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Berl I. Bernhard

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CIVIL RIGHTS AFTER FIVE YEARS

BERL I. BERNHARD*

When the United States Commission on Civil Rights commenced operations in the spring of 1958,¹ the Nation was beginning to develop an awareness of discontent on the part of its major minority group. Negro Americans, their hopes raised by the Supreme Court's *School Segregation* decisions,² were beginning to rise and throw off what many of them considered to be the yoke of official oppression.

The Congress, disturbed by the many conflicting statements which filled the air daily, had charged the Commission with studying legal developments which allegedly constituted denials of equal protection of the laws and reporting its findings to the American people through their elected representatives with "recommendations for future, if any, legislation" needed to secure "equality for all and equal protection of the laws for all."³

In 1958, the law clearly protected individuals denied their civil rights in the following situations:

(1) The courts had declared the unconstitutionality of formal exclusion of Negro Americans from any part of the electoral process.⁴ Neither could more rigid qualifying standards be applied to Negroes seeking to register to vote than to whites.⁵

(2) Government-enforced segregation in public schools had been recognized to be violative of the right to equal protection of the laws.⁶

* Staff Director, U.S. Commission on Civil Rights. Resigned on Nov. 1, 1963 to enter private practice of law with firm of Verner & Bernhard, Washington, D.C.

¹ Although the Commission had been established on September 9, 1957, 71 Stat. 634 (1957), 42 U.S.C. § 1975 (1958), the appointment of its first Staff Director was not confirmed until May 14, 1958. 104 Cong. Rec. 8677 (1958).

² *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³ See H.R. REP. No. 291, 85th Cong., 1st Sess. 5, 8 (1957). See also 71 Stat. 634 (1957), 42 U.S.C. §§ 1975-75e (1958).

⁴ *Terry v. Adams*, 345 U.S. 461 (1953). See *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁵ *Guinn v. United States*, 238 U.S. 347 (1915).

⁶ *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

(3) Government zoning to create or maintain residential segregation had been held to be invalid.⁷ Judicial enforcement of racially restrictive covenants had been prohibited.⁸ Two federal courts of appeal had held segregation in publicly owned housing to be unconstitutional.⁹

(4) The federal executive had required federal contractors to agree to refrain from discriminating¹⁰ and prohibited discrimination in federal employment.¹¹

(5) Federal criminal and civil sanctions were available in cases where civil rights had been denied.¹² Exclusion of Negroes from jury service was prohibited¹³ and held to be sufficient grounds for reversal of a conviction.¹⁴

(6) Discriminatory practices by interstate carriers had been judicially declared to be an undue burden on commerce.¹⁵ Nor

⁷ *City of Richmond v. Deans*, 281 U.S. 704 (1930); *Harmon v. Tyler*, 273 U.S. 668 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁸ *Barrows v. Jackson*, 346 U.S. 249 (1953); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Shelley v. Kraemer*, 334 U.S. 1 (1948). While the Court in *Shelley* did not expressly conclude with the Department of Justice that only "those actions of individuals which are in *no respect* sanctioned, supported, or participated in by any agency of government are beyond the scope of the Fifth and Fourteenth Amendments" (Brief for the U.S. Dept. of Justice as amicus curiae, p. 52) (Emphasis added.), it did reaffirm the blanket unreasonableness of color-conscious real property law. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

⁹ *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956); *Detroit Housing Comm'n v. Lewis*, 226 F.2d 180 (6th Cir. 1955).

¹⁰ Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953); Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951); Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943).

¹¹ Exec. Order No. 10590, 20 Fed. Reg. 409 (1955); Exec. Order No. 9980, 13 Fed. Reg. 4311 (1948).

¹² 18 U.S.C. §§ 241-242 (1958); Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958); Rev. Stat. § 1980 (1875), 42 U.S.C. 1985 (1958); Rev. Stat. § 1981 (1875); 42 U.S.C. § 1986 (1958).

¹³ 18 U.S.C. § 243 (1958).

¹⁴ See, e.g., *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85 (1955); *Avery v. Georgia*, 345 U.S. 559 (1953); *Shepard v. Florida*, 341 U.S. 50 (1951); *Cassell v. Texas*, 339 U.S. 282 (1950); *Brunson v. North Carolina*, 333 U.S. 851 (1948) (five cases); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Norris v. Alabama*, 294 U.S. 587 (1935); *Carter v. Texas*, 177 U.S. 442 (1900); *Bush v. Kentucky*, 107 U.S. 110 (1882); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

¹⁵ *Henderson v. United States*, 339 U.S. 816 (1950); *Morgan v. Virginia*,

could intrastate carriers be required to segregate.¹⁶ The Interstate Commerce Commission required interstate carriers to desegregate terminal facilities.¹⁷

(7) The government's obligation to desegregate its facilities had been established by the Court.¹⁸ But the Civil Rights Act of 1875,¹⁹ intended to impose a similar obligation upon operators of non-governmentally connected places of public accommodation, had been held unconstitutional except as it might apply to situations in which state action could be found.²⁰

During the next five years, the scope of individual protection expanded considerably.

I. VOTING

The Civil Rights Act of 1957 was the first positive congressional measure in the field of civil rights since 1875. Its purpose was "to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States."²¹ In addition to establishing the Commission on Civil Rights, it authorized the federal government to bring civil suits in its own name to obtain injunctive relief when any person is denied or threatened in his right to vote. Prior to this time, injunctive relief was available only to private persons, many of whom were unable to bear the expense of protracted and complex litigation.²² The new law gave the federal district courts jurisdiction of injunction suits without requiring that state remedies first be exhausted. Under its new authority, the Department of Justice instituted suits in Macon County, Alabama, Terrell County, Georgia, and Washington Parish, Louisiana.²³

328 U.S. 373 (1946); *Mitchell v. United States*, 313 U.S. 80 (1941). It is interesting to note that the Court in *Henderson*, indicating that racial classification was, per se, an undue burden on commerce, referred the reader to a fourteenth amendment higher education case, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), decided the same day.

¹⁶ *Gayle v. Browder*, 352 U.S. 903 (1956), *affirming* 142 F. Supp. 707 (M.D. Ala. 1956).

¹⁷ *NAACP v. St. Louis-S.F. Ry.*, 297 I.C.C. 335 (1955); *Keys v. Carolina Coach Co.*, 64 M.C.C. 769 (1955).

¹⁸ *Holmes v. City of Atlanta*, 350 U.S. 879, *reversing* 223 F.2d 93 (5th Cir. 1955); *Baltimore v. Dawson*, 350 U.S. 877, *affirming* 220 F.2d 386 (4th Cir. 1955).

¹⁹ Ch. 114, 18 Stat. 335.

²⁰ *Civil Rights Cases*, 109 U.S. 3 (1883).

²¹ *Civil Rights Act of 1957*, 71 Stat. 634 (1957), 42 U.S.C. § 1975 (1958).

²² Act of Apr. 20, 1871, ch. 22, § 1, REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

²³ *United States v. Alabama*, 171 F. Supp. 720 (M.D. Ala.), *aff'd*, 267

In the Georgia case the Government charged that certain voting registrars, through wrongful acts and in violation of the Georgia registration laws, had failed to register qualified Negro voters solely because of their race or color. The federal district court ruled that the enforcement provision of the 1957 act, as written, might be used against private persons who were depriving citizens of their right to vote and was thus unconstitutional and beyond congressional power.²⁴ But the Supreme Court, finding that the defendants in that case were, in fact, not private persons but state officials, reversed.²⁵ It went on to uphold the Attorney General's standing to sue, saying:

[T]here is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.²⁶

The Louisiana case was resolved by the determination of the Georgia case.

The Alabama case was not so simply disposed of. Registrars in Macon County, Alabama, had successfully avoided federal action under the 1957 act by resigning two months before the commencement of the suit. The district judge refused to allow the suit to be maintained against the state, ruling that it was not a "person" subject to the act.²⁷

This ruling, together with the persistent refusal by some local officials to let federal investigators examine registration and voting records, led the U.S. Commission on Civil Rights to recommend that the act be strengthened. The Commission suggested that an affirmative duty to act be placed on registrars and that records be preserved for a five-year period and subjected to federal inspection. The Commission also recommended that federal officers be appointed

F.2d 808 (5th Cir. 1959), *vacated*, 362 U.S. 602 (1960) (per curiam); *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960); *United States v. McElveen*, 177 F. Supp. 355 (E.D. La.), 180 F. Supp. 10 (E.D. La. 1959), *aff'd sub nom.*, *United States v. Thomas*, 362 U.S. 58 (1960) (per curiam).

²⁴ *United States v. Raines*, 172 F. Supp. 552, 562 (M.D. Ga. 1959).

²⁵ *United States v. Raines*, 362 U.S. 17 (1960).

²⁶ *Id.* at 27.

²⁷ *United States v. Alabama*, 171 F. Supp. 720 (M.D. Ala. 1959).

to register Negro applicants where local officials engaged in discriminatory practices.²⁸

The Civil Rights Act of 1960 provides that discriminatory acts of registrars "shall also be deemed that of the State and the State may be joined as a party defendant." If a registrar resigns a "proceeding may be instituted against the State." The act further requires that voting records be preserved for twenty-two months following any general, special, or primary election. It permits the Attorney General to gain access to them for "inspection, reproduction, and copying" before filing suit in order to determine whether proceedings are warranted.²⁹

Under the present law if a district court, in a proceeding instituted under the 1957 act, finds a "pattern or practice" of voting deprivation, it can appoint one or more federal voting referees to receive applications from prospective voters who alleged that they have been denied an opportunity to register or otherwise qualify to vote. If the referee agrees that the prospective voter is qualified, he reports his findings to the court, which may issue a decree ordering that the qualified voter be permitted to vote.³⁰

Enforcement of the two civil rights acts proceeded with new vigor. Late in 1960, the Justice Department acted on reports of economic coercion of Negroes who had attempted to vote in Haywood County, Tennessee. The complaints charged that eighty defendants, including named merchants, landowners, banks, and local officials, intimidated, threatened, and coerced Negro citizens to keep them from voting in federal elections. The alleged methods of intimidation included evictions of sharecroppers and tenant farmers, firings of employees, denials of loans by the banks and credit by the merchants, and direct threats. In May 1962, a federal court permanently enjoined the defendants from interfering with

²⁸ U.S. COMM'N ON CIVIL RIGHTS, REPORT 1959, at 134-42 [hereinafter cited as 1959 COMM'N REPORT].

²⁹ Civil Rights Act of 1960, 74 Stat. 86 (1960), 42 U.S.C. §§ 1971, 1974 (Supp. 1962).

³⁰ The Act also strengthened the measures available to the federal government for dealing with obstructions of federal court orders and bombings and burnings of schools and churches.

In 1962 Congress proposed a constitutional amendment to abolish the poll tax, a requirement existing in only five southern states. If ratified by 38 states within seven years, it will become the 24th amendment to the Constitution. 1962 U.S. CODE CONG. & AD. NEWS 4033-41. As of July 2, 1963, 36 states had ratified it. 109 CONG. REC. 11393 (daily ed. July 2, 1963).

voting by Negroes.³¹ A similar suit in Fayette County, Tennessee, was similarly decided on July 26, 1962.³²

A suit was brought by the Attorney General on January 19, 1961, on behalf of a Louisiana Negro cotton farmer who allegedly could not get his cotton ginned, could not sell his soybean crop, and could not buy butane gas to run his farm because he had testified at a Civil Rights Commission hearing on voting denials in Louisiana. The defendants stipulated on February 3, 1961, that they would do business with the farmer.³³

On December 28, 1961, the Department of Justice filed a suit to prohibit the use of a Louisiana voting "test" which required prospective voters to "interpret" the state constitution to the satisfaction of the registrars who administered it.³⁴ On June 16, 1962, the department filed a suit in federal district court in Jackson, Mississippi, asking that the court order school officials in Greene County, Mississippi, to renew the contract of a Negro school teacher who was dropped from employment after she tried unsuccessfully to register to vote and then gave testimony about those efforts in a civil rights suit.³⁵

On July 24, 1962, 26 Negroes from East Carroll Parish in north-east Louisiana were registered as voters by Federal Judge Edwin F. Hunter, Jr. in the first proceeding of its kind under the 1960 Civil Rights Act.³⁶ On August 28, 1962, the Department of Justice filed a complaint in the United States District Court in Jackson, Mississippi. It asked the court to declare unconstitutional two sections of the Mississippi Constitution which require interpretation tests and "good moral character" requirements and made a similar request concerning seven state laws which set up other devices allegedly used to discriminate against prospective Negro voters.³⁷

In all, 45 cases have been brought by the Attorney General; 16

³¹ *United States v. Beaty*, 7 RACE REL. L. REP. 484 (W.D. Tenn. May 2, 1962). See also *United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961).

³² *United States v. Atkeison*, 7 RACE REL. L. REP. 487 (W.D. Tenn. July 26, 1962).

³³ *United States v. Deal*, 6 RACE REL. L. REP. 474 (W.D. La. Feb. 3, 1961).

³⁴ *United States v. Louisiana*, — F. Supp. — (E.D. La. 1962).

³⁵ *United States v. Board of Educ.*, 7 RACE REL. L. REP. 770 (S.D. Miss. Aug. 30, 1962).

³⁶ *New Orleans Times-Picayune*, July 25, 1962, p. 11. See *United States v. Manning*, 206 F. Supp. 623 (W.D. La. 1962).

³⁷ *United States v. Mississippi*, — F. Supp. — (S.D. Miss. 1962).

in Mississippi, 11 in Louisiana, 10 in Alabama, 4 in Tennessee, and 4 in Georgia.³⁸

On February 23, 1963, a three-judge court in the Western District of Louisiana upheld the constitutionality of the 1960 act. The court concluded:

The object of the Act is to guarantee to qualified voters the right to register and vote. That end is within the scope of Article I, Section 4 and the Fourteenth and Fifteenth Amendments; the corrective registration plan embodied in Section 1971(e) is an appropriate means to accomplish the end. Congress has taken pains to accommodate the Act to States' Rights. For example, the Act does not affect the qualifications fixed by the State and no State registrar is replaced by a federal registrar. It is not for this court to inquire whether the statute is good or bad, or whether state laws are adequate or inadequate for dealing with the problem. The States must make an accommodation too. To the extent a conflict exists, the Supremacy Clause requires the States to yield to the will of the nation.³⁹

II. PUBLIC EDUCATION

When Little Rock High School opened for the September 1957 term the Governor of Arkansas attempted to avoid court-ordered segregation by directing the National Guard to prevent Negroes from entering the school.⁴⁰ At the court's request, the Attorney General filed a petition asking that the Governor be enjoined from further acts to obstruct compliance with the court's order and the Governor, pursuant to court order, withdrew his troops.⁴¹ In 1958, the court of appeals sustained the Government's standing to appear in these cases "to prevent its orders and judgments from being frustrated and to represent the public interest in the due administration of justice."⁴² Later in the year the Supreme Court, at one of its rare special terms, declared:

[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can

³⁸ U.S. COMM'N ON CIVIL RIGHTS, REPORT, CIVIL RIGHTS '63, at 37-50 (1963).

³⁹ *United States v. Manning*, 215 F. Supp. 272, 289 (W.D. La. 1963).

⁴⁰ The Governor's proclamation stated that troops were dispatched "to accomplish the mission of maintaining or restoring law and order and to preserve the peace, health, safety, and security of the citizens . . ." Proclamation of Governor Faubus, 2 RACE REL. L. REP. 937 (Sept. 2, 1957).

⁴¹ *United States v. Faubus*, 2 RACE REL. L. REP. 958 (E.D. Ark Sept. 20, 1957), *aff'd*, 254 F.2d 797 (8th Cir. 1958).

⁴² *Faubus v. United States*, 254 F.2d 797, 805 (8th Cir. 1958).

neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."⁴³

In the last stage of the Little Rock suit, the court of appeals barred the leasing of public property to a private school system which was formed to operate public schools closed by the Governor.⁴⁴

In 1959 the Supreme Court of Virginia decided, after action had been brought by white parents seeking the reopening of public schools in Norfolk, that the state school closing laws violated the Virginia Constitution.⁴⁵ Today, Prince Edward County, Virginia, stands as a lone monument to the device of school closing.

The chief means for limiting desegregation today is the pupil placement or assignment law. These laws have been used by school boards to assign all Negro pupils initially to Negro schools. Negro pupils who apply for transfer in order to escape segregation are met with elaborate screening and testing procedures. Those who are rejected must exhaust administrative remedies. Few have had the stamina to complete this complex ritual.⁴⁶

But in 1962, the minimal desegregation resulting from the administration of pupil placement and other plans led the courts to a closer scrutiny of their implementation. One court of appeals stated:

This Court . . . condemns the Pupil Placement Act when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token integration.⁴⁷

Another device for limiting desegregation was voided in June 1963, the Court declaring that "no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."⁴⁸

⁴³ Cooper v. Aaron, 358 U.S. 1, 17 (1958).

⁴⁴ Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958).

⁴⁵ Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959).

⁴⁶ 2 U.S. COMM'N ON CIVIL RIGHTS, REPORT, EDUCATION 1961, at 76-77 (1961); 1959 COMM'N REPORT 240.

⁴⁷ Bush v. Orleans Parish School Bd., 308 F.2d 491, 499 (5th Cir. 1962).

⁴⁸ Goss v. Board of Educ., 373 U.S. 683, 689 (1963). See *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). With the enforcement of the decisions in *Meredith v. Fair*, 202 F. Supp. 224 (S.D. Miss.), *motion for injunction pending appeal denied*, 305 F.2d 341 (5th Cir.), *rev'd*, 305 F.2d 343 (5th

Progress continues to be slow in the South. The Supreme Court's warning that a pace found acceptable for desegregation nine years ago will not necessarily satisfy the Court today may soon be reflected in lower court rulings.⁴⁹

III. HOUSING

On November 20, 1962, President John F. Kennedy issued an Executive Order on Equal Opportunity in Housing.⁵⁰ The order directed federal agencies to act to prevent discrimination in the sale or rental of "residential property and related facilities" owned by the federal government, or aided or assisted by it after November 20, 1962. Agencies were ordered to issue regulations, adopt policies and procedures, and enforce nondiscrimination—first through conciliation, then through the imposition of sanctions.

Thereafter, the Federal Housing Administration ruled that it would deny benefits to persons and firms which discriminate; not affected by its action was one or two-family owner-occupied housing. It required insurance applicants to agree in writing to comply and corporations owning FHA-insured apartment houses to guarantee nondiscrimination in their charters. The agency provided a procedure by which complaints of discrimination may be heard by local directors and, if necessary, appealed to Washington.⁵¹

The Public Housing Administration required local public agencies contracting for loans or annual contributions after November 20, 1962 to agree to operate low-rent housing projects and related facilities on a desegregated basis.⁵²

Cir.), *order for stay vacated, mandate recalled and new mandate issued*, 306 F.2d 374 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962); *Gantt v. Clemson Agricultural College*, 208 F. Supp. 416 (W.D.S.C.), *complaint dismissed*, 213 F. Supp. 103 (W.D.S.C. 1962), *rev'd with instructions to order admission*, 320 F.2d 611 (4th Cir.), *petition for cert. filed*, 31 U.S.L. WEEK 3386 (U.S. May 21, 1963); and *Lucy v. Adams*, 8 RACE REL. L. REP. 448 (N.D. Ala. June 5, 1963), the last three states to resist the quarter century struggle to desegregate public institutions of higher learning in the South formally succumbed. See also *United States v. Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963).

⁴⁹ *Watson v. City of Memphis*, 373 U.S. 526 (1963).

⁵⁰ Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

⁵¹ 2 FHA MANUAL, §§ 200.300-355; 27 Fed. Reg. 11548, 11802, 12126 (1962); 28 Fed. Reg. 1540 (1963). The Veterans Administration (VA) has also prohibited discrimination and provided that violators may be denied future VA benefits. 27 Fed. Reg. 11669 (1962). Because of discriminatory practices, VA stopped doing business with a Chicago real estate broker in April, 1963 and a Florida builder in July, 1963.

⁵² PHA Circular Letter, Nov. 28, 1962.

The Urban Renewal Administration required local public agencies to agree, in loan and grant contracts entered into after November 20, 1962, not to discriminate. These agencies were also required to agree to place a covenant prohibiting discrimination in deeds conveying project land. Violators are subject to contract cancellation, denial of future benefits, or court actions for covenant enforcement. The administration later required local public agencies to develop affirmative programs to expand housing opportunities for minority groups.⁵³

The Community Facilities Administration strengthened the non-discrimination provision in its senior citizen housing loan agreements and added a clause in its college housing loan agreements.⁵⁴

The Department of Defense required nondiscrimination clauses in leases for military housing and limited listings of off-base housing to open occupancy units.⁵⁵ The Farmers Home Administration, Department of Agriculture, required that mortgages closed after December 14, 1962, contain a nondiscrimination covenant, violation of which "shall constitute default under the mortgage . . ."⁵⁶

The Department of Health, Education, and Welfare required applicants for surplus property to be used for housing to agree not to discriminate.⁵⁷ The Area Redevelopment Administration, Department of Commerce, required that applicants agree not to discriminate in housing and related facilities, with the exception of hotels and other transient facilities.⁵⁸

Existing housing, not directly subject to the order's prohibitions except when Government-owned, is covered by a provision enjoining agencies "to use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required," to abate discrimination. Two complaints filed with FHA under this provision were rejected without further action after attempts at conciliation failed.⁵⁹ A private suit against the

⁵³ URA, Local Public Agency Letter No. 256, Nov. 30, 1962; URA, Equal Opportunity in Housing; Policies and Procedures, Apr. 24, 1963, p. 7; URA, Local Public Agency Letter No. 273, July 22, 1963.

⁵⁴ HHFA, CFA News Release No. 62-1396, Dec. 5, 1962.

⁵⁵ Memorandum From Secretary of Defense Robert S. McNamara to the Secretaries of the Army, Navy, and Air Force, 8 RACE REL. L. REP. 325 (March 8, 1963).

⁵⁶ 27 Fed. Reg. 12611 (1962).

⁵⁷ 27 Fed. Reg. 12753 (1962).

⁵⁸ 28 Fed. Reg. 119 (1963).

⁵⁹ Letter from FHA Commissioner to Roland E. Barnes, Jan. 11, 1963; letter from FHA Commissioner to Karl D. Gregory, Mar. 29, 1963.

owners of an allegedly "white only" motel built on urban renewal land was decided on July 30, 1963 in favor of the Negro petitioner.⁶⁰ A federal district court ruled that, because of the significant extent of government involvement in urban renewal, the existing privately redeveloped housing and related facilities must be available on an equal basis. The Department of Justice has yet to institute litigation under this provision of the order.

IV. EMPLOYMENT

Experience with earlier Executive orders requiring nondiscrimination in federally connected employment revealed weaknesses. Employers were being required to take action to afford equal opportunity only when specific complaints were made. Federal agencies were frequently in the position of investigating themselves. No President's committee could be effective until it was made clear that sanctions would be imposed against agencies and contractors which refused to comply.

In an effort to overcome these weaknesses, President Kennedy, in 1961, created the President's Committee on Equal Employment Opportunity with Vice President Lyndon B. Johnson as Chairman.⁶¹ The President said:

I have dedicated my Administration to the cause of equal opportunity in employment by the Government or its contractors. The Vice President, the Secretary of Labor and the other members of this committee share my dedication. I have no doubt that the vigorous enforcement of this order will mean the end of such discrimination.⁶²

Unlike its predecessors, the committee has authority to investigate complaints, issue recommendations and orders, and require reconsideration of final decisions by department and agency heads.

The order creating the committee directs each contracting agency to include a nondiscrimination clause in Government contracts and require contractors and subcontractors to submit compliance reports at regular intervals. The committee is authorized to order a contracting agency to terminate its contract with a noncomplying contractor or to refrain from entering into a contract with a

⁶⁰ *Smith v. Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn. 1963).

⁶¹ Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

⁶² White House Release, Mar. 6, 1961.

potential contractor who has a record of noncompliance. It may declare a noncomplying contractor ineligible for further Government contracts. It may also require prospective contractors or sub-contractors to submit compliance reports for any previous contracts covered by the order. The committee may hold hearings on and investigate the practices and policies of labor unions involved in Government work. Reports on the cooperation of labor unions and recommendations for securing their cooperation are made periodically to the President.

In addition to its assigned duties, the committee has secured the voluntary cooperation of major Government contractors in programs which go beyond the minimum requirements of the order. In the first two years of the new administration some 85 contractors employing 4.3 million workers signed "Plans for Progress"⁶³ which pledge equal opportunity for all qualified persons regardless of race, color, religion, or national origin.

On June 22, 1963, President Kennedy extended the authority of this committee to cover any federally assisted construction project, whether by grant, loan, contract, insurance, or guaranty, and empowered it to withhold federal funds from any project in which workers are discriminated against.⁶⁴

V. TRANSPORTATION

In May 1961, the "Freedom Rides" began. Late that month the Attorney General petitioned the Interstate Commerce Commission to adopt more stringent regulations against segregation in waiting rooms, rest rooms, and eating places in interstate bus terminals.⁶⁵ On September 22, 1961, the commission prescribed new rules prohibiting discrimination in seating on interstate buses⁶⁶ and requiring that each bus display a sign stating: "Seating aboard this vehicle is without regard to race, color, creed, or national origin, by order of the Interstate Commerce Commission."⁶⁷

⁶³ N.Y. Times, Nov. 20, 1962, p. 35, col. 1.

⁶⁴ Exec. Order No. 11114, 28 Fed. Reg. 6435 (1963).

⁶⁵ Dept. of Justice Release, May 29, 1961. In *Boynton v. Virginia*, 364 U.S. 454 (1960), the Supreme Court had held that, where circumstances show that a bus terminal and restaurant operate as an integral part of a bus carrier's transportation service for interstate passengers, the restaurant, although not owned, controlled, or operated by the carrier, is in interstate commerce and may not refuse to serve Negro passengers.

⁶⁶ 49 C.F.R. § 180a.1 (Supp. 1963).

⁶⁷ 49 C.F.R. § 180a.2 (Supp. 1963).

The signs were posted until January 1, 1963. Since that time, a similar notice has been required on bus tickets,⁶⁸ no interstate bus company has been permitted to use a segregated terminal,⁶⁹ and a sign containing the anti-discrimination regulations has been required to be conspicuously displayed in each interstate bus terminal.⁷⁰

By 1962, the law had become so clear that the Supreme Court was able to announce: "We have settled beyond question that no State may require segregation of interstate or intrastate transportation facilities. . . . The question is no longer open; it is foreclosed as a litigable issue."⁷¹

VI. GOVERNMENT FACILITIES

The Supreme Court in three 1963 decisions again reaffirmed that no municipally owned and operated facilities⁷² may be segregated and no unreasonable delay will be allowed in effectuating their desegregation. In *Johnson v. Virginia*,⁷³ the Court said that "it is no longer open to question that a State may not constitutionally require segregation of public facilities."^{73a} In *Wright v. Georgia*,⁷⁴ the Court held that a municipality cannot arrest and prosecute Negroes for peaceably seeking the use of city-owned-and-operated recreational facilities.

In a third case, *Watson v. City of Memphis*,⁷⁵ a desegregation plan was submitted by the Memphis Park Commission and approved by a lower court. The plan provided for the gradual desegregation of Memphis' recreational facilities, including parks,

⁶⁸ 49 C.F.R. § 180a.3 (Supp. 1963).

⁶⁹ 49 C.F.R. § 180a.4 (Supp. 1963).

⁷⁰ 49 C.F.R. § 180a.5 (Supp. 1963). When the new rules went into effect on November 1, 1961, open defiance was reported in Georgia, Louisiana, and Mississippi. The Department of Justice responded by filing a series of suits in Louisiana and Mississippi to enforce the new regulation. Dixon, *Civil Rights in Transportation and the I.C.C.*, 31 GEO. WASH. L. REV. 198, 232-40 (1962).

⁷¹ *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (per curiam). A few weeks later the Court made it clear that this principle also applied to airport facilities. *Turner v. Memphis*, 369 U.S. 350 (1962) (per curiam).

⁷² In 1961, the Court had expanded its interpretation of "municipally owned-and-operated," holding that a privately owned restaurant in a municipally owned parking garage in Wilmington, Delaware, could not refuse service on the basis of race or color. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

⁷³ 373 U.S. 61 (1963) (per curiam).

^{73a} *Id.* at 62.

⁷⁴ 373 U.S. 284 (1963).

⁷⁵ 373 U.S. 526 (1963).

swimming pools, and playgrounds, over a period of ten years. The Court rejected the plan and ordered prompt desegregation declaring that the "basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."^{75a}

VII. PLACES OF PUBLIC ACCOMMODATION

On February 1, 1960, four college students in Greensboro, North Carolina, entered a variety store, made several purchases, sat down at the lunch counter, ordered coffee, and were refused service because they were Negroes. They remained in their seats until the store closed. In the spring and summer of 1960 young people, both white and Negro, participated in similar protests against segregation and discrimination. Many were arrested for trespassing, disturbing the peace, and disobeying police officers who ordered them off the premises. The charge in the latter type of cases was frequently predicated upon the assumption that, while the demonstrators had been orderly, their conduct could have provoked a breach of the peace by others. However, the mere "possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present."⁷⁶ The exercise of the first amendment freedoms of speech and assembly cannot be abridged "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."⁷⁷

Having disposed of the first sit-in cases on evidentiary grounds,⁷⁸ the Supreme Court in May 1963 considered the question whether the arrest and conviction of protesters peaceably seeking desegregated service represents unlawful "state action" within the reach of the fourteenth amendment in a series of cases from Greenville, S.C., New Orleans, Birmingham, and Durham.⁷⁹ The protesters had

^{75a} *Id.* at 533.

⁷⁶ *Wright v. Georgia*, 373 U.S. 284, 293 (1963); *accord*, *Taylor v. Louisiana*, 370 U.S. 154 (1962) (per curiam); *Garner v. Louisiana*, 368 U.S. 157, 174 (1961).

⁷⁷ *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

⁷⁸ *Taylor v. Louisiana*, 370 U.S. 154 (1962) (per curiam); *Garner v. Louisiana*, 368 U.S. 157 (1961).

⁷⁹ *Avent v. North Carolina*, 373 U.S. 375 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963) (per curiam); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

been convicted, not for breach of the peace, but for trespass on the private property of those who operated restaurants and lunch counters. Confronted with an apparent conflict between the proprietors' property rights and the protesters' right to be free from state-enforced segregation, the Court found state action and reversed the convictions.

Three of these cases⁸⁰ involved laws requiring operators of eating places to segregate. Although not directly invoked, these laws were found to have left such operators no choice but to segregate. The Court held that the use of the state's criminal processes to arrest and convict the protesters had the effect of enforcing the segregation laws and was consequently prohibited state action in violation of the equal protection clause of the fourteenth amendment. In the fourth,⁸¹ where there was no law requiring segregation in eating places, the Court ruled that city officials' public statements that attempts to secure desegregated service would not be permitted had the same effect as segregation laws.

Many cities and states either do not have or have repealed segregation laws. Many officials either have never made or have stopped making public statements committing the state to maintenance of segregation. This has brought to the Court the broad question of whether the state has any right to arrest and prosecute protesters for seeking equal access to places of public accommodation.⁸²

In situations such as the sit-ins, protesters acted to secure immediate desegregated use of a facility. But different problems may be presented when protesters engage in street demonstrations against discrimination in general. One such incident occurred in March 1961, when 187 Negro students marched on the South Carolina State House to make their grievances known to the public and the legislature, which was then in session. Refusing to disperse, they

⁸⁰ *Avent v. North Carolina*, *supra* note 79; *Gober v. City of Birmingham*, *supra* note 79; *Peterson v. City of Greenville*, *supra* note 79.

⁸¹ *Lombard v. Louisiana*, 373 U.S. 267 (1963).

⁸² The following cases, presenting this issue were argued during October, 1963: *Robinson v. Florida*, 144 So. 2d 811 (Fla. 1962), *probable jurisdiction noted*, 374 U.S. 803 (1963); *Bell v. Maryland*, 227 Md. 302, 176 A.2d 771 (1962), *cert. granted*, 374 U.S. 805 (1963); *Griffin v. Maryland*, 225 Md. 422, 171 A.2d 717 (1961), *restored for reargument*, 373 U.S. 920 (1963); *City of Columbia v. Bouie*, 239 S.C. 750, 124 S.E.2d 332 (1962), *cert. granted*, 374 U.S. 805 (1963); *City of Columbia v. Barr*, 239 S.C. 395, 123 S.E.2d 521 (1961), *cert. granted*, 374 U.S. 804 (1963).

were arrested and convicted for breach of the peace. Their appeals were decided by the Supreme Court in February 1963. The Court found that the protesters had been orderly, that they had not obstructed pedestrian or vehicular traffic, and that there had been no clear and present threat of violence by bystanders which the police were unable to control. Reversing the convictions, the Court held that "in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of grievances."⁸³

VIII. CONCLUSION

We all have a personal and critically important stake in this struggle to close the gap between the proclamation of freedom and its practice in America. As we struggle with our enemies without, we must build additional strength within. To let our heritage be eroded means the fall of what the Great Emancipator so aptly called "the last, best hope of earth."

The issue is nothing less than this. *The law demands it.* We have the guarantees written into the Constitution which the Supreme Court, in *Watson v. Memphis*,⁸⁴ has made clear are "warrants for the here and now," and "not merely hopes to some *future* enjoyment of some formalistic constitutional promise."⁸⁵ *Morality pleads for it.* All the world's great religions forbid discrimination and demand adherents to right such wrongs. *Our economy argues for it.* The Negro as a consumer has more potential for American business than Canada or the Netherlands; bringing his average salary to parity with the white man could add twenty billion dollars to the gross national product. *National survival cries for it.* We have been badly wounded in our international struggle with Communism by the comparison of our practices with our avowed principles.

In the true spirit of our American heritage, an independent judiciary has led us far along the road toward the realization of

⁸³ *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). For a case involving protest demonstrations in the downtown business district of another city in South Carolina, see *Fields v. South Carolina*, 240 S.C. 366, 126 S.E.2d 6 (1962), *vacated and remanded*, 372 U.S. 522, *aff'd*, 131 S.E.2d 91 (S.C.), *petition for cert. filed*, 32 U.S.L. WEEK 3070 (U.S. Aug. 13, 1963).

⁸⁴ 373 U.S. 526 (1963).

⁸⁵ *Id.* at 533.

equality before the law. The challenge of our times is whether we, independently as individuals and collectively as a Nation, will demonstrate the maturity to walk that road, to translate judicial promise into living reality, and to write an honorable ending to one of the least proud chapters in American history.