CIVIL RIGHTS

92 CONGRESS, SECOND SESSION
1971-72

Cosponsor of S. 3025 prohibit racially restrictive covenants in deed records----------Dec. 15, 71

Equal Opportunities Enforcement Act of 1971 Cloture Motion--Feb. 18

Humphrey's article "Civil Rights & Executive Commitment--March 20

substantial portion of the economic backbone of our fishing industry, particularly along the East Coast, in New England, and in the Pacific Northwest, including, of course, Alaska, may become extinct. For this reason, international fisheries conventions have sought to limit and control these high seas fishing activities. Several signatory nations to ICNAF, most principally Denmark, have failed to agree to all the provisions protecting Atlantic salmon. Although they have agreed in the future to limit catch levels to approximately the 1969 level, this is nothing but a smoke screen which permits Denmark to continue fishing at an already dangerously high level. This life cycle of the Atlantic salmon is approximately 6 to 7 years. Therefore, the full impact of such exploitation will not be felt until 1975. At that time, it will be too late to save the fish and our fishing industries.

Such conventions, if they have no teeth, also work to disadvantage of those nations which agree to abide by them. These nations are put at an economic disadvantage and can only sit by and helplessly watch while other nations which have not signed continue to reap vast harvests completely unchecked.

It is apparent how vast the economic effect of such indiscriminate fishing practices is when the number of people employed not only as fishermen, but also in subsidiary industries throughout the coastal areas of this country and others is considered. And, as one witness before our committee pointed out,

> All this is being caused by a Danish high seas salmon fleet of about ten trollers manned by less than 100 fishermen! And the landed value of the salmon is worth only about several million dollars.

To many expert sports fishermen, the salmon is the finest sports fish in the world. Unfortunately it is as good on the dinner table as it is on the end of the line. And therein lies the tragedy.

This bill is not limited to one species of fish or marine mammals. It applies equally to fishery conservation programs in all areas of the world to which this country is a signatory party. It will, therefore, also put needed teeth into our Pacific fishing conventions, which are so vital to the fishing industry in my part of the country.

I therefore urge the passage of this legislation.

The PRESIDENT pro tempore. The bill is open to amendment. If there be no amendment to be proposed, the question is on third reading.

The bill was ordered to a third reading, was read the third time, and passed.

Mr. STEVENS. Mr. President, I move that the consideration of S. 2191 be indefinitely postponed.

The PRESIDENT pro tempore. Without objection, the bill will be indefinitely postponed.

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GRIFFIN). Without objection, it is so ordered.

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

The PRESIDENT pro tempore laid before the Senate the following letters, which were referred as indicated:

REPORT ON RECEIPTS AND DISBURSEMENTS TO APPROPRIATIONS FROM DISPOSAL OF MILITARY SUPPLIES

A letter from the Assistant Secretary of Defense, transmitting, pursuant to law, a report on receipts and disbursements to appropriations from disposal of military supplies, equipment and material and lumber or timber products, as of September 30, 1971 (with an accompanying report); to the Committee on Armed Services.

REPORT OF COMPTROLLER GENERAL

A letter from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Contract Award Procedures and Practices of the Office of Economic Opportunity Need Improving", dated December 15, 1971 (with an accompanying report); to the Committee on Government Operations.

PROPOSED MEDICAL DEVICE SAFETY ACT

A letter from the Secretary of Health, Education, and Welfare, transmitting a draft of proposed legislation to protect the public health by amending the Federal Food, Drug, and Cosmetic Act to assure the safety and effectiveness of medical devices (with accompanying papers); to the Committee on Labor and Public Welfare.

REPORT ON SPECIAL BRIDGE REPLACEMENT PROGRAM

A letter from the Secretary of Transportation, transmitting, pursuant to law, a report on special bridge replacement program, dated November 1971 (with an accompanying report); to the Committee on Public Works.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. GRIFFIN (for Mr. MAGNUSON), from the Committee on Commerce, without amendment:

H.R. 7117. An act to amend the Fishermen's Protective Act of 1967 to expedite the reimbursement of U.S. vessel owners for charges paid by them for the release of vessels and crews illegally seized by foreign countries, to strengthen the provisions therein relating to the collection of claims against such foreign countries for amounts so reimbursed and for certain other amounts, and for other purposes (Rept. No. 92-584).

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first time and, by unanimous consent, the second time, and referred as indicated:

By Mr. STEVENSON (for himself, Mr. BAYH, Mr. CASE, Mr. EAGLETON, Mr. HARRIS, Mr. HART, Mr. HUGHES, Mr. HUMPHREY, Mr. KENNEDY, Mr. MAGNUSON, Mr. MCGOVERN, Mr. METCALF, Mr. MONDALE, Mr. PACKWOOD, Mr. PELL, Mr. RIBICOFF, Mr. SCOTT, Mr. TUNNEY, and Mr. WILLIAMS):

S. 3025. A bill to prohibit records of deeds from giving implicit recognition to racially restrictive covenants, and for other purposes. Referred to the Committee on the Judiciary.

By Mr. MCCLELLAN (by request):

S. 3026. A bill to establish a fund for activating authorized agencies, and for other purposes. Referred to the Committee on Government Operations.

By Mr. CRANSTON (for himself and Mr. TUNNEY):

S. 3027. A bill to designate certain lands in San Luis Obispo County, California, as wilderness. Referred to the Committee on Interior and Insular Affairs.

ADDITIONAL STATEMENTS ON BILLS AND JOINT RESOLUTIONS

By Mr. STEVENSON (for himself, Mr. BAYH, Mr. CASE, Mr. EAGLETON, Mr. HARRIS, Mr. HART, Mr. HUGHES, Mr. HUMPHREY, Mr. KENNEDY, Mr. MAGNUSON, Mr. MCGOVERN, Mr. METCALF, Mr. MONDALE, Mr. PACKWOOD, Mr. PELL, Mr. RIBICOFF, Mr. SCOTT, Mr. TUNNEY, and Mr. WILLIAMS):

S. 3025. A bill to prohibit records of deeds from giving implicit recognition to racially restrictive covenants, and for other purposes. Referred to the Committee on the Judiciary.

Mr. STEVENSON. Mr. President, on behalf of myself and Senators BAYH, BROOKE, CASE, EAGLETON, HARRIS, HART, HUGHES, HUMPHREY, JAVITS, KENNEDY, MAGNUSON, MCGOVERN, METCALF, MONDALE, PACKWOOD, PELL, RIBICOFF, SCOTT, TUNNEY, and WILLIAMS, I introduce legislation which will strip racially restrictive covenants of the aura of legitimacy they continue to possess because they are uncritically accepted for recordation by public officials.

Racially restrictive covenants are relics of an era when whites felt no need to disguise their intent to deny housing opportunities to blacks and other minorities. One such covenant, which was involved in a recent lawsuit, is typical:

> No part of the land hereby conveyed shall ever be used, or occupied by, sold demised, transferred, conveyed unto, or in trust for, leased, or rented, or given, to Negroes, or any person or persons of Negro blood or extraction, or to any person of the Semitic race, blood, or origin, which racial description shall be deemed to include Americans, Jews, Hebrews, Persians, and Syrians, except that; this paragraph shall not be held to exclude partial occupancy of the premises by domestic servants. . . .

Fully 23 years ago, the Supreme Court in the landmark case of Shelley against Kraemer unanimously ruled that racially restrictive covenants in real property deeds are void and unenforceable. Notwithstanding this clear ruling, only four States have passed legislation which might arguably restrict the recordation of deeds containing restrictive covenants. I ask unanimous consent that a memorandum on this subject, prepared by the Library of Congress, be inserted at this point in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., December 6, 1971.

To: Hon. Adlai E. Stevenson III
From: American Law Division
Subject: State Laws against Racially Restrictive Covenants

This is in response to your request for a survey of state laws which may bar recordation of a written instrument relating to real

spending and deficit be printed at this point in the RECORD.

There being no objection, the tabulation was ordered to be printed in the RECORD, as follows:

FISCAL TABLES—OCTOBER 1971

TABLE 1.—U.S. GOLD HOLDINGS, TOTAL RESERVE ASSETS, AND LIQUID LIABILITIES TO FOREIGNERS

[Selected periods, in billions of dollars]

	Gold holdings	Total assets	Liquid liabilities
End of World War II	20.1	20.1	6.9
1957	22.8	24.8	15.8
1970	10.7	14.5	43.3
August 1971	10.1	12.1	[1] 46.0

[1] Estimated figure.
Source: U.S. Treasury Department.

TABLE 2.—DEFICITS IN FEDERAL FUNDS AND INTEREST ON THE NATIONAL DEBT, 1963–72 INCLUSIVE

[Billions of dollars]

	Receipts	Outlays	Deficit (−)	Debt interest
1963	83.6	90.1	−6.5	10.0
1964	87.2	95.8	−8.6	10.7
1965	90.9	94.8	−3.9	11.4
1966	101.4	106.5	−5.1	12.1
1967	111.8	126.8	−15.0	13.5
1968	114.7	143.1	−28.4	14.6
1969	143.3	148.8	−5.5	16.6
1970	143.2	156.3	−13.1	19.3
1971	133.6	163.8	−30.2	20.8
1972 [1]	143.0	178.0	−35.0	21.3
10-year total	1,152.7	1,304.0	151.3	160.2

[1] Estimated figures.
Source: Office of Management and Budget, except 1972 estimates.

TABLE 3.—FEDERAL FINANCES, FISCAL YEAR 1971

[Billions of dollars]

	Revenues	Outlays	Deficit (−) or surplus (+)
Federal funds	133.6	163.8	−30.2
Trust funds	54.7	47.8	+6.9
Unified budget	188.3	211.6	−23.3

Source: U.S. Treasury Department.

QUORUM CALL

Mr. BYRD of Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

AMENDMENT OF THE FISHERMEN'S PROTECTIVE ACT OF 1967

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 557, H.R. 3304.

The PRESIDENT pro tempore. Is there objection?

Mr. GRIFFIN. Mr. President, reserving the right to object, I do not know what this is about. I am sorry. For the time being I object.

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. GRIFFIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

Mr. BYRD of West Virginia. I object.

The PRESIDENT pro tempore. Objection is heard.

The second legislative clerk resumed the call of the roll.

Mr. GRIFFIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Is there objection? The Chair hears no objection, and it is so ordered.

AMENDMENT OF THE FISHERMEN'S PROTECTIVE ACT OF 1967

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 557, H.R. 3304.

The PRESIDENT pro tempore. The bill will be stated by title.

The bill was read by title as follows:

Calendar No. 557, H.R. 3304, a bill to amend the Fishermen's Protective Act of 1967 to enhance the effectiveness of international fishery conservation programs.

The PRESIDENT pro tempore. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. STEVENS. Mr. President, this bill (H.R. 3304) is necessary for the wise conservation and management of many ocean types of marine life, including fish and marine mammals and their products. I strongly support this legislation and urge its passage by this body.

H.R. 3304 would amend the Fishermen's Protective Act of 1967 (68 Stat. 883, as amended: 82 Stat. 729) by adding a new section 8 at the end.

Section 8 (a) provides that whenever the Secretary of Commerce determines foreign nationals are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, he must certify this fact to the President of the United States. The President is then authorized, but not required, to direct the Secretary of the Treasury to prohibit the importation into the United States of any or all fish products of the offending country for such time as he, in his discretion, believes warranted, and to the extent sanctioned by the General Agreement on Tariffs and Trade—GATP.

At this point, I believe it is important to note that such importation prohibition as permitted by the act is not limited to the particular fish product taken in violation of a particular fish conservation program. For example, although a given country, I use Denmark as an example, violates an international fisheries conservation program, such as the International Convention for the Northwest Atlantic Fisheries—ICNAF, the President may prohibit the importation of all fish products from the offending country, not only salmon. This is important, because it multiplies the effect of a violation manifold. As mentioned in the House report on this bill:

In the case of Atlantic Salmon, Danish exports to the United States totaled 54,365 pounds in 1970 worth $63,844.00. Import of all Danish fish products totaled 32,656,000 pounds valued at $10,543,298.00. The impact of loosing a 10 million dollar market as opposed to a 63 thousand dollar market is obvious.

Section 8(b) of the act requires the President within 60 days after the certification to notify Congress of any action he takes. He must also notify Congress should he fail to direct the Secretary of the Treasury to take action and also must explain his reasons therefor.

Section 8(c) makes it unlawful for any person subject to the jurisdiction of the United States to knowingly bring or import into the United States any fish products so prohibited.

Section 8(d) subjects violators to a $10,000 fine for the first offense and a $25,000 fine for each subsequent offense. In addition, all fish products thus illegally imported are subject to forfeiture or the money value thereof must be paid to the U.S. Government and in general customs laws relating to the seizure, judicial forfeiture, and condemnation of cargo violations are applicable.

Section 8(e) vests enforcement responsibility in the Secretary of the Treasury and authorizes U.S. judges of the district courts and Commissioners to issue warrants and other services of process necessary for the enforcement of the act and regulations issued thereunder. It also provides the persons authorized to enforce the provisions of the act may execute warrants and other processes, make arrests, conduct searches of vessels, and seize illegal fish products.

Section 8(f) defines the terms used in the act.

Mr. President, this bill has had extensive hearings both in the House and recently in the Senate Commerce Committee on November 22 and 24. Those hearings on November 22 were chaired by the Senator from Virginia (Mr. SPONG) and attended by the Senator from Oregon (Mr. HATFIELD) and me. The Senator from Oregon (Mr. HATFIELD) and I were present at the November 24 hearings. Last Saturday the Commerce Committee passed this bill out to the floor. To these other Senators, and to the other members of the Senate Commerce Committee, and particularly, to our distinguished chairman (Mr. MAGNUSON), who took a personal interest in the legislation, I would especially like to extend my personal thanks for their swift action on this legislation. Without them there would be no bill before us today.

Many able witnesses appeared before our committee and were generally quite favorable to the bill. It also appeared that witnesses before the House committee were similarly favorable and, when they did have any objection, the House bill was accordingly amended.

Mr. President, many arguments have been advanced for this legislation. If indiscriminately fished on the high seas, the great anadromous fish which form a

estate which contains a racially restrictive covenant.

Four states have passed laws which nullify the effect of, or restrict the use of racially restrictive covenants. Massachusetts has a law (Mass. Gen. Laws Ann., Chap. 184 §23B (Supp. 1971)) which declares such covenants void. New Jersey's statute (N.J. S. A. 46:3-23 (Supp. 1971)) provides that racially restrictive covenants are void and that they cannot be "listed as a valid provision affecting such property in public notices concerning such property." Nevada Rev. Stats., 111.237 (1967) gives a grantee the power to remove such covenants on his property from the land records by filing an affidavit with the office of the county recorder declaring such covenants to be void. Finally, Minnesota Stats. Ann. 507.18 (Supp. 1971) provides that no written instrument thereafter made, affecting real estate, shall contain any racially restrictive covenant.

Mr. STEVENSON. Mr. President, this issue has apparently been overlooked by Federal as well as State law. Last month the U.S. Court of Appeals for the District of Columbia Circuit held in the case of Mayers against Ridley that neither the Constitution nor Federal law was breached by the "ministerial" act of recording a deed containing restrictive covenants. The court did, however, condemn restrictive covenants in the strongest terms, and it urged Congress to enact new legislation dealing with the problem.

The bill we offer today places two new restrictions on recorders of deeds. First, recorders may not henceforth record or copy an instrument containing a restrictive covenant unless the instrument is accompanied by a notice stating that the covenant is void and unenforceable. Second, recorders of deeds must cause a notice stating that restrictive covenants are void and unenforceable to be displayed on every liber volume or other journal in their custody which contains deeds or other real property instruments.

Recorders of deeds should have no difficulty complying with these reasonable requirements. As the dissenting judge in Mayers against Ridley pointed out, little more than a rubber stamp will be needed.

Mr. President, it is impossible to determine how many American home buyers are humiliated or discouraged by racially restrictive covenants, but even one is one too many.

Introduction of this legislation does not constitute approval of the Mayers against Ridley ruling that section 804(c) of the Civil Rights Act of 1968 does not reach the recordation of instruments containing restrictive covenants. Rather, the bill is designed to eliminate the existing uncertainty by providing a clear and specific remedy for a clear and specific problem.

Mr. President, I ask unanimous consent that the text of the bill and the opinion of the court of appeals be printed at this point in the RECORD.

There being no objection, the bill and opinion were ordered to be printed in the RECORD, as follows:

S. 3025

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. The Civil Rights Act of 1968 (P.L. 90-284) is amended by adding the following immediately after Section 804:

"SEC. 804A. Recordation of Instruments Containing Restrictive Covenants

"(a) As used in this Section—

(i) The term 'Recorder of Deeds' means any public official in any State whose duties include the recordation of instruments relating to the conveyance or ownership of real property;

(ii) The term 'restrictive covenant' means any covenant, clause, provision, promise or other written representation purporting to restrict the right of any person to possess real property on account of that person's religious faith, race, creed, color, or national origin.

"(b) No Recorder of Deeds shall comply with any request to record or copy any instrument relating to the conveyance or ownership of real property containing a restrictive covenant unless a notice stating that the restrictive covenant is void and unenforceable is imprinted on or affixed to the instrument.

"(c) Every Recorder of Deeds shall cause a notice stating that restrictive covenants are void and unenforceable to be displayed on every liber volume or other journal in his custody in which instruments relating to the conveyance or ownership of real property are kept."

SEC. 2. The provisions of this Act shall take effect 90 days after the date of enactment.

SEC. 3. This Act may be cited as "The Restrictive Covenant Repudiation Act".

[U.S. Court of Appeals, for the District of Columbia Circuit, No. 71-1418]

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Daniel K. Mayers, et al., appellants v. Peter S. Ridley, et al.)

(Decided November 15, 1971.)

Mr. Michael J. Waggoner, with whom *Messrs. Jack B. Owens* and *Ralph J. Temple* were on the brief, for appellants.

Mr. Ted D. Kuemmerling, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. C. Francis Murphy,* Corporation Counsel, and *Richard W. Barton,* Assistant Corporation Counsel, were on the brief, for appellees.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT and TAMM, *Circuit Judges.*

Opinion filed by TAMM, *Circuit Judge.*

Dissenting opinion filed by WRIGHT, *Circuit Judge.*

TAMM, *Circuit Judge:* Appellants, homeowners in the District of Columbia whose deeds contain racially restrictive covenants, brought a class action suit in the District Court against the Recorder of Deeds and the Commissioner of the District of Columbia [1] on their own behalf and on behalf of all District of Columbia homeowners similarly situated. They alleged that the Recorder's actions in accepting for filing, and maintaining public records of restrictive covenants was in violation of the Fifth Amendment and Title VIII of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.*

They sought the following relief: (1) a declaration that their rights were infringed by the practice of the Recorder of Deeds in accepting for recording and filing public records containing racially restrictive covenants; (2) an injunction barring the Recorder from accepting for recording and filing any deed or instrument containing a racially restrictive covenant and from providing copies of such deeds or instruments without clearly identifying them as containing void and unenforceable racially restrictive covenants; and (3) an injunction requiring the Recorder to affix to every liber volume in his custody a notice that any racially restrictive covenants contained in the deeds or instruments therein were void and unenforceable.

In denying the requested relief, the District Court granted appellees' motion to dismiss, whereupon this appeal was noted. We affirm. First, we shall examine the nature of the office of the Recorder of Deeds and then proceed to a discussion of the statutory and constitutional issues.

I

Congress has provided that the Recorder of Deeds shall ". . . record all deeds, contracts, and other instruments in writing affecting the title or ownership of real estate or personal property which have been duly acknowledged and certified;" D.C. Code § 45-701 (1967). He is further required to "perform all requisite services connected with the duties prescribed" in regard to the filing of instruments and to "have charge and custody of all records, papers, and property appertaining to his office." D.C. Code § 45-701 (3), (4) (1967).

Interpreting the statute shortly after enactment this court stated:

"Undoubtedly, the recorder of deeds is in the category of ministerial officers, and has no jurisdiction to pass upon the validity of instruments of writing presented to him for record. It requires no elaboration of law or of the authorities to sustain this contention." *Dancy v. Clark,* 24 App. D.C. 487, 499 (1905).

We pointed out that although the Recorder does have ministerial discretion to determine whether a document is of the type appropriate for filing, "[h]e is by the law required to receive and file . . . such instruments as have been duly executed, and which purport on their face to be of the nature of the instruments entitled to be filed. . . ." *Id.* In short, the nature of the office bars the relief which appellants seek.

The Recorder of Deeds is a ministerial officer. The authority of a ministerial officer is to be strictly construed as including only such powers as are expressly conferred or necessarily implied. *Youngblood v. United States,* 141 F. 2d 912 (6th Cir. 1944). A decision as to whether to file a deed containing a restrictive covenant involves discretion. Indeed, the Recorder is not even permitted to correct obvious typographical errors despite the consent of all the parties thereto.

Furthermore, the Recorder is not empowered by the statute to determine the legality, validity or enforceability of a document to be filed. Determining whether a covenant in a deed is a racially restrictive covenant demands a legal judgment. The clerical staff of the Recorder certainly does not have the knowledge, capacity or acumen to perform the tasks asked of them by appellants.

In many respects the Recorder's function is similar to that of the clerk of a court. The clerk of a court, like the Recorder is required to accept documents filed. It is not incumbent upon him to judicially determine the legal significance of the tendered documents. *In re Halladjian,* 174 F. 834 (C.C.Mass., 1909); *United States v. Bell,* 127 F. 1002 (C.C.E.D.Pa. 1904); *State ex rel Kaufman v. Sutton,* 231 So.2d 874 (Fla.App. 1970); *Malinou v. McElroy,* 99 R.I. 277, 207 A.2d 44 (1965). In *State ex rel. Wanamaker v. Miller,* 164 Ohio St. 176, 177, 128 N.E.2d 110 (1955), the court commented upon the function of its clerk in the following manner:

"It is the duty of the clerk of this court, in the absence of instructions from the court to the contrary, to accept for filing any paper presented to him, provided such paper is not scurrilous or obscene, is properly prepared and is accompanied by the requisite filing fee. The power to make any decision as to the propriety of any paper submitted or as to the right of a person to file such paper is vested in the court not the clerk."

The Recorder is a neutral conservator of records. The entire purpose and value of his office is that he preserves the precise documents presented to him. To give the Recorder the power to do what appellants ask would not only be in violation of the statute creat-

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Footnotes at end of article.

ing his office, but would functionally distort the office into a hydra-headed monster.

Even though the acts of the Recorder are ministerial in nature, they may not violate with impunity the statutes of this land, nor may they contravene the constitution. We must therefore continue our inquiry. First, we turn to the relevant statute.

II

Title VIII of the Fair Housing Act of 1968, 42 U.S.C. § 3604(c) (1970), makes it unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, *with respect to the sale or rental of a dwelling* that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination." (Emphasis supplied.)

On its face the statute clearly does not apply to the Recorder of Deeds. The Recorder does not offer property for sale or rent, nor is he in any way connected with the commercial real estate market. He merely functions as a neutral repository. The "notice" or "statement" the statute speaks of is that made by the offeror or his agent in the market place.

The legislative history bears out this interpretation. After a careful search of the hearings, debates and testimony, we find only that the depth and dearth of legislative history stands in sharp contrast to the shallowness of appellants' position. The thrust of the statute is clearly directed towards advertising in the market place. As a principal witness at the hearings stated: "I think it outlaws advertising that is racial in nature." [2] Furthermore, while testifying on a substantially similar bill former Attorney General Katzenbach catalogued the parties and acts which the statute was intended to cover. The Recorder is nowhere mentioned. He stated:

"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." [3]

III

Although the Fair Housing Act of 1968 does not prohibit the Recorder's actions, those actions must be enjoined if they are violative of the due process clause of the Fifth Amendment. As the states are prohibited from racial discrimination by the Fourteenth Amendment, so the District of Columbia and its agents, including the Recorder of Deeds, are prohibited from discrimination on the grounds of race by the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The Supreme Court has declared racially restrictive covenants void and unenforceable. *Shelley v. Kraemer*, 334 U.S. 1 (1948). The question presented here is whether the Recorder of Deeds, by recording and filing deeds containing racially restrictive covenants, deprives appellants of constitutional due process.

A prerequisite to recovery under the Fifth Amendment is a showing of (1) harm done appellants (2) by the Recorder. We find these essential elements lacking.

The Recorder of Deeds, impartial in thought as well as action, is not giving the approbation of the state to the substantive contents of the deeds filed. The Recorder, the cold steel safety deposit box of the real estate industry, merely preserves documents. Although he acts on behalf of the government, he acts as a studiously *neutral* repository.

The concept of neutrality plays an important role in constitutional law. Where the government is under no affirmative obligation to act and is merely neutral, there can be no due process violation.[4] In a related area of the law courts have found insufficient state involvement in private discrimination to constitute a constitutional violation where the state merely played a neutral part.[5] We find these cases most instructive.

The most developed area of law for our purposes is the administration of estates and trusts.[6] If the state probates a discriminatory will through the use of its legal machinery,—*i.e.*, Recorder of Wills and Probate Court—the courts have held that the government is merely acting in a nonsignificant neutral capacity which does not constitute state action under the Fourteenth or Fifth Amendments. *See U.S. National Bank v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (*en banc* 1954); *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U.S. 947 (1955). *See also Wilcox v. Horan*, 178 F.2d 162, 165 (10th Cir. 1949).

Speaking for the Court in *Evans v. Newton*, 382 U.S. 296, 300 (1966), Justice Douglas stated:

"If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered."

If, however, in the administration of an estate or trust the government takes an active non-neutral role by supervising, managing or controlling, there is state action within the confines of the Fourteenth Amendment. *See Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957), *Pennsylvania v. Brown*, 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921 (1968).

In *Evans v. Abney*, 396 U.S. 435 (1970) the Supreme Court found no state action in the Georgia state court's application of the doctrine of *cy pres* to a racially discriminatory trust. The Court reasoned that the Georgia court was merely enforcing trust laws which were "long standing and *neutral* with regard to race." *Id.* at 444. (Emphasis supplied.) The court reached this conclusion despite the fact that a state is involved in a racially discriminatory trust in the following ways: (1) the state attorney general enforces the trust on behalf of the public; (2) the courts supervise the administration of the probate estate and trust; (3) the trust enjoys tax exempt status; and (4) the doctrine of *cy pres* as well as other state statutes often apply to the trust.

In the instant case appellants urge that the mere neutral act of recording deeds constitutes state action in violation of the Fifth Amendment. In light of the above precedents, we cannot agree. In the final analysis, the evil of which appellants complain lies not in the office of the Recorder, but in the soul of man.

Appellants have also failed to demonstrate any harm resulting from the recordation of racially restrictive covenants. These covenants are clearly unenforceable and may be easily repudiated.[7] In addition, these covenants do not constitute a cloud on title or affect the marketability of the property. As the learned District Judge stated:

"It is stretching too far to say that the presence of the offensive language in a deed in the custody of the Recorder is going to frighten a would-be buyer. We must face the practicality that buyers do not begin their negotiations by examining the records maintained by the Recorder of Deeds. That function is performed by brokers, attorneys and title insurance companies making the record searches. Brokers, lawyers and title insurance companies are fully aware that racially restrictive covenants are not enforceable. Slip Op. at 2-3."

Appellants, nevertheless, rely upon *Bryant v. State Board of Assessment of State of North Carolina*, 293 F.Supp. 1379 (E.D.N.C. 1968) and *Hamm v. Virginia State Board of Elections*, 230 F.Supp. 156 (E.D.Va. 1964), *aff'd per curiam sub nom. Tancil v. Woolls*, 379 U.S. 19 (1964(for the proposition that where records are maintained with unconstitutional racial identifications the maintenance is unconstitutional per se requiring no demonstration of harm. Appellants have misread these cases. In these cases state officials listed Negro and White citizens separately on voting, property assessment and divorce records. In voiding these laws, the *Bryant* court found that citizens were harmed because the opportunity for discrimination in jury selection was present. No such potential exists here. Furthermore, there is no list maintained here which classifies individuals by race, for restrictive covenants appear on deeds owned by persons of all races. Moreover, in each of those instances the lists were compiled and maintained by affirmative action of the state. A situation we again do not have here.

IV

We reach our decision somewhat reluctantly. Not reluctant in the law we expound, for we know it to be right; but, reluctant in the conclusion some may draw, and the interpretation others may glean, from our decision. We firmly believe the *legal* result in this case to be correct. We are convinced that the ministerial nature of the office of Recorder of Deeds bars the remedy sought. We also can find no statutory or constitutional violation in the actions of the Recorder of Deeds. This, however, is not to say there is no remedy for an unfortunate situation. It merely means the remedy sought is beyond the ken of the judiciary.

Congress has a panoply of power as well as a plethora of resources at its disposal to create the legal machinery to deal with this problem. We note that the courts have given an expansive reading to Congressional power in the eradication of discrimination from the fibre of our society. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States v. Guest*, 383 U.S. 745 (1966). We urge the Congress to gather together representatives from among the bankers, brokers, title insurance companies and land developers for a serious attempt at a solution. Restrictive covenants, born of a racist mileu, exorcised by the white-sheeted ghosts of a not too distant past, do not find favor with this court. We exhort the Congress to extricate the nation from this quagmire of inequality by excising these atavistic anachronisms from the legends of our culture.

V.

The vigor of our dissenting brother requires us, reluctantly, to point out, respectfully, his unfortunate failure to distinguish between the facts in this record and the fluency of his self-created rhetoric upon which he bases his erroneous conclusion. By frequently incanting "restrictive racial covenants", "constitutional" and "individual rights", as if the mere utterance of these words had some secret power to dictate an only conclusion, the dissent is obviously and completely hubristic of the factual situation to which the record confines us. There is no evidence of "governmental participation in . . . an illegal endeavor—. . ., maintenance of a segregated housing market" or of Government becoming a "co-conspirator in an illegal scheme."

The Recorder, as we point out, is neither "publishing nor circulating" racial covenants. The Recorder has not made a "policy decision to consider illegal, racist covenants as documents affecting the title or ownership of real estate," nor is he giving "deliberate and manifest encouragement of private discrimination." The Recorder does not put "Government's seal of approval" on t documents he files any more than the cler of this court puts judicial approval on the

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documents he accepts for filing. Obviously the filing of documents with the Recorder does not in any manner, means or way establish their legitimacy. These strained contortions of the meaning and nature of the record in this case, illustrate again the unfortunate practice of some members of this court of attempting to wrench far-reaching social changes without regard to the facts, the law or precedents in a particular case, and in absolute disregard of the principle of separation of powers.

The practice of choosing the philosophically eclectic rather than the established legal precedents is unfortunately a pursuit of abstract liberalism for its own sake rather than an adjudication of the law governing an individual case. The dangerous illusion that the courts, upon the pretext of ruling upon a particular case may articulate with great sympathy and understanding upon all of the social evils of the nation, is implausibly fashionable in some areas of judicial rulings, with a resulting horrible economy of law.

Somehow, these judicial proclamations, be they in medicine, economics, ecology, political science, religion, domestic relations or crime, are presumably made more acceptable by using such euphemisms as "civil rights", "constitutional rights", "discrimination" and "public interest", regardless of the fact that the record before the court is devoid of factual data supporting the resulting judicial legislation. That we thereby evade the legal truth in a particular situation is self-justified, apparently in the view that we have homogenized the life-blood of society. Without praying for, or dreaming of a consensus on every issue, we regret the suggested disposition of this, or any case for that matter, on a philosophical rather than a legal basis.

Affirmed.

WRIGHT, *Circuit Judge, dissenting:* Almost 25 years ago, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), declared judicial enforcement of restrictive racial covenants in land deeds unconstitutional. Five years after *Shelley* Mr. Justice Minton, speaking for a majority of the Justices in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), thought he was dealing with "the unworthy covenant in its last stand" and "clos[ing] the gap to the use of this covenant, so universally condemned by the courts." *Id.* at 259. Yet today the majority upholds a practice of the District Columbia Recorder of Deeds which places the official imprimatur of the state on the same racist covenants which were facing their "last stand" 18 years ago.[8] In the words of Mr. Justice Douglas, we are observing still again the "spectacle of slavery unwilling to die." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (concurring opinion).

Appellants in this action are a group of District of Columbia residents representing the class of homeowners whose property is burdened by illegal racist covenants. They instituted this suit in order to enjoin the Recorder from accepting such covenants for filing in the future. Moreover, they seek certain corrective measures which would withdraw state approval from restrictive covenants already on file. When the District Court dismissed their complaint, they renewed their arguments in this court.

For decades, the Recorder's office has accepted these covenants for filing and maintained them as public records. Appellants contend that this official legitimization of racist agreements so deeply involves the state in private discrimination as to violate the due process clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 947 (1954). *Cf. Hurd* v. *Hodge*, 334 U.S. 24 (1948). Moreover, appellants argue, even if the Recorder's actions are constitutional, they are clearly impermissible under the Fair Housing Act of 1968.[9] Section 3604(c) of that Act makes it unlawful, with certain exceptions, "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or any intention to make any such preference, limitation, or discrimination."

In response, appellees decline to meet appellants' constitutional argument. Instead, they contend that exclusion of restrictive covenants is not required by the Fair Housing Act, that such an exclusionary rule would be burdensome to administer and beyond the Recorder's statutory authority, and that in any case appellants suffer no harm because of the void covenants. For the reasons stated below, I find each of these arguments unconvincing. Although they can be attacked separately on their respective merits, it is worth observing at the outset that in the aggregate they amount to no more than the sort of lame excuses for denial of racial justice which the Supreme Court rejected long ago. *See, e.g., Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 234 (1964); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Barrows* v. *Jackson, supra*, 346 U.S. at 257–259.

The evils emanating from governmental acceptance of housing discrimination permeate our entire society. Generations of governmental participation in racial zoning have yielded a bitter harvest of racially segregated schools, unequal employment opportunity, deplorable overcrowding in our center cities, and virtually intractable racial polarization. See Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency on S. 1358 etc., 90th Cong., 1st Sess., at 46–47 (1967); Report of the National Advisory Commission on Civil Disorders 204, 244–245 (N.Y. Times paperback ed. 1968). It is too late in the day to argue that it is burdensome to correct these historic wrongs, or that government officials lack the statutory authority to do so. These are the sorts of arguments which "have no place in the jurisprudence of a nation striving to rejoin the human race," *Jones* v. *Alfred H. Mayer Co., supra*, 392 U.S. at 449, n.6 (Mr. Justice Douglas, concurring), and which we accepted at the peril of incurring a racial holocaust.

I. Appellants' statutory argument

In its opinion accompanying dismissal of Appellants' complaint, the District Court found that the "plain import of the words used" in Section 3604(c) of the Fair Housing Act prohibited no more than conventional advertising indicating a racial preference. "[T]he language cannot reasonably be tortured to embrace anything more." With due respect to Judge Corcoran, it seems clear to me that no "torturing" is required to extract more than this rigid result from the statutory language. On its face the Act prohibits any *"notice, statement,* or advertisement" indicating a racial preference. (Emphasis added.) Unless the words "notice" and "statement" are to be treated as surplusage, they must mean that the Act prohibits at least some communications which cannot be classified as advertisements.

Although the legislative history of this section is sparse, it indicates beyond doubt that, as the words themselves suggest, Congress intended to go beyond advertising to reach other sorts of "notices" and "statements" as well. *See, e.g.,* HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY ON S. 1026 ETC., 90th Cong., 1st Sess., at 125–127 (1967); HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY ON S. 3296 ETC., 89th Cong., 2d Sess., at 1105 (1966).

True, there is nothing in the legislative history tending to either support or refute the interference arising from the language that the Act prohibits statements of racial preference emanating from the Recorder's office. In all likelihood, few congressmen even addressed their thinking to this particular problem. But no court has ever held that Congress must specifically indicate how a statute should be applied in every case before the judiciary can go about the business of applying it. The whole purpose of having statutes is to establish a series of general normative rules which the judiciary can then apply on an empirical, case-by-case basis.

Congress has clearly stated that the purpose of this rule is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Reading Section 3604(c) to forbid the Recorder from frustrating this purpose by placing the authority of government behind illegal housing discrimination is perfectly consistent with ordinary canons of statutory construction. It is well established that civil rights statutes should be read expansively in order to fulfill their purpose. *See Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971); *Daniel* v. *Paul*, 395 U.S. 298 (1969). There is no reason why our reading of Section 3604(c) should not comport with this rule.[10] Since the Recorder is presently in the business of making, printing and publishing notices and statements indicating a racial preference with respect to the sale of housing, his actions should be enjoined.

The contrary reading of the statute adopted by the District Court leads to anomalous results indeed. Such a reading authorizes governmental participation in what is now universally conceded to be an illegal endeavor—*viz.*, maintenance of a segregated housing market. It need hardly be pointed out that the strongest sort of public policy considerations argue against a construction of the statute which would permit government to become a co-conspirator in this illegal scheme. *See Elkins* v. *United States*, 364 U.S. 206 (1960). *Cf. Tank Truck Rentals, Inc.* v. *Commissioner of Internal Revenue*, 356 U.S. 30 (1958).

Moreover, the District Court's reading of the statute would carve out a narrow exception to the statutory provision for the benefit of government officials. If private individuals attempted to publish and circulate racial covenants, their activity would clearly violate Section 3604 (c). *See, e.g., United States* v. *Lake Lucerne Land Co.*, N.D. Ohio, Civil Action No. C69–885, January 19, 1970 (consent order). Yet the District Court would have us believe that here, because it is a government official who violates the statutory command, his activity is somehow insulated from judicial control. This position turns the old "state action" controversy on its head. Ever since the Civil Rights Cases were decided almost a century ago, it has been thought necessary to show some degree of state involvement before private discriminatory decisions could be judicially controlled.[11] *See Civil Rights Cases*, 109 U.S. 3 (1883). Yet now the District Court seems to say that judicial control is impossible for the very reason that the state is involved. Whatever one thinks of state action as a viable limiting principle on the constitutional command of equality, it should be at least be clear that the most outrageous deprivations of equal rights are those perpetrated by the state itself. Surely Congress must have been aware of this principle—sanctified by 100 years of "state action" litigation—when it voted to enact Section 3604(c). I am unwilling to believe that the legislators who voted for that Act intended to exempt the most serious offenses from its coverage.

II. Appellants' constitutional argument

In my view, the Fair Housing Act of its own force prohibits appellees' conduct. Thus it would normally be unnecessary for me to discuss appellants' constitutional contentions. However, since the majority has re-

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jected both the statutory and the constitutional arguments advanced by appellants, I think it appropriate for me to add a few words about the constitutional problems raised by appellees' activities. In the constitutional context, the question is whether the official registration of these racial covenants constitutes state action denying black citizens equal protection of the law. To me, the answer—certainly ever since *Shelley* v. *Kraemer, supra*—is clearly yes.

Any discussion of state action and equal protection must begin with a delineation of the core concepts which have defined controversies like this since Reconstruction. On the one hand, *Civil Rights Cases* makes clear that "[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth] amendment." 109 U.S. at 11. At the other extreme, cases like *Virginia* v. *Rives*, 100 U.S. (10 Otto) 313, 318 (1880), teach that "a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

Of course, it is no easy matter to determine where "action of the State" leaves off and "[i]ndividual invasion of individual rights" begins. As governmental responsibility for racism was more clearly perceived, the old "state action" formulation ceased to provide a bright-line test for the limits of constitutional equality. *See, e.g., Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Evans* v. *Newton*, 382 U.S. 296 (1966), *affirmed after remand, sub nom. Evans* v. *Abney*, 396 U.S. 435 (1970). Indeed, the Supreme Court itself has now conceded that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' " *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

This difficulty in formulating precise, principled rules for the limits of state action [13] has led numerous commentators to suggest that the concept be jettisoned altogether, to be replaced by some test which balances individual interest in equality against competing interests in privacy. *See, e.g.*, Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963). "State action," these commentators argue, fails to dictate decisions in close cases.

Fortunately, it is unnecessary to mediate this scholarly dispute, since this is not a close case. Whatever that vagaries of "state action" at the margin, the core concepts remain clear. When the state acts directly and unambiguously in a discriminatory manner, it violates the basic command of the Fourteenth Amendment. *Cf. Commonwealth of Pennsylvania* v. *Brown*, 3 Cir., 392 F.2d 120, 125, *cert. denied*, 391 U.S. 921 (1968). We are not dealing here with a case where tangential state involvement is used to implicate otherwise private activity with "state action." *See, e.g., Burton* v. *Wilmington Parking Authority, supra; Simkins* v. *Moses H. Cone Memorial Hospital*, 4 Cir., 323 F.2d 959 (1963); *Green* v. *Kennedy*, D. D.C., 309 F.Supp. 1127, *appeal dismissed, sub nom. Cannon* v. *Green*, 398 U.S. 956 (1970). Nor is it even a situation in which a facially neutral government statute or policy has the effect in certain situations of denying racial justice. *See Hunter* v. *Erickson, supra; Reitman* v. *Mulkey, supra.* The Recorder of Deeds is a state official; and the activities of the Recorder's office are a state responsibility. The Recorder has made a policy decision to consider illegal, racist covenants as documents "affecting the title or ownership of real estate." [15] If the concept of "state action" has any meaning at all, then that decision is a state decision for which the state is fully responsible.

The fact that private individuals initiated the discriminatory conduct neither explains the Recorder's actions nor expiates his responsibility. The Recorder's deliberate and manifest encouragement of private discrimination is offensive to equal protection quite apart from the activity of private citizens who seize upon his actions to justify their illegal conduct. The state is not permitted to "[furnish] a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another." *Anderson* v. *Martin*, 375 U.S. 399, 402 (1964).

By accepting restrictive covenants for official filing, the Recorder puts government's seal of approval on racist documents deeply offensive to black citizens and thereby "affect[s] their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954). Moreover, this court should be willing to take judicial notice of the fact that the official recording of these documents is likely to give them a legitimacy and effectiveness in the eyes of laymen which they do not have in law. It is certainly not beyond the realm of possibility that a black person might be reluctant to buy a home in a white neighborhood where government itself implicitly recognizes racially restrictive covenants as "affecting the title or ownership of real estate." Indeed, the lily white character of that part of the District where recorded racist covenants abound stands as mute testimony to their continued effectiveness.

Finally, even if the subtle but real damage described above is considered too remote or speculative to receive judicial recognition, it still cannot be said that appellants have failed to make out a constitutional claim. "The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice * * *." *Anderson* v. *Martin, supra*, 375 U.S. at 402. Such classifications bear a "heavy burden of justification," *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967), and it has never been thought necessary to prove that actual harm derives from them before they can be invalidated. *See Bryant* v. *State Board of Assessment of N.C.*, E.D. N.C., 293 F. Supp. 1379 (1968); *Hamm* v. *Virginia State Board of Elections*, E.D. Va., 230 F. Supp. 156 (1964). Instead, the burden of proof is on government to demonstrate some compelling reason which justifies the classification. *See McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *Lee* v. *Nyquist*, W.D. N.Y., 318 F. Supp. 710, 719 (1970).

Here, the only possible reason for accepting the covenants for filing is to give them some legal effect. Such a purpose is violative of both the Fair Housing Act [14] and the Fourteenth Amendment.[15] If the courts cannot enforce racial covenants in the exercise of their general common law powers, *Shelley* v. *Kraemer, supra*, then surely the Recorder cannot effectuate them by administrative fiat.[16]

The best that can be said for the Recorder is that his approval of these racial classifications serves no purpose—that his actions are no more than a thoughtless, noninvidious consequence of bureaucratic inertia. But bureaucratic inertia is hardly a compelling justification for the preservation of this relic from an age which should have been long dead. The racism which continues to haunt this country is perpetuated by those who do not care as well as by those who hate. It provides scant comfort to blacks trapped in the slums of our inner cities to know that their jailers are thoughtless rather than heartless.[17]

III. Appellees' Contentions

If I understand appellees' position correctly, they wisely do not contest the validity of the constitutional arguments made above. But whereas one would think that this concession would make an end of the case, appellees go on to raise a number of supposed practical and technical difficulties which, they contend, preclude the relief requested. Given the overwhelming constitutional and statutory imperatives which dictate a contrary result, it is hardly surprising that these arguments barely rise to the level of makeweight.

A. Appellees first argue that, whatever the constitutional injury suffered by blacks because of the Recorder's actions, the white appellants in this case are not harmed. Since the racial covenants are a legal nullity, it is contended, the Recorder's publication of them in no way affects appellants' titles and thus deprives them of no rights.

But while such an argument might have some validity in a different context, it ignores the Supreme Court's willingness to relax rigid standing requirements when dealing with restrictive covenants. In *Barrows* v. *Jackson, supra*, for example, the Supreme Court explicitly held that it would permit white homeowners whose land was burdened by racial covenants to assert the constitutional rights of prospective black buyers. "Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained." 346 U.S. at 257. *See also Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969).

Moreover, it is inaccurate to say that white homeowners suffer *no* injury caused by the recording of these covenants. A certain percentage of blacks no doubt refuse to buy property with such recorded covenants either because they are under a misapprehension as to the legal effect of the covenants or because they do not want to go where they appear to be unwanted, whatever their legal rights. To the extent these blacks decline to bid for title to appellants' property, the marketability of that property suffers. *Cf. Buchanan* v. *Warley*, 245 U.S. 60 (1917). Nor is it relevant that this diminution of marketability is caused by extralegal factors. It has never been thought that a cloud upon one's title had to constitute a valid legal claim before a court sitting in equity could remove it.

Indeed, the whole purpose of a traditional action to quiet title was to clarify the status of putatively *invalid* claims. *See e.g., Barnes* v. *Boyd*, S.D. W. Va., 8 F. Supp. 584, 597, *affirmed*, 5 Cir. 73 F.2d 910 (1934), *cert. denied*, 294 U.S. 723 (1935). Surely if our courts possess the institutional competence to wrestle with contingent remainders and the Rule Against Perpetuities in such an action, they can also vindicate basic constitutional rights.

B. Next, appellees contend that they are statutorily barred from instituting the relief requested. The Recorder, they argue, is a ministerial officer who is bound to accept all deeds tendered to him without exercising any independent discretion.

With all respect, it seems to me this uncharacteristic declaration of bureaucratic modesty is entirely misplaced. Indeed, as I read the relevant statutes, the Recorder has no choice but to reject deeds which indicate a racial preference. The statute authorizes the Recorder to accept only those deeds "affecting the title or ownership of real estate." 45 D.C. Code § 701 (1967). But at least since 1948 when *Hurd* v. *Hodge, supra*, made the rule of *Shelley* v. *Kraemer, supra*, applicable to the District of Columbia, racial covenants

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have been judicially unenforceable and, hence, have had no effect on the "title or ownership of real estate." It follows that the Recorder exceeds his statutory authority when he accepts these legal nullities for filing.

It is true that the ancient case of *Dancy* v. *Clark*, 24 App. D.C. 487 (1905), states that "the recorder of deeds is in the category of ministerial officers, and has no jurisdiction to pass upon the validity of instruments of writing presented to him for record." *Id.* at 499. But that case was decided years before it was imagined that state involvement with restrictive covenants was a wrong of constitutional magnitude. It stretches credulity to the breaking point to suppose that the *Dancy* court was able to foresee the 65 years of constitutional history which have transpired since its decision. Nor is there anything in *Dancy* to support the proposition that the Recorder is bound to accept a document even when, by doing so, he commits an injury of constitutional proportions. Indeed, the *Dancy* court itself recognized that in extreme cases, where a document was facially invalid, the recorder would be justified in refusing it.[18] Of course, restrictive covenants have been facially invalid since *Shelley* v. *Kraemer*, *supra*, was decided in 1948.

Moreover, there is a more basic response to appellees' contention which I would have have thought so elemental as to hardly require elucidation. Even if we suppose that the Recorder is acting under statutory compulsion when he records racial covenants, this fact alone does not insulate his conduct from constitutional review. *Compare Strauder* v. *West Virginia*, 100 U.S. (10 Otto) 303 (1880), *with Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1880).

The local statute which sets out the powers of the Recorder of Deeds can hardly be supposed to preempt the Fair Housing Act of 1968 and the Fifth Amendment of the United States Constitution. If a part of the District of Columbia Code really forces the Recorder to violate appellants' constitutional rights, then that portion of the Code is *pro tanto* unconstitutional. It has been clear at least since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that Congress lacks the power to direct executive officers to perform unconstitutional acts. Surely this salutary rule is not to be modified at this late date for the exclusive benefit of the District's Recorder of Deeds.

C. Finally, appellees contend that it would be inconvenient and burdensome for them to implement the relief requested and that full implementation might require employment of some additional personnel. We can all join in sincerely regretting the fact that recognition of appellants' constitutional rights may impose some additional burdens on the Recorder's office. But surely appellees do not mean to contend that they can go on violating the constitutional rights of black citizens because such violations suit the Recorder's administrative convenience. Seventeen years of bitter and continuing struggle over school desegregation have made clear that vindication of constitutional rights is not always easy. But we do not have a constitutional system of government because that is the easiest or most efficient means of running a country. The guarantees of the Fifth and Fourteenth Amendments were written into the Constitution for the very purpose of preventing some future government official from ignoring the demands of equality for the sake of short term "convenience." *Cf. Cooper* v. *Aaron*, *supra*, 358 U.S. at 16–17; *Buchanan* v. *Warley*, *supra*, 245 U.S. at 81.

Moreover, it should be noted that the parade of horribles to which appellees point is largely imaginary. Appellants have scrupulously and conscientiously tailored their requested relief so as to minimize interference with the Recorder's normal routine. Appellants are not asking the Recorder to go through the thousands of deeds presently on file in a search for restrictive covenants. Nor are they requesting that the tenor of any recorded deed be changed. Instead, they ask only that *in the future* the Recorder not accept deeds with restrictive covenants in them. With respect to deeds already on file, appellants wish the Recorder to attack a notice indicating that restrictive covenants are void to the liber volumes in which such covenants might be found and to copies made of recorded deeds containing such covenants. So far as I can see, the latter elements of this relief could be effectuated by the purchase of a large rubber stamp—surely not too great a price to pay for vindication of constitutional rights.

It is true that, with respect to future deeds, someone in the Recorder's office would have to read the documents to determine whether they contain any illegal covenants. But these deeds must be read in any event to ensure that they are written in English, clearly identify the parties, and contain no obscenities.[19] The vast majority of deeds filed today contain no racial agreements[20] and hence could be routinely approved for filing. Most deeds which do contain such covenants incorporate agreements drafted in an earlier era before it was fashionable or necessary for racism to be coy. These provisions are brutally and disgustingly frank[21] and could easily be filtered out by middle level personnel without extensive legal training.

Thus only a very few deeds with ambiguous or borderline provisions would have to be referred to a lawyer for a legal determination. In any case where really serious doubt arose, declaratory judgment procedures are available to secure a binding judicial determination of the document's tenor. It is therefore difficult to escape the suspicion that the so-called burdens to which appellees point are in reality no more than feeble excuses invented as a *post hoc* justification for bureaucratic intransigence.

IV. CONCLUSION

Finally, the majority here suggests that appellants should address their complaints of racial discrimination to the political branch of government and that attempting to "wrench far-reaching social change" from the judiciary disregards the principle of separation of powers. But while we must, of course, maintain proper respect for the jurisdiction of coordinate branches of government, under our law the judiciary too has the obligation of enforcing constitutional rights. As shown in Part II of this dissent, the due process clause of the Fifth Amendment prohibits the official recording of restrictive covenants.

It therefore becomes the duty of the judicial branch to enforce appellants' constitutional rights by enjoining this practice. The fact that Congress also possesses the unquestioned power to enforce constitutional rights by appropriate legislation has never been thought to relieve the judiciary of its responsibility in this area. Indeed it was the Framers 'fear of majoritarian pressure on the political branch that has resulted in the judiciary becoming the primary guardian of the Bill of Rights. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1942).

Moreover, it seems to me that the argument for awaiting congressional action overlooks the fact that Congress has acted in this field. It acted in 1866 when it passed sweeping civil rights legislation guaranteeing to all United States citizens the "same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1964). It acted again in 1868 when it adopted the Fourteenth Amendment, thereby establishing universal citizenship and equal rights under law. And it acted most recently in 1968 when comprehensive fair housing legislation was written into law for the purpose of "provid[ing], within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

Now, the time has come for the courts to act. We have already waited entirely too long to wipe out the last vestiges of the official discrimination which has tainted the housing market from time out of mind. I would therefore reverse the judgment of the District Court.

I respectfully dissent.

FOOTNOTES

[1] The Commissioner is empowered to appoint, supervise, and control the Recorder. D.C. Code §§ 45–701(a), (c) (1967).

[2] Hearings on S. 1026, S. 1318, S. 1362, S. 1462, H.R. 2516, H.R. 10805 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., at 233 (1967).

[3] Hearings on S. 3296 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2nd Sess., pt. 1, at 84 (1966).

[4] Government inaction as well as action may result in a constitutional violation. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). However, the government must have a duty to act and the failure to so act must result in state supported or encouraged discrimination. The instant case is clearly inapposite.

[5] State action appears to exist here. This is not a case where a plaintiff brings suit against a *private* individual and alleges state involvement in private discrimination. Here plaintiff is suing the *state* and asserting that the state is involved in discrimination. The case is certainly unusual in this sense. If, however, we were to ignore this factor and analyze the case in terms of whether there is state action which encourages private discrimination, we would find none, for the state action complained of is merely a neutral one.

It must be recalled that not all governmental action is state action within the purview of the Fifth Amendment. The action must "significantly" involve the state in private racial discrimination. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). This is a logical conclusion. Any other result would open unfathomable breaches, for surely it cannot be gainsaid today that the government is not to some extent involved in every facet of our lives.

In Reitman v. Mulkey, 382 U.S. 369 (1966), the Court suggested three factors to consider in determining whether state action is present. The first—immediate objective of the act—and the third—historical context and conditions existing prior to the act—are clearly inapposite. The sole purpose of the statute creating the office of the Recorder, and the actions of the Recorder, is to facilitate and insure the safe transfer of realty. The Recorder is a neutral repository. He is not an advocate. The second factor—ultimate effect of the act—likewise indicates no state action to discriminate. Contrary to appellants' allegations no substantial harm is caused by the actions of the Recorder. See discussion in text.

Clearly then, the relevant factors set forth in *Reitman* indicate no state action. Furthermore, the neutral aspect of the governmental action which we have discussed in the text

precludes a finding of state action within the terms of the Fourteenth Amendment. *See* Evans v. Abney, 396 U.S. 435, 444 (1970); footnote 6, *infra*.

[6] Neutral state involvement in many other forms of discrimination have been placed outside the scope of the constitutional guarantees. *See* Waltz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) (religious tax exemption); Black v. Cutter Laboratories, 351 U.S. 292 (1956) (state court enforcement of contract clause); Williams v. Howard Johnson's Restaurant, 263 F.2d 845 (4th Cir. 1959) (licensing by the state).

[7] The homeowner need only file a corrective deed with the Recorder and pay a nominal fee.

[8] One gets an impression of just how noxious these covenants are by perusing some of the examples provided in appellants' complaint. One covenant provides that "no part of said land shall be sold to any negro or person of African descent or with negro or African blood in their veins." Appellants' complaint at 3. Another promises that "[n]o part of the land hereby conveyed shall ever be used, or occupied by, sold, demised, transferred, conveyed unto, or in trust for, leased, or rented, or given, to negroes, or any person or persons of negro blood or extraction, or to any person of the Semitic race, blood or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians, except that; this paragraph shall not be held to exclude partial occupancy of the premises by domestic servants." *Ibid.* These are not ancient documents unearthed from a now forgotten racist past. They are contained in modern deeds involving land transactions occurring today in this city.

[9] 42 U.S.C. §§ 3601–3619 (Supp. V 1965–1969).

[10] Thus it is not surprising that the few courts which have thus far dealt with § 3604 (c) have construed it broadly light of its purpose. *See United States* v. *Hunter*, D. Md., 324 F. Supp. 529 (1971). *Cf. United States* v. *Bob Lawrence Realty, Inc.*, N.D. Ga., 313 F. Supp. 870 (1970); *United States* v. *Mintzes*, D. Md., 304 F.Supp. 1305 (1969).

[11] Of course, this generalization does not apply to legislative or judicial action to remove badges and incidents of slavery under the Thirteenth Amendment. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

[12] *Compare, e.g., Reitman* v. *Mulkey*, 387 U.S. 369 (1967) and *Hunter* v. *Erickson*, 393 U.S. 385 (1969), *with Evans* v. *Abney*, 396 U.S. 435 (1970), and *Palmer* v. *Thompson*, 403 U.S. 217 (1971).

[13] The governing statute charges the Recorder with the duty of recording "all deeds, contracts, and other instruments in writing affecting the title or ownership of real estate or personal property which have been duly acknowledged and certified." 45 D.C. Code § 701 (1967).

[14] *See* 42 U.S.C. § 3604(a):

[15] *See Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

[16] Cases cited by the majority such as *U.S. National Bank* v. *Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954) (*en banc*), and *Gordon* v. *Gordon*, 332 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U.S. 947 (1955), are thus totally irrelevant to the issue here. These cases, decided almost two decades ago, uphold the power of the state to probate wills with discriminatory provisions over equal protection attack. Even if they can still be said to represent good law, they are limited to the situation in which the state is aiding private conduct which is not itself illegal. Since no statute prevents a testator from devising his property in a discriminatory fashion, it could conceivably be argued that a state probate court has no legal basis for refusing to participate in this legal, private discrimination. Private discrimination in the sale of housing, however, has been illegal since *Jones* v. *Alfred H. Mayer Co.*, *supra* Note 4. Thus the only justification for the Recorder's acceptance of racial covenants is to effectuate conduct which is wholly illegal. It goes without saying that this is in fact no justification at all.

[17] "Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson* v. *Hansen*, D. D.C., 269 F. Supp. 401, 497 (1967), *affirmed, sub nom. Smuck* v. *Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969) (*en banc*).

[18] *Dancy* v. *Clark*, 24 App.D.C. 487, 499 (1905). Moreover, "even if a paper on its face appears to have been regularly executed so as to entitle it to record, and the recorder had exceeded his authority in refusing to receive and record it, yet the court will not, by writ of mandamus, coerce his action, if it appears upon consideration of the contents of the paper that it is invalid under the law, for, in that event, to coerce his action and to command the receipt and record of the paper would be a nugatory thing in law." *Id.* at 500.

[19] Apparently the Recorder presently screens all deeds submitted to him to ensure that they meet these requirements. Appellants' assertion to this effect, in their brief at 19, is not challenged by appellees.

[20] At the request of the Justice Department, the major title companies have agreed not to report the existence of racial covenants appearing in the records of title on property for which they issue title insurance. *See* Exhibit A attached to "Plaintiffs' Memorandum of Points and Authorities on Opposition to Defendants' Motion to Dismiss the Complaint." At oral argument we were informed that these companies are responsible for about 95% of the deeds presented to the Recorder for filing.

[21] *See* Note 1, *supra*.

By Mr. McCLELLAN (by request):

S. 3026. A bill to establish a fund for activating authorized agencies, and for other purposes. Referred to the Committee on Government Operations.

Mr. McCLELLAN. Mr. President, I introduce, by request, a bill to establish a fund for activating authorized agencies, and for other purposes.

This legislation was requested by the General Services Administration and I ask unanimous consent to have inserted a letter from the Assistant Administrator of the General Services Administration to the President of the Senate, explaining the need for this legislation.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., Nov. 24, 1971.

Hon. SPIRO T. AGNEW,
President of the Senate,
Washington, D.C.

DEAR MR. PRESIDENT: There is transmitted herewith, for referral to the appropriate committee, a daft of legislation "To establish a fund for activating authorized agencies, and for other purposes."

The General Services Administration provides, on a reimbursable basis, administrative support services to a constantly increasing number of newly established commissions, committees, task forces, boards, and small agencies, the funding of which is not otherwise provided for.

The experience of GSA with these entities reveals a recurring problem—a lack of access to an initial fund source to enable them, during the interim period immediately following their authorization and the time their appropriations become available, to begin carrying out their assigned missions. The hiatus problem with which these bodies are now obliged to cope, arises from the delay inherent in the budget and appropriation processes. However caused, time is lost to the point of jeopardizing in some instances the meeting of prescribed time limitations. We cite as a recent example of crippling delay the establishment of the Aviation Advisory Commission (P.L. 91–258, approved May 21, 1970) required to present its report and recommendations by not later than January 1, 1972. Appropriations were not enacted for the funding of this Commission until May 25, 1971.

We believe it desirable to remedy by legislation the funding dilemma which confronts these types of organizations in their early stages. The draft bill submitted herewith would achieve the needed result by authorizing the establishment of a fund for activating authorized agencies. The fund would be administered by GSA which currently performs administrative support services for more than 40 small commissions and committees. Advances from the fund would be subject to approval by the Director of the Office of Management and Budget.

We urge prompt introduction and enactment of the draft bill.

The Office of Management and Budget has advised that there is no objection to the submission of this proposed legislation to the Congress, and its enactment would be in accord with the program of the President.

Sincerely,

HAROLD S. TRIMMER, Jr.,
Assistant Administrator.

S. 3026

A bill to establish a fund for activating authorized agencies, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established on the books of the Treasury a fund, which shall be administered by the General Services Administration. The fund may be capitalized at not to exceed $3,000,000 and shall be available, without fiscal year limitation, for advance funding to activate boards, commissions, committees, small agencies and other Federal organizations established by act of Congress or by Executive Order of the President, the funding of which is not otherwise provided for, and until such time as appropriations therefor have been made by the Congress. Such advances shall be subject to approval by the Director, Office of Management and Budget.

SEC. 2. Any advances from the fund established by this Act shall be fully reimbursed (without interest) from any appropriations made available for purposes for which the funds were advanced. The fund will also be credited with all reimbursements, and refunds or recoveries relating to personal property and services procured through the fund.

SEC. 3. There is hereby authorized to be appropriated, without fiscal year limitation, as initial capital to the fund created by this Act, an amount not to exceed $3,000,000.

By Mr. CRANSTON (for himself and Mr. TUNNEY):

S. 3027. A bill to designate certain lands in San Luis Obispo County, California, as wilderness. Referred to the Committee on Interior and Insular Affairs.

Mr. CRANSTON. Mr. President, I introduce for appropriate reference a bill to designate certain lands in San Luis Obispo County, Calif., as the Lopez Canyon National Wilderness Area. I am delighted that my distinguished colleague

ity in our defenses and then proposed military systems to protect them.

This kind of "political signaling" with strategic military systems does not seem to make sense militarily, and it is certainly inconsistent with our stated objectives at SALT and with our supposed entry into an era of negotiations rather than confrontations. So many of our actions are at variance with the objective of coming to a political settlement with the U.S.S.R.—we increase ULMS, we go ahead with a B–1 bomber, we stall entering into MBFR negotiations, we expand U.S. bases in Greece, we take the first step toward arms races in the Indian Ocean and the Persian Gulf, and Radio Free Europe continues undisturbed.

Even more startling is the Secretary of Defense's attitude toward China, which is hardly consistent with normalization of relations. The flimsy anti-Chinese rationalizations for continuing deployment of Safeguard is repeated, and the irrational fear of a Chinese strategic "threat" to this country is raised, entirely oblivious of the political realities of the relations between the two countries.

America should buy military weapons for military purposes. If weapons are to be built for political purposes, perhaps they should be reviewed by the Foreign Relations Committee, as well as the Armed Services Committee.

The ABM bargaining chip has already cost several billion dollars—for what? The time has come to buy only what we need. Our problem is to keep our own deterrent strong and to meet the needs of our own people here at home, not to match the waste of the Soviets in whatever ways they choose to waste. We will always be ahead in some ways, and they in others. We ought not let the traditional alarums of the appropriations season cloud our perception of these basic considerations.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is concluded.

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971

The PRESIDING OFFICER. Under the previous order the Chair lays before the Senate for its consideration the unfinished business which will be stated.

The assistant legislative clerk read as follows:

Calendar No. 412, S. 2515, a bill to further promote equal employment opportunities for American workers.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. WILLIAMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question before the Senate is amendment No. 809 to S. 2515.

CLOTURE MOTION

Mr. WILLIAMS. Mr. President, on behalf of myself and 50 other Senators I will in a moment offer a motion pursuant to rule XXII to invoke cloture on S. 2515 that is presently the pending business in this body. The leadership on both sides supports this motion. A constitutional majority of the Senate signed the motion.

We are now in the fifth week of debate on this measure. We have had more than 30 rollcall votes on amendments to this bill. We debated the enforcement procedure for 4 weeks and finally resolved that issue on Tuesday last.

I think that it is clear from the desultory tone of the debates since last Tuesday that the Senate is merely marking time until we can bring an end to debate on this bill. I know that a large majority of the Senate wants this bill passed.

This motion for cloture will be voted on next Tuesday afternoon. I believe that it is incumbent upon each and every one of the Members of the Senate who believes in the cause of equal employment opportunity to be present and to vote on this measure. It will be, I hope, a historic demonstration to our minorities and women that effective assistance can be provided to end job discrimination in our society.

Mr. President, this issue has been fully and completely debated. I urge all of my colleagues to join with me on Tuesday to end this debate and pass S. 2515.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. WILLIAMS. I am happy to yield.

Mr. JAVITS. Mr. President, the Senator from New Jersey (Mr. WILLIAMS) and I are presenting this cloture motion to the Senate with the feeling that every conceivable area in respect of this measure has now been explored. The amendments have been dealt with in substance, not once but more than once in most instances, and the time has now come to vote. If our constitutional system cannot under these circumstances gear itself up to acting instead of talking further then, indeed, we are in some constitutional crisis.

Also, Mr. President, we have gone very far in the number of Senators who have signed the cloture motion. Only 16 Senators are required for a cloture motion. Designedly the Senator from New Jersey and I set out to get 51 signatures of Senators, a constitutional majority.

I know I express our joint gratitude to all who joined with us because we wanted to demonstrate how conclusively is this sentiment on the part of the Senate, the constitutional majority, that the time has come to vote.

Even now no amendment will be cut off. Any amendment at the desk would be qualified by a suitable unanimous consent up to the vote, and thereafter Members will have an opportunity to have amendments voted on, every Member having an hour.

I regret the form the bill has now, but nonetheless it is the will of the Senate and if we wish the will of the Senate to be expressed in voting on this matter we must be willing to accept it after full and fair debate, as it is. I am fully cognizant of that and on other occasions I have defended vigorously the will of the Senate in conference, even though I might have voted the other way. I have no doubt that the Senator from New Jersey (Mr. WILLIAMS) feels the same way I do.

I do not use this expression in any invidious sense, but I wish to say that we accept the watering down of the enforcement power. We did it in the broader interest of getting a bill to deal with the worst of all discrimination, denial of jobs or the opportunity for jobs on the grounds of race, religion, color, national origin, or sex.

We are satisfied there is a measurable improvement over what we have had up to now and that it will result in materially cutting down the backlog of equal employment opportunity cases and giving a much better opportunity to protect constitutional guarantees.

This cloture motion contains the highest number of signers in any civil rights bill. There was a measure in 1926 that had more signers that involved a branch banking bill, but this is the largest number of signers on a bill involving civil rights.

I join the Senator from New Jersey in expressing great satisfaction in working with him in an extremely difficult debate. I doubt any more difficult matter has been carried out in this Chamber.

Mr. WILLIAMS. The feeling is certainly mutual in that respect.

Mr. President, I submit the cloture motion under rule XXII of the Standing Rules of the Senate to bring to a close debate on S. 2515.

The PRESIDING OFFICER (Mr. CHILES). The cloture motion having been requested under rule XXII, the Chair, without objection, directs the clerk to state the motion.

The assistant legislative clerk read the cloture motion, as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate upon the bill (S. 2515), a bill to further promote equal employment opportunities for American workers.

Mike Mansfield
Robert Griffin
Robert C. Byrd
Abraham Ribicoff
Thomas J. McIntyre
Jennings Randolph
Harold E. Hughes
Gaylord Nelson
Thomas F. Eagleton
Adlai Stevenson
Walter F. Mondale
Lee Metcalf
Frank E. Moss
Len B. Jordan
John O. Pastore
Robert T. Stafford
Mark O. Hatfield
Robert Taft, Jr.
Harrison Williams
Richard S. Schweiker
Hugh Scott
Jacob K. Javits

[19] See *Yale* L. J. at 922 (protective labor legislation); *Id.* at 936 (domestic relations law); *Id.* at 954 (criminal law); Id at 967 (the military). See also, Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 *Harv. Civ. Rights Civ. Lib. L. Rev.* 216, 221–23 (1971) [hereinafter cited as Dorsen & Ross].

[20] Yale L.J. at 922–936; Ross, *Sex Discrimination and "Protective" Labor Legislation*, 1970 Hearings before Senate Judiciary Committee on the Equal Rights Amendment at 210. See also *Cheatwood* v. *South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969) and *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir 1969) (weight lifting restrictions); *Mengelkoch* v. *Industrial Welfare Commission*, 437 F. 563 (9th Cir. 1971), *rev'g in part* 284 F. Supp. 950 (C.D. Cal., 1968) (maximum hours legislation)

[21] Approximately two-thirds of the states permit divorce courts to grant alimony awards to the wife only. The remaining one third permit alimony awards to either spouse. *Yale L.J.* at 952–53 & n. 192.

[22] H. Clark. *Domestic Relations* 195–96 (1968).

[23] *See, e.g., Model Penal Code* § 230.5 (Proposed Official Draft, 1962).

[24] *See, e.g., Uniform Marriage and Divorce* Act §§ 308 (a) and (b).

[25] 10 U.S.C. § 3209(b) (Supp. IV., 1967); 32 C.F.R. § 580 (1971).

[26] Yale L. J. at 969.

[27] 32 C.F.R. § 888.2(f) (1970).

[28] However, in 1950 and 1953, the Equal Rights Amendment was passed by the Senate with a clause permitting reasonable classifications to protect women (which was intended to apply to the draft). In 1970, Senator Ervin proposed a specific draft exception and in July, 1971, the House Judiciary Committee reported out the Equal Rights Amendment with a similar provision.

[29] *See, e.g., Cheatwood* v. *South Central Bell Tel. & Co., op. cit. supra* at n. 20, at 758–59.

[30] See discussion in Yale L. J. at 900–02. The Supreme Court recognized the constitutional right of privacy in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). See also *York* v. *Story*, 324 F. 2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) wherein the Court applied the constitutional right of privacy to the situation where police conduct searches involving the removal of clothing.

[31] 50 U.S.C. App. § 456 (h) (2) Supp. V. (1969).

[32] Yale L. J. at 968 & n. 252.

[33] Kurland at 250.

[34] *Yale L.J.* at 903–04. See also, Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 *Harv. L. Rev.* 564 (1965); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Equal Treatment*, 61 *Nw. U.L. Rev.* 363 (1966); *Developments in the Law—Equal Protection*, 82 *Harv. L. Rev.* 1065, 1105–20 (1969).

[35] *See Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, __ U.S. __, 91 S. Ct. 1267 (1971).

[36] *Yale L.J.* at 904.

[37] *Id.* at 904–05.

[38] Freund, *The Equal Rights Amendment is Not the Way*, 6 Harv. Civ. Rights Civ. L.b.L. Rev. 234, 240 (1971), [hereinafter cited as Freund]. The number of times that bathroom facilities have been used to justify sex-based discrimination is very surprising. To cite only a few examples: Last year one Senator opposed confirmation of the appointments of female pages to the Senate because they would not be able to deliver messages to Senators in the men's rest room. The EEOC guideline explicitly state that the lack of restroom facilities for female employees is no excuse not to hire them; thus presumably the argument has been raised many times by employers. See, *e.g., Cheatwood, supra.* Female high school students have been barred from competition in varsity sports such as tennis and swimming because the teams are all male and no locker room facilities were provided for females.

[39] See footnote 30.

[40] Emerson, *In Support of the Equal Rights Amendment*, 6 *Harv. Civ. Rights Civ. Lib. L. Rev.* 225, 232 (1971).

[41] Freund at 234.

[42] Doren & Ross at 220. *See, e.g., United States* v. *Guest*, 383 U.S. 747, 761, 774 (1966) (opinions of Clark and Brennan, J. J.); 18 U.S.C. § 241 (1964); 42 U.S.C. § 1985 (1964).

[43] The undue burden of mathematical precision which proponents of women's rights must shoulder each time legislation is pending is eliminated once a national moral commitment to sex equality is unequivocally stated. With a national expression of equality it will not be necessary to prove again and again, in each state, that women are, for example, as intelligent or as "business-minded" as men.

DISSENTING VIEWS OF PORTER R. CHANDLER

The first sentence of the Committee report says:

"The widespread and pervasive laws and practices which discriminate against women are not only irrational, but also directly and seriously injurious to a substantial part of our society."

This might have been true in 1772. It might have been partially true in 1872. But as of 1972 it seems to me to be a wild exaggeration. Many of the examples given in the report (e.g. laws forbidding women in a few states to work in mines or as bartenders, or excluding them from the dubious honor of being drafted into the armed forces) seem rather far-fetched, if not ridiculous.

Nor as I convinced that the far-reaching and shot-gun type of remedy proposed—a Constitutional amendment—is either necessary or appropriate. Such abuses as may exist are susceptible to correction either through legislative channels or through the existing Equal Protection Clause of the Fourteenth Amendment. The report dismisses these alternatives by saying in effect that they would take too long.

The broad reach of the proposed Constitutional amendment, as interpreted by the authors of the Committee report, can best be realized by a careful reading of the section of the report headed "The Military." The report unequivocally states that one of its purposes is to ensure that women be not only permitted but required to be treated on an exact parity with men for all purposes of military service. If men are drafted for combat duty in the infantry, or as truck drivers, women must be similarly drafted. If men are assignable to the boiler room of a destroyer, women must be similarly assignable. Somewhat grudgingly, the report concedes that "separate quraters for men and women would be provided under the constitutional right of privacy, even though this may involve building more toilet and sleeping facilities." How this is to be accomplished without rebuilding all our destroyers, or whether segregated pup tents and foxholes for the infantry will be constitutionally mandated, are not elucidated in the report.

I respectfully dissent and recommend that the Committee report be rejected. In this connection I note that the Committee on Federal Legislation of this Association has submitted a report adverse to the proposed Constitutional Amendment.

SOVIET STRATEGIC WEAPONS BUILDUP

Mr. FULBRIGHT. Mr. President, each year about this time, for as long as I can remember, the Senate along with the rest of the country has been afflicted with disclosures about new strategic threats which have, or will soon have materialized. This year the situation is both similar and different. It is similar in that we hear the traditional refrain of Soviet strategic weapons buildup. We are told as always that the buildup has exceeded all expectations. We are told that we are falling behind.

These statements are, of course, questionable. Just to give one example, the defense posture statement shows that U.S. "total offensive force loadings" have gone—or will go—up from 4,700 to 5,700 from November 1, 1971, to mid-1972. Meanwhile, Soviet force loadings have risen only from 2,100 to 2,500. Thus, as the posture statement itself indicates, we are adding 1,000 weapons and they only 400.

At this time of year it may be appropriate to stop and see what became of some old threats. I wonder if my colleagues remember the Soviet multiple warheads, the threat which was used to frighten us into approving the ABM? On page 56 of the defense posture statement we learn that the Soviet Union has not even had a test of an MRV warhead—that is, multiple warheads without independent guidance since late 1970—more than a year ago. We began to flight test independently guided re-entry vehicles in August 1968, and deployed them about 2 years later. In other words, we now find that we are more than 3 years ahead in MIRV technology.

The new aspect of this year's posture statement is that we are being asked to invent new weapons systems for international political purposes. This is, of course, a logical extension of the bargaining chip argument, and it represents a dangerous and expensive trend in defense planning. The initial billion dollar installment proposed for a ULMS submarine system which could ultimately cost $30 billion is a good illustration.

The posture statement does not make a serious case that our Polaris submarines are threatened. The case for a new sea-based missile force is based simply on the need to show the Soviet Union that we too can spend money on sea-based systems, if they are unwilling to halt building submarines. The defense posture statement explains ULMS this way:

> The continuing Soviet strategic offensive force buildup, with its long-term implications, convinced us that we need to undertake a major new strategic initiative. This step must signal to the Soviets and our allies that we have the will and the resources to maintain sufficient strategic forces in the face of a growing Soviet threat.

Secretary Laird went on to say that he had "carefully reviewed all alternatives for new strategic initiative" and had chosen ULMS since it had the "best long-term prospect" for survivability.

This is an unusual approach to military analysis. We decide that we need to signal the Soviet Union politically with some strategic initiative. So we look around for some weapon systems that seem likely to survive. While I am no expert on such matters, I would have thought that our military planners first looked to find some military vulnerabil-

the Senators who signed the cloture motion on S. 2515 that was offered on that date, omitted listing the names of several Senators who had signed the cloture motion. It will be recalled that a total of 53 Senators signed the motion. It was submitted on two pages, and evidently the second page somehow got lost at the printers.

I therefore ask unanimous consent that the cloture motion and the complete list of signers be printed in the RECORD.

There being no objection, the text of the motion and list of signers were ordered to be printed in the RECORD, as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate upon the bill (S. 2515), a bill to further promote equal employment opportunities for American workers.

1. Mike Mansfield
2. Robert Griffin
3. Robert C. Byrd
4. Abraham Ribicoff
5. Thomas J. McIntyre
6. Jennings Randolph
7. Harold E. Hughes
8. Gaylord Nelson
9. Thomas F. Eagleton
10. Adlai Stevenson
11. Walter F. Mondale
12. Lee Metcalf
13. Frank E. Moss
14. Len B. Jordan
15. John O. Pastore
16. Robert T. Stafford
17. Mark O. Hatfield
18. Robert Taft, Jr.
19. Harrison Williams
20. Richard S. Schweiker
21. Hugh Scott
22. Jacob K. Javits
23. J. Caleb Boggs
24. Charles H. Percy
25. James B. Pearson
26. Edward W. Brooke
27. Gordon Allott
28. Lowell P. Weicker
29. Clifford P. Case
30. Marlow W. Cook
31. Charles McC. Mathias, Jr.
32. Robert Dole
33. Henry Bellmon
34. Bob Packwood
35. Ted Stevens
36. J. Glenn Beall
37. Vance Hartke
38. George McGovern
39. Frank Church
40. Alan Cranston
41. Claiborne Pell
42. Daniel K. Inouye
43. John V. Tunney
44. Gale W. McGee
45. Joseph M. Montoya
46. Philip A. Hart
47. Stuart Symington
48. Lloyd Bentsen
49. William Proxmire
50. Birch Bayh
51. Fred R. Harris
52. Lawton Chiles
53. Warren G. Magnuson

QUORUM CALL

Mr. WILLIAMS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. ALLEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971

The Senate continued with the consideration of the bill (S. 2515) a bill to further promote equal employment opportunities for American workers.

Mr. ALLEN. Mr. President, on behalf of myself and the distinguished Senator from North Carolina (Mr. ERVIN) I call up an amendment which is at the desk and ask that it be stated.

The PRESIDING OFFICER. The amendment will be read.

The assistant legislative clerk read as follows:

On page 50, between lines 19 and 20, to insert the following at the end of section 4 with a proper subsection designation:

As used in this act, the term "charge" shall mean an accusation of discrimination supported by oath or affirmation."

Mr. ALLEN. Mr. President, by way of explanation of the clerk's difficulty in reading the amendment, it was drafted by the hand of the distinguished Senator from North Carolina (Mr. ERVIN) who——

Mr. ERVIN. If the Senator will pardon me, if he tested me solely on my capacity to write rather than to read, I could not pass a literacy test.

Mr. ALLEN. Fortunately, or unfortunately, as the case may be, there is no literacy test any more, so that the distinguished Senator would have no difficulty getting by any examination if he should appear before a board of registrars. [Laughter.]

Mr. President, the purpose of this amendment is to require that charges of discrimination filed with the Commission shall be under oath or affirmation. For some reason unexplained, but apparently not intentional, the amendment as drafted and the committee substitute as reported, leave off the requirement that a charge be under oath.

The present law and the committee report containing a copy of the present law, at page 55, section 706(a) points out:

Whenever it is charged in writing under oath by a person claiming to be aggrieved—

So all this amendment would do would be to go back to the present law and make no change in the requirement, meaning charges are to be filed and made under oath in writing.

I am advised that the sponsors of the bill have no objection to the amendment. I trust that they will so state.

Mr. WILLIAMS. Mr. President, I gather that one copy has been taken from the Chamber. Does the Senator have another copy of the amendment?

Mr. ALLEN. No, sir. The amendment adds a new section at the end of section 4, and it is between lines 19 and 20 on page 50 of the bill. It merely states that the word "charge" as used in the act shall be a charge supported by oath or affirmation.

Mr. WILLIAMS. I wonder if the Senator would refer to the bill at page 34, and whether this would not be the place to make the bill conform to present law.

Mr. ALLEN. The only reason we did not put it there would have been because four or five subsections start off with reference to a charge, and it would have been necessary to amend the bill at about four or five places, whereas if we add one coverall, blanket statement it would cover the matter without trying to amend it as four or five different points, and possibly not covering every one.

Mr. WILLIAMS. The present law makes the requirement in one place, and it is in section 706.

Mr. ALLEN. Yes.

Mr. WILLIAMS. "Whenever it is charged in writing under oath." I do not know why it was taken out of the bill, but I would think that would be the place to put it back.

Mr. ALLEN. As I stated, if it were put back, it would also have to be put back on page 35, subsection (c), where it refers to the case of a charge; it would also have to be put on page 36, subsection (d), where it refers to the case of a charge; it would also have to be put on page 37, subsection (e), where it refers to the case of a charge.

Mr. WILLIAMS. If the Senator will yield further, if it could be done in one place, it probably would be best to do it in section 706(b) where the requirement would be put at the very beginning: "Charges shall be in writing under oath or affirmation." That would be on line 21, page 34, of the bill before the Senate.

Mr. ALLEN. Apparently the oath or affirmation requirement was left out of the bill.

Mr. WILLIAMS. Yes.

Mr. ALLEN. Would the Senator then, interpose no objection if we withdrew the amendment, put in a quorum call, and then put in an amendment that is applicable to this line?

Mr. WILLIAMS. I wonder if the Senator could do that without the benefit of a quorum call, while we further discuss the bill. The reason for the omission in the bill of the requirement that the charges be filed in writing under oath is not clear to me. I do not know why it was done.

Mr. ALLEN. Very well. We will put in such an amendment.

Mr. WILLIAMS. The Senator has accommodated this provision to those who, for one reason or another do not resist taking an oath, and suggests putting it "in writing under oath or affirmation."

Mr. ALLEN. That is the way we have worded it.

Mr. WILLIAMS. Certainly, in the liberal spirit of today—

Mr. ERVIN. Mr. President, if the Senator will yield, I would suggest to the distinguished Senator from Alabama that he modify his amendment so as to read, on page 34, line 21, insert the following between the word "writing" and the word "and": "under oath or affirmation."

Mr. ALLEN. Very well.

Mr. President, I offer a modification of my amendment in the manner sug-

tion for the Commission, but might not be able to protect the Commission's interest in a case where private litigant is involved.

No. 899 is a technical amendment redefining the Commission's operational authority to eliminate references to the cease-and-desist powers.

No. 900 is a technical and conforming amendment to the provision of S. 2515 that created a general counsel. It makes clear the general counsel authority is to handle the filing of complaints under the now adopted court enforcement procedures rather than the issuance and prosecution of complaints before the Commission under cease and desist.

The amendment also strikes the provision prohibiting the Commission employees engaged in prosecutorial functions from participating in other decisional functions at the Commission since there is no administrative hearing process any longer, as a result of the amendment.

Amendment No. 901 is a technical amendment concerning the investigatory powers of the Commission which eliminates a sentence relating to the use of the subpena powers in relation to cease and desist, which again has been stricken.

Amendment No. 902 is a technical amendment, eliminating the reference in the pattern and practice transfer to cease and desist procedures to make clear that the Commission's handling of pattern and practice cases is to be through the Federal district courts.

The PRESIDING OFFICER (Mr. Moss). The question is on agreeing en bloc to the amendments numbered 896, 897, 899, 900, 901, and 902.

The amendments were agreed to en bloc.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. WILLIAMS. Mr. President, I have nine other technical amendments which have not been printed. I have reviewed them with the Senator from North Carolina and believe that, as they are of a technical nature only, they will be accepted.

I send the amendments to the desk and ask unanimous consent that they not be read but printed in the RECORD, and I will explain each one at this time.

The PRESIDING OFFICER. Is there objection to consideration of the perfecting amendments en bloc and to suspend the reading of the amendments? The Chair hears none, and it is so ordered; and without objection, the amendments will be printed in the RECORD.

The text of the amendments is as follows:

On page 33, in the matter to be inserted by an amendment after line 13, strike out the word "religions" and insert in lieu thereof the word "religion".

On page 33, in the matter to be inserted by an amendment after line 13, strike out the word "in" and insert in lieu thereof the word "to".

On page 38, in the matter to be inserted by amendment numbered 884, insert on page 2, line 7, after the period the following: "The person or persons aggrieved shall have the right to intervene in a civil action brought by the General Counsel or the Attorney General in a case involving a government, governmental agency, or political subdivision.".

On page 38, in the matter to be inserted by amendment numbered 884, insert on page 2, line 13, after the words "Attorney General" the following: "has not filed a civil action".

On page 38, in the matter to be inserted by amendment numbered 884, on page 3, line 11, strike out "subsection (c)" and insert in lieu thereof "subsections (c) or (d)".

On page 38, in the matter to be inserted by amendment numbered 884, insert on page 5, line 6, after the word "Commission" the following: "or the Attorney General in a case involving a government, governmental agency, or political subdivision,".

On page 38, in the matter to be inserted by amendment numbered 884, on page 5, line 20, strike out the word "plaintiff" and insert in lieu thereof the words "aggrieved person".

On page 38, in the matter to be inserted by amendment numbered 884, insert on page 5, after line 11, the following:

"(6) The provisions of section 706 (f) through (k), as applicable, shall govern civil action brought hereunder."

On page 55, line 12, strike out the word "or" and insert in lieu thereof the word "as".

On page 50, line 25, strike out "1971" and insert in lieu thereof "1972".

On page 51, line 20, strike out "1971" and insert in lieu thereof "1972".

On page 59, line 6, strike out "1971" and insert in lieu thereof "1972".

The PRESIDING OFFICER. The Senator from New Jersey (Mr. WILLIAMS) may propound the perfecting amendments at this time.

Mr. WILLIAMS. Mr. President, the first amendment that I offer makes two typographical corrections in the amendment that was adopted on religious belief. The first correction makes the word "religion" singular instead of plural. The second change is a grammatical change relating to hardship of religious practice to the conduct "of" the employer's business rather than "in" the conduct of the employer's business.

Mr. ERVIN. Mr. President, I would like to ask the Senator from New Jersey if that affects the amendment which was adopted in any respect——

Mr. WILLIAMS. No. This does not deal with the amendment offered by the Senator from North Carolina. This deals with the amendment offered by the Senator from West Virginia, not the Senator's amendment.

The PRESIDING OFFICER. Does the Senator from New Jersey wish these amendments to be considered en bloc or separately?

Mr. WILLIAMS. I ask unanimous consent that they be considered en bloc, Mr. President.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. WILLIAMS. The second amendment replaces language that was in the original bill making it clear that the right of an aggrieved party to intervene in a civil suit brought by general counsel or Attorney General in cases involving a governmental agency or political subdivision. It is likely that such individual would have the right of intervention under Federal rules in civil procedures which this amendment is designed to make clear.

Mr. GRIFFIN. If the Senator from New Jersey will yield for a question, are these several amendments also cleared with the ranking Members on this side; is that correct?

Mr. WILLIAMS. Yes.

Mr. GRIFFIN. I thank the Senator.

Mr. WILLIAMS. They were all cleared with the Senators from New York and Colorado.

Mr. President, the third amendment is intended to make clear the provision under which a private action may have been filed in a case involving a governmental agency and political subdivision. Private action can be filed if the Attorney General has not filed a civil action within the requisite period of time. The words "has not filed a civil action" were left out of the amendment on court enforcement.

The fourth amendment is intended to correct a typographical error which allowed for the deferral under State and local proceedings under 706(c). It should have read 706 (c) or (d), since there are two deferral procedures.

The fifth amendment is intended to make clear that preliminary injuctions invloving a governmental agency or political subdivision are to be sought by the Attorney General.

The sixth amendment is intended to conform to language in the bill relating to an "aggrieved person" rather than the term "plaintiff," since civil actions would be in the name of the commission or the United States.

The seventh amendment is in the nature of a technical amendment, to make clear the provisions under which civil actions are to be brought.

The eighth amendment is intended to correct a grammatical error in the redesignation of several subsections. This amendment, which is No. 898, is a technical amendment, intended to reflect the fact that the bill would be passed in 1972 rather than in 1971, as it is in the bill as introduced.

That concludes this group of technical amendments.

The PRESIDING OFFICER (Mr. Moss). The nine technical amendments of the Senator from New Jersey have been explained and the motion to consider them en bloc having been granted, the question is on agreeing to the amendments en bloc.

The amendments were agreed to en bloc.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. ALLEN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. WILLIAMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SAXBE). Without objection, it is so ordered.

OMISSION OF NAMES OF SIGNERS OF CLOTURE MOTION

Mr. WILLIAMS. Mr. President, I note that the CONGRESSIONAL RECORD of February 18, 1972, at page S2107, in listing

lina is going to pick up the fight for the freedom of professional baseball players to contract.

I want to say that in this analogy what we are doing here, or what it is my prayer we are doing here, is saying to the employers of this Nation, be they governments or private employers, that they cannot have a reserve clause reserving the right to not hire because of a person's religion, race, sex, or national origin.

That reserve clause opportunity, I think, is against one of the first fundamental principles of the United States of America.

Mr. President, I yield to the Senator from New York.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. JAVITS. Mr. President, I think that the very eloquent argument of the Senator from New Jersey brings the matter home to every American.

I believe that what is involved at this point is the capability of the Senate to operate. It seems to me that we get to a point—and I have recounted the major issues we have already debated and redebated in this debate—where democracy itself is challenged by the question of whether a legislative body can operate. The thing that is often overlooked is the rule in the Senate by which a cloture motion must be agreed to by two-thirds in the event of a filibuster against the bill. That gives one-third of the membership present and voting the ability to immobilize the Government.

We hope and pray that there is never a day when this right will be used to jeopardize the security of this Nation. However, it could be.

We should all realize that nothing in the Constitution makes the Government work. If money is not appropriated, if authority is not given, if a law expires and is not renewed, the U.S. Government itself literally can be ground to a halt, not by affirmative action, but by unwillingness to act. And that is what is at stake. Therefore, we have a question involving a really major bill and the capability of the Senate to act and, therefore, the ability of the Government to act.

The President cannot spend money unless Congress appropriates it. The President cannot do anything if one side in the Senate were to say, "No. We will not do anything in a given aspect concerning the Federal law."

At long last when the Senate does gird its loins, it can invoke cloture, as I believe it will do today. It represents, if inadequate a vindication of the process of our constitutional form of government so that we are not in the position where we will collapse because our own institutions have trapped us in this quagmire so that we cannot act.

I hope very much we realize that the Senate must act. Democracy has to have finality some time. That is why we have a Supreme Court of the United States. That is why we have a Congress. And that is why—notwithstanding the usefulness of a filibuster in giving the side that feels they do not want a law, the opportunity to say, for whatever reason, that they will use this rule that permits the Senate to act only by a majority of two-thirds—the Senate will act.

Mr. President, I hope that the vote on cloture will be successful today.

Mr. WILLIAMS. Mr. President, do we have any time remaining. Have we run out of time?

The PRESIDING OFFICER. The Senator from New Jersey has 5 seconds remaining.

Mr. ERVIN. Mr. President, at long last I believe that the Senator from New York and I agree that the rule requires a majority of two-thirds.

In this very case, it compels the Senate to listen, to stop, and to think long enough to recover its senses.

Mr. WILLIAMS. Mr. President, I yield to the Senator from New York the 5 seconds if he wants to correct that erroneous impression.

Mr. JAVITS. Mr. President, I think that we have argued and reargued this thing enough. There are some things, notwithstanding my great respect for the distinguished Senator from North Carolina, that we cannot agree on. So, I think we had better vote.

CLOTURE MOTION

The PRESIDING OFFICER. The hour of 12:15 has arrived. Under the unanimous consent agreement and pursuant to rule XXII the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate upon the bill (S. 2515), a bill to further promote equal employment opportunities for American workers.

1. Mike Mansfield
2. Robert Griffin
3. Robert C. Byrd
4. Abraham Ribicoff
5. Thomas J. McIntyre
6. Jennings Randolph
7. Harold E. Hughes
8. Gaylord Nelson
9. Thomas F. Eagleton
10. Adlai Stevenson
11. Walter F. Mondale
12. Lee Metcalf
13. Frank E. Moss
14. Len B. Jordan
15. John O. Pastore
16. Robert T. Stafford
17. Mark O. Hatfield
18. Robert Taft, Jr.
19. Harrison Williams
20. Richard S. Schweiker
21. Hugh Scott
22. Jacob K. Javits
23. J. Caleb Boggs
24. Charles H. Percy
25. James B. Pearson
26. Edward W. Brooke
27. Gordon Allott
28. Lowell P. Weicker
29. Clifford P. Case
30. Marlow W. Cook
31. Charles McC. Mathias, Jr.
32. Robert Dole
33. Henry Bellmon
34. Bob Packwood
35. Ted Stevens
36. J. Glenn Beall
37. Vance Hartke
38. George McGovern
39. Frank Church
40. Alan Cranston
41. Claiborne Pell
42. Daniel K. Inouye
43. John V. Tunney
44. Gale W. McGee
45. Joseph M. Montoya
46. Philip A. Hart
47. Stuart Symington
48. Lloyd Bentsen
49. William Proxmire
50. Birch Bayh
51. Fred R. Harris
52. Lawton Chiles
53. Warren G. Magnuson

CALL OF THE ROLL

The PRESIDING OFFICER. Under rule XXII, the Chair directs the clerk to call the roll to ascertain the presence of a quorum.

The second assistant legislative clerk called the roll and the following Senators answered to their names:

[No. 51 Leg.]

Aiken	Fannin	Muskie
Allen	Fong	Nelson
Allott	Fulbright	Packwood
Anderson	Gambrell	Pastore
Bayh	Goldwater	Pearson
Beall	Gravel	Pell
Bellmon	Griffin	Percy
Bennett	Gurney	Proxmire
Bentsen	Harris	Randolph
Bible	Hart	Ribicoff
Boggs	Hartke	Roth
Brock	Hatfield	Saxbe
Brooke	Hollings	Schweiker
Buckley	Hruska	Scott
Burdick	Hughes	Smith
Byrd, Va.	Humphrey	Sparkman
Byrd, W. Va.	Inouye	Spong
Cannon	Javits	Stafford
Case	Jordan, N.C.	Stennis
Chiles	Jordan, Idaho	Stevens
Church	Kennedy	Stevenson
Cook	Long	Symington
Cooper	Magnuson	Taft
Cotton	Mansfield	Talmadge
Cranston	Mathias	Thurmond
Curtis	McGee	Tower
Dole	McIntyre	Tunney
Dominick	Metcalf	Weicker
Eagleton	Miller	Williams
Eastland	Mondale	Young
Ellender	Montoya	
Ervin	Moss	

Mr. BYRD of West Virginia. I announce that the Senator from Arkansas (Mr. McCLELLAN), the Senator from South Dakota (Mr. McGOVERN), and the Senator from Washington (Mr. JACKSON) are necessarily absent.

Mr. GRIFFIN. I announce that the Senator from Tennessee (Mr. BAKER) is absent by leave of the Senate on official committee business.

The Senator from Wyoming (Mr. HANSEN) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The PRESIDING OFFICER. A quorum is present.

The question before the Senate now is: Is it the sense of the Senate that debate on S. 2515, a bill to further promote equal employment opportunities for American workers, shall be brought to a close?

The yeas and nays are mandatory under the rule, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Washington (Mr. JACKSON), the Senator from

Arkansas (Mr. McCLELLAN) and the Senator from South Dakota (Mr. McGOVERN) are necessarily absent.

On this vote, the Senator from Washington (Mr. JACKSON) the Senator from South Dakota (Mr. McGOVERN) are paired with the Senator from Arkansas (Mr. McCLELLAN).

If present and voting, the Senator from Washington and the Senator from South Dakota would vote "yea", and the Senator from Arkansas would vote "nay."

Mr. GRIFFIN. I announce that the Senator from Tennessee (Mr. BAKER) is absent by leave of the Senate on official committee business.

The Senator from Wyoming (Mr. HANSEN) is necessarily absent.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The yeas and nays resulted—yeas 73, nays 21, as follows:

[No. 52 Leg.]

YEAS—73

Aiken	Goldwater	Packwood
Allott	Gravel	Pastore
Anderson	Griffin	Pearson
Bayh	Harris	Pell
Beall	Hart	Percy
Bellmon	Hartke	Proxmire
Bentsen	Hatfield	Randolph
Boggs	Hughes	Ribicoff
Brooke	Humphrey	Roth
Buckley	Inouye	Saxbe
Burdick	Javits	Schweiker
Byrd, W. Va.	Jordan, Idaho	Scott
Cannon	Kennedy	Smith
Case	Magnuson	Spong
Chiles	Mansfield	Stafford
Church	Mathias	Stevens
Cook	McGee	Stevenson
Cooper	McIntyre	Symington
Cranston	Metcalf	Taft
Curtis	Miller	Tunney
Dole	Mondale	Weicker
Dominick	Montoya	Williams
Eagleton	Moss	Young
Fong	Muskie	
Gambrell	Nelson	

NAYS—21

Allen	Ellender	Jordan, N.C.
Bennett	Ervin	Long
Bible	Fannin	Sparkman
Brock	Fulbright	Stennis
Byrd, Va.	Gurney	Talmadge
Cotton	Hollings	Thurmond
Eastland	Hruska	Tower

NOT VOTING—6

Baker	Jackson	McGovern
Hansen	McClellan	Mundt

The PRESIDING OFFICER. On this vote the yeas are 73 and the nays 21. Two-thirds of the Senators present and voting having voted in the affirmative, the motion is agreed to.

Cloture has now been invoked on S. 2515, and all debate is limited to a total of 1 hour, in all, for each Senator.

The question is on agreeing to amendment No. 850 to the pending measure.

Mr. SCOTT. Mr. President, on my hour, I rise first to comment briefly that I understand that not all of this time will be used. I believe the distinguished Senator from North Carolina has four amendments, and I understand from him that he does not plan to ask for rollcall votes on them. I am not sure of the intention of the Senator from New York, but it is hoped that we can bring this bill to an early conclusion. Does the majority leader have any comment?

Mr. MANSFIELD. No; I just wish to echo the sentiments expressed by the distinguished Republican leader. The sooner we can dispose of this measure, the sooner we will be prepared to lay down the bill on higher education and get embarked on that journey.

Mr. SCOTT. Does the Senator from New York desire the yeas and nays on his amendment?

Mr. JAVITS. Mr. President, I think it will depend upon the nature and extent of the opposition we may encounter. We really do not know. I have no desire for rollcalls just for the sake of rollcalls, but if opposition develops to amendments which the Senator from New Jersey (Mr. WILLIAMS) and I consider important to the bill, they may be necessary. From what I already know, I do not believe that our amendments should require more than 2 rollcalls at the most.

Mr. CRANSTON. Mr. President, will the Senator from Pennsylvania yield?

Mr. SCOTT. I yield.

Mr. CRANSTON. I wish to advise him that the Senator from Colorado (Mr. DOMINICK) and I have an amendment, submitted this morning, which we wish to bring up, which will not necessarily require a rollcall or take much time.

Mr. SCOTT. I thank the distinguished Senator from California.

AMENDMENT NO. 850

The PRESIDING OFFICER. The question is on agreeing to amendment No. 850. Who yields time?

Mr. JAVITS. Mr. President, I yield myself 3 minutes.

Mr. BYRD of West Virginia. Mr. President, the Senate is not in order. We cannot hear what the Senator says.

The PRESIDING OFFICER. The Senate will be in order. Senators will take their seats. The Senator from New York may proceed.

Mr. JAVITS. Mr. President, the pending amendment seeks to authorize 10 positions in the so-called higher grades 16, 17, and 18, for the purposes of buttressing the higher level staff of the Equal Employment Opportunity Commission in connection with the new responsibilities which it would have under this bill. We are advised by the Commission that this is the absolute rockbottom minimum number with which it can even begin to hope to do the job which we are assigning it under this measure. That includes, of course, an enlarged jurisdiction relating to employers of small numbers of workers, down to 15 from the present 25; it includes the right to go into court and start suits, which the commission has not had before; and it includes, with respect to employees of other units of government, State, and local, the responsibility to look into situations and try to handle them by conciliation, the actual litigation being undertaken by the Attorney General.

The mere recital of those responsibilities indicates the size of the job, and it seems to me and to the Senator from New Jersey (Mr. WILLIAMS) that the 10 additional positions sought is by no means out of line or unreasonable, and is certainly credible on the basis of the new ambit of their responsibilities. So I hope very much that the Senate, in the process of giving them the authority, will give them the means with which to discharge the responsibility.

The PRESIDING OFFICER. Who yields time?

Mr. DOMINICK. Mr. President, on my time, I should like to make a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. DOMINICK. Under the rules of cloture, is it possible to amend an amendment if the amendment has not been sent to the desk prior to this time?

The PRESIDING OFFICER. It would not be in order to amend an amendment which has not been sent to the desk.

Mr. DOMINICK. So the ruling of the Chair is that any amendment that is printed is now in final form, not subject to any amendment whatsoever. Is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. DOMINICK. Therefore, if changes need to be made, could they be made by consent of the Senator who is offering the amendment—by unanimous consent or otherwise?

The PRESIDING OFFICER. It would require the consent of the Senate to make such a change.

Mr. DOMINICK. I thank the Chair.

Mr. JAVITS. Mr. President, if there is no opposition to this amendment, I am prepared to vote on it now.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

UNANIMOUS-CONSENT REQUEST

Mr. MANSFIELD. Mr. President, if I may have the attention of the leadership on the Republican side and the members of the Senate, a situation has come up which may call for the laying before the Senate of another cloture motion this afternoon, with the vote to come on Thursday.

Mr. President, I ask that immediately after the third reading of the pending bill, the Senate proceed to the consideration of H.R. 1746, the House companion bill; that the text of the Senate bill as amended be substituted for the House passed bill; that the House bill as amended progress through third reading, and that the final vote occur on the House bill as amended.

Mr. ALLEN. Reserving the right to object, Mr. President, rule XXII has been invoked.

The PRESIDING OFFICER. The Senator asks that rule XXII be suspended?

Mr. MANSFIELD. Yes.

The PRESIDING OFFICER. Is there objection?

Mr. ALLEN. I am reserving the right to object.

Rule XXII, to stop debate on the Senate bill, S. 2515, has been invoked. Under the provisions of rule XXII, S. 2515 shall be the pending business until disposed of. Disposed of would mean either killed or passed.

I raise the point. I do not at this time object to the unanimous-consent request. I merely at this time raise the point that the Senator's request is out of order, under rule XXII.

Mr. MANSFIELD. Mr. President, if I may be heard, I did ask unanimous consent, and it is my belief that I am in order. I was aware of the situation which might arise, and I would be prepared to hear the ruling of the Chair.

account in future disarmament negotiations. The report underlined that the growing arms race not only puts human survival in jeopardy but, granted that humanity does manage to survive, it is also a cancerous threat to human welfare.

The report comes at a most opportune time. There is increasing evidence of a trend towards détente in international relations. The current political climate presents greater opportunities than ever before for additional agreements in the disarmament field. In these circumstances, it would seem that nations can now at long last make a beginning in reordering their national and international priorities, so that their wealth and energy can be concentrated on the betterment rather than the possible destruction of life and society on this planet. The delegations present at this Conference have a most important function to perform in the fulfillment of this noble task.

I feel sure that all participants in this Conference will, in the year of its tenth anniversary, put forward their utmost efforts to deal with the full range of problems referred to the Conference by the General Assembly. I extend to all participants my most cordial wishes for the fullest success in their common endeavour.

The CHAIRMAN (Morocco) (*translation from French*). I think I am interpreting your feelings in expressing to the Secretary-General, Mr. Waldheim, our most sincere thanks for the interesting statement he has just made to us. We have listened attentively, Sir, to your clear and carefully thought-out remarks and to your words of encouragement. They will remain in our memories throughout the effort we shall be making to work out concrete and substantial measures of disarmament.

On behalf of us all, I should like to express our deep gratitude for this demonstration of sympathy and interest which you have made by your presence and by your statement.

Now I declare that we have finished the open part of this meeting. After a suspension of five minutes, the Committee will resume its work in closed meeting.

U.S. CUSTODY OF MARINE RESOURCES ON THE CONTINENTAL SHELF

Mrs. SMITH. Mr. President, for myself and on behalf of the distinguished junior Senator from Maine (Mr. MUSKIE), I ask unanimous consent to have printed in the RECORD a joint resolution of the Legislature of Maine relating to U.S. custody of marine resources on the Continental Shelf.

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

JOINT RESOLUTION PETITIONING THE HONORABLE WILLIAM P. ROGERS, SECRETARY OF STATE, AND THE MAINE CONGRESSIONAL DELEGATION FOR U.S. CUSTODY OF MARINE RESOURCES ON THE CONTINENTAL SHELF

Whereas, the living resources found in the waters adjacent to the State of Maine and associated with the continental shelf and slope of the United States are essential to the seafood needs of the State of Maine and the nation; and

Whereas, these living marine resources are gravely endangered from unrestrained harvesting and fishing; and

Whereas, the United States, because it lacks adequate jurisdiction over all domestic and foreign fishing in the area in which these resources are found, is unable to provide proper protection and management for the conservation of these living marine resources; and

Whereas, the State of Maine has traditionally depended upon its commercial fishing industry for a major portion of its coastal income; and

Whereas, the State of Maine believes that, because of a further decline in the fish stocks in this area as a result of continued heavy fishing pressures by foreign distant waters fleets, the living marine resources are in danger of critical depletion; and

Whereas, the State of Maine is convinced that the harvesting of these living marine resources on a sustained basis can be continued only if a greater measure of jurisdiction is given to coastal authorities; now, therefore, be it

Resolved: That we, the Members of the 105th Legislature of the State of Maine now assembled in special session, go on record as petitioning the Honorable William P. Rogers, Secretary of State for the United States, and members of the Maine Congressional Delegation to use every effort at their command to establish a legal basis so that the United States shall become the custodian of all living marine resources on the continental shelf and its slope, including all such living resources in the water column above the continental shelf and its slope, so that these resources may be harvested in a manner which would provide proper conservation and wise utilization; and that in addition to such management, the United States would have the rights to the preferential control and use of such living marine resources on the bottom and in the water column above the continental shelf and its slope as is now provided for the nonliving resources of this area; and that such fishery jurisdiction be qualified to permit controlled harvesting inside said United States fishery zone of species not fully utilized by United States vessels; and be it further

Resolved: That a copy of this Resolution, duly authenticated by the Secretary of State of the State of Maine, be transmitted forthwith by him to said Secretary of State of the United States and to each member of the Maine Congressional Delegation with our thanks for their prompt attention to this vitally important matter.

CIVIL RIGHTS AND EXECUTIVE COMMITMENT

Mr. MONDALE. Mr. President, an incisive review of the long history of the civil rights struggle in America, written by Senator HUBERT H. HUMPHREY, was published in the New Leader, of February 21, 1972.

Senator HUMPHREY correctly identifies the crucial role of the President in advancing or delaying the Nation's movement toward the establishment of genuine equal opportunity for all Americans. In his article, entitled "Civil Rights and Executive Commitment," Senator HUMPHREY concludes that the present administration has yet to demonstrate a genuine commitment to the quest for civil rights and full opportunity.

Senator HUMPHREY suggests a social action program to get America back on the road to equal opportunity where every possible effort is made by the Federal Government. It is a program that would assure affirmative compliance with our civil rights laws, provide effective assistance for self-help community economic development programs, rebuild our cities, and develop new growth centers in rural America—all designed to give every American genuine equality of opportunity.

Mr. President, I ask unanimous consent that the article by printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

THINKING ALOUD: CIVIL RIGHTS AND EXECUTIVE COMMITMENT

(By HUBERT H. HUMPHREY)

Is President Nixon trying to create a new climate for civil rights, a second post-Reconstructionist era in which the pains of the past decades will be cast aside? Judging from the political ebb and flow of the past three years, one would have to say Yes. The Administration has unflinchingly straddled civil rights issues; even the most liberal Republicans have found their zeal chilled by Presidential memoranda warning that their heads will roll if they seek to enforce existing statutes. "Watch what we do, not what we say" has been the official password, and in some instances the admonition has proven not without merit. Yet on the whole, little has been said and less done.

Although the Declaration of Independence held it to be a self-evident truth that all men are created equal, Richard Nixon is not our first national leader to compromise that ideal for political considerations. Some historians argue that Thomas Jefferson, for example, wanted the Declaration to censure George III for emasculating the "most sacred rights of life and liberty of a distant people, who never offended him, captivating and carrying them into slavery in another hemisphere." As Jefferson succintly pointed out, however, this provision was not inserted because it might have offended the North, where "people had very few slaves themselves, yet . . . had been pretty considerable carriers of them to others." Throughout the history of our quest for civil rights, progress has been blocked by the tacit agreement that only he who is without sin may cast a stone.

Immediately following the Civil War, radical Reconstructionism was imposed on the South; but in a decade it gave way to a general weariness about the rights of black Americans, and once again reality fell short of ideal. President Grant finally complained that "the whole public are tired out with these annual autumnal outbreaks in the South, and the great majority are ready now to condemn any interference on the part of the Government." When Northern liberalism acceded to the Compromise of 1877, we began the long retreat during which, as C. Vann Woodward observed, "at no time were the sections very far apart on race policy." Education, voting, public transportation, decent housing, employment—all became legally the exclusive preserve of whites. William Graham Sumner and the Darwinian sociological tribe soon confirmed American prejudices by "proving" that "legislation cannot make mores" nor "stateways change folkways." No one, we were informed in Congress, can legislate morality.

Not until the time Franklin Delano Roosevelt did the mass of Negroes begin to move out of the backwaters and slowly into the mainstream of national life. Under Harry Truman, who told his Committee on Civil Rights that "I want our Bill of Rights implemented in fact," the Presidential commitment to equal opportunity matched that of the Declaration. Except for military desegregation, unfortunately, Truman did not see his dreams carried out in his tenure. Yet his stand was so firm that four deep South states defected from the Democratic camp in 1948.

During the Eisenhower era straddling on civil rights became the Executive norm, despite the leadership exercised by the Supreme Court from the 1954 Brown decision onward. The lesson we all learned was that if decisions of the courts are not actively supported by appropriate administrative agencies, the sores of racial injustice are inevitably rubbed raw.

Fortunately, in the '50s several developments were conspiring to put Jim Crow behind us. The modern civil rights movement, inspired by the courage of Dr. Martin Luther

developments in the qualitative nuclear arms race, the number of deliverable nuclear warheads is being multiplied by a factor of 3 to 14. While the world thus survives on the knife-edge of nuclear terror, vast material and human resources which could be used for productive peaceful purposes to enrich the standards of living and the quality of life of the people of the world have been wasted in a futile and harmful arms race.

For more than two years the Soviet Union and the United States have been engaged in bilateral negotiations at SALT. All of us, I am sure, are greatly encouraged by the reports reaching us concerning the possibility of an early treaty on the limitation of anti-ballistic missile systems and an interim agreement on certain measures with respect to the limitation of strategic offensive arms. Any agreement between the two Powers to limit the production of these strategic weapons would have great political significance, particularly if it represented an initial step in a further disarmament process. Increasingly, however, concern is being voiced that SALT might achieve some quantitative limitation of nuclear weaponry but permit a qualitative nuclear arms race to continue.

In my view, an indispensable step to halt the qualitative nuclear arms race is a comprehensive test-ban treaty. It is now more than eight years since the Partial Test Ban Treaty was signed on 5 August 1963, banning all tests in the atmosphere, in outer space and under water. Despite the moral obligation contained in that Treaty to stop all weapon tests and the legal obligation in the Non-Proliferation Treaty to halt the nuclear arms race, underground testing has been continued at an even greater rate than previously in the other three environments. In addition, testing also continues in the atmosphere, though at a slower pace.

No other question in the field of disarmament has been the subject of so much study and dicsussion as the question of stopping nuclear-weapon tests. I believe that all the technical and scientific aspects of the problem have been so fully explored that only a political decision is now necessary in order to achieve final agreement. There is an increasing conviction among the nations of the world that an underground test ban is the single most important measure, and perhaps the only feasible one in the near future, to halt the nuclear arms race, at least with regard to its qualitative aspects. There is a growing belief that an agreement to halt all underground testing would facilitate the achievement of agreements at SALT and might also have a beneficial effect on the possibilities of halting all tests in all environments by everyone. It is my firm belief that the sorry tale of lost opportunities that have existed in the past should not be repeated and that the question can and should be solved now.

While I recognize that differences of views still remain concerning the effectiveness of seismic methods of detection and identification of underground nuclear tests, experts of the highest standing believe that it is possible to identify all such explosions down to the level of a few kilotons. Even if a few such tests could be conducted clandestinely, it is most unlikely that a series of such tests could escape detection. Moreover, it may be questioned whether there are any important strategic reasons for continuing such tests or, indeed, whether there would be much military significance to tests of such small magnitude.

When one takes into account the existing means of verification by seismic and other methods, and the possibilities provided by international procedures of verification such as consultation, inquiry and what has become to be known as "verification by challenge" or "inspection by invitation," it is difficult to understand further delay in achieving agreement on an underground test ban.

In the light of all these considerations, I share the inescapable conclusion that the potential risks of continuing underground nuclear weapon tests would far outweigh any possible risks from ending such tests.

The widespread impatience and dissatisfaction of the non-nuclear-weapon States with the failure of the nuclear Powers to stop nuclear-weapon tests was clearly demonstrated at the recent 26th session of the General Assembly. Three resolutions were adopted, in stronger and more specific language than ever before, calling for a halt to all nuclear-weapon tests at the earliest possible date.

The General Assembly condemned all nuclear-weapon tests and called on the nuclear Powers to desist from further tests without delay; it called for immediate unilateral or negotiated "measures of restraint" to reduce the number and size of such tests pending an early ban; and finally the Assembly called upon this Conference to give "highest priority" to banning underground nuclear tests, and appealed to the nuclear Powers to take an active and constructive part in developing in the CCD specific proposals for such a ban.

A comprehensive test-ban treaty would strengthen the Treaty on the Non-Proliferation of Nuclear Weapons, which remains the foremost achievement thus far of the disarmament negotiations. It would be a major step towards halting what has been called "vertical proliferation," that is, the further sophistication and deployment of nuclear weapons, and would also strentghen the resolve of potential nuclear-weapon States not to acquire nuclear weapons and thereby help to prevent the "hcrizontal proliferation" of such weapons. On the other hand, if nuclear-weapon tests by the nuclear Powers continue, the future credibility and perhaps even the viability of the Non-Proliferation Treaty achieved after such painstaking effort may be jeopardized. I need not describe the greatly increased dangers that would confront the world in such event.

In the field of chemical and biological weapons, an encouraging first step has been taken during the past year. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction has the distinction of being the first international agreement on a measure of actual disarmament; it will result in the destruction of a small but not negligible part of the world's stockpile of weapons of mass destruction, bearing the stigma of particular horror. Its significance will be vastly increased when it is complemented, as the General Assembly has urged, and as indeed the treaty itself prescribes, by a similar ban on the development, production and stockpiling of chemical weapons. The Assembly has also called for an immediate halt in the development, production and stockpiling of the most lethal chemical weapons pending agreement on the complete prohibition of all chemical weapons. I am confident that the Conference will put forward the most strenuous efforts in order to fulfil the specific mandates of the General Assembly concerning chemical weapons.

The recent General Assembly has demonstrated its keen interest in the many facets of the disarmament problem by adopting a greater number of resolutions than ever before in this field. All these resolutions are now before you. On the questions of general and complete disarmament, which remains the ultimate goal of all disarmament efforts, they include a call to this Conference to resume its work on this subject, taking into account the comprehensive programme of disarmament originally proposed by some nonaligned members of the Conference, as well as other documents presented, as recommended by the previous General Assembly. The comprehensiveness of the CCD's agenda and the flexibility of its practices and procedures make it possible for all of these disarmament items to be discussed at any time.

Among the important resolutions adopted by the General Assembly is one concerning the convening of a World Disarmament Conference. The discussions revealed a broad interest in the holding of such a conference and led to a decision by acclamation to take immediate steps in order that careful consideration be given to convening, following adequate preparation, of a world disarmament conference open to all States. It would in my opinion be most fitting that a World Disarmament Conference be held at some early date, also in order to advance the common objectives of both the Disarmament Decade and the Second Development Decade. It is, of course, of prime importance, as the resolution itself indicates, that such a conference be the subject of the most careful preparation in order to ensure its success.

Mr. Chairman, while disarmament is of vital interest to all peoples and to every member of the United Nations, I share the oft-repeated view of my distinguished predecessor underlining the importance of the participation in disarmament negotiations of all the militarily most important States which as permanent members of the Security Council have—according to the Charter of the United Nations—primary responsibility for the maintenance of international peace and security in which progress in disarmament is such a vital element.

As far as the participation of China in disarmament negotiations is concerned, a new situation has been created by the restoration of the lawful rights of the People's Republic of China in the United Nations, its subsequent entry in the organization and participation in its various activities.

This new situation was reflected in the disarmament debates during the 26th session of the General Assembly during which a practically unanimous wish was expressed by those delegations which spoke on the subject underlining the desirability of the participation of China and France in disarmament negotiations.

I have thought it appropriate to bring these facts to the knowledge of the representatives of the Governments concerned.

Mr. Chairman, it is my firm conviction that it is of paramount importance that China and France be associated with the disarmament negotiations. I hope that serious consideration would be given to this matter in order to ensure the participation of these two Powers in the disarmament negotiations.

During the Disarmament Decade all existing international treaties in the field of disarmament should be strengthened and fully implemented. I have already referred to the growing adherence to and support of the 1925 Geneva Protocol.

Today we are only a few days away from the second anniversary of the entry into force of the Non-Proliferation Treaty. In those two years, progress has been made in working out a Safeguards Agreement as required by Article III of the Treaty. As the previous chairman of the Safeguards Committee that succeeded in working out the Safeguards Agreement, I can share with you my satisfaction and appreciation of the good will and universal co-operation that was displayed by all involved in its deliberations. The efficient help and guidance given by the International Atomic Energy Agency was invaluable in reaching this agreement. It is essential that this spirit of international co-operation remain and be reinforced so as to facilitate the speedy and successful conclusion of negotiations on the Safeguards Agreement.

The report of the Secretary-General on the Economic and Social Consequences of the Arms Race and of Military Expenditures was welcomed with satisfaction by the General Assembly, which recommended that the conclusions of the report should be taken into

King Jr., was helping Americans to accept the Negro not simply as a Negro but as a fellow human being. His nonviolent vision captured all of us when, echoing St. Paul, he cried out to his followers: "You may even give your body to be burned, and die the death of a martyr, and your spilled blood may be a symbol of honor for generations yet unborn, and thousands may praise you as one of history's supreme heroes; but even so, if you have no love, your blood is spilled in vain."

At the same time, America was increasingly realizing that it had a "white problem" too. Once this recognition took hold, pressure mounted on Congress to enact needed changes. After 1956, a great part of the legislative leadership in the area of civil rights and social welfare came from a generally unnoticed source—the Democratic Study Group. Formalized out of Minnesota Representative Eugene "McCarthy's Mavericks," this ad hoc body developed a broad social and economic platform, much of which became the law of the land under Presidents Kennedy and Johnson. And over in the Senate a strong corps of Republicans and Democrats was also coalescing around key issues, leading in 1957 and 1960 to the first of the modern civil rights bills. Their limitations notwithstanding, these measures helped create the lawmaking momentum of the '60s.

With John Kennedy's leadership on civil rights, America could no longer turn back. True, his Administration offered few legislative initiatives at first and sometimes was also compelled to straddle in order to ease its programs through Congress. But when the crunch came and the nation had to know just where he stood, President Kennedy left no doubt. Responding to the racial violence in Birmingham and elsewhere in the South, he said: "Let it be clear, in our own hearts and minds, that it is not merely because of the cold war, and not merely because of the economic waste of discrimination, that we are committed to achieving true equality of opportunity. The basic reason is because it is right."

President Kennedy's death triggered the flood of civil rights and social legislation worked through Congress by President Johnson; ambivalence on equality became a historical and political anachronism. While black, brown and red Americans still trail white in most economic and social measures of success, and free social relations among the races remains a goal envisioned but unachieved, minority progress since 1960 has been truly revolutionary. Legal barriers to integration have generally falled and housing, jobs, income, and education have improved dramatically. The country has good cause for hope—provided we recognize that America's problem, to cite Archibald MacLeish's formulation, is "not to discover our national purpose but to exercise it."

A President out of tune with history, as Richard M. Nixon has been, might attempt to return us to the social complacency of the past, and in limited ways he might succeed. But history does not stand still, even for Presidents. Our nation simply will not long support attempts to sidetract the quest for civil rights and full opportunity.

The two essential ingredients of the Nixon recipe for civil rights seem to be (1) code words such as "strict constructionism" and "forced integration" to slow down Federal efforts against racial discrimination, and (2) reliance on welfare reform and revenue sharing to improve the lives of the urban poor. These have been mixed into a political stew called the "Southern strategy."

Some uses of the first integredient are well known—e.g., Attorney General John Mitchell's 1969 confrontation with the Supreme Court over desegregating Mississippi's schools. Even legal novices realized this ploy would merely transfer responsibility for Federal civil rights leadership from the Executive Branch, where Congress had placed it in 1964, to the Court, which has few instruments to integrate urban schools, higher education, the nation's 25,000 nursing homes, and so forth. The President subsequently produced his 8,000-word legal brief on school desegregation, promising no busing, and his June 1971 message on equal housing. Whatever their intentions, these statements were interpreted as a pledge to keep blacks in their place. Of course, neither statement reflected "strict constructionism" or "law and order," but rather a defiance of the affirmative compliance provisions of Title VI of the Civil Rights Act of 1964 and the 1968 Act. The public should not have been surprised when Nixon Supreme Court nominees were marked by inadequate judicial qualifications or actions connoting bigotry.

Meanwhile, the President has allowed the second ingredient, his plans for revenue sharing and welfare reform, to be consigned to the limbo of neglect. In his eloquent farewell to the Administration, Daniel P. Moynihan forecast precisely this result, pointing to the persistent inability of the White House to develop a second- and third-order advocacy of its priorities. Although Moynihan did not mean for his remarks to be so construed, they leave a distinct impression of the Executive's gross mismanagement of its own initiatives. And when this mismanagement of programs was extended to a massive mismanagement of the economy, the cause of legal and social justice suffered a sizable setback.

Lyndon Johnson used to remind us that we have only one President at a time and that he deserves at least our sympathy and respect for trying. Richard Nixon, for all his failures, did try to achieve progress in employment, welfare reform and revenue sharing. Unfortunately, these efforts seem to be headed nowhere. In his dramatic August 1971 address to the nation on economic reforms, the harsh reality became clear: The President's bungling of the economy for three years forced him to ask Congress "to amend my proposals to postpone the implementation of revenue sharing for three months and welfare reform for one year."

Several years ago Harry Golden observed that "noble Southerners have raised their voices against immorality and injustice but have remained mute about racial segregation because to condemn it made them traitors." But in today's South economic and social questions—which cannot be answered by rhetoric—are evidently larger than racial ones. Moreover, as John S. Nettles, Vice Chairman of the Alabama NAACP, told the Washington *Post*, the South is "dealing with a new nigger now—a black man who is no longer afraid."

President Nixon's Southern strategy might have succeeded in the South of 10 years ago, when only 1.5 million black citizens were registered to vote. Now the number has reached 3.6 million, and the white community is turning its back on the past. (In this new South, the Republican Governor of Virginia—once the home of "massive resistance"—"respectfully" disagrees with the President and urges Virginians not to resist court-ordered busing!) Indeed, the new South is increasingly facing the same problems as the rest of the country.

Should his new economic course pay off, Nixon may still check inflation and create more jobs, goals that eluded him during his first three years in office. But even if he achieves these goals, he will surely have done little to improve the quality of life for the poor—black, Spanish-speaking, Indian, or white.

What, then, must the Democrats do to get America back on the road to equal opportunity? We must develop a social action program that can be implemented if our candidate gains the Presidency.

First, we must pledge to enforce the statutes already on the books. As the U.S. Civil Rights Commission conclusively demonstrated in 1970, there has been a massive breakdown in Federal execution of existing legislation, a situation that is continuing to grow worse. Similarly, we must promise that affirmative compliance with existing civil rights laws by state and local governments will be a routine condition for receiving all Federal financial assistance, including funds returned in any revenue-sharing plan.

Second, Democrats ought to promote the cause of equal opportunity by expanding Federal monetary and technical assistance to minority enterprises and to financing institutions, as well as to community self-help programs. Federal projects like "Model Cities," now tottering after three years of the Nixon Administration, must be strengthened. In addition, renewal and development plans for our metropolitan centers must be made to include lower- and moderate-income housing with good public facilities and services. Since housing opportunities and public transportation in suburban locations are limited, jobs in these areas are effectively denied to underemployed and unemployed residents of the inner city. Principal HUD officials have stressed that income discrimination in housing affects more whites than blacks, but one would never guess this to be true from the President's pronouncements on the matter. Furthermore, we should create a National Domestic Development Bank (as proposed in legislation I recently introduced) to provide the funds to restore our decaying cities.

Third, although our urban problems remain the most serious obstacle to equal opportunity, the Congress has committed this nation to promoting a "sound balance between rural and urban America." To fulfill this mandate, we need to encourage rural capital development that would create new regionalized growth centers in the American economy. These will ease the pressures—economic, environmental, social, and fiscal—generated by the concentration of 70 per cent of our people on 2 per cent of the land.

Raymond Aron has argued that America's civil rights problem is "tragic, because Negroes and whites, despite their theoretical loyality to Americanism and its values, have remained socially so alien they may perhaps be tempted to formalize their separation at the very moment they achieve the right and ability to become united." Rigid separation would certainly be a tragic outcome to our historical quest for civil rights and full opportunity. No doubt there will always be significant cultural and social differences among us. But that does not excuse us from the struggle to achieve the right to life, liberty, and the pursuit of happiness for all. To accept anything less would be a violation of the ideals that gave birth to our country.

CANCELLATION OF U.S. AID TO BANGLADESH

Mr. KENNEDY. Mr. President, after telling Congress and the American people that "all of us can be proud of the administration's record" in committing $158 million in aid to the Bengali people, the administration has relunctantly revealed that $97 million of those commitments were canceled. These statistics confirm earlier findings of the Judiciary Subcommittee on Refugees.

But what pride can there be in a record of nondeliveries, bureaucratic delays, and inefficiency in allocating humanitarian assistance for the Bengali people, whose needs were—and remain—great?

Mr. President, the administration has a sorry record in responding to human needs in Bangladesh. They have oversold

and overannounced their program. A look at the record reveals a clear contrast between rhetoric and performance. Whether this is double talk, incompetence, or both, the administration has seriously misled the Congress and the American people on the release of humanitarian aid to the people of Bangladesh.

The record is clear that there remain today massive humanitarian needs in Bangladesh, and that three international appeals for relief assistance have not been answered in any meaningful way by this administration. The Congress has appropriated $200 million for Bangladesh relief needs, yet we read dispatches from the field that tell us that relief programs of the United Nations have been canceled and stymied because of the lack of American contribution. And so in desperation, the Bangladesh Government is turning instead to the Soviet Union. Should we be proud of the fact that the Russians are proving themselves to be more responsive and efficient in humanitarian assistance than the United States?

It becomes clearer every day that America's failure to recognize Bangladesh is standing in the way of America's ability to respond to the human needs of the Bengali people. The Congress recognized these needs months ago, and has provided funds that this administration must use now.

Mr. President, I ask unanimous consent to have printed in the RECORD recent press and academic articles on the crisis in Bangladesh and America's response to it.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

[From the Washington Post, Mar. 16, 1972]

WEST HESITATES, DACCA GIVES PORT JOB TO SOVIETS

(By William J. Drummond)

DACCA.—The Soviet navy has taken a major step toward extending its influence in the waters surrounding the Indian subcontinent, taking advantage of the inability of Western countries to come up with $6 million to finance salvage operations.

After waiting for more than two months for the West, acting through the United Nations, to clear sunken vessels from the ports of Chalna and Chittagong, Bangladesh Prime Minister Sheikh Mujibur Rahman gave the Russians permission to do the work.

Thirty hours later, United Nations headquarters in New York came through with approval for its representatives here to accept bids for the work. By then, it was too late.

The Soviet vessels were already under sail, and although it is understood that the Sheikh would like to cancel the invitation, he cannot, for diplomatic reasons.

Some neutral diplomatic sources here think that the Russian salvage fleet is the precursor of an extensive Russian naval presence in the Bay of Bengal.

The Russians will be able to chart every mile of the vast waterways of Bangladesh and will gain an important supply foothold to complement the growing Soviet naval presence in the Indian Ocean, according to these sources.

Other sources dispute this contention, pointing out that the larger of the two ports, Chittagong, cannot accommodate a vessel larger than a destroyer and would require extensive work before it could become a useful facility for ships of the line of the Soviet fleet.

Furthermore, these sources say, it seems unlikely that Mujib would tolerate full-fledged Soviet bases since the prime minister has proclaimed his country to be "The Switzerland of Asia."

In addition, India, the Soviet Union's major ally in the region, is committed to keeping the area free of the navies of the big powers.

Whether or not the Soviet Union gains a base, diplomatic sources of all persuasions say, its undertaking of the salvage operation is a significant step that will further heighten its political influence in Bangladesh.

The granting of the salvage job to the Soviet Union was a natural outgrowth of the delays characterizing Western relief operations in Bangladesh, most of which are channeled through the United Nations Relief Operations Dacca (UNROD).

In early January, UNROD informed headquarters in New York that clearing the ports of vessels sunk during the December war was an item of the highest priority. Even in the best of times Bangladesh imports more than a million tons of foodgrains a year, and with the ports blocked to normal shipping, a food shortage in the hinterland was bound to develop, UNROD said.

A Singapore firm was asked to provide a cost estimate for the work and the figure came to $6 million, which UNROD asked New York to supply.

Each day the food shortage upcountry became more severe. Rahman went to Moscow for an official visit, during which the Russians offered to clear the ports. Mujib did not give an answer immediately.

Mujib returned to Dacca on March 6, inquiring immediately whether the ports would be cleared by the U.N.

No approval had come. He waited until March 9 before accepting the Soviet offer to do the salvage job.

[From the Baltimore Sun, Mar. 17, 1972]

FOOD CRISIS GROWS IN BANGLADESH

DACCA, BANGLADESH.—The head of the United Nations relief program in Bangladesh said yesterday that the country is "heading for disaster" because of a food shortage and lack of response to a U.N. money appeal. He forecast food riots "a few weeks from now."

"Bangladesh has been a playground for charitable hobbies," said Toni Hagen, the Swiss director for U.N. relief operations in Dacca.

"You can't build bridges with baby food and you can't transport food with blankets," he told a news conference.

Bottlenecks in Bangladesh ports receiving rice and wheat shipments from abroad are so great that the shipments have virtually halted. The distribution delay stems from congestion in port warehouses, according to U.N. officials.

Erna Seilver, Austria's ambassador to India and head of a special U.N. team surveying relief, said she had cabled the U.N.'s secretary-general, Kurt Waldheim, requesting $100 million worth of Red Cross goods to combat supply bottlenecks.

United Nations officials report that 229,000 tons of food grain—a six-week supply—is backed up in the ports, unable to move inland because of disrupted communications and lack of transport. Another 66,000 tons of grain is in government warehouses in the interior, where the bulk of the new nation's 75 million people live.

The relief officials say 11,143 tons of wheat from Switzerland and the United States, and 18,300 tons of rice from the U.S. is all that is scheduled to arrive in the ports of Chittagong and Chalna in the next 90 days. With the officials hoping to keep at least 150,000 tons of grain moving each month, this 29,443 tons will amount to only a 10 days' supply. There has been slow response to a worldwide appeal three weeks ago for $626 million in aid for Bangladesh.

Mr. Hagen has met Prime Minister Mujibur Rahman twice this week to discuss the faltering program.

A week ago, Mr. Hagen said the U.N. program and the two-dozen voluntary relief organizations operating under its umbrell would pull out unless the government starte unloading and moving more grain. He says he has noted some improvement. But the prime minister's coordinator of external relief assistance, Abdul Ran Choudhury, criticized the relief agencies and charged that they were taking up too much time making surveys.

Relief sources say the government has rejected a U.N. plan to spend $6 million clearing sunken ships from the harbors of Chittagong and Chalna, and apparently agreed instead to accept a Soviet salvage proposal outside U.N. auspices. The ships were sunk during the war between India and Pakistan last December.

The sources also say that rice in private stocks has been depleted by widespread smuggling across the border to India, where prices are higher. Sheikh Mujib has called for the formation of citizens' committees in the northern border areas to combat the smuggling.

The Indian government has started to ship the first 80,000 tons of 500,000 tons of wheat that it has promised into north Bengal. This is coming overland across the northern border.

U.S. AID TO BANGLADESH BEING REPROGRAMED

WASHINGTON (Reuter).—About 60 per cent of United States relief aid for Bangladesh, formerly East Pakistan, is being reprogramed or canceled, the State Department disclosed yesterday.

The disclosure came following claims by Senator Edward M. Kennedy (D., Mass.) that the Nixon administration had misled the American people on the extent of U.S. aid actually reaching the war-torn nation.

A department spokesman, Charles Br said that of the total U.S. commitment East Pakistan relief of $158 million between November, 1970, and November, 1971, $97 million was being reprogramed or deobligated.

No one knows how much of this latter amount will go to Bangladesh. The U.S. officials said that of the $97 million, $91 million represented food-for-peace dollar sale agreements with the government of Pakistan.

In order to deliver this food to Bangladesh, it would require renegotiation of the agreements with the new government in Dacca, which the U.S. has not yet recognized.

[From Worldview, January 1972]

TAKING BANGLADESH IN STRIDE: SELECTIVE INDIGNATION IN AMERICA

(By Martin E. Marty)

The world community does not seem to care. This judgment appears in almost every analysis of the situation in Bangla Desh, formerly East Pakistan. North Americans know little about the politics of Pakistan, the geography of suffering, the moral issues involved. What is more, "compassion fatigue" has set in and our capacity for moral outrage is dormant, at least where the agonies of remote millions are concerned. Still we can, as Hugh McCullum, for example, does in the September, 1971, *Canadian Churchman*, make an effort to personalize the plea to help save the life of a Bengali refugee. ("One of the almost eight million driven from their homeland by soldiers of West Pakistan . . . the people . . . are systematically being destroyed culturally, politically and, in many cases physically by a repressive military regime from West P stan.")

McCullum knows that readers "don't want to be harangued again. You've seen it all. The old familiar scene from Biafra and the Middle East and South America and Vietnam. The naked child, the bloated belly, the

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