participants, however, saw no constitutional necessity to limit a federal registration plan to federal elections — whether or not the plan was based on a court finding or court referees. Moreover, they considered it impolitic not to propose some effective new remedy for discrimination in state as well as federal elections.


6 It would be "a shame," said Mr. Silard, "now that the Administration has suggested taking a further step to cure the state problem as well to fall back to the federal solution of this only."

7 In submitting his referee plan as a substitute for the Commission's registrar plan the Attorney General said that the Commission's recommendation that only federal elections be covered was a grave deficiency leading to the fragmentation of the ballot and separate-but-unequal voting for state and federal elections. Senate Hearings, 168, 347. Strangely, the Attorney General's bill for the preservation of voting records is limited only to federal elections. See note 35 supra.

88 For example, Article 1, Section 4 of the Constitution gives Congress power "at any time" to "make or alter" state regulations as to the "times, places and manner of holding elections" for members of Congress. Professor Nathanson questioned whether by extending the scope to state elections under the fifteenth amendment it might not be necessary to give more of a day-in-court to the state. If limited to federal elections, then he thought the state's interests were clearly subordinate to the interests of the primary parties, the federal government and the individual voter.

Professor Harris also suggested that, in order to avoid any judicial review of the presidential appointment of a federal registrar, it was necessary to restrict the scope of the plan to federal elections. He urged that, if this simplified appointment of a registrar is not adopted, then by all means let's cover state and federal elections both. On the other hand, if a political decision is made only to cover federal elections, let us take what legal advantage we can of that decision, to throw out the necessity for a dual review, first of registrars, then of specific acts, vis-a-vis each voting applicant.

Attorney General Rogers told the Rules Committee: "I don't think there is any question about the fact that Congress, if it wanted to, could take all the federal election machinery out of the hands of the States." Senate Hearings, 362.

89 Commissioner Johnson explained to the Senate Rules Committee that the Commission's federal registrar plan was limited to federal elections as a matter of policy and prudence. The Commission's finding of voting discrimination, he said, applied to State and Federal elections alike. Moreover, we were and are fully aware that the commands of the Fifteenth Amendment, prohibiting de-
Professor Nathanson suggested "an eclectic approach which permits an alternative group of remedies, some of which may be applicable and usable for the purpose of federal elections and others for the purpose of state elections." His approach was similar to Senator Javits' later proposal for the adoption of a simple, sweeping administrative federal registrar system applicable only for federal elections and the court-referee plan for use in state as well as federal elections, when such judicial enforcement proved necessary.\footnote{\textsuperscript{91}}

6) Enforcement By Federal Court Injunction

While some participants favored criminal sanctions, most considered that court injunctions against local election officials should be available as the primary method of enforcing the right to vote of federally-registered citizens.

The chief contribution of the Attorney General's bill was not in providing for equitable remedies, which were available under the Commission's registrar plan, but in spelling out the methods of supervising and enforcing court voting orders, including attendance at the actual balloting and counting of ballots by a court officer who would immediately report any discriminatory actions of local officials.\footnote{\textsuperscript{92}}

\section*{6.\) Enforcement By Federal Court Injunction}

While some participants favored criminal sanctions, most considered that court injunctions against local election officials should be available as the primary method of enforcing the right to vote of federally-registered citizens.

The chief contribution of the Attorney General’s bill was not in providing for equitable remedies, which were available under the Commission’s registrar plan, but in spelling out the methods of supervising and enforcing court voting orders, including attendance at the actual balloting and counting of ballots by a court officer who would immediately report any discriminatory actions of local officials.

\footnote{\textsuperscript{90} In fact, the existing remedy of a court injunction suit under the 1957 act might prove to be adequate in cases where local officials try to continue discrimination in state elections after it has been ended in federal elections by federal intervention. Commissioner Johnson suggested that the effectiveness of such suits “would be greatly augmented in a case where a person had been registered for a Federal election, but was refused registration for a State election.” Senate Hearings, 96. At least the difficult problem of proving discrimination in such cases should be facilitated by the federal finding of the voter’s qualification.

Moreover, the present fusion of the state and federal election process should in many situations result in the abandonment of discrimination in state elections if discrimination in federal elections is effectively ended. The assumption of those in the Senate who passed the anti-poll tax amendment to the Constitution this session, which was limited to federal elections, must have been that same assumption, that if the practice was eliminated for federal elections the states would drop it in all elections rather than go to the trouble of establishing separate balloting.

As Congressman Dingell said, however, “we have to remember that people who are willing to close their school system will not be reluctant to, in effect, snarl up their state governments and to snarl up federal elections to preserve and to protect the status quo which they seek to preserve.”

\footnote{\textsuperscript{91} See Javits bill and Yale-Pennsylvania memorandum, supra notes 41 and 60. Senator Keating has also supported a somewhat similar dual approach, adopting both plans.

Such dual relief through both judicial and administrative avenues has precedent in the field of government trade regulation. The enforcement of the anti-trust laws provided by Congress is through suits by the Attorney General (and by individuals) in federal district courts, and through administrative action by the Federal Trade Commission.

Adopting both measures would be consistent with the approach taken in the 1957 act, where an administrative fact-finding agency, the Commission, was established, and the Attorney General was given new power to bring civil suits. Both these provisions of the 1957 act proved to need strengthening.

\footnote{\textsuperscript{92} Although Senator Javits' first registrar bill relied on criminal sanctions, Dean Storey, on behalf of the Commission, suggested to the Senate Rules Committee (Senate Hearing, 29)
With a court order, under either the 1957 act or a 1960 act, requiring local registrars to cease discrimination, the registrar who denies a qualified Negro applicant the right to vote risks prosecution for contempt of court. Similarly, after a court order has declared certain persons to be entitled to vote, a local election official, with notice of such order, is subject to punishment for contempt if he refuses to let such federally-registered persons vote.

Professors Cramton and Estep vigorously protested any such enforcement through contempt rather than regular criminal prosecution with full trial by jury. In response, it was agreed that a jury trial could be available in criminal contempt cases where the penalty was more than 45 days in jail, as was provided in the 1957 act. Moreover, this was said to be a situation where judicial abuse of the injunction and contempt power was most unlikely.

Injunctions have gained a bad odor because in labor disputes they were often used to decide the issue rather than to preserve the status quo. But here, as Mr. Yarmolinsky stressed, "The use of the injunction process in the pre-election period is not settling any questions. It's merely assuring that rights are not taken away by a pre-election process." As discussed below, an injunction in a voting case preserves rights that can be adjudicated later, after the election. Failure to use the injunctive process and sole reliance on criminal prosecution after the fact, Mr. Bernhard of the Civil Rights Commission argued, would...
amount to the government saying, "Well, we will penalize, but we won't assure the right to vote."

7) No Stay of Right to Vote During Challenge or Appeal

Probably the most fruitful idea agreed upon at the conference was that the time for the state to challenge the qualifications of federally-registered persons should come when and if such persons appear to vote, and that, pending decision by the federal courts on such challenges, they should be entitled to cast their votes and have their ballots impounded and held for subsequent inclusion in the count if upheld by the courts. Or, stated more broadly, state challenge of federal registration should take place at a time and in a manner which cannot by delay defeat the right of those enrolled to cast their votes in the next election.

The Deputy Assistant Attorney General agreed that nobody should lose his vote while the challenging goes on and stated that Congress certainly could write into the act a provision that the time for such challenge to begin would be when a federally-registered person comes to vote. Mr. Calhoun said he saw "no reason under the Rogers proposal why a federal district court . . . could not order the election officials to take an impounded ballot from the applicant and then let the state thrash it out as it would."

In the new version of the referee bill submitted on February 16 the Department spelled out this provision, although the issuance of such order for provisional voting was left to the discretion of the court. On March 16 the House of Representaives adopted a further amendment, making it mandatory for the court to issue an order entitling an applicant to vote provisionally if his application was filed 20 or more days before an election.

96 This proposition had just been made publicly by Senator Hennings and was submitted to the Conference by Mr. Silard. It had been proposed in the background memorandum on civil rights circulated to participants in advance of the conference. See 106 Cong. Rec. A 1709, A 1727 (daily ed., Feb. 29, 1960). The following week it was embodied in the Hennings combination bill, supra note 38. See also Senate Hearings, 353-354.

97 This February 16th version provided that the execution of any order declaring an applicant qualified to vote "shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote." It also provided that the court "shall have authority to make an order entitling an applicant to vote provisionally pending final determination of any exception."

Although Deputy Attorney General Walsh told the House Judiciary Committee that the Department saw no need to include such provisions and still preferred its original bill, the February 16th version in fact became the Administration bill pressed by Rep. McCulloch, H. R. 10625 and its later amended form, H. R. 11160.

98 This amendment by Rep. O'Hara of Michigan was worked out with and accepted by the Administration after a strong manifestation of northern Democratic support for the Hennings combination plan which provided for delay of any challenge of federal registration until election time. On March 13 the Hennings bill, moved by Rep. Kastenmeier of Wisconsin, had been adopted, with the help of southern votes; then the southerners and Republicans together killed the whole voting-rights section of the bill. The parliamentary situation required some such compromise as the O'Hara amendment if there was to be any bill at all.

In the Senate this provision was amended to authorize such provisional voting only if the applicant was "qualified to vote under State law." While the language in the context is ambiguous and gives rise to fears that it nullified the intent of the House provision, the legislative history leaves no doubt that the State law referred to is that specifying the period before an election within which a person must register in order to be qualified in that election. Thus a court, under the Senate revision, should permit an applicant to vote provisionally, pending final court determination of his qualification, if the applicant applied within the state-prescribed period. This was in fact the intent of the House amendment, so there seems to be no substantive change involved. 106 Cong. Rec. 7269, 7894-96 (daily ed., April 8 and 21, 1960).
Participants gave a number of arguments for taking the further step proposed by Senator Hennings and providing that the only time for any state challenge of federal registration is at the election. First, this is the usual way that registration is challenged under existing state procedures — no state, according to Mr. Silard, affords the opportunity to challenge registrations at the time of registration. Second, it is inappropriate to adjudicate the propriety of a particular registration when it is merely speculative whether that person will ever actually try to vote — whether he will even be alive or living within the district at the time of election. Third, this delaying of the state’s day in court on the eligibility of a particular registration would probably minimize the number of challenges and court appeals, for if the election were not close the incentive for contesting some impounded ballots would be greatly reduced. And fourth, the state’s day in court could then be a long one without denying anyone’s right to vote.

Some concern was expressed about the uncertainty that might overhang some elections as a result, but in the cases where the impounded ballots actually made a difference, the interim election would simply be overturned and the incumbent would surrender his seat to the victor. Generally, this timing of the state challenge was seen as a sound tactic.99

As a corollary of this approach there should be an explicit provision giving the federal district court the exclusive jurisdiction of all challenges to a federally-registered voter.

**Other Approaches: A Constitutional Amendment to Establish Universal Suffrage**

Father Hesburgh urged the participants to consider another basic alternative remedy to the denials of the right to vote found by the Commission. The inevitable complexities of establishing federal registration machinery to take over what has been a function of state officials and to administer this machinery in accordance with state voter qualification laws led three members of the Civil Rights Commission to propose a constitutional amendment establishing universal suffrage.100

Chairman Hannah, Commissioner Johnson and Father Hesburgh concluded that “it appears to be impossible to enforce an impartial administration of the literacy tests now in force in some states, for, when there is a will to discriminate, these tests provide the way.”101 Therefore, they proposed an amendment to prohibit the literacy, comprehension, and interpretation tests through

---

99 By this procedure, said Professor Foster, “you have now for the first time the white resistant South on the side of trying to get this election over with, and with less encouragement to delay in every conceivable way. . . . Now all the forces are not against the Negro.”
100 Commission Report, 143-145.
101 Id. at 103. For example, see affidavit challenging a Negro’s qualification on grounds of an “error in spelling” where the challenger himself spelled it “spilling.” Id. at 104. Four Negro school teachers were denied registration because in their reading test they “pronounced ‘equity’ as ‘eequity.’” Id. at 67. Among the provisions of the Louisiana State Constitution which are used to test an applicant’s understanding are the following:
   “The Legislature shall provide by law for change of venue in civil and criminal cases.”
   “Prescription shall not run against the State in any civil matter.” Id. at 103.
the discriminatory application of which, according to these Commissioners, "Most denials of the right to vote are in fact accomplished." 102

The amendment would permit the states to retain age and residence requirements, but no others. 103 This amendment would cut through the maze of discriminatory tests and diminish the need for direct federal intervention in the operation of registration. With only age or length of residence to be proved, Negro applicants would be encouraged to make more attempts to register. With only these objective and simple standards to be applied, local registrars would find the leeway for discrimination narrowed. And if discrimination should ensue, the problem of proving it would be greatly facilitated. It should not take very long to prove to the satisfaction of a court that a Negro possessed the requisite age and residence requirements of state law. A court injunction under the Civil Rights Act of 1957 could require the immediate registration of every person who meets these clear-cut state qualifications.

Father Hesburgh presented this approach as the simplest long-range answer, and Congressman Brademas noted that he had introduced a joint resolution proposing such a constitutional amendment. 104 Father Hesburgh argued that state literacy requirements for voting (now in force in only 19 states) no longer served a serious or useful purpose. The United States, he said, is more educated today than at any time in its history. It is probably the most educated country in the whole world. Literacy is well over 90 per cent throughout the nation and the growth in literacy has been absolutely astounding in these past few years.105

It is time, Father Hesburgh said, for the United States to demonstrate to the world its commitment to democracy by saying that every adult citizen has a right to participate fully in our self-government.

**Limitations on Literacy and Education Tests**

Another approach toward the same end was proposed to the conference: an act of Congress prohibiting or strictly limiting the use of literacy or comprehension or education tests. One form of limitation might be a law providing that a certificate of graduation from the sixth grade (or from high school or col-

102 Id. at 143. "As long as man is ingenious and these tests exist there will be discrimina-
103 In major part the proposed amendment reads:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State or by any person for any cause except inability to meet State age or length-of-residence require-
ments uniformly applied to all persons within the State, or legal confinement at the time of registration or election. This right to vote shall include the right to register or otherwise qualify to vote, and to have one's vote counted.

104 H. J. Res. 524. The same resolution was introduced simultaneously in the Senate by Senator Humphrey, S. J. Res. 141.

105 106 Cong. Rec. A1721 (daily ed., Feb. 29, 1960). The U. S. Census Bureau reports that only 2.2 per cent of the American people were illiterate in 1959 compared with 20 per cent in 1870. Less than 8 per cent of the Negro population are illiterate, compared with 80 per cent just after the Civil War. BUREAU OF CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, No. 99 (1960).

"In a nation dedicated to the full development of every citizen's human potential, there is no excuse for whatever illiteracy that may remain," said the three Commissioners. "Ratification of the proposed amendment would, we believe, provide an additional incentive for its total elimination. Meanwhile, abundant information about political candidates and issues is available to all by way of television and radio." Commission Report, 144.
le) would be conclusive evidence of sufficient literacy or comprehension of the federal or state constitution and educational qualifications to vote.\(^{106}\)

As an alternative to this, or in addition for those who did not graduate from the sixth grade, there could be a provision that any such literacy or comprehension test must be in writing and the same test must be uniformly applied to all applicants.\(^{107}\)

Some such federal regulation or prohibition of literacy tests appears to be required to make any federal registration machinery fully effective. For without this there is the possibility that even the fair application of state qualification laws to Negro applicants would amount to discrimination, since many white applicants probably get registered by state officials without meeting the prescribed standards.\(^{108}\)

Need for Simplicity and Executive Encouragement

Participants stressed that the legal machinery devised under any approach should be as simple and easily understandable as possible and that the executive branch do everything in its power to encourage disfranchised citizens to exercise their right to vote. Governor Williams proposed, jokingly but suggestively, that the government should carry on an educational campaign around the slogan: “President Lincoln wants you to register.”\(^{109}\)

Time and Education

While many participants stressed the urgent need for effective federal action, several argued that even with all deliberate speed in enacting and enforcing appropriate legislation, the law’s great role as educator would still require considerable time.

In any plan requiring a court finding before a federal registrar or referee is appointed and permitting at some point a further judicial contest of the propriety of registering a particular person, “a great deal of delay is involved,” said Dean O’Meara. He then argued:

We are not, we should not be, concerned simply with working out a bill which would be the best of all possible bills in an ideal community, but a bill which will work as well as possible given the actual situation that exists. A great lot of education is going to be needed. The law cannot do all the educating, but it can make a substantial contribution to the educational process. So... the fact that there will be long delays is not a disadvantage, it is an advantage.

106 Opponents of such a measure might be embarrassed to contend that segregated schools for Negroes have such low standards that Negroes are graduated from the sixth grade who cannot read or write. There may be cases of this and some not very literate citizens might get a right to vote. But Mr. Edelsberg contended that “the faster they get to vote the faster they’ll get qualified.”

107 This latter provision is substantially embodied in Senator Hennings omnibus amendments of August 17, 1959, S. 1617. The constitutional basis for such legislation would be a congressional finding that the application of such tests or the lack of objective standards was a major source of denials of the right to vote under the fifteenth amendment.

108 See supra notes 52, 83, and 84.

109 Mr. Edelsberg had recalled that the National Industrial Relations Act of the early New Deal did not lead to union organization in some places until the unions, with some official approval, put up signs: “President Roosevelt wants you to join the union.” Governor Williams said that some such “persuasive method” was required now of the government rather “than just sitting back and waiting for somebody to come in and knock down the door to register.”
A different but also encouraging point can be made. Despite the weaknesses there may be in whatever plan of federal registration is adopted by Congress, the very adoption of such a plan will contribute to the remedy desired. It will encourage Negroes to make new or further attempts to register. It will discourage white officials who do not relish the legal risks involved in continuing a course of discrimination. And perhaps, equally important, it may lead the Department of Justice to become far more active in the protection of civil rights and to file a larger number of civil rights suits or proceedings under the new act. As the Commission said, "It is not time alone that helps, but the constructive use of time." \(^{110}\)

C. Assistance to School Desegregation

Those close to the southern situation agreed that the process of school desegregation has slowed down or practically ground to a halt. In the past year only a handful of school districts desegregated. Voluntary desegregation reached its peak in 1956, according to the Civil Rights Commission, and at present has all but stopped.\(^{111}\) The only exceptions are in the areas where federal military personnel are concentrated.\(^{112}\)

Southern resistance increasingly takes the form of legal evasion, rather than violence such as at Little Rock. The chief method of evasion is the pupil-placement plan which Dr. Morsell of the NAACP said was "the real 100 per cent down-to-earth roadblock to desegregation in the predictable future." Since the Supreme Court has held that the Alabama plan is not discriminatory on its face, there is presently no way to challenge such plans until there is an accumulation of evidence demonstrating that the plans are in fact being administered to preserve desegregation.\(^{113}\)

For further progress participants agreed there would have to be many more desegregation suits. Professor Foster said it was "of urgent importance that we

\(^{110}\) Commission Report, 548. \textit{But see supra} note 69.

\(^{111}\) The trend toward desegregation only as a result of a court order is particularly unfortunate in view of the Civil Rights Commission's unanimous finding that "when local school officials are permitted to act responsibly in adopting plans that fit local conditions the difficulties of desegregation can be minimized." The Commission said that "In the transition to a nondiscriminatory school system, a carefully developed State or local plan is better than a plan imposed by a court for the immediate admission of certain litigants, or a plan imposed by any outside agency." Commission Report, 325.

\(^{112}\) Deputy Director Bernhard of the Civil Rights Commission stated: "We found that in North Carolina, in Dade County, Florida and in Pulaski County, Arkansas, where there has been some token desegregation, this has resulted predominantly in military districts." See 106 \textit{Cong. Rep.} 3353-59 (daily ed., Feb. 27, 1960).

"We realize that in six states — Delaware, Maryland, West Virginia, Kentucky, Missouri and Oklahoma — the official state policy is one of compliance. But in the eleven so-called compulsory segregation states nothing is presently being done except through the pupil-placement laws. . . ."

Professor Foster reported that after an extensive survey in the South he was "quite discouraged about the immediate prospects for school desegregation in the South. At the point of the decision in \textit{Brown v. The Board of Education} in 1954, there was somewhere in the neighborhood of 3,000 biracial school districts which were segregated. Three-quarters of those today have so far taken no step whatever toward desegregation. In the quarter in which the step toward desegregation has been taken, that step has more often than not been only the most minimal token step. And the truth of the matter is that even in those places where beginnings have been made, with a few exceptions, there are very few real instances of intermixing of races in the educational process." \textit{Id.} at 3346-48.

get going as many lawsuits as we can find Negro plaintiffs... provided we can get skilled counsel to man the operation.” Only with such suits would there be more starts at desegregation, and the accumulation of enough experience to sustain a successful legal attack on pupil-placement plans.

**Suits by the Attorney General**

The question, then, is: Who should bear the burden of bringing these lawsuits? So far the entire burden has been borne by the NAACP. The high cost of such suits\textsuperscript{114} and the limited number of NAACP lawyers sharply restrict the number of suits that can be brought in this way. Moreover, it seems inappropriate for a private organization to play the primary role in shaping public law in this field—in setting the pace and picking the places of further desegregation.

There was a strong consensus that the Attorney General should be empowered to protect the civil rights of citizens, including the right to desegregation in public education, by bringing equitable suits in federal courts. This is the controversial part III provision that was stricken from the 1957 act. It would give the Attorney General power in these other fields equivalent to the power to bring voting rights suits given him in 1957.

Professor Foster, who had recently conducted a first-hand investigation of this problem in the South and talked with a number of judges there, said that:

> If the Attorney General were permitted, in the name of the United States, to bring these actions so that we could test in a whole wide variety of circumstances and get this comparative data that we need to demonstrate the inefficacy and unfairness of these pupil-placement plans as compared with those systems in which we get the board taking the initiative, as at Nashville, then and there I think we have the foundation for rather quickly peeling back what is at present a very unhappy setup with respect to pupil placement.

He contended that vigilant litigation by the Attorney General could lead to larger-scale desegregation in areas where progress was possible, particularly in urban communities such as Memphis and Knoxville.

**Information and Technical Assistance**

There was less agreement on other ingredients of useful congressional legislation to assist school desegregation\textsuperscript{115} No one opposed the Commission’s mild

\textsuperscript{114} Senator Javits has published information supplied by the Civil Rights Commission on the cost of an average desegregation law suit. The average cost of a case in a district court and carried once to the Supreme Court was estimated to be from $15,000 to $18,000, not including the fair value of services of those lawyers for the plaintiffs who serve without compensation. Then there are other protracted and costly litigations which have not yet resulted in any final order. Under pupil-placement laws, in which each applicant must individually exhaust administrative remedies before resorting to court action, the costs per Negro child involved may be higher—as high as $19,000 per child, according to Commission Staff Director Tiffany. This expense, Mr. Tiffany noted, is only that of the plaintiff. The cost of such litigation to the school board might be twice as much, he said. Against all this should be compared the average annual expenditure per pupil in average daily attendance for instruction of Negro pupils in the public schools in the eight southern states for which such data is available: $128.85 (in 1956-57). “Obviously,” wrote Mr. Tiffany, “not very many cases will be prosecuted at such a cost. Other solutions will have to be sought.” 106 Cong. Rec. 3376-77 (daily ed., Feb. 27, 1960).

\textsuperscript{115} The conference did not consider, but after adjournment one of the participants proposed, a bill providing that by a certain date—in perhaps one or two years—each school district not yet desegregated shall submit a plan for desegregation to some designated federal
proposal that there should be some federal agency acting as a center of information and study on the problems involved and offering advice, technical assistance and conciliation services to communities faced with desegregation.\textsuperscript{226} Active governmental dissemination of information on desegregation is a \textit{sine qua non} of any effective prescription, according to Harold Fleming of the Southern Regional Council in Atlanta.\textsuperscript{217} But there were different views about how such programs should be carried out.

Professor Ward of Notre Dame and others strongly supported Senator Douglas's omnibus civil rights bill.\textsuperscript{118} Not only does this give the above power to the Attorney General but it assigns a major creative role to the Secretary of Health, Education and Welfare. The Secretary is directed to provide technical and other assistance, including his good offices for conciliation, in the implementation of desegregation, to disseminate information aimed at obtaining better agency. This was suggested as a way to put pressure on such local boards to work out their own plans and to make a start toward good faith compliance with the Court's decision without waiting until a court action is brought against them. With the submission of such plans to the Department of Health, Education and Welfare, to the Civil Rights Commission, or to the Attorney General, the basis would exist for further federal enforcing action, if necessary, including an equitable suit by the Attorney General. Other congressional action, such as a law prohibiting pupil-placement plans, or requiring at least a beginning of desegregation in the first grade, as in Nashville, would also be appropriate under the fourteenth amendment.

116 After finding unanimously that "a variety of desegregation plans have proved to be successful," but that "Many school districts in attempting to evolve a desegregation plan have had no established and qualified source to which to turn for information and advice," the Commission, with its three Southern members concurring, recommended:

1 (a) That the President propose and the Congress enact legislation to authorize the Commission on Civil Rights, if extended, to serve as a clearinghouse to collect and make available to States and to local communities information concerning programs and procedures used by school districts to comply with the Supreme Court mandate, either voluntarily or by court order, including data as to the known effects of the programs on the quality of education and the cost thereof.

(b) That the Commission on Civil Rights be authorized to establish an advisory and conciliation service to assist local school officials in developing plans designed to meet constitutional requirements and local conditions, and to mediate and conciliate, upon request, disputes as to proposed plans and their implementation.


No bill has been introduced to effectuate this recommendation.

117 See \textit{supra} note 28. The Civil Rights Commission's 190-page report on school desegregation, and the published transcript of its Conference on Education in Nashville on Mar. 5 and 6, 1959, constitute one useful source of public information — the first such official fact-finding by the federal government. In March 1960 the Commission met again with school superintendents and other school officials from districts that have experienced some desegregation, to hear discussion of the problems met and the lessons learned. The fact that, as a result of its investigations and studies, the Commission, with its three respected Southern members, should \textit{unanimously} make the following basic findings, was itself a contribution:

(1) The American system of public education must be preserved without impairment because an educated citizenry is the mainstay of the Republic. . .

(2) The constitutional right to be free from compulsory segregation in public education can be and must be realized, for this is a government of law, and the Constitution as interpreted by the Supreme Court is the supreme law of the land.

The problem, therefore, is how to comply with the Supreme Court decision, while preserving and even improving public education. The ultimate choice of each State is between finding reasonable ways of ending compulsory segregation in its schools or abandoning its system of free public education. Commission Report, 324.

CONFERENCE ON CIVIL RIGHTS

public understanding, and to encourage the formulation of local desegregation plans. If all else fails, the Secretary is authorized to devise a plan which the Attorney General may take into court for enforcement. The bill also includes a congressional declaration of support for school desegregation.

**Congressional Endorsement of Desegregation**

Since no one thought the Douglas bill had any chance this session, the discussion focused on other possibilities. Professor Foster said that if he could write the ticket for a single piece of legislation at the moment, it would be a simple declaration by Congress that it endorses the principle of school desegregation.119

Everywhere in the South he found the point being made insistently that the Supreme Court had usurped constitutional power, and the strongest proof offered for this was that neither the Congress nor the President had ever indicated any agreement with *Brown v. Board of Education of Topeka*.120 Because of the effectiveness of this argument, thoughtful southerners, he reported, were gravely concerned about the future of their public school systems.121 Harold Fleming of the Southern Regional Council in Atlanta strongly supported such a one-sentence resolution to counteract this argument.

Such a declaration by Congress might at least be the beginning of the exercise of congressional responsibility under the fourteenth amendment, although there is some question about the propriety of — and the precedent which would be set by — a congressional endorsement of a Supreme Court decision. It makes more sense as a preamble to a piece of substantive legislation, such as the Administration's rather limited proposal for financial and technical aid to state and local agencies to assist them in meeting the costs of special professional services needed for the adjustments required by desegregation.122

Even this provision is missing from the Celler bill reported out by the House Judiciary Committee. H. R. 8601 touches school desegregation only peripherally, with provisions for penalties for the obstruction of court orders enforcing school integration, and for temporary education for children of members of the armed forces in areas where the public schools have been closed to avoid

---

119 In opening the Notre Dame Symposium on the Problems and Responsibilities of Desegregation Dean O'Meara said:

One thing that seems obvious is that the process of desegregating the public schools of the South cannot rightly be left to the federal courts alone. Congressional action, I submit, is needed urgently. I think it neither necessary nor desirable for Congress to spell out in detail how local communities should go about desegregating their schools. There is the greatest need, however, for some action — indeed, any action — which will put Congress on record in support of integration. 34 Notre Dame Law. 605 (1959).


121 "For at the moment," reported Professor Foster, "this whole usurpation argument gives strength to the arm of the segregationist who urges the South to turn down public school bonds, not to worry about increasing salaries of teachers, in short, to disregard what is happening to your public schools — because, as the argument goes, you perfectly well know we're all going over to private schools as soon as the courts come in anyway, so there's no point in increasing any expenditures with respect to our public schools."

122 S. 958. The Department of Health, Education and Welfare would carry out this modest program of grants-in-aid and technical assistance. The House Judiciary Committee struck this provision out of the Administration's bill.
integration. 

Professor Ward cautioned against adopting a civil rights act that went no further than to "barely squint at school desegregation." In the field of voting rights he thought almost any congressional legislation would have important symbolic value and would contribute to the public education necessary and to the ultimate adoption of workable federal machinery to protect the right to vote. But he thought the situation was otherwise with school desegregation. According to him, "every bill which simply pays lip service to the school problem is a strategic triumph for the segregationists." For, Professor Ward argued:

I'm afraid that a large number of Americans can be persuaded that there are insuperable problems in the way of integrating schools. And a series of abortive bills, all seemingly aimed at the problem of implementing desegregation, would in my judgment be a disaster.

The Celler bill, as it stood, was in his judgment "the kind of legislation which ought not be allowed to pass under the guise of civil rights legislation." Congressman Dingell agreed that the bill was "a nothing," but explained that it could be amended and strengthened when brought to the floor. 

**Senator Johnson's Proposed Conciliation Service**

One of the pending proposals that Professor Ward also questioned was Senator Lyndon Johnson's bill for the establishment of a new community-relations service to offer conciliation assistance by trained conciliators in communities where disagreements are threatening to disrupt peaceful relations among citizens. The implicit purpose of the service would be to arrange for and preside over discussions of problems arising out of the necessity for desegregation. Professor Ward argued that conciliation is of value where both sides have an interest in settling the controversy but that such an interest does not exist in the affected areas of the South.

Others considered the idea of a conciliation service more promising. Mr. Fleming supported a program of conciliation if it embodied a mandate to carry on public education or to disseminate information about desegregation. The practical choices afflicting Southerners, in Atlanta, for instance — whether to...

---

123 Both of these provisions recommended by the Attorney General are questionable. It is difficult to defend singling out integration orders of a court for treatment different than that of other court orders. And the provision for special educational facilities for servicemen's children might actually impede progress toward integration by reducing the pressure of such families upon local governments to keep the public schools open. See *supra* note 112. This latter provision, according to Professor Ward, may have the germ of a bigger and better idea — perhaps an emergency federal school system in districts closing their public schools.

124 The General Counsel of the House Judiciary Committee, Mr. Foley, explained that the original Celler bill, H. R. 8601, was identical with Senator Douglas's omnibus bill. "That bill," he said, "was considered by the Judiciary Committee, both in subcommittee and then again in full committee. Literally and figuratively it was gutted in subcommittee. They struck out all after the enacting clause, and that position was overwhelmingly supported in the full committee. So from the House standpoint the Douglas proposal, I'm afraid, is dead, completely."

125 S. 499, introduced Jan. 20, 1959. It authorized a staff of 100 conciliation assistants with headquarters in Washington and up to five regional offices. The Administration has attacked the plan on the ground that it is improper to conciliate or mediate constitutional rights. But, obviously, under the Court's school decisions the time and manner of implementing desegregation is supposed to be negotiated reasonably and disputes about it are clearly subject to conciliation. As the Commission suggested, a voluntarily agreed upon plan which the community will support is preferable to a court-imposed plan, even if the former is considerably more gradual than the latter. Professor Ward agreed that conciliation was a sound approach if its direct purpose was, as in the Commission's recommendation, assistance in desegregation.
accept some desegregation or close public schools—are, according to Fleming, “producing a receptivity to information on this subject.” He said the movement was “slow and grudging, but the receptivity among rank-and-file citizens to information and reassurance that desegregation is not synonymous with catastrophe . . . has increased enormously.” He suggested that conciliation would be most promising in states where desegregation has begun rather than in the intransigent states.

Mr. Edelsberg defended Senator Johnson’s plan on this ground:

Any conciliator sent into a southern school situation is a representative of a national political position, and that national political position cannot afford to permit the South to continue to evade. Just as the Attorney General and the Department of Justice were put on the spot under the Civil Rights Act of 1957, because people said, ‘How many new Negroes have been added to the voting list?’ so a conciliation service federally administered would be on the spot if at the end of a year or two of service it couldn’t point to genuine desegregation accomplished as a result of its efforts.

Such a service might move into the peripheral areas of the South and help “those communities that are closer to doing the decent thing. For one thing, they can persuade southern communities that desegregation is not quite a fate worse than death.” He said it would be a useful starting point to have federal educators and other officials coming into a school superintendent’s office, where there is reason to believe he is well disposed, and help him become the leader of a movement with the school board, looking toward the adoption of a school desegregation program that certainly couldn’t be any worse than the kind of pupil placement we’re getting today, as a response to compulsory legal process.

Nondiscrimination Condition on Federal Aid

The conference also considered the further sanction proposed by the three northern members of the Commission: that all federal aid to institutions of higher education be conditioned on the practice of a policy of nondiscrimination by such institutions. The three Commissioners held that, “While Congress has not required such conditions for these grants, the operations of the federal government are subject to the constitutional principle of equal protection or equal treatment.” Father Hesburgh said that the adoption of such conditions on

126 Commission Report, 328-330. Congressman Brademas asked why such a policy should apply only to institutions of higher learning and not to all educational institutions receiving federal aid, including elementary and secondary schools, as Commissioner Johnson proposed. The statement of the Commissioners suggests one basis for a distinction:

In regard to public institutions of higher education the courts have required the immediate admission of qualified students without discrimination. The reasons for the gradual elimination of racial discrimination in elementary and secondary schools do not obtain in the field of higher education. There, immediate equality of opportunity for qualified students of all races is possible and necessary.

127 Commission Report, 329. They add: “Although the equal protection clause of the Fourteenth Amendment applies only to State action, ‘it would be unthinkable,’ the Supreme Court has held, ‘that the same Constitution would impose a lesser duty on the Federal Government.’

“We believe that it is inconsistent with the Constitution and public policy of the United States for the Federal Government to grant financial assistance to institutions of higher education that practice racial discrimination.” Ibid.
federal aid "could be accomplished tomorrow morning if those in power would decide to do something about it." 128

The Commissioners' proposal that such a condition of nondiscrimination could be required by the executive agencies of the federal government even without any further congressional authority gets around the primary objection that a nondiscrimination amendment to an educational-aid bill in Congress would only result in the defeat of the bill so that there would be neither aid nor a policy of nondiscrimination. Professor Nathanson agreed that "in the not-too-distant future federal grants will be playing a tremendous part in the education field," and that "the great sanction, really, is going to be the withholding of funds." 129 But he thought that Congress should not be bypassed by an Executive Order because:

it's asking too much of the executive or administrative agency to determine that its funds will not be available except on certain conditions so fundamental as this, conditions which may to some extent hamper the carrying out of the program. . . . It seems to me that kind of a determination — that weighing of ultimate goals here — has to be made by the Congress and that it has to be faced up to by the Congress.

He "would sacrifice the immediate gains . . . by asking for these conditions" because he had "great confidence in the persuasiveness of money." 129

Mr. Vernon Eagle suggested that the same requirement of nondiscrimination might be made of all institutions, educational, charitable or otherwise, seeking federal tax exemption. 130 Some $7 billion, he reported, was spent last year on philanthropy, "a good deal of it" on a basis of discrimination. 132 If pressure could be put on the expenditure of that $7 billion a year to see that none is spent on institutions or organizations that discriminate, "you've got a fairly

---

128 He said:

We know that the Supreme Court has outlawed compulsory school segregation. Yet some universities and colleges, the institutions supposed to be the center of the training of leadership for the next generation, which are being given literally hundreds of millions of dollars of Federal support from the Congress and administered through executive agencies (some of which I belong to) — some of these institutions getting this Federal money simply do not follow the Constitution or the law of the land.

He thought a federal requirement of nondiscrimination as a condition for aid would actually help some college and university administrators who "would like to act rightly on this," but who must face their boards of trustees or state legislators.

129 More than $2 billion a year of federal funds go for educational purposes and to educational institutions, the principal recipients of which are the institutions of higher education. Commission Report, 314-323, 328.

130 Illinois State Representative Paul Simon reported that two terms ago the state legislature passed a bill prohibiting state aid to any school district which practiced discrimination in the employment of teachers. "It has been a very helpful thing in the State of Illinois," he said, "in getting more leadership, in providing a little more employment opportunity, and in helping to solve this paradox of a shortage of teachers and a surplus of teachers at the same time." See Commission Report, 265-270.

131 The New World Foundation, of which he was Executive Director, was the only foundation he knew of that has written into its rules of operation that no money would be given to institutions which discriminate on the basis of race, color or creed.

132 About $7.8 billion was given for philanthropic purposes in 1959, according to "Giving, U.S.A," published by the American Association of Fund-Raising Counsel, Inc. About 15 per cent or more than $1 billion went for educational purposes with higher education receiving 95 per cent of this. The some 11,000 philanthropic foundations were reported to have assets of more than $10 billion, with about half of these assets held by the 150 larger foundations. Foundation grants totalled about $700 million in 1959. N. Y. Times, Feb. 25, 1960.
hard pinch where it hurts,” he said, “in the pocketbook.” This might be one way of checking the white southern resort to tax-exempt segregated private schools.

This whole approach of “forcing people to act against their principles in order to obtain money,” was sharply questioned by Mr. Yarmolinsky. Its effect “would be that in the situations where the money was most needed it would be turned down, and the result of turning it down would deny people the education they need to overcome the prejudices that they have.”

The Gap in Academic Standards

Some consideration was given to the substantive problems involved in desegregation, and the positive solutions required. The top of the iceberg, just coming into view, according to Professor Foster, is “the sinking realization” that the academic standards of the Negro schools were “so woefully” lower than those of the white schools. To deal with this, Professor Foster urged “a really first-class federal aid-to-education program . . . with far greater contribution in the form of salaries, in those states that simply have not come up with adequate salaries for their teachers.”

133 See supra note 30. Mr. Yarmolinsky, a legal consultant on foundation policy, especially warned against doing anything to further tighten the laws of tax exemption on ideological grounds.

134 After noting the gap in standards of education as well as other such gaps, the Civil Rights Commission concluded that: “Prohibiting discrimination . . . will not suffice. The demoralization of a part of the nonwhite population resulting from generations of discrimination can ultimately be overcome only by positive measures.” Commission Report, 548.

135 As an example, he reported that:

The smartest young Negro fellow in a North Carolina Negro high school was permitted to transfer to the 11th grade of a white high school in that community as one of the first students to transfer. This was 3 years ago. The principal of the white high school told me that that child who stood at the very top in achievement in his group ready to enter the 11th grade was more than 2 academic years behind the median white 11th grade student in the school to which he was being assigned. The boy flunked some courses that first semester. To his credit, he graduated with his class 2 years later.

Every Negro child in that community today knows how tough it is to transfer to the white schools at a high school level. And this, if you had nothing more, I submit, is an enormous deterrent to a Negro community socially inert in a great many aspects so far as this problem is concerned.

136 Mr. Yarmolinsky agreed that “an essential ingredient of any legislative program . . . is really a massive infusion of federal funds.” With enough money the new techniques for raising educational standards for all students could be applied on a nation-wide scale. He reported the experiment in New York where in a junior high school, with a great majority of Negro and Puerto Rican students, a very substantial increase in facilities resulted in overcoming two- and three-year deficiencies in reading and arithmetic skills over a period of months, so that the students were brought up to a level where they could go on to compete with other not-disadvantaged students in the New York City high schools of fairly high educational standards, and go on as they are now doing to college and professional preparations. In this connection, see the proposal for an experimental federal school system for deficient or disadvantaged students, by Professor Harvey Wheeler. 34 Notre Dame Law. 667 (1959).

“The more the psychologists look into the nature of human intelligence,” said Mr. Yarmolinsky on the basis of work he had just done in this subject, and particularly of the intelligence of children, the more apparent it is that ability is to a tremendous extent a function of motivation, and the capacity of an individual child to improve his IQ—which we used to think was something that was fixed and immutable—is quite extraordinary.

*   *   *

Now, . . . we find ourselves in a situation where education is available to everybody, but unless we take some giant steps to improve the quality of
The problem of the gap in standards was one reason, according to Professor Foster, for supporting the Nashville approach of beginning desegregation in the first grade rather than the Little Rock approach — tentatively adopted in Atlanta — of beginning in high school. For six-year-old children, black and white, share about the same degree of illiteracy and the gap in achievement levels is not so great.\textsuperscript{137}

\textit{Nashville Plan v. Pupil Placement}

The Nashville Plan's provision for voluntary transfer out of a school, after normal nonracial geographical assignment, if a pupil finds himself in a racial minority and prefers to be in a school where his race is in the majority, was seen as preferable to any pupil placement plan. Whites could — and did — transfer out of schools in which they were in a minority, but they could not transfer simply because some Negroes had entered the school. Nearly ninety percent of the Negroes assigned to white schools transferred back to Negro-majority schools, but at least those preferring integrated schools did not have to take the initiative and run the gauntlet of interviews or examinations under the pupil-placement plan.\textsuperscript{138}

Professor Foster predicted that in a few years it will be demonstrable that plans of the Nashville type are in fact bringing about desegregation and that pupil-placement plans are not producing this result. Then, he said, the foundation would exist for overturning the Court's present opinion that these pupil-placement plans are not unconstitutional \textit{per se}. For the present, however, he urged that every likely combination or permutation of plans be tried in order "to get the answers as fast as we can on the things that work and don't work and pragmatically to push forward every time we find a system like Nashville that works." \textsuperscript{138a}

\textquote{Education that is available generally, we are going to have a system of education which is more and more segregated, not by levels of actual ability, but by levels of opportunity, so that we'll not only have a perpetuation, even in the North, of de facto racial segregation, but we will have segregation of every disadvantaged group in our society, and that segregation will grow greater and greater and not less and less as the quality of education and the distribution of education is increased.}

\textsuperscript{137} Even in the first grade the gap may be great enough, for, according to Professor Foster, the Negro of the South is far less ready to go to school at 6 than the white is at 6. The teachers ascribed this to the fact that a Negro child perhaps has never held a book, nor has ever been read to. Now this is not to say that there are not whites of whom the same may be said, for obviously there are whites in the same condition. Such a child has to be taught to want to read before you can even teach him to read. So that the readiness of these children to start at the first grade level is far less.

\textsuperscript{138} One of the evils of the pupil-placement system, said Professor Foster, is that "it shifts to this fearful, hesitant, and inertial Negro the responsibility of having to step forward and go through a perfectly horrible process as an individual — of cross-examination, interrogation of the most embarrassing kind, in order even to apply to a school that is white."

\textsuperscript{138a} The Civil Rights Commission found that, "in many instances desegregation has been used by the local community as the occasion to raise its educational standards. In many instances remedial programs have been adopted for the handicapped, and advanced programs established for gifted students." The Commission urged that desegregation be planned so as to "result in an improvement of educational standards for both" white and Negro pupils. Commission Report, 132. See Southern Regional Council Report No. L-16, "Atlanta and Washington — Racial Differences in Academic Achievement," and Report No. L-17, "Desegregation and Academic Achievement," 1960.
Court-Appointed School Referees

To do this Professor Foster proposed the skillful and inventive use of masters by federal courts in equitable desegregation suits. With the evasive tactics that can be anticipated, the courts would need to draw on all their inherent equity powers. In this direction he saw real hope if we can have joining that heroic handful of people... working with the legal defense fund of the NAACP... a cadre of government lawyers who can give to these federal judges opportunities imaginatively to use equitable powers in the form of masters, referees, what have you, to meet any kind of contingency as it opens up.139

Finally there was recognized the fact that a school district violates nothing in the Constitution if it assigns children to the school nearest each child's home. Because of the general condition of residential segregation, North as well as South, such a nonracial criterion would, in at least most urban areas, result in de facto school segregation.140

This brought the conference to the third item on the agenda.

D. Achievement of Equal Opportunity in Housing

There was no disagreement with the finding of the Civil Rights Commission that racial discrimination in housing constitutes an affront to human dignity which a nation dedicated to respect for the individual should not tolerate.141 Nor was there disagreement with the proposition of a California court that "When one dips one's hand into the Federal Treasury, a little democracy necessarily clings to whatever is withdrawn."142 The division of opinion, along the same

139 Professor Foster had proposed and studied the possibility of the use of court referees in desegregation cases before the Administration suggested their use in voting cases. He hoped that any law authorizing voting referees would make it clear that the inherent equity power to appoint referees in other cases, such as desegregation suits, was in no way being limited by implication. See supra note 79.

140 Moreover, the existence of residential racial concentrations makes it easy for school boards to district according to racial lines and difficult to prove this. Dr. Morsell of the NAACP said that the plans for new school construction in city after city were drawn with the "very obvious purpose of making it next to impossible to achieve desegregation no matter what happens. See Commission Report, 288-61, 389-90.

141 The Commission Report, 534. The Commission found that a large proportion of colored Americans are living in overcrowded slums or blighted areas in restricted sections of our cities, with little or no access to new housing or to suburban areas. Most of these Americans, regardless of their educational, economic, or professional accomplishments, have no alternative but to live in used dwellings originally occupied by white Americans who have a free choice of housing, new or old. Housing thus seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay. It would be an affront to human dignity for any one group of Americans to be restricted to wearing only hand-me-down clothing or to eating the leftovers of others' food. Like food and clothing, housing is an essential of life, yet many nonwhite families have no choice but secondhand homes. The results can be seen in high rates of disease, fire, juvenile delinquency, crime and social demoralization among those forced to live in such conditions.


lines as in the discussion of school desegregation, came on the question of how
the federal government should exercise its responsibility to promote the constitu-
tional objective of equal opportunity in housing.

The Civil Rights Commission unanimously recommended an executive
order stating this constitutional objective and directing all federal agencies
to shape their policies and practices to make the maximum contribution to the
achievement of this goal. While this recommendation called for "plans to
bring about the end of discrimination in all federally assisted housing," it did
not specify when, if ever, the government should impose a nondiscrimination
condition on all aid, or withdraw aid, from builders who discriminate. An "all
deliberate speed" formula seems to be implied, although even the direction of
the motion is somewhat ambiguous. It did relieve Congress of some pressure
by proposing only presidential and administrative action against discrimination
rather than any new legislation.

racialy restrictive private covenants is unconstitutional. Shelley v. Kraemer, 334 U.S. 1
(1948) and Barrows v. Jackson, 346 U.S. 249 (1953). Although the presence of local press-
ture maintains segregation in many low-rent public housing projects, any official discrimina-
tion by local governmental authorities clearly violates the Fourteenth Amendment. City of
Detroit v. Lewis, 226 F.2d 180 (6th Cir. 1955). When the government and private persons
combine to act and the private person seeks to discriminate, as in the urban renewal program
or in FHA and VA loan guarantee programs, the question is more complicated. See Com-
mision Report, 451-57.

Commission Report, 538. The Commission also recommended: "That the Adminis-
trator of the Housing and Home Finance Agency give high priority to the problem of gearing
the policies and the operations of his constituent housing agencies to the attainment of equal
opportunity." Both recommendations are in accord with the Report of the Commission on
Race and Housing, COMMISSION ON RACE AND HOUSING, WHERE DO WE LIVE? 63-64 (U.
of Cal. Press 1958), issued after a three-year study under the chairmanship of Earl B. Schwulst,
President of the Bowery Savings Bank.

Id. at 537-38. "Federally assisted housing" was defined to include housing constructed
with the assistance of federal mortgage insurance or loan guaranty as well as federally aided
public housing and urban renewal projects.

"What is at issue," the Commission said,
is not the imposition of any residential pattern of racial integration. Rather,
it is the right of every American to equal opportunity for decent housing.
There may be many Americans who prefer to live in neighborhoods with
people of their own race, color, religion, or national origin. The right of
voluntary association is also important. But if some Americans, because
of their color, race, religion, or national origin have no choice but to grow
up and live in conditions of squalor and in rigidly confined areas, then all of
America suffers.

* * *

Opportunities and freedom of choice in housing could be increased in
several ways . . . : the promotion of new housing developments for minority
groups both in or adjacent to the present areas of minority-group concentra-
tion and in outlying areas; the promotion of new open-occupancy housing
projects available to both members of minority groups and others who choose
to live there; and the promotion of policies of equality of treatment in the
housing market generally, so that builders and property owners may rent or
sell and lending institutions make loans on equal terms to all in search of
housing.

Id. at 332. But see statement of southern members, criticizing the Report for being "keyed
to integration rather than housing." Id. at 540.

The Commission found that "the fundamental legal principle is clear" and needed no
new legislation: "The operation of federal housing agencies and programs is subject to this
principle" of nondiscrimination. Without any further Congressional mandate, the President,
according to the Commission, should issue an executive order on federal housing programs
similar to the executive orders requiring equal opportunity in the fields of government con-
tacts and employment and in the armed services. Id. at 557-38.
Participants welcomed such executive action as an alternative to the perils of pressing for nondiscrimination amendments to important substantive legislation. But the tension remained between efforts to end discrimination and efforts to expand housing generally, even with this approach of leaving the former task primarily to the President and the latter primarily to the Congress. A firm executive policy against aid to segregated housing projects might, as Professor Broden of Notre Dame said, “dry up any federal aid for housing in the places needing it most.” The ultimate issue, he said, is “whether we should sacrifice federal aid for segregated housing today in the hope of achieving non-segregated housing tomorrow.”

**Shortage of Low-Cost Housing**

The need for more housing for lower-income families was stressed in the conference, as in the Commission Report. “The national housing crisis, involving a general shortage of low-cost decent housing, is a potent factor imposing substandard housing on racial minorities,” said Professor Broden. “Therefore, no real solution to actual discrimination in housing can come until there is a vast increase in the availability of decent low-cost housing.” To provide the necessary mortgage money for this Professor Dukeminier of Kentucky proposed a

---

147 See *supra* note 30. Congressman Brademas described how Congressman Powell and the three other Negro members of Congress led the fight against a Powell-type amendment designed to kill a 1959 housing bill. Mr. Edelsberg noted that Mr. Powell voted for the nondiscrimination amendment when it was tacked on to the housing bill he didn’t care about; he voted against it when it was tacked on to the bill he wanted. Congressman Brademas said that this was a decreasing problem because “more and more members of Congress who believe in the substantive legislation are now not going to let themselves be mousetrapped on this issue.”

148 Mr. Anderson, of Senator Douglas’s office, said that in Chicago “The white wards will not accept public housing because they know it will be integrated. And so we have a large number of units of public housing allocated to Chicago that go unused.” State Senator Dickinson suggested that the South Bend Housing Authority which he heads faces similar difficulties in site location.

149 The Commission found this need and the fact of racial discrimination to be the “two basic facts” constituting the Negro’s housing problem. “Americans of lower income, both colored and white, have few opportunities for decent homes in good neighborhoods,” the Commission said.

Since most suburban housing is beyond their means, they remain crowded in the central city, creating new slums. Since colored people comprise a rising proportion of the city dwellers with lowest income, these slums are becoming increasingly colored. The population of metropolitan areas, already comprising over 60 per cent of the American people, is growing rapidly not merely by births but by migration. These migrants, many of them colored, most of them unadapted to urban life, form the cutting edge of the housing crisis.

Consequently, the Commission found that for decent homes in good neighborhoods to be available for all Americans, two things must happen: the housing shortage for all lower income Americans must be relieved, and equality of opportunity to good housing must be secured for colored Americans. If racial discrimination is ended but adequate low-cost housing is not available, most colored Americans will remain confined in spreading slums. If low-cost housing is constructed in outlying areas and little or none of it is available for colored Americans, the present inequality of opportunity and the resulting resentments and frustrations will be accentuated. Commission Report, 534-35.
federal program of direct loans to Negroes who are refused loans by private bankers.¹⁵⁰

One advantage a strong antidiscrimination federal policy in housing had, it was suggested, was that it would affect the whole country and not seem directed simply at the South. With nearly half of the Negroes now living outside the South, discrimination in housing is, as Professor Broden said, "just as ugly and pervasive in the North and West as it is in the South." The northern liberal, said Professor Nathanson, "will be in a stronger position and will be more influential if what he's asking for really has a bite at home."¹⁵¹

The Use of 'Benign' Racial Quotas

A great and growing problem in the North, even in cities seeking to make equal opportunity a reality, is to prevent open occupancy from becoming a euphemism for all-Negro housing. Mr. Anderson of Senator Douglas's office reported that in Chicago, since it must be nondiscriminatory, public housing is located in Negro areas. This only compounds the already serious problem of trying to make integration work.²⁵² To prevent an inundation of Negroes in any area opening to them on the edge of their present overcrowded ghettos, Mr. Anderson saw the necessity for a "benign racial quota" designed to preserve and make possible racial integration.¹⁵³ Whether any such quota applied by a public housing authority would be upheld by the courts is doubtful, although a good Brandeis brief might demonstrate its reasonableness in these special circumstances, and hence its constitutionality.¹⁵⁴

But Professor Broden emphasized that that Commission "does not leave these problems to the courts alone. It recommends administrative remedies."¹⁵⁵ In this he saw a parallel with its recommendations concerning voting. There were good reasons for this, he said, since the executive branch possesses all the

¹⁵⁰ See also proposals made to the Commission. Id. at 520-22.
¹⁵¹ One recommendation of the Commission was that "an appropriate biracial committee or commission be established in every city and state with a substantial nonwhite population." Such agencies should be empowered "to study racial problems in housing, receive and investigate complaints alleging discrimination, attempt to solve problems through mediation and conciliation..." The Commission added that, "Where public opinion makes possible the adoption of a law against discrimination in housing, this might contribute to the work of the agency promoting equal opportunity in housing. Then the agency would have legal support in its efforts at mediation and conciliation." Id. at 536. For an account of the 13 states and 34 cities or counties with some significant legislation against discrimination in some area of housing, see 410-15 of the Report.
²⁵² See Commission Report, 430, 438-39, 475-76. The Commission recommended that the federal Public Housing Administration "take affirmative action to encourage the selection of sites on open land in good areas outside the present centers of racial concentrations. PHA should put the local housing authorities on notice that their proposals will be evaluated in this light. PHA should further encourage the construction of smaller projects that fit better into residential neighborhoods, rather than large developments of tall 'high-rise' apartments that set a special group apart in a community of its own."
¹⁵³ See similar proposals. Id. at 443-46, 512.
¹⁵⁴ A plan to maintain twenty per cent Negro population in a private housing development has been found to be unconstitutional. Progress Development Corp. v. Mitchell, 28 U. S. L. WEEK 2461 (N. D. III. March 4, 1960). See also Navasky, The Benevolent Housing Quota, 6 HOWARD L. J. 30 (1960), and Note, 107 U. PA. L. REV. 515, 538-50 (1959).
¹⁵⁵ The Commission made specific recommendations concerning the Housing and Home Finance Agency, the Federal Housing Administration, the Veterans Administration, the Public Housing Administration, and the Urban Renewal Administration. Id. at 538-40. See also 457-501.
flexible powers of the administrative process, whereas "in any judicial remedy, state or federal, there is the problem of expense and delay which is significant for the usual victims of racial discrimination."

Conclusion

While the conference gave priority to the legislative problem of protecting the right to vote, and did not consider discrimination in employment or in the administration of justice or in public places such as lunch counters, the interrelationships were recognized. Father Hesburgh emphasized "the organic nature of the problem" and the need for equal opportunity "across the board" — in the political process, in education, in the choice of homes and jobs, in all parts of our public life.

In adjourning the meeting, Dean O'Meara expressed his "hope that this conference has contributed a little bit toward the realization of that kind of society described by Prime Minister Macmillan as one in which 'individual merit alone is the criterion for man's advancement, whether political or economic.'"