Department of Justice

Statement

By

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Before The

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, SENATE JUDICIARY COMMITTEE

In Support Of The

PROPOSED CIVIL RIGHTS ACT OF 1966

Monday, June 6, 1966

Mr. Chairman:

I appear to urge enactment of S. 3296, the proposed Civil Rights Act of 1966. This is a bill designed to accomplish a few simple, clear objectives.

Titles I and II seek to end racial discrimination in our federal and state jury systems. There is nothing more fundamental to our legal system than the right to have an impartial trial of the facts in every criminal and civil case. There may be no more fundamental duty of citizenship than to serve on juries when called.

Any invidious discrimination in the selection of jurors is incompatible with these tenets.

Title III would provide the tools to complete the desegregation of schools, which 12 years ago was ordered carried out "with all deliberate speed."

Title IV would end compulsory residential segregation, a formidable obstruction to progress toward human equality.

Title V would provide capacity to deal effectively with racial violence. The title is a response to the number of killings and assaults which have gone unpunished.

Problems treated by this bill are deeply engraved on the national consciousness and conscience. They are not undefined shadows on a distant horizon. To the common citizen as much as to the constitutional expert they are apparent and present realities.

This administration is committed to continue the national effort to expunge the blight of human neglect and injustice as long as such problems remain.

The commitment was voiced by President Johnson only five days ago when he pledged his days and talents "to the pursuit of justice and opportunity for those so long denied them."

Mr. Chairman, before I turn to detailed warrants for each section of the bill, I would like to comment on the labelling of Title IV by some of its opponents as a "forced housing" proposal.

I find this ironic. For forced housing is just what Title IV is designed to eliminate -- forced housing through which walls of segregation not only force Negroes to stay out of some residential areas but, conversely, force them to remain in others.

Title IV would not force an owner to sell or rent his home.

It would not force him to sell or rent to anyone who is financially unsound or otherwise legitimately undesirable.

What it would do is assure that houses put up for sale or rent to the public are in fact for sale or rent to the public.

What it would do is free the housing market of barriers built only on encrusted bigotry -- barriers which are often unwanted handicaps not only for the Negro buyer but also for the white seller.

I submit that forced housing exists today.

I suggest that all Americans truly opposed to forced housing unite in support of Title IV -- just as all Americans dedicated to the finest ideals of democracy should support the entire bill.

Let me now turn to a title-by-title review of the bill.

TITLES I AND II: JURY REFORM

Exclusion of any person from jury service in any court in this country on account of race, color, religion, national origin, sex or economic status is inconsistent with our principles.

Yet discrimination against potential jurors continues to infect our system of justice.

There have been scores of cases involving such discrimination over the past century. In recent years, there have been state court findings of jury discrimination in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, and North Carolina.

There have been more than 30 Supreme Court decisions relating to jury discrimination in the states. And in the past few months, federal courts have found that Negroes have been systematically excluded from jury service in Lowndes and Macon counties, Alabama.

Such discrimination strikes a triple blow at Negro citizenship:

--It deprives Negro defendants and litigants of fair trials;

--It denies, in some places, Negroes and civil rights workers equal protection of the laws by virtually insuring that juries will not truly represent the interests of the entire community in securing convictions of civil rights violators when warranted by the facts;

--Finally, such discrimination denies to qualified Negroes the opportunity to participate in the operation of their government in one of the few direct ways open to the average citizen.

Nor is the problem of jury discrimination limited to the exclusion of Negroes. Women, persons from low-income groups, persons of particular national origins, and others have sometimes been excluded from jury service either by law or practice.

Legal challenges to jury discrimination should not have to be the exclusive concern of individual criminal defendants or private citizens.

Under present law, the federal government may not initiate action to eliminate jury discrimination in state courts. Title IX of the Civil Rights Act of 1964 authorizes the Department of Justice only to intervene in jury discrimination suits brought by private litigants under 42 U.S.C. 1983.

(Pursuant to this authority, the Department recently has intervened in six such suits and participated as amicus curiae in five other recent jury discrimination cases.)

Substantial constraints often operate against the individual who seeks to initiate action against jury discrimination.

One was pinpointed in the observation of the Court of Appeals for the Fifth Circuit in a recent opinion (Whitus v. Balcom, 333 F. 2d 496, 1964):

> We believe that we know what happens when a white attorney for a Negro defendant raises the exclusion issue in a county dominated by segregation patterns and practices: both the defendant and his attorney will suffer from community hostility.

Moreover, even if a criminal defendant or civil litigant decides to challenge jury discrimination, the records of jury selection -- necessary to prove the allegation -- may not have been preserved by jury officials or, if retained, may not be accessible to the complainant.

A somewhat different problem exists concerning jury selection in the federal courts. Varying selection systems are used and the results in some cases can create the appearance of unfairness. At a minimum they lack desirable uniformity in the opportunities for service afforded to all segments of the community.

Of the varying methods now used to obtain source lists of names in the federal courts, the so-called "key man" system is the most common. This system is used as the exclusive source of potential jurors in over forty federal judicial districts. It relies on a selected group of residents of the district -- the key men -- who are requested by federal jury officials to submit names of persons whom they believe to be suitable for jury service.

Many of the persons selected for jury duty under this system are, inevitably, from the same social groups as the key men.

A recent informal survey taken by the Department of Justice in Alabama, Florida, Georgia, Louisiana, Mississippi and Texas -- indicates substantial under-representation of Negroes on federal jury lists when compared with the percentage of adult Negroes residing in the district.

FEDERAL JURIES

The basic purpose of Title I is to insure that federal jurors are drawn from a broad cross-section of the community.

It provides, first, that no person or class of persons shall be denied the right to serve on federal grand or petit juries because of race, color, religion, sex, national origin, or economic status.

Second, it specifies voter registration rolls as the exclusive source from which names of prospective jurors are to be drawn.

Third, it lays down definite requirements for the selection of names from the voter rolls and details mandatory procedures for each subsequent step in the juror-selection process.

Fourth, it provides a challenge mechanism for determining whether jury officials have followed the prescribed procedures.

Section 1864 requires the jury commission in each district to maintain a master jury wheel containing names from official voter registration lists.

These lists reflect a fair cross-section of the community in most areas and the Voting Rights Act of 1965 provides the means to insure within the near future that they will do so in all areas.

This section also provides however, that where Negroes or other groups are not yet adequately representated on the voting rolls, the Judicial Council of the Circuit is to designate supplementary sources of names for the master jury wheel.

Thus what is designed to be a fair original standard is supplemented by the discretion of federal appellate judges.

Those whose names are drawn from the wheel must fill out a juror qualification form. Title I retains the qualifications prescribed by present law, including the requirement that a juror must be literate -- but this requirement based solely on his ability to fill out the form. Higher qualifications -- in an effort to obtain "blue ribbon" juries -- would not be permissible.

The names of those found qualified then would be placed in a qualified juror wheel to be drawn as needed for grand and petit jury panels.

Section 1867 establishes a special procedure in both criminal and civil cases for determining whether there has been compliance with the selection procedures.

If the court determines that there has been a failure to comply, it is required to dismiss the indictment or stay the proceedings pending the selection of a petit jury in conformity with this title.

STATE JURIES

Title II of the bill is designed to eliminate unconstitutional discrimination in the selection of jurors in state courts. It contains three basic provisions.

First, it prohibits discrimination in state jury selection processes because of race, color, religion, national origin, sex or economic status.

Second, it authorizes the Attorney General to enforce the prohibition by civil injunctive proceedings against state jury officials.

Third, it provides a discovery mechanism to facilitate determinations of whether unlawful discrimination has occurred in the jury selection process.

The terms of the prohibition on discrimination contained in section 201 are identical to the corresponding section in Title I governing federal juries. The effect of the prohibition of discrimination on account of sex and economic status, however, would be somewhat different.

Under Title I, all federal jurors would be selected at random from the voter rolls. No exemptions, excuses, or exclusions based solely on sex or economic status would be authorized.

Under Title II, two types of state laws regulating jury service by women would be nullified:

--First, those in Alabama, Mississippi and South Carolina which totally exclude women from jury service;

--Second, those in Florida, Louisiana, and New Hampshire which exclude women unless they affirmatively volunteer for jury service by taking steps -- not required of men -- to sign up for jury service.

It would not nullify laws which exempt women from service only if they affirmatively claim exemption, such as exist in a number of states.

The ban on economic discrimination in Title II would not outlaw every state procedure which may have some incidental economic impact.

State laws imposing direct economic qualifications for jury service would be nullified by Title II. State laws prescribing the tax rolls as the exclusive source of names of jurors also would be nullified unless the tax base is so broad as to include practically every adult in the community.

Title II would authorize the Attorney General to institute civil action in federal court for preventive relief against state jury officials who violate the prohibition against discrimination. This provision is similar to those in other civil rights legislation.

If in such a lawsuit (or in a similar lawsuit brought by private persons under existing laws) the court makes a finding of discrimination, it would be authorized to grant effective relief. This would include suspension of the use of objectionable qualifications and procedures and, if necessary, the appointment of a master to operate a state court jury system. A federal court in Alabama recently took the position that under present law it had the power to appoint a master for this purpose, and would do so should other remedies fail.

The third important provision of Title II is the special discovery procedure contained in Section 204. This machinery, to be available in addition to that afforded under the federal rules or applicable state law, would be set in motion whenever it is asserted in an appropriate case that discrimination had occurred in the jury selection process.

Local officials would be required to furnish information and records about their jury selection process to enable the court to base its decision on a complete record of the questioned events.

TITLE III: PUBLIC SCHOOLS AND PUBLIC FACILITIES

Considerable progress in the desegregation of public schools and public facilities has been made since passage of the 1964 Civil Rights Act. With regard to public schools, much of the progress is attributable to Title VI of that statute, which requires desegregation as a condition of eligibility for federal financial assistance.

But in some areas, school authorities have yielded to community pressures and forfeited federal aid rather than desegregate. And in school districts where "freedom-of-choice" desegregation plans have been formally adopted, intimidation of Negro pupils and their parents has prevented any meaningful integration of the schools. It is in these areas that the need for federal intervention is greatest.

Yet the Attorney General now can sue to desegregate public schools and facilities only after he has received a written complaint from a local resident and determined that the complainant is unable to sue on his own behalf.

This complaint requirement is unrealistic in areas where the likelihood or fear of harassment makes Negroes understandably afraid to complain to the federal government. We have found that the other restriction in the present law -- that the complainant must be found unable to sue on his own behalf -- does not sufficiently serve the public interest in achieving orderly desegregation.

Title III of the bill is designed to insure that intimidation does not affect the power of the federal government to bring suits to desegregate schools and public facilities.

It would permit the Attorney General to sue when he believes suit to be necessary -- giving him essentially the same authority he now has in the areas of voting, public accommodations, and employment.

Thus, Title III would repeal both the written complaint requirement and the requirement that the Attorney General determine the complainant is unable to sue. In addition, Title III would provide a direct remedy against intimidation by authorizing the Attorney General to seek injunctive relief against interference by private individuals or public officials with desegregation of public schools and facilities. (Title V would impose criminal penalties for such interference.)

TITLE IV: HOUSING

In the years since World War II we have seen tremendous strides toward full citizenship for the Negro American. Brown v. Board of Education did more than merely hold segregated schools to be in violation of the Constitution. It set in motion forces of democracy aimed at the ultimate goal of destroying every aspect of discrimination.

Substantial progress has been made in such areas as schools, voting, public accommodation, transportation, public facilities, expenditures of public funds and employment.

Yet we have hardly made a start in dealing with the one pervasive problem which silently sabotages efforts toward equality in all of these areas -- enforced housing in segregated ghettos of vast numbers of Negro citizens.

The period from 1910, when only 10 per cent of this country's Negroes lived outside the South, through 1960, when that figure rose to almost 40 per cent, has been a period of migration to northern cities. Economic necessity, restrictive covenants, and refusals by real estate dealers and landlords to lease or sell forced this group into racial ghettos.

Today, ghetto living is the fate of great numbers of our Negro citizens in urban areas across the United States. The housing is of inferior quality and overcrowding is intense. For example, in Harlem 237,792 people live in a 3-1/2 square mile area, or 100 people per acre. Ninety per cent of the housing is more than thirty years old and nearly half was built before 1900.

This problem is not limited to any one region of the country. No section of the United States is free from housing discrimination and racial ghettos.

Segregated housing isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation and transportation services and facilities. It restricts access to training and employment and business opportunities. It leads a large class of citizens to despair -- a despair which has at times contributed to violent outbreaks against society itself.

The Negro citizen has not been able to benefit from the post-World War II housing boom on a par with other Americans. His choice of a place to live is limited not merely by his ability to pay, but by his color. As the United States Commission on Civil Rights had concluded, today "housing 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."

Illustrative of the problem's scope is a recent survey of 235 Defense installations by the Department of Defense. The survey disclosed that Negro servicemen faced severe discrimination in obtaining housing near 102 of the installations.

Reported in the survey were case after case of Americans, in the service of their country, being denied houses or apartments, or being charged outrageous prices for housing, simply because of their skin color.

Often they were forced to live far away from their duty stations, sometimes in inferior dwellings in deteriorating neighborhoods. Many of these service-members decided against having their families join them and be subjected to these conditions.

Among the instances reported was that of an officer who signed a contract for the construction of a home only to have the construction firm refuse to fulfill the contract after learning that he wanted the house built in an area where no Negroes lived. Despite efforts to resolve the problem, it was still unresolved when the officer departed for Viet Nam.

A Lieutenant Colonel stationed near Washington was unable to rent a home in either of two communities near his base and found it ncessary to purchase a house further away.

Twelve officers reporting on their housing problems said, in part:

> "We often saw white non-rated men move into facilities which were 'unavailable' to us. In many cases we were separated from our families for long periods as we watched persons reporting to the area after us acquire accommodations and rejoin their families.
>
> "Often persons have recommended 'nice colored' locations usually served by 'nice colored' schools which offer our children substandard education. . .
>
> "We simply want to be able to find decent housing just as easily (or with as much difficulty) as anyone else. . .
>
> "Often it is said that our situation is understandable and everyone sympathizes with us but very little can be done. . ."

Mr. Chairman, experiences like this, repeated daily across the country and affecting hundreds of thousands of citizens, add up to a system of forced housing which disables our society.

State and local governments have made some headway in attacking this system. Fair housing laws have been enacted by seventeen states and by a large number of municipalities. Efforts by private groups, such as Neighbors, Inc., here in the District of Columbia, have been made in many communities.

Nor has the federal government ignored the problem. In 1948, the Supreme Court held racially restrictive covenants unenforceable in both state and federal courts. And President Kennedy's Executive Order of

November 20, 1962, established the President's Committee on Equal Housing Opportunity and forbade discrimination in new FHA or VA-insured housing.

By now, it should be plain that scattered state and local laws are not enough. The work of private volunteer groups is not enough. Court decisions are not enough. The limited authority now available to the executive branch is not enough.

The time has now surely come for decisive action by Congress. Only Congress can fully commit the nation to begin to solve the problem on a national scale. That is the purpose of Title IV.

The Title applies to all housing and prohibits discrimination on account of race, color, religion or national origin by property owners, tract developers, real estate brokers, lending institutions and all others engaged in the sale, rental or financing of housing.

It also prohibits coercion or intimidation intended to interfere with the right of a person to obtain housing without discrimination -- for example, firing a Negro from his job because he inspected a house for possible purchase in an all-white neighborhood.

Title IV provides a judicial remedy. An individual aggrieved by a discriminatory housing practice could bring a civil action in either a federal district court or a state or local court for injunctive relief and for any damages he may have sustained. In the court's discretion, he could also be awarded up to $500 exemplary damages.

The title authorizes the Attorney General to initiate suits in federal courts to eliminate a "pattern or practice" of discrimination, and to intervene in private suits brought in federal courts.

Title IV is primarily based on the Commerce Clause and on the Fourteenth Amendment of the Constitution. I have no doubt that it is constitutional.

The Commerce Clause makes Congress responsible for the protection and promotion of interstate commerce in all its forms. The construction of homes and apartment buildings and the production and sale of building materials and home furnishings take place in or through the channels of interstate commerce. When the total problem is considered, it is readily apparent that interstate commerce is significantly affected by the sale even of single dwellings, multiplied many times in each community.

The housing industry last year represented $27.6 billion of new private investment. This expenditure on residential housing is considerably more than the $22.9 billion which all American agriculture contributed to the Gross National Product in 1965. Forty-one million tons of lumber and finished wood stock were shipped in the United States in

1963, and forty-three per cent of it was shipped 500 miles or more.

With regard to interstate financing in the housing industry, Secretary Weaver has said that, for example, in 1964 approximately 40 per cent of the mortgage holdings of mutual savings banks -- representing some $15 billion -- was on properties located outside the states where the banks were located. There is also a very substantial interstate flow of mortgage funds involved in the activities of savings and loan associations. Secretary Weaver also pointed to the ever-increasing mobility of our population -- fourteen million persons moved from one state to another between 1955 and 1960, and of course sought new homes in the state of their destination -- as a critical factor in assessing the interstate character of the housing business.

Secretary Weaver's statistics were illustrated by a statement of Mr. William J. Levitt, President of Levitt & Sons, Inc., the builders of residential homes. Mr. Levitt, who supports Title IV, says that "perhaps 80 per cent of the materials that go into our houses come from across state lines."

Mr. Levitt says that "with the possible exception of the New York Community that we are building now, every other community in which we build receives its financing from a state other than the one in which it is located."

Mr. Levitt also says that "75 to 85 per cent" of his firm's advertising was interstate and that "out-of-state purchasers run from about 35 to 40 per cent, on a low side, to some 70 per cent, on our high side."

The power of Congress over interstate commerce and activities affecting that commerce is broad and plenary. With that controlling principle in mind, let me anticipate three questions at the outset. First, the Congressional power is not restricted to goods actually in transit. In sustaining the public accommodations title of the 1964 Act as it applies to restaurants catering primarily to local residents, the Supreme Court laid any such notion to rest, saying:

> "Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation." (Katzenbach v. McClung, 379 U.S. 294, 302).

Second, it does not matter whether Congress' motive in acting is solely to promote commerce. What was said by the Court in upholding another section of the public accommodations title of the 1964 Act disposes of the point: "That Congress was legislating against moral wrongs in many of these areas rendered its enactment no less valid" Atlanta Motel v. United States, 379 U.S. 241, 257.

Third, I recognize that it is difficult to determine the extent to which discrimination by individual homeowners affects interstate commerce. But each part of the pattern of discrimination affects, and is affected by, the whole. And to eliminate the clear and substantial effect that patterns of discrimination have on commerce, Congress can and must deal with separate parts.

It is settled that the reach of the Commerce Clause is not exceeded merely because the particular activity regulated is local or is quantitatively unimportant where considered in isolation -- such as the sale of a single dwelling. In Mabee v. White Plains Publishing Co., 327 U.S. 178, the Fair Labor Standards Act was applied to a newspaper whose circulation was about 9,000 copies and which mailed only 45 copies -- about one-half of one per cent of its business -- out of state. And in Wickard v. Filburn, 317 U.S. 111, the Agricultural Adjustment Act of 1938 was applied to a farmer who sowed only 23 acres of wheat and whose individual effect on interstate commerce amounted only to the pressure of 239 bushels of wheat upon the total national market. See also Labor Board v. Fainblatt, 306 U.S. 601, 607; United States v. Darby, 312 U.S. 100, 123; United States v. Sullivan, 332 U.S. 689.

The discrimination at which Title IV is directed affects commerce in several different ways. For instance, it restricts the movement of building materials and home furnishings from one State to another. The confinement of Negroes to older homes in the ghettos restricts the number of new homes which are built and consequently reduces the amount of building materials which move in interstate commerce. It has a similar impact upon the number of new apartment buildings constructed and the amount of materials purchased for their construction.

Additionally, discrimination in housing impedes the interstate movement of individuals. Although many Negroes do move from one part of the country to another despite the lack of unsegregated housing at their destination, there can be little doubt that many others are deterred from doing so. In particular, Negroes in the professions or those with technical or other skills are less likely to move into communities where a "black ghetto" is their only prospect. See Katzenbach v. McClung, supra at 300.

Title IV is also sustainable as "appropriate legislation" to enforce the substantive guarantees of the Fourteenth Amendment.

The right to acquire property without discrimination dates from emancipation. The Negro slave was, of course, confined to a segregated compound or "slave quarters," legally disabled from acquiring a residence of his choosing. This was, indeed, one of the "necessary incidents of slavery." Civil Rights Cases, 109 U.S. 3, 22. Nor did the situation change radically immediately after formal emancipation. Some of the so-called "Black Codes" of 1865 and 1866 continued these disabilities,

sometimes altogether "fencing out" the Negro from the towns. See Slaughter-House Cases, 16 Wall. 36, 70. It is not surprising, therefore, that the drafters of the Fourteenth Amendment explicitly addressed themselves to the problem.

Viewing the right to hold property as one of "those fundamental rights which appertain to the essence of citizenship * * * the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery" (Civil Rights Cases, supra, 109 U.S. at 22), the Thirty-Ninth Congress acted even before the adoption of the Fourteenth Amendment, invoking its power to enforce the Thirteenth.

The very first Civil Rights Act, in 1866, provided that all citizens of the United States, "of every race and color," "shall have the same right * * * to inherit, purchase, lease, sell, hold and convey real and personal property * * * as is enjoyed by white persons, * * * any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Act of April 9, 1866, §1, 14 Stat. 27.

Two months later, the same Congress -- some of its members doubtful of the constitutional basis for the legislation, others anxious to place it beyond easy repeal (see Hurd v. Hodge, 334 U.S. 24, 32-33) -- proposed the Fourteenth Amendment, which was understood as incorporating into the Constitution the guarantees of the Civil Rights Act of 1866. See Slaughter-House Cases, supra, 16 Wall. at 70; Civil Rights Cases, supra, 109 U.S. at 22; Yick Wo v. Hopkins, 118 U.S. 356, 369; Buchanan v. Warley, 245 U.S. 60, 78-79; Oyama v. California, 332 U.S. 633, 640, 646; Shelley v. Kraemer, 334 U.S. 1, 10-11; Hurd v. Hodge, supra, 334 U.S. at 32-33; Takahashi v. Fish Comm'n., 334 U.S. 410, 419-420. And to make the assurance doubly sure, a subsequent Congress expressly re-enacted the 1866 provision in the Enforcement Act of 1870. Act of May 31, 1870, § 18, 16 Stat. 144, 146.

That law remains on the statute books today. R.S. § 1978, 42 U.S.C. 1982. The right involved is not a mere abstract privilege to purchase or lease property which is satisfied if Negroes are not absolutely disabled from acquiring property at all. What was given was more than the bare right to hold property. The constitutional and statutory guarantee includes also an immunity from being "fenced out" of any neighborhood, indeed, any block, on the ground of race. Buchanan v. Warley, supra; Harmon v. Tyler, 273 U.S. 668; Richmond v. Deans, 281 U.S. 704; Shelley v. Kraemer, supra; Hurd v. Hodges, supra; Barrows v. Jackson, 346 U.S. 249.

To be sure, despite its absolute language, the existing statute has been held to protect only against state action. Shelley v. Kraemer, supra. But it does not follow that Congress may not now enlarge the right. On the contrary, in light of its origin, the right to be free of racial discrimination in the purchase and rental of residential

property--partially grounded as it is in the Thirteenth Amendment--is one of those privileges of national citizenship which Congress may protect even as against wholly private action. See Slaughter-House Cases, supra, 16 Wall. at 80; Civil Rights Cases, supra, 109 U.S. at 20, 23; Clyatt v. United States, 197 U.S. 207, 216-218.

Indeed, in the Civil Rights Cases, the Supreme Court distinguished between the asserted right to be free from discrimination in privately-owned places of public accommodation--which it characterized as one of the "social rights" of men and races in the community"--and the "fundamental rights which are of the essence of civil freedom" enumerated in the Civil Rights Act of 1866; and the Court came close to suggesting that, while Congress could not constitutionally protect the former as against private discrimination, it might be competent to fully safeguard "civil rights." 109 U.S. at 22.

In any event, it is clear that the right to freedom from discrimination in housing enjoys particular recognition under the Fourteenth Amendment. This is reflected in the fact that State-imposed residential segregation was held unconstitutional (Buchanan v. Warley, supra) as early at 1917, at a time when enforced segregation in public and private schools was condoned (Berea College v. Kentucky, 211 U.S. 45; see Gong Lum v. Rice, 275 U.S. 78, 85-87; Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 344, 349), as it was with respect to transportation (Plessy v. Ferguson, 163 U.S. 537; see McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151, 160) and other activities (e.g., Pace v. Alabama, 106 U.S. 583). So, also, it is revealing that in the restrictive covenant cases (Shelley v. Kraemer, supra; Hurd v. Hodge, supra; Barrows v. Jackson, supra), the Court found prohibited "state action" in the apparently neutral judicial enforcement of private discriminatory agreements--invoking a doctrine which it has declined to follow elsewhere.

Moreover, it is highly relevant that government action--both state and federal--has contributed so much to existing patterns of housing segregation. Local housing segregation orders were outlawed in 1917 (Buchanan v. Warley, 245 U.S. 60) but ordinances which had a similar effect were still being tested in the courts as late as 1930. See Harmon v. Tyler, 273 U.S. 668 (1927); City of Richmond v. Deans, 281 U.S. 704 (1930). Private racially restrictive covenants were enforceable by the courts until the Supreme Court's 1948 decision in Shelley v. Kraemer, 334 U.S. 1, and as late as 1936, the Federal Housing Administration in its Underwriting Manuals affirmatively recommended such covenants and warned against "inharmonious racial groups." With such a history of past governmental support, it can hardly be argued that present practices represent purely private choice.

As was stated in the opinion of Mr. Justice Brennan in United States v. Guest, the Fourteenth Amendment includes "a positive grant of legislative power, authorizing Congress to exercise its discretion

in fashioning remedies to achieve civil and political equality for all citizens." In the light of the history of particular concern in the framing and interpretation of the Fourteenth Amendment for the right of Negroes to purchase or lease property and in view of the past contributions of government to housing segregation, the "positive grant of legislative power" contained in the Fourteenth Amendment surely provides a constitutional basis for Title IV.

The authority for the legislation is clear. So, too, is the need. As Mr. Levitt's testimony made clear, a builder or landlord who now resists selling or renting to a Negro often does so not out of personal bigotry but out of fear that his prospective white tenants or purchasers will move to housing limited to whites and that, because similar housing is unavailable to Negroes, what he has to offer will attract only Negroes. This, generally, would narrow his market considerably.

If all those in the housing industry are bound by a universal law against discrimination, there will be no economic peril to any one of them. All would be in a position to sell without discrimination.

Therefore, I think it would be a mistake to regard the most significant aspect of a federal fair housing measure as its sanctions against builders, landlords, lenders, or brokers. What is more significant, rather, is that they can utilize this law as a shield to protect them when they do what is right.

Nor need we fear that Title IV would impair real estate values. Mr. James W. Rouse, the president of a nationally-known mortgage banking and real estate development firm, has said that, in his opinion, a national fair housing law would prevent any irrational fluctuations in real estate values. He stated that "the preponderance of real estate developers and home builders would prefer to operate in a fully open market, but they fear the results of going it alone." He went on to say that open housing does not have adverse effects on mortgage financing.

TITLE V: TERROR AND VIOLENCE

What I have described so far are measures to help the nation deal with the effects of segregation, in many instances segregation long enforced by law.

What is equally--critically--necessary is to deal decisively with segregation enforced by lawlessness.

As President Johnson observed in his recent Civil Rights Message, "Citizens who honor the law and who tolerate orderly change--a majority in every part of the country--have been shocked by attacks on innocent men and women who sought no more than justice for all Americans."

There is small need to catalogue the brutal crimes committed in recent years against Negroes seeking to exercise rights of citizenship--and against whites supporting them. Just to cite the names of some of the victims is enough:

Medgar Evers, Andrew Goodman, James Chaney, Michael Schwerner, Lemuel Penn, James Reeb, Mrs. Viola Liuzzo, Jonathan Daniel, Vernon Dahmer.

It is not only murders--or injuries or bombs or bullets--that must concern us. For as the President noted, the effect of such violence goes far beyond individual victims. It generates widespread intimidation and fear--fear of attending desegregated schools, using places of public accommodation, voting, and other activities in which federal law and American citizenship demand equality.

Where the administration of justice is color blind, perpetrators of racial crimes will usually be appropriately punished and would-be perpetrators deterred by local authorities.

In some places, however, local officials either have been unable or unwilling to prosecute crimes of racial violence or to obtain convictions in such cases even where the facts seemed to warrant conviction.

But the need for effective federal criminal legislation to deal with the problem of racial violence does not arise solely from a malfunctioning of state or local administration of the criminal law. Crimes of racial violence typically are directed to the denial of affirmative federal rights and thus reflect an intention to flout the will of the Congress as well as to perpetuate traditional racial customs.

The principal federal criminal statutes dealing with crimes of racial violence are sections 241 and 242 of the federal criminal code. Two months ago, the Supreme Court decided two cases--United States v. Price and United States v. Guest--involving the construction of these statutes.

The Court's decision in Price--concerning the indictment of private individuals and public officials in connection with the killing of the three civil rights workers in Neshoba County, Mississippi--establishes that when public officials, or private individuals acting in concert with public officials, interfere with the exercise of Fourteenth Amendment rights, section 241 is violated.

In the Guest case, however, which involved the highway slaying of Lemuel Penn, only private individuals had been indicted. The Court sustained a part of the indictment charging a private conspiracy to interfere with the right to travel interstate--a distinctly "federal" right not flowing from the Fourteenth Amendment.

But the part of the indictment charging a conspiracy of private persons to interfere with Fourteenth Amendment rights (in that case, the right to use highways and other state facilities without discrimination) appears to have been found sufficient only because of certain allegations of official involvement in the conspiracy, even though no public officials had been indicted. The majority and concurring opinions leave in doubt whether Congress, when it enacted Section 241 in 1870, intended to reach private interference with Fourteenth Amendment rights.

What we should take particular note of, however, in the Guest decision is that six justices expressly said that Congress does have the power under section 5 of the Fourteenth Amendment to reach such purely private misconduct.

Another defect in the present law stems from the fact that section 241 is worded in general terms. Because it is not always clear just what rights are encompassed by the Fourteenth Amendment, the Supreme Court has read into this statement the requirement that the prosecution prove a "specific intent" by the defendant to deprive the victim of a particular Fourteenth Amendment right. Commenting on this "specific intent" requirement in his concurring opinion in the Guest case, Mr. Justice Brennan said--

> Since the limitation on the statute's effectiveness derives from Congress' failure to define--with any measure of specificity--the rights encompassed, the remedy is for Congress to write a law without this defect . . . . . [If] Congress desires to give the statute more definite scope, it may find ways of doing so.

Title V is intended to achieve four main objectives.

First, it would make it a crime for private individuals forcibly to interfere, directly or indirectly, with participation in activities protected by federal laws, including the Fourteenth Amendment--whether or not "state action" is involved. It would also protect these activities against interference by public officials.

Second, it would specify the different kinds of activity which are protected--thus giving clear warning to lawless elements that if they interfere with any of these activities, they must answer to the federal government.

Thurd, it would protect not only Negroes and members of other minority groups, but also civil rights workers and peaceful demonstrators seeking equality.

Fourth, it would provide a graduated scale of penalties depending upon whether bodily injury or death results from the interference.

Title V prohibits injury, intimidation or interference based on race, color, religion or national origin that occurs while the victim is actually engaged in protected activity--for example, a person assaulted while he is standing in line at the polls or swimming at a public pool.

This title gives the same protection to persons seeking to engage in protected activities--for example, entering a restaurant, enrolling a child in school, or applying for a job.

Title V also covers interference that occurs either before or after a person engages in protected conduct but which is related to that conduct. This would include, for example, reprisals or threats against a Negro after he inspected a home in an all-white neighborhood.

This title also would cover interference with persons performing duties in connection with protected activities--for example, a public school official implementing a desegregation plan or a welfare official distributing surplus commodities.

Title V would not require proof of "specific intent" as is required under 18 U.S.C. 241 by the decision in Screws v. United States, 325 U.S. 91 (1945). This is so primarily because, unlike section 241, Title V clearly describes the prohibited conduct and stands by itself. No reference to the Fourteenth Amendment or any other law would be required in order to determine what conduct is prohibited.

We have recognized that violence which merely happens to occur at or near the time that a person engages in a federally protected activity, does not necessarily fall within federal jurisdiction. For this reason, section 501 (a)--which prohibits interference that occurs while a person is actually engaging or seeking to engage in protected activity--applies only to racially motivated conduct.

Similarly, under sections 501 (b) and (c)--which cover reprisals and attempts to deter protected activity--the jury would have to find that the defendant's purpose was to deter persons from engaging in protected activity or to punish persons who have done so.

Title V covers one situation in which the victim of the interference need not himself have had anything to do with any kind of civil rights activity--the terrorist act in the truest sense. This is the case where there is an indiscriminate attack on a Negro simply because he is a Negro and for the purpose of discouraging Negroes generally from engaging in the activities specifically described in Title V. Such incidents are not rare and when they occur, they are often silently effective in generating wide intimidation.

CONCLUSION

Mr. Chairman, I hope that this discussion has made clear the need for each title of this bill.

I recognize fully the mindfulness which you and the members of this sub-committee have that legislation of this character be scrupulously reviewed. Proposals of this sort deserve conscientious and exacting analysis in open hearings.

But circumspection and searching analysis do not require an indefinite stay of judgment or the invoking of a hypothetical future more seasonable for action.

There seems to be no reason why we cannot in the weeks immediately ahead fully ventilate all questions, consider all honest doubts and ambiguities, and clarify public understanding. We stand prepared--morning, afternoon, and evening, weekday and weekend to assist the committee and the Congress in the completion of this task.

We cannot do less in attempting to compensate for decades of neglect with legislation that is necessary, constitutional and timely.