Department of Justice

STATEMENT

by

ATTORNEY GENERAL NICHOLAS deB. KATZENBACH

before

SUBCOMMITTEE NO. 5, HOUSE JUDICIARY COMMITTEE

in support of the

PROPOSED "CIVIL RIGHTS ACT OF 1966"
(H.R. 14765)

Wednesday, May 4, 1966

Mr. Chairman and Members of the Sub-Committee:

It is a privilege to come before this committee, as you embark on the consideration of the proposed Civil Rights Act of 1966, H.R. 14765, and to urge its prompt enactment.

During the past three years this committee has been almost continuously in the eye of the storm. Yet it has confronted directly a series of measures raising profound issues of both social upheaval and social adjustment. It has done so with wisdom, insight, and with a substantial fusion of purpose and action on both sides of the aisle. The whole nation has been the beneficiary of your work. You have played an indispensable role in the process of peaceful and timely change without which there might be deep rifts in our public order.

The President reminded us in his Howard University address last year that the inequities suffered by Negroes are not isolated infirmities. "They are," he said "a seamless web. They cause each other. They reinforce each other. Most of the Negro community is buried under a blanket of history and circumstance. It is not a solution to lift one corner of that blanket. . . . we must raise the entire cover if we are to liberate our fellow citizens."

It is possible to report measurable and meaningful progress since the passage of the Civil Rights Act of 1964 and 1965. The overwhelming conscience of the nation has been truly aroused.

--- We have made heartening progress toward achieving the integrity of the ballot since the enactment of the Voting Rights bill last August.

In the five states affected by this Act the number of Negroes registered has increased by 50% -- 350,000 newly registered voters; in these states 43% of the total number of eligible Negroes are registered, and I

can assure you that this will further improve by this fall. More than two-thirds of these new voters have been enrolled by local officials. In the 11 states of the South registration now exceeds 50% of total eligible Negroes.

The impact has not only been a statistical one; there have been environmental changes also. The terms of political debate and attitudes in the South are changing.

--- In school desegregation the rate is progressively accelerating. In this past year over 1,500 school districts reported either specific headway or at least acquiescence in the principles of the law and the guidelines formulated by the Department of Health, Education, and Welfare. Only 80 districts in the 17 southern and border states refused to comply.

In the eleven states of the South only 6% -- 180,000 out of about 3 million -- of Negro children attend desegregated schools, but this marks more progress in one year than in all previous years. Again, this next fall we see a greater mobilization of effort and accomplishment. The passage of Title III of this bill would further insure this result. The experience we have had in very recent weeks in so difficult an area as Lowndes County is reassuring.

--- In employment, experience is short. But in the nine months since Title VII went into effect, the work of the Equal Employment Opportunity Commission has moved forward rapidly.

--- In public accommodations compliance has been marked though considerable momentum had already voluntarily been set in motion prior to the passage of the 1964 Act. But once Congress set uniform requirements and the Department of Justice had the power to file suits, the rate of progress rose sharply.

Equally significant, there has been a mutually reinforcing effect between the assaults our government is making on the malignancies of poverty, the greatly intensified efforts to lift all levels of educational quality and opportunity, and the civil rights legislation.

Why, then, a Civil Rights Act of 1966?

The answer is that there continue to be deep-seated, interconnected and complex problems of racial injustice which are immediate, apparent, and not susceptible to effective treatment without action by Congress now.

Title V is, of course, a response to the shameful catalogue of racial killings -- sometimes Klan sponsored -- most of which have so far gone unpunished.

The responsibility for maintaining order and security is primarily one for state and local government. Title V does not diminish this responsibility. What it does is give to the federal government a capacity to deal with Klansmen and other fanatics when the local authorities are unwilling or unable to do so, or when federal action is appropriate to vindicate federally protected rights.

Titles I and II seek to end discrimination in our jury system.

Title III will give us tools we need if we are to complete the desegregation of schools and public facilities.

Beyond this, however, we have the plain fact of a further blight on the social climate which relentlessly obstructs progress toward human equality all across the country. This is the inequity in housing everywhere which sharply retards all our efforts in civil rights, education, employment, and recreation. The ending of compulsory residential segregation has become a national necessity. This is the purpose of Title IV.

Residential segregation strikes at dignity and freedom in a manner often more subtle and less resounding than acts of terror, exclusion from the polling booth or barricades at the school door. Yet the isolations and tensions produced by housing segregation are serious ruptures in our national life and undercut all the other efforts toward human and economic betterment. Law must lead and law must protect in this vital area as it has in voting, public accommodations, school and employment.

Freedom in the choice of housing is a large principle of modern civilized society which cannot be reduced now to the technicalities of administrative improvisation or judicial interpretation. It requires a concerted voice and the enlarged effort that will unquestionably result from Congressional action.

Let me turn then, Mr. Chairman, directly to the bill.

TITLES I AND II--JURY REFORM

I can think of nothing more fundamental to our legal system than the right to have an impartial trial of the facts in every criminal and civil case. To assure impartiality in cases triable by jury, the Federal Constitution requires that no invidious discrimination be made in the selection of jurors in State and Federal courts. Unfortunately, however, this command of the fundamental law has not always been obeyed. Let me describe, first, the scope and nature of the problem of jury discrimination in the State courts.

In the last century there have been scores of court opinions dealing with claims of jury discrimination in State courts, including at least 35 decisions by the United States Supreme Court alone. In just the very recent past there have been judicial findings of jury discrimination in

State courts in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, and North Carolina.

A striking example of unconstitutional jury exclusion is set forth in a decision of a three-judge federal court in Alabama, handed down on February 7 of this year, in the case of White v. Crook. Despite the fact that Negroes comprised 72 percent of the adult male population of Lowndes County, Alabama, they made up just slightly more than one percent of the names on the jury rolls and, as the court found, "No Negro ha[d] ever served on a civil or criminal petit jury" there. The district court found that the jury commissioners of Lowndes County had "pursued a course of conduct in the administration of their office which was designed to discriminate and had the effect of discriminating in the selection of jurors . . . on racial grounds." The result, the court said, was "gross systematic exclusion of members of the Negro race from jury duty in Lowndes County."

The full scope of the jury discrimination problem is not revealed, however, by focusing exclusively on exclusion of Negroes. Either by law or practice, women, persons of low economic status, and persons of identifiable national origins have sometimes been excluded from jury service.

Legal challenges to jury discrimination should not be left exclusively to individual defendants in criminal cases or to private citizens, often hardly able to afford it, who might bring civil actions. In this connection, the United States Court of Appeals for the Fifth Circuit observed that (United States ex rel. Goldsby v. Harpole, 263 F. 2d 71, 82 (C.A. 5, 1959)) --

> . . . the very prejudice which causes the dominant race to exclude members of what it may assume to be an inferior race from jury service operates with multiplied intensity against one who resists such exclusion. Conscientious southern lawyers often reason that the prejudicial

effects on their client of raising the issue far outweigh any practical protection in the particular case.

Once a claim of unlawful exclusion has been raised, the information necessary to sustain the challenge may not be accessible to the complainant or, in fact, the records prepared in the course of selecting jurors may not have been retained by jury officials. Even when available, the records may be so voluminous and the dimensions of the investigation so great that only the rarest of private litigants will have the time and resources to prepare the case.

The federal government presently has no authority to act independently to bring civil actions for relief against unconstitutional discrimination in State jury selection procedures. The Department of Justice is authorized by Title IX of the 1964 Civil Rights Act to intervene in jury discrimination suits brought by private litigants under 42 U.S.C. 1983. The Department has intervened recently in six such suits, including the Lowndes County suit that I have described, and has participated as an amicus curiae in five other recent jury discrimination cases. But the Department's authority to act in this area is unduly limited.

The problem of jury selection in the federal court system is somewhat different. Varying selection systems are used, and the results in some cases create the appearance of unfairness. At a minimum they lack desirable uniformity in the opportunities for service afforded to all segments of the community.

One of the most widely used methods of securing source lists of names is the so-called "key man" system. Over forty federal judicial districts rely exclusively on this system under which the federal jury officials ask various individuals in the district to submit names of persons who, in

the opinion of the individuals contacted, would be suitable for jury service. Persons suggested for jury duty under this system are frequently members of the social and economic classes to which the "key men" themselves belong.

Recent informal samplings taken by the Department of Justice in six States of the South show a substantial disparity between the percentage of the adult Negro population and the percentage of Negroes on jury panels or jury lists. In none of the districts surveyed in Alabama, Florida, Georgia, Louisiana, Mississippi, or Texas did the percentage of Negroes on Federal jury panels equal the percentage of age-eligible Negroes in the population of the district.

Nor is the federal jury problem confined to the underrepresentation of Negroes or other racial or national origin minorities. There is also reason to believe that in some places persons of relatively low economic status are underrepresented, while wealthier persons constitute a greater percentage of jurors than is warranted by their percentage of the population.

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. As the Supreme Court has said, "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community . . . . Jury competence is an individual rather than a group or class matter." Thiel v. Union Pacific Railroad, 328 U.S. 217, 220 (1946). "To disregard" this principle, the Court has said, "is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

FEDERAL JURIES

The basic objective of Title I is to assure that federal grand and petit jurors are drawn from a full cross-section of the community. This title contains four key features designed to accomplish this objective.

First, it provides that no person or class of persons shall be denied the right to serve on grand or petit juries in federal courts on account of race, color, religion, sex, national origin, or economic status.

Second, it designates voter registration rolls as the exclusive sources from which names of prospective jurors must be drawn, subject to an exception where, in the judgment of the Judicial Council of the Circuit, use of the voter rolls would not result in obtaining an adequate cross-section.

Third, it specifies definite requirements for the selection of names from the basic sources and detailed mandatory procedures for each subsequent step in the 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" for the district (or separate wheels for divisions or places of holding court), and to place in the master wheel names of potential jurors selected "at random" from the official voter registration lists. These voter rolls currently reflect a fair cross-section of the community in most areas, and the Voting Rights Act of 1965 provides the means to end in the near future such racial discrimination in the voter registration process which has not yet been eliminated. We have, however, also made provision for the current period of transition during which some areas are moving from large scale exclusion of Negroes from

the electorate to full participation by Negroes in elections. The key provision is Section 1864 (a). It provides that in areas in which Negroes or other groups are still not fairly represented on the voter rolls--whether because of the lingering effects of past discrimination, intimidation, the mores of a segregated society, or other factors--the Judicial Council of the Circuit would be required to designate other sources of names to supplement the voting lists so that the pool of potential jurors will fairly reflect the population of the district. The sitting appellate court judges comprise the Judicial Council.

The next step in the selection process is to draw names from the master wheel and summon by mail the persons whose names are drawn. A person summoned, must appear before the clerk and fill out a juror qualification form which will elicit his name, address, age, sex, religion, education, race, occupation, and citizenship, as well as other information necessary to determine whether he is qualified to serve as a juror.

This title retains the qualifications prescribed by present law. One of these qualifications is that a juror must be able to read, write, speak and understand the English language. The determination whether a person is able to meet this qualification is to be based solely on the juror qualification form. A person who is able to fill out the form substantially, who stated on the form that he is able to read, write, speak and understand the English language, and who satisfies the remaining qualifications, must be found qualified to serve.

Imposition of higher qualifications not set forth in the statute in an effort to obtain so-called "blue ribbon" juries would not be permissible under this title.

The names of all persons determined to be qualified are then to be placed in a "qualified juror wheel." As jurors are needed, the jury commission is to draw names from the wheel and assign persons to particular grand or petit jury panels.

Section 1867 establishes a special procedure in both criminal and civil cases for determining whether the provisions governing selection procedures--sections 1864, 1865 and 1866--have been complied with. If the court determines that there has been a failure to comply with those procedural provisions, it is required, as appropriate, to dismiss the indictment or stay the proceedings pending the selection of a petit jury in conformity with this title.

Persons challenging the selection system must be given access to confidential jury records if there is "some evidence" of noncompliance with the procedural requirements. This is intended to impose only a modest burden on the challenger, however, and he need not, for example, make out a "prima facie" case of noncompliance, as that concept has developed in jury discrimination cases under the Fourteenth Amendment. There need only be enough evidence to cause a reasonable man to believe that further investigation is necessary before the allegation can be disposed of. Moreover, in order to prevail on the challenge, it is not necessary for the challenger to show prejudice in his particular case, only some significant failure to comply with the prescribed procedures.

This challenge mechanism is intended to be a self-executing enforcement provision. The possibility of the filing of a challenge motion and disclosure of jury records should go far to insure that proper procedures are followed.

Finally, under present law entire classes of persons can be excluded from jury service on hardship grounds. Under the bill, excuses may only be granted on an individual basis and then only for six months at a time in cases of "unusually severe hardship." Since the bill substantially increases juror fees and mileage payments, eliminating much of the economic hardship now entailed in jury service, such service should impose no undue burden on most wage earners and members of other low-income groups.

STATE JURIES

Title II of the bill is designed to eliminate all forms of unconstitutional discrimination in the selection of jurors in State courts. This title contains three basic provisions.

First, it prohibits discrimination in state jury selection processes on account 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.

Although 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 will be somewhat different. Under the federal jury system embodied in Title I all jurors would be selected at random from the voter rolls and 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. The laws in the second category place a heavier burden on women who want to serve, than on men, and undoubtedly exclude many women who do not know that they must volunteer.

Similarly, 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, such as New York's $250 property qualification, would be nullified by Title II. State laws prescribing the tax rolls as the exclusive source of names of jurors would also be nullified unless the tax base is so broad as to include practically every adult in the community. Other state laws which may be affected by Title II, depending upon how they are construed and administered in practice, include those which prescribe direct economic qualifications, but only in the alternative; and those which call for tax lists or other selective sources of names as an alternative to other unobjectionable sources.

Title II would authorize the Attorney General to institute in a federal court a civil action for preventive relief whenever he has reasonable grounds to believe that state jury officials are violating the prohibition against discrimination. This provision is similar to statutes authorizing the Attorney General to sue to prevent violations

of federal rights with respect to voting, public accommodations, and employment, and, under Title III of the bill, with respect to schools and public facilities. Of course, litigants in both civil and criminal cases in the state courts could continue to challenge the composition of juries --including possible violations of section 201--under existing procedures.

The third important provision of Title II is the special discovery procedure contained in Section 204. The discovery 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. Upon making of such an assertion, the appropriate state or local officials are required to furnish a sworn "written statement of jury selection information" containing a detailed description of the sources of names of potential jurors and of all standards and procedures employed in each step of the jury selection process.

The written statement of jury selection information constitutes evidence on the issue of discrimination. In addition, the complaining party may cross-examine the state jury officials and any other persons having knowledge of relevant facts and may also present any other available relevant evidence. If, at that point, the court determines that there is "some evidence" of discrimination, the complaining party is to be given access to any relevant records and papers relating to the jury selection process which may otherwise be unavailable to him under state law. The purpose and meaning of the "some evidence" requirement here is substantially the same as the "some evidence" requirement under Title I. If the court then determines that there is reasonable cause to believe that discrimination has occurred and that the records and papers of the

jury officials are inadequate to permit a determination of this issue, it becomes the responsibility of the appropriate state officials to produce additional evidence demonstrating that discrimination did not occur.

Title II provides the means of assuring that State juries are selected in conformity with the Constitution while, at the same time, leaving those State and local courts which have always met their responsibilities free to follow their traditional procedures.

TITLE III--PUBLIC SCHOOLS AND PUBLIC FACILITIES

Under Titles III and IV of the Civil Rights Act of 1964 the Attorney General is authorized to initiate civil proceedings to desegregate public schools and facilities. But this authority has proved deficient for three principal reasons.

First, the Attorney General may sue only after a written complaint has been received from an aggrieved person, and many Negroes are not familiar with the complaint requirement or do not know how to go about complying with it.

Second, even when a complaint has been filed, the Attorney General may sue only if he determines that local residents or other interested groups will be unable to bear the burden of litigation themselves--a time-consuming and difficult judgment to make.

Third, school desegregation has generated an increase of violence and intimidation aimed at Negroes seeking to assert their constitutional rights. Thus, the requirement of a written complaint as a prerequisite to a suit by the federal government, and intimidation of Negroes have proved to be mutually reinforcing obstacles to the orderly progress of desegregation, the expressed statutory purposes of Titles III and IV.

Title III of the bill is designed to ensure that such unlawful intimidation does not affect the power of the federal government to bring suits to desegregate schools and public facilities. It would repeal both the written complaint requirement and the requirement of a determination that local residents are unable to sue on their own behalf. It would also authorize civil proceedings by the Attorney General to enjoin interference by private individuals or public officials with desegregation of public schools and facilities. Title V of this bill would impose criminal penalties for such interference.

TITLE IV--HOUSING

In the Civil Rights Act of 1866 Congress declared:

> "All citizens of the United States shall have tha same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." (42 U.S.C. 1982)

Again, in the National Housing Act of 1949, Congress made an even broader commitment by pledging the Nation to the goal of a decent home and a suitable living environment for every American family.

Yet today, one hundred years after the Civil Rights Act and seventeen years after the Housing Act, we find, in the words of the United States Commission on Civil Rights, that "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."

Title IV of the President's bill is designed to help achieve equality in the market place.

The past twenty years have provided the country with millions upon millions of new dwelling units and have vastly changed the character of our urban residential areas. Suburbia has come into being around the boundaries of our cities and continues to spread.

Except for our Negro citizens, virtually all Americans have had an equal opportunity to share in these developments in our national life. The Negro's choice in housing, unlike that of his fellow citizens, is not limited merely by his means. It is limited by his color. By and large, desirable new housing in our cities and suburbs is foreclosed to him, and, ironically, because of its scarcity, what housing is left available to him frequently costs him more, judged by any fair standard, than comparable housing open to whites.

The result is apparent to all: impacted Negro ghettos that are surrounded and contained by white suburbia. The problem has arisen in metropolitan communities everywhere in the country.

Segregated housing is deeply corrosive both for the individual and for his community. It isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation and transportation services and facilities. It means denial of access to training and employment and business opportunities. It prevents the inhabitants of the ghettos from liberating themselves, and it prevents the federal, state, and local governments and private groups and institutions from fulfilling their responsibility and desire to help in this liberation.

Through the years, there has been considerable state and private response to discrimination in housing. Seventeen states, the District of Columbia, Puerto Rico, the Virgin Islands, and a large number of municipalities have enacted a variety of fair housing laws.

Volunteer efforts by private citizens also have been organized in many communities, such as Neighbors, Inc., here in the District of Columbia.

In addition, there has been a series of actions by the federal government.

In the judicial branch, the Supreme Court acted decisively as early as 1948 when it held racially restrictive covenants to be unenforceable in either the state or federal courts.

In the executive branch, President Kennedy's Executive Order 11063 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 a patchwork of state and local laws is 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 the legislative branch of the federal government. Durable remedies for so endemic and deep-seated a condition as housing segregation should be based on the prescription and sanction of Congress. This is all the more so as the issue is national in scope and as it penetrates into so many other sectors of public policy such as the rebuilding and physical improvement of our cities.

The extent to which the decisions of individual homeowners reduce the availability of housing to racial minorities is hard to estimate. But I believe it is accurate to say that individual homeowners do not control the pattern of housing in communities of any size. The main components of the housing industry are builders, landlords, real estate brokers and those who provide mortgage money. These are the groups which maintain housing patterns based on race.

I do not mean to suggest that the enforcement of segregation in housing is necessarily motivated by racial bias. More often the conduct of those in the housing business reflects the misconception that neighborhoods must remain racially separate to maintain real estate values. While there exist studies which indicate that segregated housing does not depress real estate values, many in the real estate business fear to take the chance. I have no doubt that they simply feel trapped by custom and the possibility of competitive loss. The fact is, however, that their policies and practices are what perpetuate segregated housing.

At present a particular builder or landlord who resists selling or renting to a Negro most 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. 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. Indeed, experienced developers have stated that they would welcome such a law.

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.

The same protection would be given an individual homeowner who privately has no reservation about selling his home to a Negro but who may be inhibited by the fears he could generate among the neighbors he is leaving. A uniform statute would outlaw segregation in all neighborhoods.

There is a close parallel here with the impact of the Public Accommodations Title of the Civil Rights Act of 1964. Restaurant or motel owners, willing to desegregate, failed to do so because of economic fears. Once the Act was passed--and all of their competitors had to serve Negroes --many quickly complied.

Title IV 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, the coercion of a mob attempting to prevent a Negro family from moving into a neighborhood.

And it prohibits retaliatory action by real estate boards or associations against real estate agents who have refused to discriminate against Negroes or other persons of minority groups.

Title IV provides a judicial remedy. An individual aggrieved by a discriminatory housing practice would be enabled to bring an 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 empowers 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 based primarily on the Commerce Clause of the Constitution and on the Fourteenth Amendment. I have no doubts whatsoever as to its constitutionality.

As one of the Justices of the Supreme Court said in the very recent Guest case--to which I shall return shortly--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."

I have pointed out already how segregated living is both a source and an enforcer of involuntary second-class citizenship. To the extent that this blight on our democracy impedes states and localities from carrying out their obligations under the Fourteenth Amendment to promote equal access and equal opportunity in all public aspects of community life, the Fourteenth Amendment authorizes removal of this impediment.

That there is official and governmental involvement in the real estate and construction industries needs little demonstration. Apart from zoning and building codes, there are the obvious facts of regulations covering credit, mortgages, interest rates, and banking practices, and there is the universal licensing of real estate agents.

But there are more basic considerations.

Are we to tell our Negro citizens that the Congress which has guaranteed them access to desegregated public schools and to swimming pools and to golf courses is powerless to guarantee them the basic right to choose a place to live? I would find this hard to explain, for I would not be able to understand it myself.

To me it is clear that the Fourteenth Amendment gives Congress the power to address itself to the vindication of what is, in substance, the freedom to live.

Congress can and must make the legislative judgment that without equal housing opportunity there cannot be full equality under law.

Congress can and must determine that the enforcement of involuntary segregation through discriminatory housing practices is inconsistent with the words, spirit and purpose of the Fourteenth Amendment.

These are the human terms in which the Constitution speaks and cries out for quick response. There are also economic terms. The Congress is charged with the protection and promotion of interstate commerce in all its forms.

I cannot doubt that housing is embraced under this Congressional power. The construction of homes and apartment buildings, the production and sale of building materials and home furnishings, the financing of construction and purchases all take place in or through the channels of interstate commerce.

When the total problem is considered, it requires no great leap of the imagination to conclude that interstate commerce is significantly affected by the sale even of single dwellings, multiplied many times in each community.

It was almost thirty years ago that the Supreme Court faced and resolved this problem in Wickard v. Filburn. In that case the court held that the Agricultural Adjustment Act could validly apply to a farmer who sowed only 23 acres of wheat, almost all of which was consumed on his farm.

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.

Simply consider in practical terms how housing is financed, built, and sold.

Take the case of a real estate developer in California who wants to construct a subdivision on land in Arizona. He and a group of associates raise money from banks in New York, from insurance companies in Connecticut, from pension funds in Chicago. They go to Arizona to purchase the land; hire a contractor from Texas to build the homes; he leases construction equipment in Colorado, orders lumber from Oregon, millwork from Michigan, steel products from Pennsylvania, appliances from Ohio, furnishings from North Carolina. Meanwhile the developer is advertising for buyers from all over the nation in national magazines and in newspapers from coast to coast. Buyers are found; they in turn secure mortgages from banks and insurance companies throughout the country. One might almost say that <u>everything</u> in each of those homes--from the land to the homeowner--"moved" in interstate commerce; but certainly the "housing" as a marketable commodity, was created, financed, and sold in and through the channels of interstate commerce.

Of course, like Mr. Filburn's wheat, not every home has all of these connections with interstate commerce. But <u>most</u> housing has <u>some</u> of these. For example, of the total of almost 15 million single-family occupant-owned dwellings that carried mortgages in 1960, two and a half million were mortgaged to out-of-state lenders. More than half the home mortgages held by insurance companies were held by companies outside the homeowner's state. What is more, in many of our largest cities with the most serious housing problems, the local real estate markets are themselves in interstate commerce, seeking owners and tenants from multistate metropolitan areas or through national listings. Such cities as Kansas City, New York, Chicago, St. Louis, Cincinnati, Omaha, Philadelphia, have

"bedroom areas" crossing into other states.

There thus can be no doubt that anything which significantly affects the housing industry also affects interstate commerce. Discriminatory housing practices produce such an effect. They restrict the amount and type of new housing; discourage the repair and rehabilitation of existing housing; remove incentives to the purchase of new furniture and appliances, and frustrate the efforts of people to move from job to job and from state to state.

Clearly the people, the money, the materials, the entrepreneurial talent which move in and to the housing market are not confined within single states. Rather they are well within the range of Congressional regulation, and within this range Congress' judgment as to what problems need solving and how they should be solved is necessarily broad. Title IV identifies a national problem. It suggests an effective solution.

TITLE V--NEW CRIMINAL LEGISLATION

The vast majority of Americans have welcomed the efforts of American Negroes to assume their rightful position of equality in all aspects of our public life. Other Americans, although finding these developments difficult to approve, have accepted them in a spirit which does credit to our principles of majority rule and respect for law. But unfortunately, our society includes a small minority of lawless elements who have reacted with violence to these efforts. We know, too, that unpunished acts of racial violence can effectively deter the free exercise of federal rights and frustrate the national commitment to equality in public life.

It is an historic and, I believe, sound principle of federalism that the keeping of the peace is, for the most part, a matter of State and not

federal concern. This system works, even where racial strife exists, in those places where public opinion supports law and order and local law enforcement officials carry out their federal constitutional duties to provide protection to citizens without regard to race or color and proceed against wrongdoers.

The fact is, however, that in some places 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 appeared to warrant conviction.

But the need for effective federal criminal legislation in the civil rights area does not arise solely from a malfunctioning of State or local administration of the criminal law. Particularly in recent years, crimes of racial violence typically have been directed to denying positive federal rights and thus reflect a purpose to flout the will of the Congress as well as to express age-old racial animosities. Alexander Hamilton seems to have had both of these considerations in mind when he observed in No. 81 of The Federalist that "the prevalence of a local spirit" would require that federal courts be vested with "the jurisdiction of national causes."

The principal federal criminal sanctions against crimes of racial violence on the books today are sections 241 and 242 of the federal criminal code. In March, the Supreme Court decided two cases--United States v. Price and United States v. Guest--involving the construction of these statutes as they were applied in indictments for conspiracies involving killings in Neshoba County, Mississippi, and on a highway in Georgia. The Court's decision in Price--where private individuals and

public officials were indicted--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, only private individuals had been indicted. The Court in Guest sustained a branch of the indictment charging a private conspiracy to interfere with the right to travel interstate--a distinctly "federal" right not dependent upon the Fourteenth Amendment. But that portion of the indictment which charged a conspiracy of private persons to interfere with Fourteenth Amendment rights--in that case, the right to use the highways and other state facilities without discrimination on account of race or color--appears to have been upheld because of certain allegations of official involvement in the conspiracy (even though no public officials had been indicted). The opinion leaves in doubt the question whether Congress in section 241 reached purely private interference with Fourteenth Amendment rights.

The really important fact about the Guest decision, however, is that six justices declared that Congress has the power, under section 5 of the Fourteenth Amendment, to reach such purely private misconduct if it chooses to do so.

Before turning to an explanation of Title V of the bill -- which embodies among other things a responsible answer to the Guest case -- let me mention another defect in the present law.

Section 241 is worded in general terms. As Justice Holmes once said of Section 241, it protects federal rights "in the lump." Because it is not always clear just what rights are secured or protected by the Fourteenth Amendment, the Supreme Court has read in the requirement that the government

prove a "specific intent" on the part of the defendant to deprive his victim of a particular Fourteenth Amendment right. As Justice Brennan said, commenting on this "specific intent" requirement in his concurring opinion in the Guest case --

> [s]ince 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 . . . . [I]f Congress desires to give the statute more definite scope, it may find ways of doing so.

Specific statement of the protected fields of activity has a further value: the prohibition should be better understood by would-be violators. Such a statute would have a greater deterrent effect.

Title V of the bill 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 unmistakable warning to lawless persons that if they interfere with any of these activities, they must answer to the federal government.

Third, it would protect civil rights workers, Negroes 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 engaging in protected activity--for example, a person assaulted while he is eating in a restaurant or working on a job. It gives the same protection to persons seeking to engage in protected activities--for example, going to the polls to vote, taking steps to enroll a child in school, or inspecting a home for possible purchase. Title V also prohibits 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 taken against a person a week or even months after an election because he voted, or threatening a person with violence to discourage him or others from voting. Title V would also cover interference with persons performing duties in connection with protected activities -- for example, a public school official implementing a desegregation plan.

Title V would not require proof of a "specific intent" such 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 because, unlike section 241, Title V specifically 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.

I think it should be recognized, however, that the federal government has no special concern with incidents involving violence simply because they happen to occur at or near the time that a person engages in a federally protected activity. 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 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. This is the case where there is an indiscriminate attack on a Negro simply because he is a Negro -- a terrorist act in the truest sense -- and for the purpose of discouraging Negroes generally from engaging in activities described in subsection 501 (a)(1)-(9) or civil rights workers from assisting Negroes to participate in such activities. Such incidents are not uncommon and are effective in discouraging Negroes from seeking equality and those who would help them. Any law that fails to deal with the pattern of indiscriminate violence would be seriously deficient.

Finally, you will recall that Title VII of the 1964 Civil Rights Act prohibits discrimination only by private employers with a substantial number of employees and that governmental employers are not covered at all; that under Title II of that Act, places of public accommodation are defined to include only those establishments whose operations have certain specified relationships with interstate commerce; and that the federal statutes prohibiting discrimination in transportation reach only interstate carriers.

Violence directed at a person seeking service in a restaurant not covered by the 1964 Act will intimidate persons who might want to seek service in covered restaurants. It is therefore necessary to punish the former in order adequately to protect the latter. The same holds true with respect to employment and transportation. For these reasons, Title V

of this bill would reach racially-motivated forcible interference with employment, regardless of the size and regardless of the public or private character of the employer; with service in all of the described types of places of public accommodation, whether or not they fall within the limits of the 1964 Act; and with common carrier transportation whether interstate or intrastate.

CONCLUSION

Mr. Chairman, I hope that this discussion has established the compelling warrants for each section of the bill. I believe that each of the titles is necessary, timely, and constitutional. The President in his message made it abundantly clear that he does not lightly ask for new laws.

The President also stressed that "the day has long since passed when problems of race in America could be identified with only one section of the country." "We know," he said, "that the more important challenges of racial inequality are emphatically national."

It is one of the merits of this Act, I believe, that it strikes both at conditions of special circumstance and at national needs. Title III seeks to improve legal remedies in school desegregation to make them comparable to those in voting, public accommodation, and employment rights.

But the effects of Titles I, II, and IV are national and are not conceived as attacks on problems specifically Southern or regional.

I grant--as the President has--that the fifth major civil rights law in 9 years demands much of this committee and the Congress itself. But the issue presented is the pervasive one in our democratic system today. Moreover, we are compensating for decades of neglect and deprivation.

The Negro asks not for special privilege or unusual favor but for what is rightfully his: the dignity and the opportunity for a full and participating citizenship.

Let me suggest also that it often happens that great measures of social and political transformation follow each other in rapid succession and with cumulative force. Thirty years ago, as the Chairman will well recall, there was a whole series of bills which gave life and vigor to our regulatory system.

Almost twenty years ago the national consciousness was focussed intensively on our world responsibilities; in but a few years time the Greek-Turkish aid program, the Marshall Plan, NATO, and mutual security were enacted by the Congress.

More recently, we have had an interrelated and rapid sequence of laws adopted in the critical field of education.

A true effectiveness of national effort often depends on what the scientist would call "critical mass." Several steps taken in close progression have much greater combined impact than a series of episodic thrusts. The moment for "critical mass" in civil rights has arrived.