



9-1-1959

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### Recommended Citation

John S. Cooper, *Role of Public Officials II*, 34 Notre Dame L. Rev. 612 (1959).

Available at: <http://scholarship.law.nd.edu/ndlr/vol34/iss5/2>

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## THE ROLE OF PUBLIC OFFICIALS II

*Senator John Sherman Cooper\**

My native State is Kentucky and I'm glad to say that I think it has done well toward eliminating compulsory segregation. Louisville, under the leadership of Superintendent Omer Carmichael, provided an outstanding example of voluntary compliance with the Supreme Court's ruling which other communities in Kentucky have followed. Kentucky has its closest ties with the South, yet it is correct to say that our problem is not as complicated as those of our neighbors to the South. The proportion of negro students to the total school enrollment in Kentucky is relatively small. In the 1956-57 school year, only 38,000 were enrolled in a total of nearly 600,000 in our public schools.

If you will permit me, I would like, at the beginning, to give some account of my position on the problems of desegregation, not so much as a personal matter, but because it may throw light upon the statements that I will make. I have supported, and support without question today, the decision of the Supreme Court, both its constitutional and legal reasoning, and also I support it because of my religious and philosophical beliefs. In the Senate of the United States, I supported the Civil Rights Bill, passed in 1957, including the controversial Title Three. I am sure you remember that Title Three was the section which authorized the intervention of the Attorney General to enforce rights when individuals could not enforce them themselves. Although agreeing with Justice Frankfurter that "The use of force to further obedience to the law is, in any event, the last resort and one not congenial to the spirit of our nation", I supported the President's action in sending troops to Little Rock, because the law of the land was forcibly resisted. I would like to believe, and I do believe, that I would have held my beliefs wherever I might have lived, yet I know that my background and problems have not been, and are not, the same as members of the Congress from the southern states.

I appreciate very much Dean O'Meara's clear statement of the purposes of this symposium and his forthright admonition against our discouragement. He has said that we are here "to concentrate on the practical problems arising from the Supreme Court's decision and to consider the responsibilities of public officials, the churches, and private institutions, and of the community as a whole, towards their solution."

As I tried to prepare for my talk this evening, I must confess that I felt that the field of ideas had been well considered and worked by others, and solutions seemed more and more difficult to me. I hope you will take what I say as my best thoughts at this time and will treat my statements as questions for your criticism and your new suggestions.

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The Supreme Court of the United States has held that the segregation by the state of races by law in public schools, as in other parts of our public life, is the denial of the equal protection of the laws guaranteed by the fourteenth amendment. This decision overturned the rule of separate-but-equal that the southern section of our country had been following with court approval for many years. I think it was inevitable that this decision requiring great changes in the vital field of public education would cause great problems in transition even if acceptance of the decision was obtained. But difficult as the problems of transition are, where consent obtains, or at least where no active resistance is offered, they are not the ones which cause the greatest concern. The issue of greatest concern, at least to my mind, is the unwillingness to accept the law, violent resistance to the law, and at worst, evasion and defiance of the law by public officials and by state governors. Now these attitudes, as Governor McKeldin has pointed out, are held by large groups of our fellow Americans. Some come from prejudices and local habits and customs, but some are held with sincere belief in their validity. That may be hard to believe, but last year I had occasion to visit two southern states and to talk to leaders who were understanding of the integrationist position. Yet many of them told me that they expected it would be years before the great body of people of their states would accept desegregation and, of course, in the debate in the Senate in 1957, I heard the constitutional, legal, and social arguments made in the Senate by my colleagues from the southern states. I shall never forget, I wanted to hear particularly one member of the Senate from the southern states; one who I knew as a man without prejudice, a man of deep religious convictions, and yet I listened to him say, in effect, that there was a system in the South which they would defend and support. I shall never forget, when I heard him speak, of how I felt of the depth and the difficulty of this problem.

In general terms, it seems to me that the decision of the Supreme Court in the *Brown*, and subsequent cases, and the resistance and defiance to its orders, presents two crises. One crisis is a constitutional one. Shall the principle of equal protection of the laws guaranteed by the Constitution, and interpreted by the Court be flouted in its application to negro citizens because it flies in the face of long hallowed, but discriminatory customs and practices? To this question I think there can be only one answer. If we are to maintain the structure of law and order upon which high society is based, until the Constitution is altered it is the duty of all to adhere to it, to honor it, and to defend it, and this is a duty which every citizen, and particularly every public official, is under a duty, to recognize, to support, and enforce. Our crisis, as Father Hesburgh has suggested, is one of ethics. The root of our democratic system, growing from our religious beliefs, is the principle of the dignity and worth of every human being, and from this principle and our reliance and faith in God, we derive our concepts of justice, brotherhood, and mercy. Can we, in good conscience, permit our practices to deny or religious principles in the nature of our political system? "Faith without works", to quote the ancient writings, "is dead." We must live our beliefs or see the moral basis of our life and of our free system of government

corroded by the failure of our practices. These crises require the steady enforcement of the law. They require also the steady and wise effort of all those who believe in the Constitution and the moral soundness of these decisions to secure its acceptance and consent upon which its support must ultimately rest. And both enforcement and consent are related. It is important what the people think about this decision. The laws are not obeyed because they are laws but because people believe they are right. We say that we believe in government by the consent of the people. And when the validity of a law is in dispute, the people's response to it may prove to be decisive.

I should like to discuss first the problem of enforcement. As a member of Congress, I am aware of a special responsibility arising out of the last clause of the fourteenth amendment which says, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." I want to discuss the role of Congress in the context of the whole role of government and enforcing this particular requirement of the Constitution, and also in the context of the word "appropriate." In doing so, of course, I present my own views and I am sure they are not the views of everyone in Congress. There are before the Senate today, three bills or groups of bills. The bill introduced by Senator Johnson, in its reference to desegregation, would provide a community-relations service to assist in reaching solutions, and to avoid force. The groups of bills introduced by Senator Dirksen of which I am a close sponsor, represents the administration's views. The one bill in the administration group which deals specifically with desegregation, other than one asking for the extension of the Civil Rights Commission, would amend the criminal code and make it a federal offense to wilfully use force, or the threat of force, to obstruct court orders in school desegregation cases. The bill introduced by Senator Paul Douglas of Illinois, Senator Javits of New York and others, includes a revised version of the Title Three offered by the administration in 1957 which was rejected by Congress. In addition, the Douglas-Javits Bill provides a method for the establishment of desegregation plans for local communities by the Secretary of Health, Education, and Welfare if local school agencies fail to act. To my view, the administration bill and the Douglas-Javits Bill, although their ends are the same, present quite different concepts as to the role of the Congress in providing supplementary legislation. The administration approach is limited. It adds to the power of the courts a new instrument to enforce their orders. But it is only in those cases where the court has assumed jurisdiction over the complaint of an individual that his right of desegregation, his right not to be discriminated against in education, had been denied. This new instrument would reside in the authority of the Attorney General to immediately arrest and bring to prosecution members of mobs obstructing the orders of the court as a result of the experience in the Little Rock case. I believe this authority would constitute a powerful instrument against such mobs as formed at Little Rock, Clinton, Tennessee, and other places, for the immediate arrest of their ring-leaders would tend to prevent the formation and the violence of mobs. I think this amendment is important and that it should be adopted.

Now, whether or not it is from the usual pride of authorship, I mention

an amendment which I offered to the Civil Rights Bill in 1957 as a limited version of Title Three when it was evident that Title Three would be defeated. We know that the Attorney General does enter proceedings today in desegregation cases as a friend of the court but, as a friend of the court, he comes by invitation and he may not be clothed with the full powers of a litigant. In brief explanation, my amendment would have authorized the Attorney General to intervene with the full powers of a litigant and to institute a civil action for preventive relief, including injunctions and restraining orders, against any persons conspiring to prevent compliance with the order of the United States Court issued to secure the equal protection of the law to any purpose. I point out that that is a limited version of Title Three because it would have only become applicable after the court had entered an order. I must say my amendment was defeated, resoundingly, by the extremes, those who would have Title Three or nothing else, and the southern bloc which resisted any intervention by the Attorney General. But it was my view, and it is my view today, that when a court of the United States has issued its order and the order is defied, usually by a third party in these cases, that the United States should have the immediate power and the right, without invitation, to act through the Attorney General to uphold the dignity and authority of the decrees of its own Court. The Douglas-Javits Bill goes further than the administration's proposal. It is directed toward reaching those areas of the South where no effort towards compliance is being made, or where individuals for various reasons, cannot assert their rights in the courts. As I have said, it would also enable the Secretary of Health, Education, and Welfare to develop plans for desegregation if local agencies do not act. I would say that to the extent the Douglas-Javits Bill — and I have great respect for them and for their co-sponsors — would transfer desegregation plan-making from local school bodies to the Secretary of Health, Education, and Welfare, or to a federal agency, I think it unwise at this particular time. Without trying to predict how even I would vote on these bills in their final form, and with full sympathy for the purposes of these proposals, I want to make the case for leaving primary jurisdiction with local authorities reviewable by the federal district court. My argument rests chiefly on the need for getting desegregation plans devised and proposed by local school boards and approved by local communities. What we look forward to is that negro children shall be admitted, in time, by the consent of the community, rather than by court order over the bitter opposition of the school board in the white community. The Federal Administrative Agency with primary jurisdiction in this field would, I am afraid, be less able to bring about local adoption and support of desegregation plans in the federal district court. The federal district courts are in as relatively good position to judge the community situation as any other body. There is time for the local school board, there has been too much time, to propose a plan for gradual transition. But the recent Charlottesville case has shown that even at the last stage of litigation, when it seemed that the court had nothing left to do but to admit negro litigants, the district judge granted the school board time to work out a compromise plan and this plan was then approved by the court. The result

was a gradual plan but there is reason to believe that the majority of the people in Charlottesville will stand behind it. This is the kind of outcome the Supreme Court must have had in mind when it left the approval of particular local plans to the federal district court and I quote that part of the decision.

The full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems. Courts will have to consider whether action of school authorities constitutes good faith implementation on the governing constitutional principles, the cause of their proximity to local conditions and the possible need for further hearings. The courts which originally heard these cases can best perform this judicial appraisal.<sup>1</sup>

Of course, any such process of local solution is impossible in the face of massive resistance to the very idea of desegregation by the state government. But I do not know of any more effective way to break down such massive resistance than the action of the federal court. This is what finally happened in Virginia, and will, in time, I am sure, happen in the remaining states openly defying the Supreme Court. As you know, there is a case now pending involving these statutes which have been passed by the state of Arkansas. It seems to me those statutes challenge the ultimate right of the federal government itself to legislate in this field. I am sure, in my own judgment, that this effort which goes to the ultimate question will be rejected by the court. I point out that when, through litigation, the state of Virginia had made all the arguments possible and taken all the available appeals, the choice was reached between abandoning public education and beginning the transition to desegregation. The governor and people of Virginia last appeared to be choosing public schools with local option. This choice was then made through the long, deliberative process of litigation. Supreme Court procedures for a local solution have worked. Dean O'Meara has called attention to the Nashville plan. In Nashville, the local school board had sought to delay any plan of desegregation as long as possible. But when faced with the prospect of an order for abrupt desegregation, the board devised, approved, and submitted to the court its own gradual plan — the grade-a-year desegregation plan, beginning with the first grade. Today desegregation is proceeding in Nashville with substantial support from the community. In many communities, the Nashville plan may be too slow in the particular circumstances and the court will make that decision. But it is my view that it is at least a minimum plan that all southern communities should accept. To be sure, much of the desegregation that has taken place in the South is on a token scale, but the important thing is to make steady progress.

Now I sum up this question of enforcement. I do not think that Congress should try to take from federal district courts the primary jurisdiction of assessing the adequacy of desegregation plans, nor do I believe it is possible for Congress to adopt a national timetable for desegregation. Leaving the pace to be set by litigation is slow and troublesome but I think it is a necessary

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<sup>1</sup> *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955).

procedure at this time. I do not mean to suggest that there is nothing that Congress can do or should do to facilitate desegregation. I have suggested in this talk that we promptly adopt the administration proposal to impose criminal sanctions upon those who wilfully obstruct court orders in school desegregation cases. I suggest that, at a minimum, Congress should authorize the Attorney General to intervene with full power to institute civil preventive action against persons or state agencies obstructing the orders of a federal court.

But now I know we come to the ultimate question: What shall the government of the United States do when a state, or communities in a state, or large groups of its citizens will not accept the *Brown* decision, will not submit a desegregation plan, or worse, defy the Constitution and the federal government? We hope that steady enforcement, persuasion, and time will at last solve these ultimate situations. But we do not know that this will be so. It is to meet such a situation that I voted for Title Three of the original Civil Rights Bill. And today I believe power should be given to the Attorney General to intervene when requested to do so and to sue on behalf of those whose rights are denied and who, for reasons of poverty or fear of retaliation, cannot sue because of the necessity of at last securing consent and acceptance to the *Brown* decision by the South. I believe this authority should be used by the Attorney General's discretion, and only when there is substantial evidence that the process described by the *Brown* case could not prevail. It is certain that the Attorney General will be placed under great pressure to intervene where it would be unwise to do so, in situations where local action and consent could in a reasonable time work their way. But these are risks that must be taken when authority and discretion are provided. I believe it more important to provide a well defined Title Three authority or Title Six authority in the Douglas Bill, to the Attorney General so that it would be known that if the reasonable means provided by the *Brown* case will not be followed, the Government of the United States will have the necessary power to support its Constitution and the equal rights of its citizens. There are proposed other measures of aid to the states, financial aid and so forth, which are good, but which I do not have time to discuss tonight. I will mention and I hope very much, as I know you do, that the Civil Rights Commission will be continued because of the record of the great work and the great opportunities that it has.

I have come to the close of my remarks about legislative measures of enforcing the rights guaranteed by the fourteenth amendment and particularly the right not to be segregated by races in public schools.

I turn now to another side of the problem — that of the responsibility of working to secure acceptance and consent to the basic law. When I speak of consent, I do not condone or admit disobedience to the law. Where, as Justice Frankfurter said in the case of *Cooper v. Aaron*, arising from the Little Rock situation, "On the few tragic occasions in the history of the nation, North and South, when law was forcibly resisted or systematically evaded, it has signalled the breakdown of constitutional processes of government on which ultimately rests the liberties of all."<sup>2</sup> But in the same decision, Justice Frankfurter pointed

out that in our system of government "The duty to abstain from resistance to 'the supreme Law of the Land,' . . . does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be still. Active obstruction or defiance is barred."<sup>3</sup> Again in the *Brown* and subsequent cases, the Supreme Court recognized that time would be required to secure approval and compliance with the law. In these cases we find the recognition of local habits and customs of differing circumstances that will permit different plans. And we find such phrases as "deliberate speed," and such sentences as: "Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms."<sup>4</sup> What can Congress do, the government do, the people do to encourage this consent in acceptance of law which is also a part of a free system? I quote again Justice Frankfurter in the case of *Cooper v. Aaron*:

Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counter-acted and moderated. Experience attests that such local habits and feelings will yield gradually, though this be, to law and education. And educational influences are exerted not only by explicit teachings. They vigorously flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost-unconsciously transforming actualities of living under the law.<sup>5</sup>

The courts have made a magnificent record in individual cases, and in the whole series of Virginia cases, towards demonstrating the actuality of living under the law. Let us remember that these are southern courts. Educational influence will flow as the courts have said, "from the fruitful exercise of the responsibility of those charged with political power." The consistent, steady support of the Executive, of Congress, and of elected officials, to the *Brown* decision as the law of the land and the willingness of the Congress to enact needed and reasonable legislation of enforcement and aid will have their effect. The most helpful development that could occur, in my opinion, would be the acceptance of the *Brown* decision as the law of the land and the beginning of constructive steps towards compliance by responsible citizens in the southern states. Surely we must believe that in these states, in the churches, the schools, the legal profession, the labor unions, and among the citizenship of the South, there are those who will help to solve this problem which is national, as well as sectional, and these groups might be stimulated and assisted by their counterparts in other sections of the country, and by such symposiums as this.

I know that these remarks will seem too general to some, to others, an inadequate program, and perhaps to others, too extreme. If all of us consider the problem we discuss here, we will move with a steady hope that we might cut through this problem by some single sweeping stroke and reveal the essential fairness and justice of the American political process but I can offer no single instrument capable of this achievement. Yet I do not believe my

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<sup>2</sup> 358 U.S. 1, 22 (1958).

<sup>3</sup> *Id.* at 24.

<sup>4</sup> *Id.* at 25.

<sup>5</sup> *Ibid.*

remarks are wholly negative for I believe that in the long run the legal and moral disciplines of our system will correct abuses, will isolate those who abuse power, and come to the support of those who are abused by it. Justice Holmes said: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."<sup>6</sup>

The Catholic bishops in their statement on racial discrimination in the moral law stated that "The problems we inherit today are rooted in decay, even centuries of custom and cultural patterns. Changes in deep-rooted attitudes are not made overnight. When we are confronted with complex and far-reaching evils, it is not a sign of weakness or timidity to distinguish among remedies and reforms. Some changes are more necessary than others. Some are relatively easy to achieve. Others seem impossible at this time. What may succeed in one area may fail in another. . . ."<sup>7</sup>

It may be that at last the solution of this problem will be found in the willingness of the people of our country to admit our common moral heritage. We distinguish our own system from the Soviet Union in our belief that even before practice, there were principles, deep religious principles, and they are based upon the identity of man under God. Perhaps that, at last, will be our solution. Finally the bishops said, "Clearly, then, these problems are vital and urgent. May God give this nation the grace to meet the challenge it faces. For the sake of generations of future Americans, and indeed of all humanity, we cannot fail."<sup>8</sup>

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6 Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

7 59 CATH. SCHOL. J. 50, 51 (1959).

8 *Ibid.*