

RACIAL DISCRIMINATION IN HOUSING: A  
STUDY IN QUEST FOR GOVERNMENTAL  
ACCESS BY MINORITY INTEREST  
GROUPS, 1945-1962

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A DISSERTATION PRESENTED TO THE GRADUATE COUNCIL OF  
THE UNIVERSITY OF FLORIDA  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE  
DEGREE OF DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

August, 1967



UNIVERSITY OF FLORIDA



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## ACKNOWLEDGMENTS

The author wishes to express his appreciation to Dr. Ernest R. Bartley, Supervisory Committee Chairman, whose gentle prodding and guidance made possible the completion of the dissertation; to Dr. Manning J. Dauer, Chairman of the Department of Political Science, for the assistantships that allowed the continuance of graduate study; to Frances Levenson, former Director of the National Committee Against Discrimination in Housing, for providing early publications, press releases and studies conducted by the organization that were otherwise unobtainable.

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## CHAPTER I

### INTRODUCTION

#### The Scope of the Study

David Truman has shown that a characteristic feature of the governmental system in the United States is its "multiplicity of points of access."<sup>1</sup> Access can be described as the fluid relationship that interest groups maintain or seek with governmental institutions in their quest for decisions favorable to the group. The American governmental system provides in abundance the "multiplicity" of access points of which Truman has spoken. The division of powers between the levels of governments in the federal system, the separation of powers, the decentralized character of American political parties--these and numerous other features of American government create vantage points for interest groups to seek or secure privileged access to government.<sup>2</sup> Governmental decisions are the result of effective access to centers of power by various groups.

Groups of citizens organized to combat racial segregation policies acted in completely characteristic fashion

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<sup>1</sup>David B. Truman, *The Governmental Process* (New York: Alfred A. Knopf, 1960), p. 507.

<sup>2</sup>*Ibid.*

to seek out those centers of power in the national government that could render decisions on housing programs where the federal government was involved. Study of the activities and strategies of these groups and their interactions with each other and with governmental points of access provides fruitful understandings of the group process.

The efficiency of interest groups often depends on the strength of other supporting interests, the status of the groups in American society, the skills of their leadership, and the receptiveness of the branches of government to the groups themselves. It is not unusual for groups that are rebuffed by Congress to turn to the federal judiciary, to the President, or to the political parties for the rendering of favorable policy decisions. Over a period of time, with alterations in their power and prestige, groups frustrated at one time and place need not feel irrevocably defeated. Describing policy-making as cyclical in nature, Donald Blaisdell noted how "it could pass successively through the legislative, administrative and judicial stages, only to return to a new starting point and pass again through one or more of the same three stages."<sup>3</sup> Attempts to curb discrimination in federally assisted housing by Negro and civil libertarian groups did not take Blaisdell's circular course but rather followed the successive stages of petitioning the legislature, the judiciary, and finally the executive branch

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<sup>3</sup>Donald C. Blaisdell, *American Democracy Under Pressure* (New York: The Ronald Press Company, 1957), p. 261.

of the national government.

Civil rights groups firmly believed that the consequences of racially segregated housing boded ill for the future of the American society. They believed, and with justification, that the federal government had long been an active and effective promoter of segregated housing. Extensive consideration is given, therefore, in this study to the history and background of the federal housing programs and policies and their contributions to segregated housing. The consequences and effects of residential segregation patterns, including private housing industry practices supporting segregation, are considered as background necessary to understanding the major part of the work.

The major thrust of this study, however, traces the efforts of civil rights groups to change effectively governmental housing programs and policies. The study analyzes the types of groups involved, their choices in tactics, utilization of points of governmental access, the obstacles encountered, and the strategy leading to President John Fitzgerald Kennedy's Executive Order 11063 of November, 1962, which prohibited racial discrimination in federally aided housing. As its analytical frame of reference, this study is based on the different tactics employed by the civil rights groups as they sought accommodation to the potential access points available within the governmental system.

The struggle for housing equality posed many choices of strategy for civil rights groups as access was sought

with legislative, executive, or judicial branches of the national government. How could the goal best be achieved? By an executive order? By resort to litigation? By federal or state statutes? Rebuffed initially by Congress, they were forced to resort to other access points. What actions should be taken? The course taken thereafter demonstrates clearly the thesis that the sensitivity of the housing question dictated a strategy of continuing accommodation to shifts occurring in the personnel or philosophy of the other branches of government.

This study does not pretend to examine all of the many activities of groups operating on the many battle-grounds of racial discrimination. The primary focus is on national public policy dealing with housing discrimination; though, in order to explain more fully the activity of groups at the national level, a description is given of the various state laws and actions taken against racial discrimination in housing. The basic concern is with national governmental structure and access to the elements of that structure as it aided or handicapped Negroes and their allies in achieving the goal of equal opportunity in housing where federal funds were involved, for housing on an equal basis is an essential objective in the drive to change a long-existing pattern of Negro-white relationships.

## The Background of the Problem

### The federal government enters housing

When the Eighty-first Congress passed the long-awaited general housing legislation in 1949, it declared as its national housing objective: "a decent home and a suitable living environment for every American."<sup>4</sup> The legislation ended a period of recourse to makeshift housing measures previously enacted in response to crises like the depression years of the 1930's and World War II. Since the passage of the 1949 Act, federal public housing programs have been expanded, urban redevelopment plans have been initiated, and earlier indirect federal subsidization of private housing through Federal Housing Administration (FHA) and Veterans Administration (VA) mortgage insurance legislation has been enlarged. With its funds and credit facilities, the federal government has been without question the major force in contributing to the expansion of the housing industry.

Most of the white beneficiaries of these federal programs have not been hindered in their quest for housing in an open and competitive market. Minority racial groups were not so fortunate, however. Federal housing policies and administrative practices dating back to the depression years saw the national government become the most effective promoter of racial exclusion in desirable residential neighborhoods. Linking the prejudices of private housing operations with the

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<sup>4</sup>*Housing Act of 1949*, Public Law 171, 81st Congress, 1st Session, 1949.

policies of the federal government, the Commission on Race and Housing reported in 1958 that housing was the one commodity on the American market that Negroes and persons belonging to certain other minority groups could not purchase freely.<sup>5</sup> In its analysis, the Commission estimated that the opportunity of twenty-seven million Americans to live in neighborhoods of their choice was restricted because of their race, color, or ethnic attachment.<sup>6</sup> The Commission felt that the federal government had extensively incorporated into its programs the bias of the private housing market and supported racial discrimination in housing through the use of its coercive power.

#### Housing and the race question

When the United States Commission on Civil Rights issued its report in 1959, the national goal of "a decent home and a suitable living environment for every American" was still a "pledge" that was far from attainment. In its findings, it reiterated the report of the Commission on Race

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<sup>5</sup>Commission on Race and Housing Report, *Where Shall We Live?* (Berkeley and Los Angeles: University of California Press, 1958), p. 1. Hereafter cited as *Where Shall We Live?*

The Commission on Race and Housing, an independent citizens' group, was formed in 1955 for the purpose of inquiring into problems of residence and housing involving racial and ethnic minority groups in the United States. Grants by the Fund for the Republic made its work possible. Chairman of the Commission was Earl B. Schwulst, President of the Bowery Savings Bank of New York. Among the distinguished members serving on the Commission were Gordon W. Allport, Elliot V. Bell, Clark Kerr, Henry Luce, and Charles S. Johnson.

<sup>6</sup>*Ibid.*, p. 2.

and Housing, pointing out that: "Housing . . . seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay."<sup>7</sup> In citing the federal government's complicity in housing discrimination, the Commission on Civil Rights emphasized what scholars on racial segregation had been decrying for many years--the federal government had imitated the policy of segregation used by private institutions like banks, mortgage companies, building and loan associations, and real estate companies.<sup>8</sup>

Within American cities, the first significance of residential discrimination is the spreading of slums as the consequence of the restricted market for Negro housing.<sup>9</sup> The Negro population has always increased at a faster rate than the living space made available to them. New areas that are opened up to Negro residence become overcrowded by conversion

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<sup>7</sup>U. S. Commission on Civil Rights, *Report* (Washington: U. S. Government Printing Office, 1959), p. 534. Hereafter cited as *1959 Report*. This same phrase was used in 1961 when the Commission issued its second report. See U. S. Commission on Civil Rights, *Report, Housing* (Washington: U. S. Government Printing Office, 1961), Book IV, p. 145. Hereafter cited as *Housing Report*.

<sup>8</sup>Gunnar Myrdal, *An American Dilemma* (New York: Harper and Brothers Publishers, 1944), p. 349. See also Robert C. Weaver, *The Negro Ghetto* (New York: Harcourt, Brace and Company, 1948), pp. 70-92; Charles Abrams, *Forbidden Neighbors* (New York: Harper and Brothers, 1955), pp. 227-243. Hereafter cited as *Forbidden Neighbors*.

<sup>9</sup>Morton Grodzins, "Metropolitan Segregation," *Scientific American*, XCVII, No. 4 (October, 1957), 33-34. See Grodzins, *The Metropolitan Area as a Racial Problem* (Pittsburgh: University of Pittsburgh Press, 1958), *passim*.

of one-family houses to multiple dwellings and by squeezing two or more Negro families into apartments formerly occupied by a single white dweller. Housing occupied by Negroes is more expensive, more crowded, and more dilapidated than housing occupied by whites with equivalent incomes. With the growth of outlying suburban areas beyond the central core of the cities, restrictions have kept the vast majority of Negroes concentrated in an institutionalized racial pattern. Robert C. Weaver described this pattern in 1948 when he reported:

The modern American ghetto is a Black Belt from which the occupants can escape only if they move into another well defined Negro community. . . . This ghetto has income and social classes. Its inhabitants are better prepared and more anxious than ever before to enter the mainstream of American life. Residential segregation, more than any other single institution, is an impediment to their realization of this American Dream.<sup>10</sup>

No part of the United States is free of housing discrimination. Whether it be the East, West, South or North, large or small cities, wherever Negroes are found, exclusion is almost universal. Whatever their ability to pay, they often find it impossible to obtain homes which meet minimum standards of health, safety and decency.<sup>11</sup>

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<sup>10</sup>Weaver, *op. cit.*, p. 7.

<sup>11</sup>Donald O. Cogwill, "Trends in Residential Segregation of Non-whites in American Cities, 1940-1950," *American Sociological Review*, XXI, No. 2 (February, 1956), 43-47. In his analysis, Cogwill concluded that the segregation of Negroes increased in over two-thirds of 185 cities studied. In some small- and medium-sized cities, where a clear separation of the races never before existed, there began to appear for the first time Negro "ghettos" of substantial size.

Paradoxically, residential segregation has increased since World War II, a time when institutionalized racial prejudice and discrimination showed signs of weakening. After World War II, measures undertaken by the national and state governments began to weaken the system. Many significant changes altered previous existing racial patterns. Employment opportunities were widened. Governmental facilities and public accommodations were opened for the Negroes' use. The armed forces were desegregated. Finally, public schools were to be legally desegregated with the Supreme Court decision in *Brown v. Board of Education* in 1954.<sup>12</sup>

However, victories in these civil rights areas have been weakened with the growth and concentration of segregated residential districts. Because of residential restrictions, other forms of racial discrimination have been generated. Community practices intended to ensure, augment, or facilitate residential segregation have affected employment, schools, and the use of public facilities.<sup>13</sup>

Victories, gained over the years by Negroes and their allies in attacks upon selected targets, have been offset by the social consequences that are rooted in the system of housing segregation. Legal battles for constitutional rights were won, yet these rights often had little practical meaning for the majority of American Negroes. The entry of a few

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<sup>12</sup>347 U. S. 483 (1954).

<sup>13</sup>Dennis Clark, *The Ghetto Game: Racial Conflicts in the City* (New York: Sheed and Ward, 1962), p. 10.

Negro school children into an all-white Little Rock or Atlanta high school was an important victory for the fundamental principle, but it did not carry any immediate hope for Negro children who would continue to attend the still segregated schools of the South and the slum-ridden schools of the North.

Because of the Negro's inability to move outside of the barriers erected against him in the cities, the patterns of *de facto* segregation remained the same. To break through the life cycle of "inherited" poverty, observers have pointed out that only a massive assault upon the Negro's inferior educational system will remedy this dilemma.<sup>14</sup> Michael Harrington has pointed to residential segregation as the crucial factor in this abject inheritance, saying,

Housing is perhaps the most crucial element in racial poverty. As long as Negroes and other minorities are segregated into neighborhoods, the impact of all civil rights legislation is softened. It is possible to have a public policy for integrated schooling, but if the school districts are themselves a product of residential discrimination, the schools will continue to be Jim Crow.<sup>15</sup>

#### Early history of the housing battle by the Negro

Negro leaders have long been well aware of the ephemeral nature of civil rights victories in the courts unless

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<sup>14</sup>James B. Conant, *Slums and Suburbs* (New York: McGraw-Hill, 1962), p. 27. See also Joseph P. Lyford, "Proposal for a Revolution, Part I," *Saturday Review*, XLVI, No. 42 (October 19, 1963), 22.

<sup>15</sup>Michael Harrington, *The Other America: Poverty in the United States* (New York: MacMillan Company, 1963), p. 79.

accompanied by breakthroughs in existing housing patterns. The National Association for the Advancement of Colored People had not been in existence more than two years when in 1911 it began to attack ordinances that zoned Kansas City into white and Negro districts.<sup>16</sup> Subsequently, a test case reached the United States Supreme Court in 1917 relating to similar ordinances in Louisville, Kentucky. The Court declared racial zoning ordinances unconstitutional, saying that

The Fourteenth Amendment was designed to assure to the colored race the enjoyment of all the civil rights . . . and to give to that race the protection of the general government in that enjoyment whenever it should be denied by the states.<sup>17</sup>

This decision by the court had rendered an important opinion striking down municipal ordinances which zoned residential areas on the basis of race or color. But as the National Association for the Advancement of Colored People was to discover, it did not portend any lasting gains in breaking down residential segregation. Only a few southern cities had passed such ordinances. Other devices, more sophisticated in practice though just as arbitrary, proved to be the real obstacles to an open housing market.

Litigation alone could not break down the housing barriers. The difficulties of fighting the system through legal means were immense. Not only were lawsuits costly and

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<sup>16</sup>Langston Hughes, *Fight for Freedom: The Story of the National Association for the Advancement of Colored People* (New York: W. W. Norton and Company, Inc., 1962), pp. 117-122.

<sup>17</sup>*Buchanan v. Warley*, 245 U. S. 60 (1917).

time consuming, but the nature of legal processes and the federal system worked against anything less than token gains. Unless the Negro could develop some leverage on the "power structure" resistant to their aspirations, any drive for equality would be blunted, if not ineffective.

### Early Power Structure and Housing Rights

Of those elements of the "power structure" in American life--government, banks, industry, labor unions, newspaper, and the communications media--Negroes had leverage only in one, government. And prior to World War II, Negroes had little leverage even with government. Political power was won, or to be won, by translating the growth of the Negro northern population into solid blocs that could swing state-wide elections. By exploiting this strength, Negro leaders began to insist that government regulate elements of the "power structure," both public and private.<sup>18</sup> Negro leaders proposed that government make concerted regulatory efforts in all areas where positive government policies could contribute to ending racial discrimination.

### Political pressure supplements litigation

It is difficult to isolate the first instance of successful Negro pressure, as such, on government. While the

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<sup>18</sup>Theodore H. White, "Power Structure, Integration, Militancy, Freedom Now," *Life*, LV, No. 5 (November 29, 1963), 82. For an early account of the rising Negro vote see Henry Lee Moon, *Balance of Power: The Negro Vote* (Garden City, New York: Doubleday, 1948), *passim*.

National Association for the Advancement of Colored People joined the American Federation of Labor in successfully protesting President Hoover's nomination of Judge John J. Parker to fill a vacancy on the United States Supreme Court, there is no indication that Negro pressure was of consequence when the appointment was blocked.<sup>19</sup> In 1941, A. Philip Randolph formed a March-on-Washington Committee which threatened a mass march on the nation's capital unless federal action opened employment opportunities to Negroes in defense industries. This caused President Roosevelt to issue an Executive Order creating a Committee on Fair Employment Practice which succeeded to some degree in curbing discrimination in the hiring practices of these industries.<sup>20</sup>

#### General Negro gains

However, the first comprehensive gain made by the Negroes in civil rights came in December, 1946. President Truman appointed a Committee on Civil Rights, and a year later he urged the Congress to enact the Committee's recommenda-

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<sup>19</sup>David Truman, *op. cit.*, p. 492.

<sup>20</sup>Executive Order No. 8802, 6 Fed. Reg. 3109 (1941). President Roosevelt's power to issue the executive order creating the Committee which investigated discriminatory employment practices in defense industries was uncontested. Since the government may contract for goods and services with private industries, it may do so on its own terms. The nature and extent of defense needs made the order significant and set a precedent for the creation of similar committees under Presidents Truman, Eisenhower, and Kennedy.

tions.<sup>21</sup> Although the Congress failed to act on the recommendations, the Committee's report, *To Secure These Rights*, was widely acclaimed. Included in the report was a description of segregated housing practices. The Committee recommended that Congress condition all federal grants-in-aid and other forms of federal assistance on the absence of racial or religious segregation or discrimination.<sup>22</sup> Now with an official report branding racial segregation in housing, Negro and other civil libertarian groups began to seek the means whereby government would implement the details of *To Secure These Rights*.

#### Pressure resumes

After World War II a large number of organizations came into existence seeking to lessen group prejudice and discrimination and to promote equal rights and opportunity in housing. Some of these organizations had been long established; others were formed after World War II specifically to fight segregation in housing.<sup>23</sup> Such an organization, to take but one example, was the National Committee Against Discrimination in Housing, expressly formed in 1950 to act as a clearing house in the struggle to eliminate racial and

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<sup>21</sup>President's Committee on Civil Rights, *The Report, To Secure These Rights* (New York: Simon and Schuster, 1947), pp. 67-70.

<sup>22</sup>*Ibid.*, p. 166.

<sup>23</sup>*Where Shall We Live?*, p. 54.

religious restrictions from the nation's housing market.<sup>24</sup>

There was clear recognition by all concerned that only government and law could be directly effective on a large scale in reducing or eliminating discriminatory housing practices. Strong sustained pressure from organized groups would be necessary to spur the federal government into action.

#### Pressure for Executive Order

The road to fulfillment was long, tedious and difficult. From 1945 to 1962 congressional action proved fruitless, while judicial pronouncements were piecemeal. Leaders eventually determined that the route for a favorable decision lay in the hands of the President. Throughout the 1950's, pressure by anti-discrimination groups was brought to bear on the President to issue an executive order to bring about a climate of equal opportunities for Negroes in the federal housing program. This strategy was partially realized on November 20, 1962, when President Kennedy issued Executive Order 11063 prohibiting discrimination in federally assisted housing.<sup>25</sup>

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<sup>24</sup>By 1962, thirty-seven organizations were affiliated with the National Committee Against Discrimination in Housing. For a list of member organizations see Appendix C.

<sup>25</sup>U. S. Housing and Home Finance Agency, Executive Order 11063, *Equal Opportunity in Housing* (Washington: U. S. Government Printing Office, November 24, 1962).

Functioning of Pressure  
Process in the  
Housing Battle

The organizations that worked for equal opportunities in housing faced obstacles common to all groups working for minority rights. Organized groups dedicated to racial equality were not powerful politically, operated on limited funds, and placed heavy reliance on volunteer, unpaid services to carry on their activities. Yet with all their weaknesses, these groups supplied a major part of the stimulus and leadership necessary for the advances made toward racial equality. Unsuccessful in their legislative campaigns on the federal level in the passage of statutory law to eliminate discriminating housing codes, they supplied much of the pressure leading to the abandonment in 1950 of the FHA's one-time discriminatory policies sanctioning racially restrictive covenants.<sup>26</sup> In northern and western states, they were responsible for the passage of legislation mitigating long-standing restricted housing practices in these

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<sup>26</sup>The case of *Shelley v. Kraemer*, 334 U. S. 1 (1948), had knocked out the legal props of racially restrictive covenants. Aiding the National Association for the Advancement of Colored People in the case were many civil rights groups who presented *amici curiae* briefs to the court. However, the FHA did not move until it was prodded by the Truman Administration to align itself with the Court's decision. In December, 1949, the Agency announced it would not finance any property subjected to racially restrictive clauses after February, 1950.

areas.<sup>27</sup> Through litigation, the National Association for the Advancement of Colored People succeeded in winning a series of notable victories in the federal and state courts.

In their quest for an executive order, they sought a comprehensive decision to end governmental activities that fostered involuntary segregation in the field of housing. They sought a new national ethic, a standard whereby the doctrine of "separate but equal," declared unconstitutional by the Supreme Court, would be meaningfully ended. Only by curbing enforced residential segregation would the Negro be allowed to take his place in the mainstream of American life. As pointed out by Eli Ginzberg, in his book, *The Negro Potential*:

It must be recognized that the Negro cannot suddenly take his proper place among whites in the adult world if he has never lived, played, and studied with them in childhood and young adulthood. Any type of segregation handicaps a person's preparation for work and life. . . . Only when Negro and white families can live together as neighbors . . . will the Negro grow up properly prepared for his place in the world of work.<sup>28</sup>

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<sup>27</sup>By 1963, according to *Trends in Housing*, a bi-monthly published by the National Committee Against Discrimination in Housing, 26 governmental jurisdictions had adopted fair housing statutes affecting private housing: 13 states, 12 cities and the Virgin Islands. In addition, there were 17 states and 60 cities that had fair housing laws affecting discrimination in public and publicly assisted housing. *Trends in Housing*, VII, No. 5 (September-October, 1963), 1, 7.

<sup>28</sup>Eli Ginzberg, *The Negro Potential* (New York: Columbia University Press, 1956), pp. 114-115.

## CHAPTER II

### FEDERAL HOUSING PROGRAMS: GOVERNMENTAL SUPPORTS FOR SEGREGATION

Course I don't want to make it sound fancier than it is. . . . It's just a plain little old house--but it's made good and solid--and it will be ours. Walter Lee--it makes a difference in a man when he can walk on floors that belong to him. . . .<sup>1</sup>

Mama Younger

It is one thing when private tenants, property owners, and financial institutions maintain and extend patterns of racial segregation in housing. It is quite another matter when a Federal agency chooses to side with the segregationists.<sup>2</sup>

Gunnar Myrdal

#### The History and Background of Federal Approaches to Housing

The federal government's first entry into the problem of housing dates back to 1892 when Congress provided \$20,000 for the investigation of the slums in cities having 200,000 or more people.<sup>3</sup> No constructive action came out of this

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<sup>1</sup>Lorraine Hansberry, *A Raisin in the Sun* (New York: Random House, 1959), p. 84.

<sup>2</sup>Myrdal, *op. cit.*, p. 349.

<sup>3</sup>U. S., Congress, Senate, Committee on Banking and Currency, *Federal Housing Programs: A Chronology and Brief Summary of Congressional and Executive Action Affecting Housing from 1892 to October 25, 1949*, 81st Congress, 2nd Session, 1949, p. 2. Hereafter cited as *Federal Housing Programs*.

legislation but the investigation, not surprisingly, did indicate the existence of slums and their related problems. The report noted a concerted movement of Negroes to the cities in large numbers. By 1890, one-fifth of the 7,500,000 Negroes in the United States lived in urban areas; their housing problems had been compounded by urban living but these were not deemed worthy of congressional notice.<sup>4</sup>

Thereafter, Congress did nothing positive in the field of housing until the exigencies of World War I resulted in legislation providing housing for shipyard workers and war workers.<sup>5</sup> These programs were to be administered by the United States Housing Corporation, a short-lived Agency which was in operation only 109 days. The uneasiness of the federal government in building and operating housing units quickly resulted in the sale of these units to private owners after the war.<sup>6</sup>

It was only with the economic crisis of the depression of the 1930's that Congress again passed any housing legislation. Federal action to ease the burden of the emergency was to be far different from the piecemeal measures taken during World War I. From the depression years down to the present day, the federal government, through its mortgage credit aids, public housing, and slum clearance pro-

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<sup>4</sup>*Housing Report*, p. 9.

<sup>5</sup>*Federal Housing Programs*, p. 2.

<sup>6</sup>*Housing Report*, p. 11.

grams, began to exercise a large measure of control over housing built in the nation.

Housing legislation throughout the 1930's saw the creation of such agencies as the Federal Home Loan Bank Board (FHLBB) in 1932, the Home Owner's Loan Corporation (HOLC) in 1933, the FHA in 1934, and the Federal National Mortgage Association (FNMA) in 1938. The question of housing was considered one of the broad categories of "pump-priming" measures of the New Deal.<sup>7</sup> The groups seriously affected by the depression were homeowners, farmers, farm tenants, slum-dwellers, mortgage-lenders, and cities dependent upon property taxes. Such "pump-priming" would also revive the construction industry, encourage lenders to finance homes and repairs and improve houses and farms.<sup>8</sup> All the aforementioned agencies were designed to strengthen these weak points in the economy and were not intended to encroach upon the private home building industry.

During this period, the federal government also entered into public housing as it now began to provide shelter directly for the underprivileged at rents they could afford. The Public Works Administration (PWA) made loans and grants to local agencies to build low-rental units during the early stages of the economic crisis. In 1937, the United States Housing Authority (USHA) was established to take over the

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<sup>7</sup>*Ibid.*, pp. 13-14.

<sup>8</sup>*Forbidden Neighbors*, p. 227.

federal public housing program and was designed to meet low-rental needs at the local levels.

Since the 1930's, the federal housing program has been enlarged and expanded. The Housing Act of 1949 not only drew up national goals for the federal government in this portion of the nation's economy but called for greater national expenditures in building more public housing. It also provided federal aid and set down regulations for urban renewal or redevelopment projects by private interests.<sup>9</sup> In subsequent years, Congress has extended the 1949 program culminating in the passage of an omnibus law in 1961 during the first year of the Kennedy administration. From its involvement as a spur to the moribund economy of the depression, the federal government became more than just an interested by-stander on questions of home finance and providing roofs over the heads of low-income families. It now played an active and direct role in refining, reshaping, and elaborating upon the nation's housing industry.<sup>10</sup>

#### Federal Supports for Housing Segregation

The portion of the federal depression recovery program devoted to housing endeavored primarily to alleviate and correct economic imbalance, not social inequalities. Although the general aim was economic recovery when the federal

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<sup>9</sup>Jack Greenberg, *Race Relations and American Law* (New York: Columbia University Press, 1959), p. 286.

<sup>10</sup>*Housing Report*, p. 15.

government entered the housing scene, it was immediately confronted with the problem of racial discrimination, a problem that has recurred, grown, and since then persisted. By the 1930's marked trends had developed in relation to Negro housing throughout the United States. There was a continuing concentration of Negroes in well-defined areas in all parts of the country. At the same time, Negro residents in northern cities were slowly expanding into new residential areas even against the overt pressure placed in their paths.<sup>11</sup> According to Robert C. Weaver, this was the period when stereotyped opinions related to Negroes and residential areas began to be formed by the white community, that is, the oft-repeated generality that Negro occupancy ultimately leads to the physical deterioration of housing units. It was true that many Negro areas became extended slums. This was the end result but what was overlooked were the causes that had brought this to pass. As Weaver pointed out:

The combined forces of too little space, too few dwelling units, increasing pressure of new arrivals, general low incomes and disproportionately large declines in the earning of those in upper income brackets modified the anatomy of the Negro community.<sup>12</sup>

The problem of supply and demand, complicated by the color question, required Negroes to seek housing wherever

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<sup>11</sup>The first comprehensive government analysis concerning the problems of housing for Negroes occurred under President Hoover in 1931. U. S. President, Conference on Home Building and Home Ownership, *Report of the President's Conference on Home Building and Home Ownership* (Washington: U. S. Government Printing Office, 1931).

<sup>12</sup>Weaver, *op. cit.*, p. 68.

it was available to them. The paths taken were the slow encroachment of Negroes to fringe areas beyond the "Black Ghetto" (lines determined by the greater white community) or by increasing the density of Negro neighborhoods that were already overcrowded because of too little space and too many people. A solution to the problem was a mass "doubling up" of the populace. The concomitant aspects were the proliferation of slums, high rents charged for scarce housing, and substandard living conditions for those forced to live in such an environment.

These economic and social facts, compounded by the utilization of racial restrictive covenants and the general attitude that Negroes should not enter new neighborhoods, had by the 1930's strengthened residential segregation. Each new influx of Negroes to northern urban areas proliferated the nation's growing "Black Ghettos." The federal government was faced with the problem of what standards to follow in its influential role of underwriting housing operations. Negro ghettos had largely arisen due to the practices of the private housing industry. With its expanded housing activities, the federal government was faced with the difficult and perplexing problem of tackling racial discrimination. Should the federal government detach itself from the practices and ethics of the private housing industry or should it follow the principles of the Bill of Rights and the Fifth and Fourteenth Amendments? Did governmental undertakings in housing programs demand a higher public morality, the test of

the color-blind, ethical government intended by the Constitution, or the standards utilized by the private entrepreneur?<sup>13</sup>

The federal approach to this problem was evasive. In the initial stages of the various housing programs that began in 1933, the federal government allied itself with the principles and standards of the private housing industry. According to the *Housing Report* of the United States Commission on Civil Rights, federal policy in the housing field reflected and even magnified the attitude of private industry.<sup>14</sup> The patterns and attitudes toward racial discrimination were imbedded in the early stages of the housing program and were maintained for the next three decades. Governmental policy in public housing projects built with federal aid and monies was one of equivocation. Once erected, they followed the

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<sup>13</sup>*Forbidden Neighbors*, p. 228. As of 1964, the "moral" dilemma facing the federal government in the late 1930's and early 1940's as far as Negro enjoyment of the housing programs was concerned, would not happen. Prior to the *Shelley v. Kraemer* (1948) and *Brown v. Board of Education* (1954) cases, the federal government was following the accepted constitutional practice, that is, the narrow interpretation given to the Fifth and Fourteenth Amendments. In this period, the nation was not "civil rights conscious." Therefore, the role of the federal government took the form of encouragement and assistance to the private housing industry with as few restrictions as possible. Federal housing agencies in drawing up standards, did not set requirements at variance with accepted business practices or local customs. To require that the benefits of government housing programs be made available on an equal basis would bring the agencies in conflict with the practice of racial discrimination in the building and real estate industries. Since there was no legislative guidance or direction provided by the President, the federal housing agencies were not willing to change the status quo.

<sup>14</sup>*Housing Report*, p. 16.

neighborhood patterns, which usually meant segregation. Little effort was made to create new mixed patterns even when there was a favorable environment.<sup>15</sup>

The policies of the FHA sanctioned racial discrimination and actively promoted and encouraged it as well. In the case of the FHA, the federal government in its relationship to home builders and lenders could have sought compliance to a nondiscrimination policy. Instead, it patterned its policies, as Charles Abrams, noted housing and planning expert, has pointed out, along the lines of a "racial policy that could well have been culled from the Nuremberg laws."<sup>16</sup>

In terms of its indirect and direct support of segregation in this manner, the federal government had given moral sanction to the discriminatory practices of private business. Its increased activity in the housing sphere had made possible the emergence of the large-scale builder, federal insurance systems, the rise of vast suburban subdivisions, long-term credit and low down payments, and extensive slum clearance and redevelopment within our cities. All such measures were beneficial to private business. As authors Frances Levenson and Margaret Fisher have indicated:

In no other aspect of national life has the federal government given more aid, exercised more controls, and brought about more changes than in the field of housing. Those enormous undertakings have been supported, of course, by taxes imposed on all alike. Yet their benefits have been largely denied to more than twenty million

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<sup>15</sup>*Forbidden Neighbors*, p. 229.

<sup>16</sup>*Ibid.*

Negro Americans and to members of certain other minority groups.<sup>17</sup>

Thus, compounding private business practices with governmental practices, residential segregation continued to grow and grow. Failing as a source of moral as well as legal authority, the federal government continued to foster racial discrimination in housing. Summarizing this situation, the Commission on Race and Housing in 1958 could readily state that "if the government sees nothing wrong in racial discrimination, how can private persons be censured for practicing it?"<sup>18</sup>

It should be pointed out that these policies were not carried out with insidiousness and malice and forethought. Government programs related to housing were originally designed for homeowner relief and to stimulate the private housing industry. They were not blueprints for "social engineering" or breaking down the social barriers in housing. Once the housing programs got underway, however, it was evident that the unique adoption of discriminatory policies on the part of the newly created public agencies would be maintained in the absence of a clear-cut, overt pronouncement by the President or the Congress undercutting or eliminating such practices.

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<sup>17</sup>Frances Levenson and Margaret Fisher, "The Struggle for Open Housing," *The Progressive*, XXVI, No. 12 (December, 1962), 26.

<sup>18</sup>*Where Shall We Live?*, p. 32.

When the new housing laws went into effect, the administrators of the agencies were generally staffed with experts from private housing fields where discrimination was an operative business practice.<sup>19</sup> The newly created public agencies then carried the private housing industry's ethic into the public housing programs. Since administrators were primarily concerned with the nation's credit machinery and the creation of business volume and financial success for their agencies, very little attention was paid to ensuring equality in the housing market. Administrators did not fight for racial desegregation or for open or equal opportunity housing for Negroes and minority groups. They followed the path of least resistance, the ethos of real estate and business interest groups, which of course did not lead to experimentation in breaking down residential segregation.

David Truman has indicated that government regulatory agencies increasingly take on the complexion of those they presumably regulate. In describing the direct access of interest groups to the administrative process, he noted that policy-determining administrative boards and commissions are often staffed with an eye to the group memberships of the appointees. He has stated that:

. . . this policy may be a matter of statutory requirements that more or less severely restrict selections to the members of particular interest groups. More often it is a reflection of group access to the

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<sup>19</sup>*Housing Report*, p. 29.

appointing authority.<sup>20</sup>

The administrators then come to their positions with group affiliations and preferences. This conditioning is likely to be maintained during their period of government employment. In some agencies the formal interest group memberships of leading administrative officials can be interpreted as having an important effect upon the access of groups.<sup>21</sup> The experience of the federal housing agencies has borne this out.<sup>22</sup>

In addition to the professional bias that has resulted in discrimination against Negroes in federal housing programs, a number of other factors have operated to vitiate the possibility of social equality in the housing market. Central to any public agency is its desire to create an increased volume of business. This was particularly true of the FHA, FHLBB, the VA and the Urban Renewal Administration (URA).

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<sup>20</sup>Truman, *op. cit.*, p. 452.

<sup>21</sup>*Ibid.*, p. 451.

<sup>22</sup>Two comparatively recent examples help to bear this out. When President Eisenhower selected Albert M. Cole as the Administrator of the Housing and Home Finance Agency in 1953, advocates of public housing felt that his appointment meant the curtailment or even the death of this program. Cole, as a Congressman, had repeatedly voted against any public housing programs and was accused of being the chief spokesman of the real estate lobby in the House of Representatives by liberal groups. The appointment of Robert C. Weaver to this same post by President Kennedy in 1961 was interpreted as the furnishing of access to public housing and "open occupancy" interest groups. Weaver had long espoused both policies. His appointment was opposed by real estate groups and their business allies.

In the case of the FHA, the Agency must get enough housing insurance business to make its actuarial formulas work.<sup>23</sup> Therefore, it hesitated to condition its aid to builders upon nondiscrimination, fearing that to do so would endanger the volume of housing sales. This, too, had long been the catchphrase of real estate men, home builders and credit agencies in discouraging the idea of mixed racial residential neighborhoods, that is, prospective white clients would refuse to buy into such housing enclaves.

Another factor is that governmental agencies become dependent upon pressure groups for their support in Congress.<sup>24</sup> In Washington, the governmental agencies afforded larger operating budgets and perquisites by Congress are those that are backed by strong private lobbies. Certainly, the real estate lobby, home builders, and the savings and loan associations have had an easier entree to Congress than civil libertarian groups seeking to desegregate the housing programs. Agency officials are more prone to give a sympathetic ear to the pressures and prejudices of beneficiaries who also function as their benefactors in the legislative bodies.<sup>25</sup>

Finally, the political power of the South in Congress impeded any attempt to change existing segregation practices in housing. Racial ghettos are less pronounced in the South

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<sup>23</sup>*Forbidden Neighbors*, p. 240.

<sup>24</sup>Truman, *op. cit.*, p. 442.

<sup>25</sup>*Forbidden Neighbors*, p. 240.

than in the North, but the southern bloc in Congress has remained adamant against any proposal that might result in the mixing of the races.<sup>26</sup> Few housing administrators were willing to arouse the enmity of powerful legislators who are positioned strategically in the congressional power structure and could frustrate their existing and future programs.<sup>27</sup> Federal regulations that banned residential segregation would meet with bitter opposition from the southern bloc. Housing agencies sought to formulate rules that would be acceptable and uniformly applicable throughout the nation. By doing so, they enhanced their ability to gain maximum congressional support. Therefore, segregated practices as followed by the southern states then tended to become the common denominator

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<sup>26</sup>*Ibid.*

<sup>27</sup>Since the congressional system works to the advantage of men with seniority, southern Congressmen chair more than one-half of the standing committees in both houses. In the 88th Congress, 1st Session, southerners held the chairmanships of ten of the sixteen standing committees in the Senate while in the House they held eleven of the twenty. See U. S., *Congressional Directory*, 88th Congress, 1st Session (Washington: U. S. Government Printing Office, 1963), pp. 239-243; 251-259.

The housing program and the agencies concerned with housing legislation come under the jurisdiction of the House and Senate Banking and Currency committees and their subcommittees. In 1964, the Senate parent committee was chaired by A. Willis Robertson of Virginia who succeeded Burnet R. Maybank, South Carolina, after his death in 1955. The chairman of its subcommittee on housing was John Sparkman of Alabama. In the House, two southerners have long controlled the fate of housing legislation: Wright Patman of Texas, Chairman of the House Banking and Currency Committee and Albert Rains of Alabama for many years had chaired its subcommittee on housing.

in the nation's racial housing policy.<sup>28</sup>

The Programs and Policies of Federal Housing  
Agencies: The Scope of Federal Involvement

After President Truman had urged the reorganization of the federal housing agencies, Congress, in July, 1947, established the Housing and Home Finance Agency (HHFA). The Agency was to operate as a single unit for the principal housing programs and functions of the federal government. It was created to provide general supervision and coordination of its constituent units: the FHA, the Public Housing Administration (PHA), and the URA.<sup>29</sup> In addition, the Administrator of the HHFA served as the Chairman of the National Voluntary Mortgage Credit Extension Committee which directed the affairs of the Voluntary Home Mortgage Credit Program (VHMCP) and Chairman of the Board of Directors of the Federal National Mortgage Association (FNMA). He also was directly responsible for approving programs of communities that sought assistance from the URA.<sup>30</sup> In sum, the HHFA was to deal with the federal housing programs as a whole, to assess the needs of the nation, and to recommend constructive steps to meet these needs.<sup>31</sup>

Each of these programs will be discussed separately.

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<sup>28</sup>*Forbidden Neighbors*, p. 240.

<sup>29</sup>*1959 Report*, p. 457.

<sup>30</sup>*Ibid.*

<sup>31</sup>*Ibid.*, pp. 457-458.

Greater stress will be placed on the federal mortgage insurance and guaranty programs because in these areas the principles followed by the FHA and the VA were most pervasive in imposing residential segregation by administrative fiat. The role of the FHA and the nation's housing market became intertwined after its operations became clear. Since the FHA's creation in 1934, the federal government became the most important factor in the housing market, prompting the authors of a *Fortune* article in February, 1954, to comment:

The overwhelming fact is that Government guaranty of mortgages . . . has done more than anything else to make possible a million or more new houses a year. If people had to pay 20 to 30 per cent down, as they do on some uninsured mortgages, millions never would have bought houses. And because Government-guaranteed mortgages have proved ideal investments for banks, insurance companies, and similar institutions, mortgage money now flows freely across state lines.<sup>32</sup>

#### Federal Housing Authority (FHA)

The National Housing Act of 1934 established the FHA. Its original aim was to encourage improvement in housing standards and conditions, to provide an adequate home financing system, and to exert a stabilizing influence on the residential mortgage market.<sup>33</sup> Agencies such as the Federal Home Loan Bank System (FHLBS), created in 1932 to serve as a

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<sup>32</sup>Gilbert Burck and Sanford S. Parker, "The Insatiable Market for Housing," *Fortune*, XLIX, No. 2 (February, 1954), 218.

<sup>33</sup>U. S., Congress, House, Subcommittee on Housing of the Committee on Banking and Currency, *Investigation of Housing*, 1955, H. Res. 203, Part I, 84th Congress, 1st Session, 1955, p. 543. Hereafter cited as *Investigation of Housing*, 1955.

reserve credit pool exclusively for home financing institutions, and the HOLC, established in 1933 to refinance mortgage and interest rates for home owners, placed their emphasis on restoring public confidence in the nation's financial institutions. Their efforts to a large extent succeeded and paved the way for a resumption of lending activity.<sup>34</sup> Congress, in passing the National Housing Act of 1934, devised a new method to encourage housing construction and to increase the supply of funds for new lending through the new and independent agency, the FHA. Used at first to aid a sick construction industry, it has since been utilized for many purposes. Initially, a "pump-priming" device of the depression years, it then served to meet other national emergencies such as mobilization, war, and demobilization. The FHA has been a prime instrument to relate housing production with national needs and to implement broad social purposes of the federal government.<sup>35</sup>

In terms of long-range policies, the FHA was the most important of all housing credit agencies. Its many contributions are so well known that its principal programs need not be mentioned here.<sup>36</sup> The FHA has largely determined where housing shall be built, for whom, at what price, the character of construction, and the methods of financing.

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<sup>34</sup>*Housing Report*, pp. 12-13.

<sup>35</sup>*1959 Report*, pp. 461-462.

<sup>36</sup>For a detailed description of its coverage and scope see: 48 Stat. 246 (1934) and 12 U. S. C. sec. 1702 (1958).

Its influence has been so pervasive that conventionally financed building has been inevitably affected by its practices. FIIA standards, even though substantively minimal, have become the norm for the real estate market. Broadly stated, it offered mortgage insurance to lenders who financed the purchase of housing, provided the housing and the mortgagee complied with certain statutory and administrative requirements.

Under the system, the following three groups were benefited by FHA's policies: mortgagees, purchasers of homes, and builders.<sup>37</sup> The mortgagees were benefited by being protected against the risk of any loss on the mortgage loan. Purchasers were able to finance their homes on terms more favorable than those which they could secure under conventional financing. Builders were the recipients of an expanded housing market as the result of the financial advantages they could offer potential purchasers. In general it may be said that no other agency of the federal government has had as great an effect on shaping the character and appearance of American communities, especially the suburban communities.

The problem of residential segregation was not ignored by the FHA. From its earliest years, housing patterns figured in its policies to the extent that the Agency en-

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<sup>37</sup>Comment, "Builder of FHA Housing Held Barred From Discriminating Against Purchasers on Basis of Race: Possible Sources of Federal Prohibition and Basis for Cause of Action," *Columbia Law Review*; LIX (1959), 782.

couraged racial discrimination. Many benefits of the FHA program were not available to minority groups on equal terms.<sup>38</sup> Until the aftermath of *Shelley v. Kraemer*<sup>39</sup> in 1948, described later in judicial context, the FHA officially placed the weight of the federal government against open occupancy of housing for all citizens regardless of their race. The policy directives of the FHA were contained in rules, regulations, Agency letters issued from time to time, and its *Underwriting Manual*. The FHA's *Underwriting Manual* contained the criteria in judging eligibility for Agency benefits. It was designed to guide and aid both its staff and those who would make use of its aid. Until 1947, the *Underwriting Manual* warned against insuring property not protected from adverse influences such as "inharmonious" racial groups and declared it necessary to the stability of neighborhoods that properties shall continue to be occupied by the same social and racial classes.<sup>40</sup> It offered a model racial restrictive covenant to insure communities against "adverse influences" and recommended the inclusion of such covenants in all

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<sup>38</sup>Eunice and George Grier, *Discrimination in Housing: A Handbook of Fact* (New York: Anti-Defamation League of B'nai B'rith, 1960), p. 16.

<sup>39</sup>334 U. S. 1 (1948).

<sup>40</sup>1959 *Report*, p. 464.

contracts of sale.<sup>41</sup> Under this policy the FHA would not insure inter-racial projects or Negro developments in other than all-Negro neighborhoods.

Negroes gained very little new housing under this program. The FHA, stressing the development of suburban communities, deprived Negroes of moving to the outlying areas through the use of the restrictive covenants. If Negroes wanted to participate in this mortgage insurance program, they had to seek out vacant areas in the Black Belts from which they had originally sought to leave. Here, however, the lack of adequate land left prospective purchasers only older housing to turn to. Housing of this type invariably failed to meet the FHA neighborhood requirements and applicants, because of these strictures, were refused the right to participate in the program. Even those who could afford to build new homes were stymied by FHA's policies. According to Robert C. Weaver:

FHA's chief contribution to Negroes was to complicate the ultimate solution of their housing problem. . . . By failing to permit or promote Negro participation, while facilitating the augmentation of the total supply of new housing, it contributed greatly to widening the gap between the living conditions of whites and Negroes. . . . But the most objectionable feature of FHA operations was its acceptance and championing of race restrictive covenants. This was probably inevitable once the government had turned the agency's

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<sup>41</sup>The 1938 *Underwriting Manual* urged the use of a model covenant which provided that "no persons of any race other than \_\_\_\_\_ [race to be inserted] shall use or occupy any building or any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant." Quoted in *Forbidden Neighbors*, p. 230.

operations over to the real estate and home finance boys.<sup>42</sup>

Weaver was not subjecting himself to hyperbole, since the FHA had accepted the prejudices of the trade association of real estate brokers, the National Association of Real Estate Boards (NAREB). The *Code of Ethics* of the NAREB sanctioned a policy of racial discrimination. Member realtors were beholden to follow it. If they did not, they were subject to discipline by their local real estate boards. This usually meant being dropped from the local board membership. Essentially, the Code served as an imprimatur, directing that no realtor could be instrumental in introducing into a neighborhood members of any race or nationality whose presence might be detrimental to property values in that neighborhood.<sup>43</sup> This same ethos prevailed in the FHA and it prompted Weaver to state:

. . . the financial institutions through which FHA operated and from which most of its key officials in Washington and the field were recruited, were the very financial and real estate interests and institutions which led the campaign to spread racial covenants and residential segregation.<sup>44</sup>

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<sup>42</sup>Weaver, *op. cit.*, p. 71.

<sup>43</sup>*Forbidden Neighbors*, p. 156. It is interesting to note that few Negroes are on the constituent 1100 member boards that make up the National Association of Real Estate Boards. The Association holds exclusive rights to the word "realtor." A Negro, not a member of the local real estate boards, cannot be a "realtor." He must be a "realist." This deprives the Negro broker access to sources for his clients, such as multiple listings which are only open to members of real estate boards.

<sup>44</sup>Weaver, *op. cit.*, p. 70.

The FHA continued to encourage racially restricted housing until 1950, despite the pressure that had been building up by civil rights groups and state and local anti-discrimination commissions against this practice.<sup>45</sup> In 1947, the Agency did revise the *Underwriting Manual* by deleting most references to racial groups and eliminating the model racial restrictive covenant. This action, however, did not constitute a real change in its policy as it amounted to merely softening the *Manual's* wording in relation to racial restrictions. The first drastic revision in the FHA's policy came after the *Shelley v. Kraemer* decision in 1948. After this decision the FHA amended its rules that had permitted the financing of housing formerly restricted on the basis of race, creed or color. However, nearly two years elapsed before the FHA moved to align itself with the Supreme Court's decision. Even after the Supreme Court ruling rendering racially restrictive covenants unenforceable in the courts, Assistant FHA Commissioner W. J. Lockwood, in November, 1948, months after the *Shelley* decision, stated that the "FHA has never insured a housing project of mixed occupancy" and that he believed "that such projects would probably in a short period of time become all Negro or all white."<sup>46</sup>

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<sup>45</sup> 1959 Report, p. 464.

<sup>46</sup> *Ibid.*

Indications that there might have been official pressure upon the FHA to change its rules and regulations was a statement by then Solicitor General, Philip B. Perlman, who had filed an *amicus curiae* brief for the government in

After December 2, 1949, the FHA underwent a new phase in its racial policy. On that day an FHA directive announced that the agency would no longer insure properties that were subject to racial restrictive covenants filed after February 15, 1950.<sup>47</sup> The revision of the FHA's *Underwriting Manual* seemed finally to give recognition to the special problems facing minority group families in the quest for housing. This was followed up in 1951 with an announcement that all repossessed FHA-insured housing would be administered on a nonsegregated basis. In 1953, the FHA began to set annual goals for local insuring offices in order to spur them on to increase the supply of housing available to minority families. A final phase of FHA's minority group policy was announced in a speech on May 21, 1954, by FHA Commissioner Norman P. Mason. He outlined a positive program whereby the FHA would encourage open occupancy in housing so as to serve the minority housing market.<sup>48</sup>

By 1954, FHA had run the gamut from a policy requiring segregation to a policy of promoting minority housing and

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the *Shelley* case. Before a conference of the New York State Committee on Discrimination in Housing on December 2, 1949, he stated that the FHA was amending its rules and that "these actions are designated to bring the mortgage insurance operations of the FHA into line with the policy underlying the recent decisions of the Supreme Court of the United States. . . ." Quoted in *Investigation of Housing, 1955*, p. 545.

<sup>47</sup>1959 Report, p. 464.

<sup>48</sup>*Investigation of Housing, 1955*, p. 545.

open occupancy projects. However, little occurred between this time and the issuance of President Kennedy's Executive Order 11063 in November, 1962, to show that the open occupancy concept in housing was being carried out. The FHA still in fact issued mortgage insurance to builders who discriminated against Negroes.

The ban on restrictive covenants constituted only one means of housing discrimination and FHA's refusal to insure property with such a proviso did not have a great effect in securing equal housing opportunity. In spite of the open occupancy policy to which the FHA had moved by 1954, it remained a fundamental principle of the Agency that builders and lenders should be entirely free to make their own decisions as to who could buy or rent houses built with the aid of federal mortgage insurance.<sup>49</sup> This policy did not provide Negroes with additional existing housing to any great extent nor did it open to Negroes new housing or apartment units in suburban and outlying areas.<sup>50</sup> Here Negroes met

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<sup>49</sup>*Housing Report*, p. 25.

<sup>50</sup>*Equal Opportunity in Housing*, a report of the American Friends Service Committee, 1955, stated: "Of 2,761,172 units which received Federal Housing Authority insurance during the years 1935-50 an estimated 50,000 units were for Negro occupancy. This amounts to 2 per cent of the FHA total." American Friends Service Committee, *Equal Opportunity in Housing* (Philadelphia: American Friends Service Committee, March, 1955), p. 7. The United States Commission on Civil Rights reported on the basis of the testimony given in its regional hearings that from 1946 to 1959 less than 2 per cent of the new homes insured by the FHA had been available to minorities. *Housing Report*, p. 63.

the discriminatory practices of the real estate business, the home building industry, and the financial institutions who continued to deprive them of housing. FHA insurance was still granted to builders who openly discriminated against Negroes.<sup>51</sup> With the help of FHA financing, huge insured projects that are now residential towns were built with an acknowledged policy of excluding Negroes.<sup>52</sup>

FHA, with the advent of anti-discrimination laws passed by state and local governments, began to utilize a policy of refusing to insure loans for discriminatory builders. This, of course, applied only to those states and cities that enacted anti-discrimination housing laws.<sup>53</sup> As of September 30, 1963, seventeen states and sixty cities had laws or resolutions affecting discrimination in housing.<sup>54</sup> With some of these units of government, the FHA worked out agreements with the various state commissions that were created to enforce the anti-discrimination in housing. Under

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<sup>51</sup>Builder William Levitt, who had initially constructed developments in New York, Pennsylvania and New Jersey that excluded Negroes until forced to integrate them by order of the courts, was erecting in 1962 a suburban community, Belair Levittown, in Bowie, Maryland. According to Paul Cooke, National Vice Chairman of the American Veterans Committee, the development was to be an all-white one and Negroes were to be barred. Testimony before the United States Commission on Civil Rights, *Regional Hearings, Washington, D. C.* (Washington: U. S. Government Printing Office, 1962), p. 232.

<sup>52</sup>*1959 Report*, p. 465.

<sup>53</sup>*Ibid.*

<sup>54</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 7.

these agreements, FHA would cease to do business with any builder or housing developer who had been found by these commissions to have violated the state's anti-discrimination housing law and had been enjoined to refrain from such action.<sup>55</sup>

Prior to President Kennedy's Executive Order 11063 in 1962, the effect of FHA's agreements to support a state's anti-discrimination laws was limited. It was limited because FHA did not take action on its own initiative if a builder practiced discrimination. FHA did nothing until a "valid finding" of a builder's violation of state law had been made by a state agency.<sup>56</sup> By the time a particular case had been adjudicated by the state commission on anti-discrimination and its ruling had gone on to subsequent litigation upon being challenged, the builder generally had completed and sold all the homes on a discriminatory basis.

#### Veterans Administration (VA)

On June 22, 1944, Congress passed the Servicemen's Readjustment Act,<sup>57</sup> the GI bill, a provision of which provided veterans of World War II the opportunity to buy homes with little or no down payment. Unlike the FHA insured mortgage program, the GI loan plan was not principally

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<sup>55</sup>See Chapter VI, *State Laws Against Discrimination in Publicly Assisted Housing*, for a more detailed account.

<sup>56</sup>1959 Report, p. 466.

<sup>57</sup>*Servicemen's Readjustment Act of 1944*, 58 Stat. 284.

concerned with stimulating the home construction industry, but was concerned with providing homes for veterans. Thus, the VA guaranteed the financing of homes at low interest rates and in case of defaults, lenders were assured of cash payments for any losses incurred. Government-guaranteed mortgage loans were available to veterans under terms generally more liberal than those of FHA loans, including, at one time, the privilege of buying homes with no down payment. From 1944 to 1960, the VA had through its loan program guaranteed almost \$50 billion in mortgages on more than 5,500,000 homes.<sup>58</sup> Since its policies were more liberal than the FHA, VA's benefits were believed to be more readily available to more low-income home purchasers, and hence to nonwhites.<sup>59</sup>

The VA did not refuse to guarantee loans made by private lenders if the property was encumbered by racial restrictions created and recorded after February 10, 1950,

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<sup>58</sup>*Housing Report*, p. 68. The volume of individual home loans guaranteed by the VA program exceeded that of the FHA. In 1956, almost a fourth of all existing first mortgages on owner-occupied, single dwelling units in the United States were VA-guaranteed. See Davis McEntire, *Residence and Race* (Berkeley: University of California Press, 1960), p. 307.

<sup>59</sup>*Ibid.*, pp. 68-69. Neither the FHA nor the VA maintained lists of Negroes who were recipients of the insured mortgage program or loan guarantees. It is estimated that nonwhites held 2.9% of VA loans in 1956 while VA statistics show that 7.5% of all civilian veterans of World War II and the Korean war were nonwhite.

as did the FHA.<sup>60</sup> However, the lenders who made such loans could not convey the property to the VA in the event of default or foreclosure. The VA felt that the loss of this option had the effect of causing the lender not to make loans on racially restricted housing. Reporting to the United States Commission on Civil Rights, the VA stated that, "So far as we know, no loan has been guaranteed on a property covered by the proscribed restriction."<sup>61</sup> The contemplated effect of this regulation was to prevent and make it impossible for housing developers to market their products to veterans if racial restrictions were placed on their properties.

As of 1961, the VA had cooperative agreements with five states that had anti-discrimination laws: New York, New Jersey, Washington, Oregon and Connecticut.<sup>62</sup> Under these agreements, the VA advised the state's anti-discrimination agency of new housing developments which were submitted to it for approval. The state in turn advised the builder of its anti-discrimination statute.<sup>63</sup> Like the cooperative agreements arranged by the FHA with state commissions, the burden rested on the state agency to find that a

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<sup>60</sup>1959 Report, p. 497.

<sup>61</sup>*Ibid.*

<sup>62</sup>*Housing Report*, p. 69.

<sup>63</sup>*Ibid.*

builder had violated the law.<sup>64</sup> Only then would the VA suspend the builder from the program. No builder had been suspended from the VA program by 1961.

The Commission on Civil Rights noted in 1959 that the cooperative agreements arranged with states having anti-discrimination laws were superfluous because the VA had power in its own right to suspend builders practicing discrimination.<sup>65</sup> Under Section 504 (C) of the *Servicemen's Readjustment Act of 1944*, the VA was authorized:

. . . to refuse to appraise any dwelling or housing project owned, sponsored, or to be constructed by any person identified with housing previously sold to veterans . . . as to which it is ascertained that the type of contract of sale or the method or practices pursued in relation to the marketing of such properties were unfair or unduly prejudicial to veteran purchasers.<sup>66</sup>

The implication can be drawn from this section of the law that the VA could enforce this provision in all states, and not in just those having anti-discrimination laws. To wait for a state's fact-finding agency to disclose and prove a violation should have had no bearing on the VA's right to suspend a builder from participating in the program throughout the country. The VA, however, had not deemed it necessary to enforce this provision of the law.

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<sup>64</sup>*Supra*, pp. 41-42.

<sup>65</sup>*1959 Report*, p. 499.

<sup>66</sup>*Housing Report*, p. 70.

Federal National Mortgage Association (FNMA) and the  
Voluntary Home Mortgage Credit Program (VHMCP)

The Federal National Mortgage Association (FNMA) has as its basic function the purchasing and selling of residential mortgages that have previously been insured by the FHA or guaranteed by the VA, that is, its secondary market operations. Its second role is to offer special assistance to segments of the American people who cannot obtain adequate housing under established home financing programs. FNMA's latter function is similar to that of the Voluntary Home Mortgage Credit Program (VHMCP) which was established by the Housing Act of 1954 so that mortgage money would be made available to people in small communities and for minority groups in any area who could not obtain FHA-insured or VA-guaranteed loans on the same terms as are generally available to others.<sup>67</sup> The result of these provisions has been to stimulate a volume of new construction for minority groups. The figure has not been large in relation to the need, but it was greater than private industry would otherwise have provided. However, the houses built under the two programs, with few exceptions, have been built in segregated projects.<sup>68</sup>

FNMA makes available special assistance funds for the purchase of home mortgages under special housing programs. This results in direct government lending for special

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<sup>67</sup>*Ibid.*, p. 54.

<sup>68</sup>*Where Shall We Live?*, p. 31.

programs ranging from housing for the aged and urban renewal housing. The programs also provide new low-rent housing developers a reduction of interest and amortization costs.<sup>69</sup> When special assistance funds have been utilized for minority groups, their spokesmen have opposed such a program designation, feeling that these funds would be used for segregated housing projects.<sup>70</sup> A proposal to counter this tendency by using FNMA funds specifically for assistance to open occupancy housing developments was subsequently turned down in 1959 by Norman Mason, then Administrator of the HHFA.<sup>71</sup> He felt that FNMA's special assistance fund should not be designated for open occupancy projects and that the needs of minority group families could be better met through the general housing program.

The Voluntary Home Mortgage Credit Program (VHMCP) was established in 1954 with the basic recognition by the mortgage banking associations that minority groups were not securing their share of housing or home finance.<sup>72</sup> The private lending industry had offered this proposal before both

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<sup>69</sup>*Housing Report*, p. 76.

<sup>70</sup>McEntire, *op. cit.*, pp. 310-312.

<sup>71</sup>This proposal was offered by Emil Keen, Chairman of the Long-Range Planning Committee of the New York State Home Builders Association, who recommended that the President authorize FNMA to set aside \$250 million for the purchase at par of mortgages on homes to be offered on an open occupancy basis. See U. S. Commission on Civil Rights, *Regional Hearings, New York City* (Washington: U.S. Government Printing Office, 1959), pp. 276-277.

<sup>72</sup>*Housing Report*, p. 53.

the Senate and House Banking and Currency Committees, in the second session of the Eighty-third Congress, to head off more direct-government lending. When incorporated into the Housing Act of 1954, the program was based on voluntary action by private lenders with their own investment funds. Under the program, regional committees were created to serve as a channel for making private FHA or VA money available to qualified borrowers who had been unable to secure loans because of their minority status. Lenders cooperating with the program were asked to make loans at reasonable rates to qualified minority group persons who could show that they had been turned down by at least two local lenders. Obviously, the very fact that the VHMCP was brought into being attested to the fact that there was discrimination in the financing of homes for minority groups.

From 1954 to 1961, 47,036 loans had been placed by the VHMCP. Of this figure, 10,108 had been for minority group members.<sup>73</sup> The peak year for loans in any year during this period was 1956 when 1,108 went for minorities. Since 1956 the number has become progressively lower each year. The Commission on Civil Rights concluded in 1959 that

. . . VHMCP has neither stimulated any large volume of construction of new homes for minority group families, nor apparently has it relieved to any appreciable extent the shortage of mortgage credit for minority groups.<sup>74</sup>

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<sup>73</sup>*Ibid.*, p. 56.

<sup>74</sup>1959 Report, p. 495. The *Housing Report* of the Commission in 1961 felt nothing markedly had occurred in the

The failure of the VHMCP to attract more applications from minority groups has been attributed by the program's administrators to the lack of experience on the part of lenders. According to the administrators, an ample supply of loan money has been made available to Negroes.<sup>75</sup> However, there has been evidence to the contrary. A real estate broker from Ohio furnishing information to the Commission in 1961 reported: "I know of no instance that the [VHMCP] program has secured a lender for the first home [to be occupied by a Negro] in a new area."<sup>76</sup> Furthermore, he stated that, in his experience, applications by minority group members were referred back to the same institutions that had discriminated in the first instance.<sup>77</sup>

Both the FNMA and the VHMCP had announced policies of equal housing opportunity for all, and both expressed their opposition to the concept of race as a factor in the determination of insured mortgages for home purchases. Yet, they were powerless under the law to do anything about the existing prejudice of the private lending industry which made the ultimate decision on home mortgages. These government agencies did not initiate loans. They operated in the overall environment of the private housing and home finance

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interim to alter this conclusion.

<sup>75</sup>*Housing Report*, pp. 57-58.

<sup>76</sup>*Ibid.*, p. 57.

<sup>77</sup>*Ibid.*

industry. As the Commission on Civil Rights pointed out:

It is here that the critical decisions are made that determine the effect of Federal aid to home financing, and it is here that the force of the Federal Government must be exerted against housing discrimination if it is to be exerted effectively.<sup>78</sup>

To take this course would necessitate the reorientation of the private banking system in the United States. The Commission was aware of the deep-seated nature of the problem. Yet, the Commission felt that effective measures could be developed which would not deprive the banking community of its power to make independent final judgments. The Commission suggested that directives could be drawn up so as to stifle the lending practices that encouraged segregated housing. Properly designed, the measures would not prevent private bankers from making legitimate financial decisions based on facts and not on false concepts such as the effect of Negroes on the decline of property values.<sup>79</sup> To this end the Commission recommended in its *Housing Report* of 1961 that the federal government, either by executive or by congressional action, take appropriate measures "to require all financial institutions engaged in a mortgage loan business . . . supervised by a federal agency to conduct such business on a nondiscriminatory basis. . . ."<sup>80</sup>

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<sup>78</sup>*Ibid.*, p. 79.

<sup>79</sup>*Ibid.*, p. 52.

<sup>80</sup>*Ibid.*, p. 151.

The supervision of the federal government over the financial community is quite extensive and is indirectly

## Public Housing Administration (PHA)

The first government aided low-rent housing program came out of the depression. Operating under Title II of the National Industrial Recovery Act, the housing division of the Public Works Administration (PWA) undertook the construction of large-scale housing projects in thirty-six cities. In 1937, the PWA's housing function was succeeded by United States Housing Authority (USHA).<sup>81</sup> The creation of this agency served notice that the government was committed to a long range low-rent public housing program. By May of 1940,

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involved in many ways with housing. Federal Savings and Loan Associations are incorporated under federal statutes and they provide mortgage financing to individuals and corporate builders and buyers. Also, banks which finance mortgages on housing constructed without other federal assistance or insurance are customarily members of the Federal Reserve System and their deposits are protected by the Federal Deposit Insurance Corporation.

The 1961 *Housing Report* of the Commission on Civil Rights, pp. 28-53, described the extent of governmental involvement. The Commission indicated that these services by the federal government cast the government in the role of participant in what otherwise would be nongovernmental transactions. Therefore, the ban against denials of equal protection might be held to apply to the home financing activities of Federal Savings and Loan Associations and banks which are members of the Federal Deposit Insurance Corporation and Federal Reserve System. Such federal benefits which these institutions might not otherwise realize through private actions provided a basis for legislative or executive regulation of their home financing activities according to the Commission. The Commission ascertained that private lending institutions which benefit from federal programs and are supervised by federal agencies hold more than 60% of the country's nonfarm home mortgage debt.

<sup>81</sup>U. S. Housing Authority was subsequently succeeded by the Federal Public Housing Authority in 1942, which was in turn succeeded by the PHA in 1947.

48,000 of the Authority's 140,000 aided housing units were for Negro occupancy.<sup>82</sup> Under the enabling legislation, the Authority was granted the power to make loans to local housing authorities representing ninety per cent of the cost and to pay annual subsidies to meet the loan carrying charges.<sup>83</sup> The construction, ownership, and operation of public housing properties were to be under the jurisdiction of local housing authorities.

Public housing prior to World War II proved to be a boon to Negroes in the North and elsewhere, giving 20,000 Negro families an escape from slum living and a release from substandard housing and high rents.<sup>84</sup> Most of the housing units, however, were located on what had been slum sites. Following a neighborhood pattern plan, a majority of the projects that were built became either all-Negro or all-white settlements. By concentrating on slum sites and giving preference in tenant selection to the racial groups that previously lived in the neighborhood, residential segregation patterns were strengthened. The directors of the USHA were convinced that the Agency could do little else at the time, since Negroes needed housing desperately.<sup>85</sup> Local public housing authorities were permitted to enforce either

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<sup>82</sup>Weaver, *op. cit.*, p. 74.

<sup>83</sup>*Housing Report*, p. 14.

<sup>84</sup>Weaver, *op. cit.*, p. 76.

<sup>85</sup>*Ibid.*

"separate but equal" or "open occupancy" policies. Most cities chose the former policy in both the North and South prior to World War II.<sup>86</sup>

Under the public housing laws, local authorities were allowed to segregate whites and nonwhites on the basis of a neighborhood pattern of occupancy. The local authority first made a survey of blighted housing in the community to determine the ratio of whites to nonwhites. This ratio was then applied to the total number of public housing units which the authority planned to build. Because the local authority did not take into consideration the fact that Negro blighted housing was generally in worse condition than that occupied by whites, the equity of the neighborhood pattern formula may be considered as debatable. Because of their housing needs, they received less housing than they were entitled. Because of the neighborhood pattern, they were forced to live in segregated projects. Since slum-dwellings had to be eliminated at the same rate as new units were constructed, it hit the Negro who had no place to go while the new projects were being built.<sup>87</sup> There is no doubt that Negroes who did avail themselves of public housing benefited from the USHA program but segregated housing patterns were enforced and Negroes were forced to turn to

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<sup>86</sup> *Housing Report*, p. 111.

<sup>87</sup> Staughton Lynd, "Urban Renewal--For Whom?" *Commentary*, XXXI, No. 1 (January, 1961), 34-45.

other slums while the old ones were being razed.<sup>88</sup>

The success or failure of the low-rent housing program as applied to Negroes reflected the practices of the local public housing authorities. Serving as agents of the federal government, these local groups often exerted significant pressure upon field employees of the USHA and its successor, the Federal Public Housing Authority (FPHA). The most difficult decision by local housing authorities was the approach to residential segregation. In attempting to avoid the issue, they concentrated upon slum areas and followed the United States Housing Authority policy of not changing the racial composition of neighborhoods.<sup>89</sup>

It was difficult for the federal housing authorities to develop a national policy on segregation to govern these federally aided programs. Since Congress had voted down proposed amendments which would have expressly forbidden

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<sup>88</sup>During World War II as Negro workers filled the cities, the Black Belts in northern cities became more concentrated and densely settled. Chronic overcrowding caused a spilling out of Negroes in quest for housing. Forced to compete with whites for shelter, faced with no vacant sites for Negro housing and curbed by the racial restrictive covenants in private housing, each proposal opening new areas for them met a storm of opposition. The Detroit race riot of 1943 was precipitated when in the previous year, the Sojourner Truth Housing project, originally scheduled to be white, was then opened up for Negro occupation. The Trumbull Park Home riots in Chicago of 1953 and 1954 came about because of the fear of Negro intrusion into an all-white housing project. Riots that have occurred because of the entrance of Negroes in all-white neighborhoods in recent years saw their counterparts in public housing as the competition for housing went on. See *Forbidden Neighbors*, pp. 81-136.

<sup>89</sup>Weaver, *op. cit.*, p. 179.

segregation in public housing,<sup>90</sup> the public housing agencies, USHA, FPHA, or PHA, left the decision of segregation to local authorities, except for a requirement that equitable provision be made for all racial groups. In the states that sanctioned or required separate public facilities, including northern states that did not outlaw discrimination in public housing or where the courts had declared segregated housing patterns constitutional, racial enclaves continued to grow. A federal policy that sought any uniform regulation was bound to run into difficulties. If the policy required abolition of segregation, it conflicted with states' rights; if it advocated segregation, it might run counter to legislation in some of the northern states.<sup>91</sup>

By March, 1961, nonwhites occupied 210,280 public housing dwelling units out of 456,242 occupied or available for occupancy, or 46 per cent of the total units.<sup>92</sup> Because

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<sup>90</sup>Typical attempts to tack on amendments forbidding segregation in the housing programs were the following: Congressman Adam C. Powell's amendment in 1949, *U. S. Congressional Record*, 81st Congress, 1st Session, 1949, XCV, Part 4, p. 8656; Congressman Jacob Javits' amendment banning segregated projects underwritten by FHA mortgage guarantees, *U. S. Congressional Record*, 83rd Congress, 2nd Session, 1954, C, Part 1, p. 4487; Congressman Adam C. Powell's amendment requiring assurances that all housing be made available on a nondiscriminatory basis, *U. S. Congressional Record*, 86th Congress, 2nd Session, 1959, CV, Part 7, p. 8654. *Infra*, Chapter IV, pp. 116-126.

<sup>91</sup>Weaver, *op. cit.*, p. 197.

<sup>92</sup>*Housing Report*, p. 110. Representative figures as of 1960 were: Detroit--Negroes made up 29% of the population while 51.3% of the 7,700 public housing tenants were

of this high percentage, the policies of PHA and the local housing authorities had a large impact on the housing problems of Negroes. Undoubtedly the major cause of disproportionate Negro use of public housing is their low economic status. But as one witness stated before the Commission in 1960, there must be added

. . . the unrealistic, undemocratic, and unjust practices of the housing forces in the private real estate market who cling to outmoded patterns of racial segregation. Inability to secure housing in the real estate market on an open occupancy basis and the accumulated effect of the employment discrimination are directly responsible for the disproportionate number of nonwhite families in public housing.<sup>93</sup>

The basic racial policy of PHA was adopted in 1951 to spread low-rent housing benefits equitably to Negroes. Known as its "racial equity formula," and included in its *Low-Rent Housing Manual*, the PHA announced that any program desiring assistance for the development of low-rent housing "must reflect equitable provision for eligible families of all races determined on the approximate volume and urgency of their respective needs for such housing."<sup>94</sup> Supposedly, this

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nonwhite; Los Angeles--Negroes made up 12% of the population but constituted 65% of the people living in public housing units; Baltimore--75% of these units were occupied by Negroes who comprised 41% of the city's population. Chicago, which the Commission on Civil Rights in 1959 called "the most segregated northern city," had Negroes occupying 85% of the public housing in the city. *1959 Report*, p. 475.

<sup>93</sup>*Housing Report*, p. 111.

<sup>94</sup>U. S. Housing and Home Finance Agency, Public Housing Administration, *Low-Rent Housing Manual*, Sec. 102.1 (Washington: U. S. Government Printing Office, February 21, 1951).

formula was applicable to all sections of the country. But in practice, the PHA has applied the formula only in localities that operate their low-rent housing on a "separate but equal" basis and only there to protect Negro interests.<sup>95</sup> The formula was not applied where "open occupancy" policies had been adopted by states or cities.

The patterns of *de facto* segregation in public housing essentially stem today in northern cities from site selections. Since the PHA has no mandatory requirements under the public housing laws, its positive approaches are confined to encouraging communities to utilize vacant land or sites outside of the areas of racial concentration. This policy has been vitiated to a great extent by neighborhood opinion which has resisted proposals to locate public housing in nonslum neighborhoods or in outlying areas. Public pressure on local governing bodies has often prevented appropriate site selection.<sup>96</sup>

Lacking an affirmative mandate ("open occupancy" and "racial equity formula" policies notwithstanding), the PHA has found itself powerless to cope with the trend of minority group concentration in public housing. The Commission on

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<sup>95</sup> 1959 Report, p. 475.

<sup>96</sup> *Ibid.* Pressure within localities to curb the extension of public housing from going into more favorable sites has been in the form of forcing the local authority to reduce the construction of the number of planned units or by requiring a referendum before any public housing can be built.

Race and Housing observed that ". . . the conclusion seems justified that public housing has served, on the whole, to sustain and probably intensify racial segregation."<sup>97</sup>

### Urban Renewal Administration (URA)

Until 1949, urban renewal was undertaken by a few states that had passed laws granting private developers tax exemptions to redevelop blighted areas in their cities. With the passage of the Housing Act of 1949, there was recognized that a comprehensive urban renewal program was necessary to erase the blight defacing American cities. Federal programs beginning with the 1949 act were designed to assist the cities in solving the problems of blighted areas. Toward that end the Housing Act of 1949 asserted:

. . . the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family. . . .<sup>98</sup>

Title I of the Act provided for an urban redevelopment program under which land cost in slum areas would be written down to a price attractive for redevelopment.<sup>99</sup>

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<sup>97</sup>*Where Shall We Live?*, p. 31.

<sup>98</sup>U. S., Congress, House, Committee on Banking and Currency, *Hearings, Housing Act of 1949*, 81st Congress, 1st Session, 1949, p. 1. Hereafter cited as *Hearings, Housing Act of 1949*.

<sup>99</sup>*Forbidden Neighbors*, p. 244.

Federal grants paid two-thirds of the net cost of purchasing and clearing redevelopment sites approved by local urban renewal authorities. In addition, when a capital grant to a locality was involved, the government made relocation payments to individuals, families and business concerns displaced. Although public housing authorities could benefit from the writing down of land, the program was designed primarily to aid private developers.<sup>100</sup>

After the urban redevelopment program had been in existence for a short time, two facts became evident. First, there were no houses available for the slum-dwellers who were to be displaced from the sites. Secondly, slum-dwellers were largely minority groups to whom housing in new areas was denied.<sup>101</sup> The concentration of minority groups in the decaying cores of the cities, together with their forced immobility, meant that urban renewal had a great impact on them. Too often urban redevelopment officials and realty groups saw the program as an opportunity to get rid of the minorities.<sup>102</sup> Little effort was made to administer the program to emphasize acquisition of vacant land or insistence upon projects which would favor rehousing of the minorities. This occurred in spite of the admonition given by Raymond M. Foley, then Housing and Home Finance Agency

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<sup>100</sup>Lynd, *op. cit.*, p. 35.

<sup>101</sup>*Forbidden Neighbors*, p. 244.

<sup>102</sup>*Ibid.*, p. 245.

Administrator, before the House Committee on Banking and Currency. Foley said:

. . . eliminating slum and blighted areas and making the land therein available for redevelopment cannot be separated from the necessity for providing the housing necessary for the families now living in the slums. Any slum clearance program which fails to assure adequate rehousing for these families will be merely aggravating their problems. . . . Such a short-sighted policy imposes unusual hardship on families of minority races who comprise a considerable portion of our slum population and for whom the problems of relocation are particularly difficult.<sup>103</sup>

The hope for some of the displaced families would have been the public housing program. However, in the two sessions of the Eighty-third Congress, 1953 and 1954, Congress failed to appropriate public housing funds. Groups like the National Association of Home Builders, and the American Federation of Labor--Congress of Industrial Organizations have estimated that from 1960 to 1965 at least 2,000,000 new dwellings were needed yearly to replace substandard housing, reduce overcrowding, and house the rapidly increasing population.<sup>104</sup> The Housing Act of 1949 provided for 810,000 public housing units to be built within six years, but as Michael Harrington has pointed out, less than half this number had been completed by 1960.<sup>105</sup> Since private industry has maintained a building pace of an estimated 1,000,000

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<sup>103</sup>*Hearings, Housing Act of 1949*, p. 46.

<sup>104</sup>Michael Harrington, "Slums, Old and New," *Commentary*, XXX, No. 2 (August, 1960), 118.

<sup>105</sup>*Ibid.*

units each year approximately 1,000,000 dwelling units were not being built for the American people. These were homes needed for low-income families for whom private builders did not provide. Their plight was compounded by urban renewal projects that actually reduced the amount of housing available to them. A study in 1961 made by Professor L. K. Northwood of the School of Social Work, University of Washington, reported that

During the first 10 years of urban renewal, approximately 115,000 housing units were built or in process by 1959. These were planned to replace 190,500 original dwelling units--a net loss of 75,500. About 56 per cent of the families displaced were non-whites. This process is expected to continue as the over-crowded slums are cleared; a special problem is thereby set up in finding other housing for Negroes.<sup>106</sup>

Experience under the 1949 Act showed that to be effective urban renewal had to cover a much broader program than it did. In 1953, the President's Advisory Committee on Government Housing Policies and Programs felt the existing program offered only piecemeal thrusts at occasional slum pockets without curbing the spread of urban blight. The Committee observed that "the tight relationship between cause and effect in slums must be held in sharp focus, and we must insist upon dealing with both if we are to get rid of either."<sup>107</sup> To this end, the Congress included in the Hous-

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<sup>106</sup>Quoted in *Housing Report*, pp. 107-108.

<sup>107</sup>U. S. President, Advisory Committee on Government Housing Policies and Programs, *Recommendations on Government Housing Policies and Programs* (Washington: U. S. Government Printing Office, December, 1953), p. 109.

ing Act of 1954 new provisions which would facilitate a broadened program of urban redevelopment and provide housing for families displaced by slum clearance and urban renewal.

The Urban Renewal Administration (URA) was established in 1954 as a constituent unit of the HHFA to administer the slum clearance and urban redevelopment programs authorized by the Housing Acts of 1949 and 1954.<sup>108</sup> Since the 1949 legislation appeared only to nibble at the overall problem, the 1954 Act broadened the slum clearance concept to include more community planning so that workable programs might be realized. To that end the legislation required communities seeking federal assistance to draft "a program for community improvement" including, in addition to slum clearance, a plan for strict code and zoning enforcement, a comprehensive community program, a neighborhood-by-neighborhood analysis of blight, adequate financing, housing for displaced families and community-wide citizen participation in the total plan.<sup>109</sup>

Communities complying with the requirements set down by the HHFA and the PHA received loans to assist planning and working capital for acquiring land and preparing the project area for its reuses.<sup>110</sup> In addition, federal grants paid two-thirds of the net cost of these activities, that is, the difference between what they cost and the price received

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<sup>108</sup> *1959 Report*, p. 480.

<sup>109</sup> *Housing Report*, p. 82.

<sup>110</sup> *Ibid.*

for the land. Between 1949 and the end of 1961, Congress appropriated grants of two billion dollars for urban renewal projects. When President Kennedy signed the Housing Act of 1961, another two billion dollars were added to the program. As of April 30, 1961, there were 786 communities operating under active urban renewal programs.<sup>111</sup>

Urban renewal brought problems for Negro housing. Adequate relocation of those displaced by slum clearance and other community projects was foremost. Relocation was difficult because of impediments met in the housing market. Relocation for many Negroes meant moving from one overcrowded slum to another, creating further pressure on the limited supply of housing available. The primary responsibility for rehousing families displaced by urban renewal rested with the communities, but the HHFA and the URA also shared responsibility under the Housing Acts. Before any community could gain certification of its urban renewal project, the HHFA Administrator had to give his stamp of approval to the rehousing programs contemplated by the community. Once approval had been given, localities were left free to execute the program with very little supervision by the URA.<sup>112</sup> Left to their own devices, the practices of local relocation authorities failed to provide sufficient and

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<sup>111</sup>*Ibid.*

<sup>112</sup>1959 Report, p. 480.

adequate housing for the displaced.<sup>113</sup>

In addition to relocation problems, the redevelopment phase of urban renewal has resulted in an absolute reduction in living space for nonwhites: Since redevelopment projects are mainly in the hands of private investors, the housing that was built was geared to the middle and upper middle-income groups. New apartment houses, whose rents ranged from seventy-five to one hundred dollars per room, did not add to the supply of low-cost housing available to the vast majority of the displaced poor. Civic promotions also cut the figure of available housing. Staughton Lynd has pointed out that

In subordinating all other considerations to the happy marriage of private profit with the public tax base, urban renewal programs sometimes decrease rather than increase the housing supply. In this category are the many projects for downtown civic centers, high-rise office buildings, and industrial parks. . . . Most of these nonresidential structures are clearly of obvious value. But all such projects erected on former residential sites, decrease the total housing supply by the simple fact that they tear down homes and put none in their place.<sup>114</sup>

The Commission on Civil Rights has indicated that the clearance of slums and their replacement with housing accommodations beyond the means of most Negroes has given

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<sup>113</sup>A study made by Professor H. W. Reynolds of the University of Southern California showed that in 41 cities undertaking urban renewal projects: 93% of the relocated were nonwhite; 70% entered nearby housing that was substandard; 80% of the families paid higher rent for their new housing. Described in *Housing Report*, p. 90.

<sup>114</sup>Lynd, *op. cit.*, p. 36.

rise to the question whether slum clearance is being used for "Negro clearance."<sup>115</sup> In 1961, the Commission reported a continuance of this trend stating that

If URA maintains a "no policy" posture it may reduce the inventory of available nonwhite housing with no guarantee that the rebuilt sites will be available to all. In the face of a closed housing market, urban renewal, though it beautifies cities, may offer nothing more than increased misery to low-income nonwhites.<sup>116</sup>

The one promising federal program to encourage housing for families displaced by urban renewal projects is known as Section 221 housing. This section was included in the Housing Act of 1954. Technically, it was put under the jurisdiction of the FHA but it is considered an important tool for relocation purposes. Section 221 authorized the insurance of mortgages on low-cost housing for sale to families displaced from urban renewal areas and by other governmental action such as highway displacement. Under Section 221, mortgage insurance with a maximum term of forty years and a minimum down payment of only \$200 was available if requested by a community undertaking urban renewal and certified by the HHFA Administrator. This kind of housing could be "built anywhere within the city limits of a community for which it was certified, or in an outlying area if the government thereof consented in writing."<sup>117</sup>

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<sup>115</sup>1959 Report, p. 488.

<sup>116</sup>Housing Report, p. 108.

<sup>117</sup>Ibid., p. 93.

Section 221 by 1961 had not resulted in encouraging the large quantities of low-cost housing required for displaced persons even though the terms appeared to be very attractive. Racial restrictions on sites for 221 housing and the low limitation on the maximum mortgage insurance authorized appeared to be the chief obstacles to the program.<sup>118</sup> Because of the unavailability of open land for Negro housing due to the existing neighborhood patterns of occupancy, when Section 221 mortgage money was utilized, the housing that was built under the program was constructed in all or heavily Negro areas. The limitation on the maximum mortgage insurance has served as an additional inhibition. Under the program, the mortgage limit was \$9,000 and \$10,000 for high-cost areas. A basic drawback within the authorized mortgage limits was the high cost of land when made available for the construction of new housing for Negroes. Mortgage limits were not ample enough in the urban or suburban areas with their inflated land prices.

The question of urban renewal and the relocation problem has led to an aggravation of the housing problem and has intensified race relations. The relocation of families from renewal sites required a broad range of choice. The agencies responsible for relocation work were confronted with an almost insoluble problem--finding adequate housing for displaced families without disturbing racial patterns.

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<sup>118</sup>*Ibid.*, pp. 94-100.

If they tried to upset the web of housing discrimination, or failed to do so, a public uproar might follow.

Dennis Clark significantly observed:

. . . urban renewal became involved with civil rights problems at the time when the civil rights of Negroes were a burning national issue . . . the full social significance of the process in relation to such problems as race relations had not been clearly recognized by the local agencies spurring renewal programs.<sup>119</sup>

The civil rights demonstrations and riots that began in the summer of 1964 in part attested to this observation.

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<sup>119</sup>Clark, *op. cit.*, p. 162.

## CHAPTER III

### CONSEQUENCES AND EFFECTS OF RESIDENTIAL SEGREGATION

The people in Harlem know . . . they are living there because white people do not think they are good enough to live anywhere else. No amount of "improvement" can sweeten this fact. Whatever money is now being earmarked to improve this, or any other ghetto, might as well be burnt. A ghetto can be improved in one way only: out of existence.<sup>1</sup>

James Baldwin

#### Residential Patterns: Segregation and Concentration of Negro Population

There are many aspects to racial discord in the United States. To single out any one factor for its cause would be a gross oversimplification of a very complex problem. The historical, sociological, economic and emotional factors of this problem cannot be ignored. A great many groups and people have contributed to it by acts of commission and omission through the years. Certainly, the dearth of Negro housing cannot be overlooked as a compelling force.

Beginning with the "long hot summer" of 1964, this was brought to the fore in the metropolitan areas of the nation. The abject ghetto conditions that prevail in Harlem,

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<sup>1</sup>James Baldwin, *Nobody Knows My Name* (New York: Dial Press, 1961), p. 65.

in the Bedford-Stuyvesant area of Brooklyn, in Rochester, New York, in Newark, Patterson and Elizabeth, New Jersey, or in the Watts district of Los Angeles, are found in cities large and small wherever there is an extensive Negro population. A configuration of tenements, the lack of good schools, inadequate recreational facilities, and the shortage of job opportunities condemn thousands of human beings to lives that approach an emotional sickness.<sup>2</sup>

The nation becomes aware of these conditions when headline-making riots occur and subsequent reports make known the squalorous environment of the Negro ghetto to the outsiders.<sup>3</sup> Nathan Glazer has described how, in New York City, the housing project is an important factor in upsetting the balance of the slums.<sup>4</sup> The so-called normal

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<sup>2</sup>For an account of the high incidence of psychiatric illness among the poor in a slum neighborhood see August B. Hollingshead and Frederick C. Redlich, *Social Class and Mental Illness: A Community Study* (New York: John Wiley and Sons, 1958).

<sup>3</sup>Michael Harrington has pointed out that slums and poverty are often off the beaten track. The transformation of the American city has made the poor invisible to the white middle class who more than likely have made the exodus to the suburban areas ringing the city. They may catch a glimpse of the slums as they commute to work by bus or car or on an occasional shopping trip, but it is not an important experience to them. This kind of poverty is segregated from emotional experience of millions of middle-class Americans who know very little about the miserable housing in the central core of the city where Negroes are increasingly isolated from contact with anyone else. See Harrington, *The Other America*, pp. 9-24.

<sup>4</sup>Nathan Glazer and Daniel Patrick Moynihan, *Beyond the Melting Pot* (Cambridge, Massachusetts: The M.I.T. Press and Harvard University Press, 1964), pp. 63-64.

families who live in projects that are erected around the outer boundary of the slums, leave the remaining slums to become the homes of the old, the criminal, the mentally unbalanced, the most depressed, miserable and deprived.<sup>5</sup> Glazer pointed out that

. . . the slums that ring the projects, and areas that were perhaps barely tolerable before the impact of the projects are now quite intolerable. As we tear down the slums, those that remain inevitably become worse. And what . . . are we to do with the large numbers of people emerging in modern society who are irresponsible and depraved?<sup>6</sup>

Even the more substantial members of the Negro population are never totally withdrawn from this milieu. The Negro middle class in the nation's large cities rarely escape from the near presence of the Negro poor and the criminal. Bordering the lower-class, slum neighborhoods, the Negro middle class suffers the frustrations and psychic assaults of their neighbor slum-dwellers.<sup>7</sup> Because of the federal government's housing policies described in Chapter II and the prejudicial practices of the private housing industry, the middle-class Negro is not far removed from the slums. He is subjected to the same image that the white man has of the slum-dweller. Prejudice becomes institutionalized and

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<sup>5</sup>*Ibid.*, p. 64.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.* Although the Glazer and Moynihan study relates only to the boroughs of New York City, their description is similar to other major metropolitan areas such as Los Angeles, Atlanta, Philadelphia, Chicago and St. Louis. For these descriptions see *1959 Report*, pp. 354-374.

acts as a force that white America uses to keep the Negro down. Michael Harrington recounted the vicious cycle the Negro encounters in white America when he stated that:

White America forces him into a slum, it keeps him in the dirtiest and lowest-paying jobs. Having imposed this indignity, the white man theorizes about it. He does not see it as the tragic work of his own hands, as a social product. Rather the racial ghetto reflects the "natural" character of the Negro: lazy, shiftless, irresponsible, and so on. So prejudice becomes self-justifying. It creates miserable conditions and then cites them as a rationale for inaction and complacency.<sup>8</sup>

The artificial social barriers and the very real economic factors<sup>9</sup> that bar Negroes from the housing market serve to keep people apart and limit the opportunities for understanding and acceptance. Oftentimes this chasm has led to tensions and fear between the white and Negro communities, manifesting itself in violence as Negroes have sought to leave their delimited areas. The harmful effects on the nation and on international relations are immeasurable when

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<sup>8</sup>Harrington, *The Other America*, p. 78.

<sup>9</sup>Better housing for Negroes and income are naturally linked. The Negro market for housing is severely limited compared to that of whites when family income figures are analyzed. The median income of the Negro family in 1960 was only 54% of that of the average white family--\$5,893 for white families and \$3,161 for Negro families. U. S. Housing and Home Finance Agency, *Our Nonwhite Population and Its Housing, the Changes Between 1950 and 1960* (Washington: U. S. Government Printing Office, July, 1963), Table 12, p. 36. Hereafter cited as *Our Nonwhite Population and Its Housing*.

The disparity in incomes is reflected in homeownership. In the last decade Negro homeownership has not kept pace with the growth of white homeownership. Negroes in the 1950's did improve their position somewhat as homeownership edged upward from 35% to 38% between 1950 and 1960. But this increase lagged well behind white householders where a sharp rise in the number of homeowners brought their proportion up from 57% to 64% between 1950 and 1960. *Ibid.*, p. 9.

these occurrences connote the lack of order and control within the nation's societal complex. Since the conditions that have created such hostility have tended to increase in the last two decades, an examination of the problem shows that racial tensions have resulted in no small degree from the rigid patterns of segregation that have evolved in the nation's cities.

By the year 1960, the total nonwhite population of the United States approached 20,500,000 people. Of this figure, more than ninety-five per cent of the nonwhites were Negroes.<sup>10</sup> Although Negroes comprised eleven per cent of the population, they had been restricted to four per cent of the residential area in the nation's urban cities.<sup>11</sup> Negro migrations since 1900 have created this shortage of living space and the problem has been compounded since then by the meager housing opportunities that were made available to them. Seeking greater economic opportunity, there has been a continuous migration from the South. Since the turn of the century, the geographic distribution of Negroes by 1960 saw Negroes comprising only fifty-six per cent of the population in the South.<sup>12</sup> In the 1950's alone, nearly 1,500,000 nonwhites left the South.<sup>13</sup> The movement from farm to city

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<sup>10</sup>The Negro population in 1960 was 18,871,831. U. S. Bureau of the Census, *Census of the Population, 1950 and 1960* (Washington: U. S. Government Printing Office, 1960).

<sup>11</sup>Louis E. Lomax, *The Negro Revolt* (New York: Harper and Brothers, 1962), p. 55.

<sup>12</sup>*Our Nonwhite Population and Its Housing*, p. 2.

<sup>13</sup>*Ibid.*, p. 3.

was not only a northern migration as the South felt a significant Negro movement into its cities. As a result of the shift in the Negro population, the year 1960 showed a nationwide urban nonwhite population of 14,800,000, a gain of 4,800,000 over 1950.<sup>14</sup>

As Negroes moved into urban areas, they gravitated into the central cities. By 1960, 10,300,000, or slightly more than half the nonwhite per cent of population, lived in such communities, a gain of sixty-three per cent over 1950.<sup>15</sup> At the same time, there was a corresponding shift among whites from the cities to the suburbs so that by 1960, fifty-two per cent of the white population lived outside of the central cities.<sup>16</sup> From the standpoint of the nation's 212 standard metropolitan statistical areas, the 1960 census showed divergent patterns for white and nonwhite sections of the population. In the case of nonwhites, seventy-eight per cent lived in the central cities, while only twenty-two per cent were in the suburbs.<sup>17</sup> The failure of most of the nonwhite families to move into suburban communities was not due entirely to their own predilection for the central city environment. It was more the reflection of the lack of housing available to them in most suburban areas because of race or

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<sup>14</sup>*Ibid.*, p. 3.

<sup>15</sup>*Ibid.*, Table 5, p. 22.

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*, p. 3.

their inability to pay for such housing.

The racial influx into the cities has not been the sole reason for the white population's flight to the suburbs. Yet, between the years 1950 and 1960 the twelve largest United States cities lost over two million white residents while gaining nearly two million Negro residents.<sup>18</sup> A projected picture of the future in the principal cities of the United States would clearly be: large nonwhite concentrates (in

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<sup>18</sup>Charles E. Silberman, "The City and the Negro," *Fortune*, LXV, No. 3 (March, 1962), 88.

Former Director of the Census Bureau, Richard M. Scammon, has pointed out that the white flight to the suburbs is not solely due to immigrating Negroes. He has stated that the population shift revealed by the Census occurred even in cities like Minneapolis where the proportion of nonwhites was only 2.4%. Thus, he claimed that the flight was due to fundamental factors in our cities having nothing to do with race. However, he related that the racial problem arose from the fact that with the strong attraction of the suburbs operating on all city residents, only majority group families can take advantage of the homes that are being constructed. *Washington Post*, March 26, 1961, p. E3.

The first major city in the nation to achieve a Negro majority in its population was Washington, D. C. By 1960, the central city was 54% Negro. As one witness before the United States Commission on Civil Rights pointed out: "What has happened is that Negroes have grown largely within the confines of the District of Columbia, while the white population has spread to all of the surrounding suburbs." U. S. Commission on Civil Rights, *Regional Hearings, Washington, D. C.* (Washington: U. S. Government Printing Office, 1962), p. 13. At the same time the nonwhite population in the suburban areas around the District of Columbia was 6.5%.

The Commission on Civil Rights, referring to the "white noose" around the city has said: "There may be relatively few Negroes able to afford a home in the suburbs, and only some of these would want such homes, but the fact is that this alternative is generally closed to them. It is this shutting of the door of opportunity open to other Americans, this confinement behind invisible lines, that makes Negroes call their residential areas a ghetto." *1959 Report*, p. 378.

some cases, majorities as in Washington, D. C.), and large white majorities, with a few segregated Negro enclaves, in the surrounding areas.

The explosive growth of large Negro populations has constituted the large cities' principal problem and concern since World War II. As has been pointed out by the late Morton Grodzins, the Negro migration involved great political, economic, and cultural stakes for the affected metropolitan areas.<sup>19</sup> The more tangible effect so far has been the spreading slums, those areas that city officials talk about when they point to the physical deterioration of areas inhabited by Negroes. When studies and reports are given about juvenile delinquency, fire protection, the burden of welfare payments, or any of a long list of city problems, officials are talking principally about the problems of Negro adjustment to the city. The problems confront the nation's principal cities with a severe crisis--a crisis in black and white.<sup>20</sup> For the large cities were not absorbing and "urbanizing" their new Negro residents rapidly enough. Unlike the slums once inhabited by earlier European immigrants, Negro ghettos were not acting as the incubator of a new middle class.

The first consequence of this racial schism within

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<sup>19</sup>Grodzins, *Scientific American*, XCVII, No. 4, 33-44.

<sup>20</sup>Charles Silberman, *Crisis in Black and White* (New York: Random House, 1964), pp. 17-35.

the cities is a spreading of the slum. Since there is no free housing market for Negroes, limited areas have been carved out and "restricted" for their occupancy, "restricted" both by the private housing industry and even public officials. The latter, concerned with the public housing projects, invariably followed the existing neighborhood patterns. Thus, public housing all too often became equated with Negro housing. If these public housing units were not built within the slums themselves, they formed a perimeter around the deteriorated area.<sup>21</sup>

Because the Negro population has increased faster than the living space made available,<sup>22</sup> areas that house Negroes become overcrowded by the conversion of one-family houses to multiple dwellings and by squeezing two or more Negro families into apartments previously occupied by a single family. An overview of this situation tends to show that the housing occupied by Negroes is more expensive, more crowded, in greater need of repair, and is marked by the greater lack of civilities (such as private bathrooms) than

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<sup>21</sup>Central Harlem occupies only a 3.5 square mile area of upper Manhattan. However, 232,000 people are packed into the area, 94% of whom are Negro. It is estimated that if the population density in some of Harlem's worst blocks prevailed in the rest of New York City, the entire population of the United States could fit into three of its five boroughs. "No Place Like Home," *Time*, LXXXIV, No. 5 (July 31, 1964), 11.

<sup>22</sup>Between 1950-1960 the nonwhite population increased at a faster rate than the white. The nonwhite percentage increase during the decade went from 17 to 27% while the white percentage increase rose from 11 to 18%. *Our Nonwhite Population and Its Housing*, Table 1, p. 15.

the housing occupied by whites with the equivalent incomes.

The very conditions of life in Negro slum neighborhoods subsequently lead the greater white population to resist any Negro expansion at all. Whether this Negro expansion might be due to "blockbusting," the erection of Negro public housing projects, or the attempt to find housing for Negroes displaced by urban renewal projects in adjacent white areas, hostile feelings are aroused in white neighborhoods. The prevalent reaction against any Negro intrusions is that displaced families from slum sites are not the best pioneers in penetrating all-white neighborhoods. Citing the problem, Grodzins has related that

The racial attribute--skin color--is added to the social attributes of lower class behavior. . . . While Negroes, like other urban immigrants, can lose undesirable social attributes, they cannot lose their color. They therefore do not have the mobility of other immigrant groups. They are racially blocked, whatever their social bonafides.<sup>23</sup>

Negroes are not, of course, the only disadvantaged group in the large cities. The Puerto Rican population in New York had reached 700,000 in 1960 and cities like Cincinnati, Baltimore, St. Louis, Detroit, and Chicago have received a steady stream of impoverished whites from the southern Appalachian Mountains.<sup>24</sup> But Puerto Ricans and Appalachian whites affect only a limited number of cities and

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<sup>23</sup>Morton Grodzins, "Segregation in the North," *The Progressive*, XXIX, No. 1 (January, 1959), 66.

<sup>24</sup>Hal Bruno, "Chicago's Hillbilly Ghetto," *The Reporter*, XXX, No. 12 (June 4, 1964), 28-31.

only in a limited way.

City officials and planners face many problems but the foremost problem in almost all large cities and many smaller ones is the Negro. Most of the Negroes in the North have been crowded into the slums of the twelve largest cities, which today hold sixty per cent of the Negroes outside the deep South.<sup>25</sup> Acceleration of Negro populations in the nation's cities is evident. Since 1940 the Negro population of New York City has increased nearly two and one-half times to 1,141,000 by 1960. In Philadelphia, Negroes have doubled in number to 535,000, or twenty-seven per cent of the city's population between 1940-1960. The Negro population has more than tripled in twenty years to 487,000, or twenty-nine per cent of the city's population in Detroit. While in Los Angeles the Negro population has almost increased sixfold since 1940, going from 75,000 to 417,000.<sup>26</sup>

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<sup>25</sup>The figures cited here are drawn from: Silberman, *Fortune*, LXV, No. 3, 90 and *Our Nonwhite Population and Its Housing*, p. 28.

<sup>26</sup>These increases have resulted in a heavy concentration of most Negroes into one or two or more severely constricted areas, with some small scattering of colored families in other sections of the city. See *1959 Report*, Charts XXII-XXXI, pp. 355-364. A general observation would indicate that the larger the proportion of Negroes in the total population of a city, the higher is the degree of their concentration. One-third of Philadelphia's Negro population, now approximately 600,000, is concentrated in an area of four square miles. *Minneapolis Sunday Tribune*, August 30, 1964, p. 1.

### Social Consequences

The effect of residential segregation has intensified the needs and problems which are evident in the many Negro communities around the country. Well-documented reports constantly point out that these needs and problems are the direct result of past and present discrimination and exclusion based on race.<sup>27</sup> As suggested by the National Urban League, it has resulted in a large segment of the American Negro population lagging behind other Americans in every type of measurement which can be used to determine social and economic well being.<sup>28</sup>

Since this study is not concerned with the total consequences of racial segregation, only those indices which can be directly related to segregated and poor housing will be noted here.

1. Despite an improvement in the condition of Negro housing since World War II, nearly half of all

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<sup>27</sup>There are numerous reports relating to the economic and social effects of residential segregation. Excellent descriptions can be found in the following: *Equal Opportunity in Housing*, issued in 1955 by the American Friends Service Committee; *Where Shall We Live?; 1959 Report*, pp. 343-397; Chicago Urban League, *Report to the Illinois House Executive Committee, 72nd General Assembly* (Chicago: Chicago Urban League, 1961).

<sup>28</sup>National Urban League, *A Statement - Urging a Crash Program of Special Effort to Close the Gap Between the Conditions of Negro and White Citizens* (New York: National Urban League, June 9, 1963). This statement contains the request of the Executive Director of the National Urban League, Whitney M. Young, for a "Marshall Plan" program to close the wide economic, social and educational gap between Negroes and whites.

houses and apartments occupied by Negroes are still classified in the Census as dilapidated or deteriorating. Forty-four per cent of the housing units either owned or rented by Negroes have been adjudged substandard.<sup>29</sup> Only fifteen per cent of all occupied housing units of the white population in the nation are in this condition.<sup>30</sup>

2. Although the housing available to the Negro is poorer than that available to the white person, the rents charged Negroes are nearly as great as those paid by the whites. In terms of home ownership, it has been determined that the nonwhite buyer of a house gets less for his dollar than the white person who buys a house in the same price category.<sup>31</sup>

3. Coupled with the condition mentioned above is the fact that the median income of Negro families is only fifty-four per cent of the white. This has meant that Negroes can only acquire housing by "doubling up," that is, many families sharing an apartment unit or extensive overcrowding in homes that are owned. Between 1950-1960, among nonwhite families the number of overcrowded units increased over the decade from nearly one

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<sup>29</sup> *Our Nonwhite Population and Its Housing*, p. 10. Standard housing units are units that are not dilapidated and have private toilets, baths and hot running water.

<sup>30</sup> *Ibid.*

<sup>31</sup> *1959 Report*, p. 345.

million in 1950 to 1,300,000 in 1960.<sup>32</sup>

4. While good housing does not guarantee good behavior, bad housing has contributed to disorganization and the breakdown of the Negro family and hence to juvenile delinquency. In addition there is a direct relation between congested neighborhoods and those areas in a city having the highest rates of tuberculosis and infant mortality, the greater incidence of fires and a higher ratio of crimes.<sup>33</sup>

5. The effects of minority housing inequalities causes the whole city to suffer. Disease, fire, building deterioration, and crime are major items in any city's budget. With the movement of middle- and higher-income residents to the suburbs, the city's costs have increased while its revenues have been cut. In 1958, as estimated by the Commission on Civil Rights, the substandard twenty per cent of our urban centers, containing

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<sup>32</sup>*Our Nonwhite Population and Its Housing*, p. 12.

An average of more than 1.5 persons to each room is considered a measurement of overcrowding in a housing unit.

<sup>33</sup>*1959 Report*, pp. 386-394.

Judge Justine W. Polier of the Children's Court and Family Court of New York City has emphasized the close relationship between housing and the family conditions of children and delinquency. In a study of 500 children who came into her court, she found that the majority of these children were living in substandard housing areas, and an even higher percentage came from broken homes. Her account cited the influence of slum living upon Negro children. Living in slums, knowing that it is a Negro area and seeing all around them badges of inferiority and discrimination, has caused young Negroes to lose their sense of personal worth and hope for their own future. *Ibid.*, pp. 388-389.

some thirty-three per cent of the urban population, accounted for forty-five per cent of the total city costs but yielded only six per cent of the real estate tax revenues.<sup>34</sup>

6. The schools available to slum-dwellers are inferior. Located in the oldest sections of cities, they are likely to be overcrowded, antiquated, poorly equipped, subjected to periodic turnovers of teaching staffs, and more prone to have double shifts during the day because of the crowded conditions. But above all, they are segregated in fact although not by law.<sup>35</sup> Arnold Rose, who assisted Gunnar Myrdal in writing *An American Dilemma*, has reiterated the conclusion voiced by many observers that *de facto* segregation in the public schools will be maintained as long as residential segregation exists. In a recent study of the problem Rose maintained that this is the major problem of race relations in the North and West. He has stated that

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<sup>34</sup>*Ibid.*, p. 390.

Louis Lomax in *The Negro Revolt*, pp. 56-57, reported how housing discrimination increased welfare costs for Cook County, Illinois. In his account the Illinois Aid to Dependent Children (ADC) report for 1956 showed that a major cost item of the welfare budget went to housing unwed and deserted mothers, a high proportion of whom were Negroes. The report showed that it cost Illinois taxpayers \$83.77 a month to house the average Negro ADC case as compared with \$64.84 for the average white ADC case. This discrepancy was caused solely by housing discrimination, costing Illinois taxpayers four million dollars a year in Cook County alone.

<sup>35</sup>Arnold Rose, *De Facto School Segregation* (New York: National Conference of Christians and Jews, 1964), pp. 14-17.

The ultimate solution to the "hard-core" problem of racial unbalance in schools would obviously be residential desegregation. Despite the Supreme Court's 1948 decision that restrictive covenants could not be court enforced, and the introduction since 1958 of an increasing number of "fair housing" statutes and ordinances, plus the presidential order of 1962 restricting government guaranteed loans for segregated housing, residential segregation is decreasing very slowly.<sup>36</sup>

Summarizing the consequences of the social and economic limbo from which there appeared to be no escape, the Commission on Civil Rights compared the situation to a vicious circle. The Commission said:

The effect of slums, discrimination, and inequalities is more slums, discrimination, and inequalities. Prejudice feeds on the conditions caused by prejudice. Restricted slum living produces demoralized human beings--and their demoralization then becomes a reason for keeping them in their place.<sup>37</sup>

It is this same self-fulfilling prophecy utilized as a rationale by the majority white society that has caused a growing sense of alienation among Negro intellectuals epitomized by writer James Baldwin.<sup>38</sup> More plaintively voiced by Ralph Ellison, author of *The Invisible Man*, is his succinct description of the Negro human condition. When a Negro utters the phrase "I'm nowhere," it expresses the feeling borne by many Negroes that they have no stable, recognized place in society. Ellison has concluded that

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<sup>36</sup>*Ibid.*, p. 54.

<sup>37</sup>1959 Report, p. 392.

<sup>38</sup>This is best described in his *The Fire Next Time* (New York: Dial Press, 1963).

When Negroes are barred from participating in the main institutional life of society . . . they lose one of the bulwarks which men place between themselves and the constant threat of chaos. For whatever the assigned function of social institutions, their psychological function is to protect the citizen against the irrational, incalculable forces that hover about the edges of human life. . . .

And it is precisely the denial of this support through segregation and discrimination that leaves the most balanced Negro open to anxiety . . . he cannot participate fully in the therapy which the white American achieves through patriotic ceremonies and by identifying himself with American wealth and power. Instead he is thrown back upon his own slum shocked institutions.<sup>39</sup>

Private Housing Industry Practices:  
Mechanisms of Discrimination

American public opinion concerning the housing of minority groups has deep roots, intertwined as it is with history and social experience in addition to its pattern of racial thinking. In a society where the institution of slavery has left a stigma on Negroes and where the immigration of diverse peoples has played an important role in domestic politics, American attitudes on race have developed.<sup>40</sup> The roots in racially segregated housing are many and there is a variety of causes. Housing expert Robert C. Weaver has attributed housing segregation to three major sources: prejudice, the influence of upper-class patterns of residential exclusion, and the fear that minorities will subvert local

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<sup>39</sup>Ralph Ellison, "Harlem Is Nowhere," *Harper's Magazine*, CCXXIX, No. 1371 (August, 1964), 56-57.

<sup>40</sup>See C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1957) and Oscar Handlin, *Race and Nationality in American Life* (New York: Doubleday and Company, Inc., 1957).

residential standards.<sup>41</sup> Another likely factor can be drawn from the comment of Dennis Clark who has stated that "only in a society rich enough for housing to become a status device could racial restrictions become so much of a force."<sup>42</sup> The group prejudices of the white population, whatever the cause, are the basis for the segregation of minority groups; the actual controls and restrictions are administered by the housing industry.

Principals in the private housing industry have disclaimed responsibility for any part in segregation. Real estate brokers, builders and mortgage finance institutions proclaim themselves as neutral agents who serve the public and are only responsive to the public's needs--or demands. Their view is that of a business psychology that utilizes a credo of doctrinaire "free enterprise." In a keenly competitive business field that is not too difficult to enter, the slogan of free enterprise has an appealing ring, even though government intervention and aid has permeated the whole housing industry.<sup>43</sup> Shunning any social viewpoint, motivated

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<sup>41</sup>Weaver, *op. cit.*, p. 359.

<sup>42</sup>Clark, *op. cit.*, p. 35.

<sup>43</sup>*Ibid.*, p. 94.

Because the homebuilding and real estate brokerage firms have traditionally been easy businesses to enter, there has been a great deal of chaos and erratic activity in the economics of the housing market. To bring some order and stability and better business practices into the industry, their own so-called regulatory bodies were formed--the National Association of Home Builders in the 1940's and the National Association of Real Estate Boards in 1908. Both

only by business principles for profit, they contend the responsibility for inducing racial tolerance belongs to other institutions, for example, the churches and educational groups. Yet, as the Commission on Race and Housing has declared: "It is the real estate brokers, builders, and mortgage finance institutions which translate prejudice into discriminatory action."<sup>44</sup> In the main, their services are extended to Negroes only under special conditions. Whatever their motivations and personal convictions on racial prejudice, the housing industry has the power to make important decisions concerning access to housing. Their unwillingness to make their services fully available to the members of minority groups has had the effect of creating, for those groups, a separate market in which only a limited quantity of housing is offered for sale.<sup>45</sup>

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have their codes of ethics, both have helped shape legislation and property codes at the state and local levels and both of their national associations maintain effective lobbies in Washington. Dennis Clark has surmised that though they have established a minimum of order in the housing industry, it is the changing technology of homebuilding and the influence of government programs that are imposing more rational construction and business procedures. Mass production, government insured mortgages requiring appraisals, and minimum property standards have dictated basic requirements that must be met. *Ibid.*, p. 85.

<sup>44</sup>*Where Shall We Live?*, p. 22.

In the housing industry, this attitude is not universal. Morris Milgram, builder of integrated housing developments and an advocate of open occupancy, has taken a contrary viewpoint. Testifying before a housing subcommittee in 1955, he asked the national government to make its position clear and refuse financial assistance in the form of mortgage insurance to builders who discriminate. *Investigation of Housing, 1955*, p. 615.

<sup>45</sup>*Where Shall We Live?*, p. 23.

### Real estate brokers

There is no reason to believe that real estate brokers are more racially prejudiced than any segment of the American population. However, the power exercised by local real estate associations has led its membership consistently to practice discrimination. The existing "Code of Ethics" of the National Association of Real Estate Boards is a modification of an earlier one which had more blatant racial overtones. It states that

A realtor should not be instrumental in introducing into a neighborhood a character of property or use which will clearly be detrimental to property values in that neighborhood.<sup>46</sup>

The Code, with its racial tinge, has been current so long in housing circles that to break it is to be branded a professional renegade. The broker who would permit Negroes to purchase in an all-white area faces almost immediate ostracism, if not expulsion.<sup>47</sup> The intent of the Code is to

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<sup>46</sup>Quoted in *Forbidden Neighbors*, p. 157.

Reacting to growing pressure by the federal government and many states for an end to racial restriction in housing, the National Association of Real Estate Boards, early in 1963, clarified its "Code of Ethics." It was not accomplished by any change in the actual wording but by the issuance of a booklet interpreting the "Code of Ethics." A specific illustration in the booklet is intended to show that the Code is expansive enough to permit a realtor to make a sale to a Negro in a white neighborhood. *Minneapolis Morning Tribune*, March 16, 1963, p. 3.

<sup>47</sup>For an account of how a real estate salesman was dismissed for violating the racial code by selling to Negroes see U. S. Commission on Civil Rights, *Regional Hearings, San Francisco, California* (Washington: U. S. Government Printing Office, 1960), p. 484. Hereafter cited as *Regional Hearings, San Francisco*.

enforce uniform action by real estate brokers. Fearing the reaction of neighborhood residents and colleagues, the broker will negotiate the sale or rental of property to Negroes only in areas considered appropriate for minority residence. To do otherwise, to "break" white neighborhoods, it is feared, would bring serious harm to their business.<sup>48</sup>

A family setting out to buy a home is largely dependent upon the services of real estate brokers, home builders, and mortgage finance institutions. This dependency has enabled real estate brokers to supplement their concept of business ethics with practical devices to sustain racial discrimination by guarding the racial homogeneity of white neighborhoods. For many years, real estate dealers and appraisers have been taught to value homogeneity and avoid the hazards of "incompatible groups." College courses in real estate are even directed toward this end.<sup>49</sup> Anything else would run counter to the traditional beliefs that entry of nonwhites into a neighborhood damages property values and brings the danger of a prospective slum area.

Asserting that they do not initiate discrimination but only follow the wishes of their sellers, there is definite evidence that brokers generally take a more independent view of their responsibilities, and will refuse to participate in transactions which they consider improper, regardless of

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<sup>48</sup>*Where Shall We Live?*, p. 23.

<sup>49</sup>*Forbidden Neighbors*, p. 157.

the wishes of individual sellers and buyers. According to the Commission on Race and Housing, there is no record of any real estate board's having announced that introduction of a minority buyer into a white neighborhood was permissible if the seller were willing.<sup>50</sup> Testimony given before the Commission on Civil Rights has borne this out and prompted Commissioner Hesburgh to assert:

. . . the information seems to be everywhere that no real estate broker will say he discriminates. And yet, in fact, when you get down to the individual people--minority groups looking for houses--it turns out that practically every real estate broker they go to says, for some reason or other, "I can't get you a house except in this section of the town."<sup>51</sup>

Oftentimes, the activities of real estate boards have gone beyond the scope of mere business transactions. In fact the boards have taken the lead in defending racial segregation in the area of public policy.<sup>52</sup> Real estate boards have been the leading opponents to proposed municipal laws against

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<sup>50</sup>*Where Shall We Live?*, p. 24.

<sup>51</sup>*Regional Hearings, San Francisco*, p. 496.

In the Washington, D. C. hearings in 1962, the Commission sought information from the District's Board of Realtors on the willingness of brokers to show homes to Negroes in white neighborhoods. The president of the Board testified it was not unethical for a realtor to show a house in a white area to a Negro if the people in the area wanted to sell to Negroes. However, the question of whether it was unethical for a realtor to refuse to show a house to a Negro if the owner and the people of that area had no objection or if the owner alone had no objection remained unanswered. U. S. Commission on Civil Rights, *Civil Rights U. S. A./Housing in Washington, D. C.* (Washington: U. S. Government Printing Office, 1962), p. 13. Hereafter cited as *Civil Rights U. S. A.*

<sup>52</sup>*Where Shall We Live?*, p. 24.

discrimination in private housing in various cities throughout the country. In Los Angeles the real estate board had urged a constitutional amendment to reverse the United States Supreme Court's decision against judicial enforcement of race-restrictive housing covenants.<sup>53</sup> In 1964 the California Real Estate Association backed and financed a constitutional referendum to negate the passage by the California legislature in 1963 of the Rumford Act. Known as *Proposition 14*, the constitutional referendum was passed in the fall of 1964 by a two to one majority. Thus, legislation prohibiting discrimination on the basis of race, religion, or national origin in the sale or rental of public and publicly assisted housing and all privately financed multiple dwellings with five or more units was revoked.<sup>54</sup> There were indications that the National Association of Real Estate Boards also had a strong interest in killing the Rumford Act as the first step in a national campaign to destroy fair housing laws in other states and cities that had adopted them.<sup>55</sup>

Another aspect of the real estate business is the exclusion of Negro real estate brokers from the professional

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<sup>53</sup>*Ibid.*

<sup>54</sup>*Trends in Housing*, VII, No. 1 (January-February, 1964), 7.

<sup>55</sup>"Fair Housing in Peril," *The Progressive*, XXVIII, No. 9 (September, 1964), 7.

associations of real estate men, the real estate boards. Real estate as a business is controlled largely by white personnel. Only a few Negro brokers have been admitted to these associations and only in a few cities.<sup>56</sup> Their exclusion, the Commission on Race and Housing has said, testifies to the racial attitudes of the real estate fraternity and symbolizes the separate housing market for minority groups.<sup>57</sup> Despite the fact that a few Negroes have been able to enter the real estate brokerage business, most Negro "realists" are excluded from an active role in the affairs of the organization pertaining to that business. The white real estate boards are insulated from the minority point of view. This all-white character of the industry has had deep significance in relation to residential segregation. As Dennis Clark has commented:

The inadequacy of Negro representation in the real estate field has obviously served to entrench the mentality which produces discriminatory restrictions. . . .It is a condition for the conduct of real estate activity along racist lines.<sup>58</sup>

#### Home builders

Few private builders, whether utilizing governmental guarantees or not, will sell on an open, nondiscriminatory basis. Their most effective and widely used method of exclusion is the simple refusal to sell to Negroes. This

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<sup>56</sup>*Civil Rights, U. S. A.*, p. 14.

<sup>57</sup>*Where Shall We Live?*, p. 25.

<sup>58</sup>Clark, *op. cit.*, p. 86.

practice has been normally followed by large-scale builders such as Levitt and Sons in the number of Levittowns they have erected. Only a few builders, in various parts of the country, have challenged the definite racial assumptions and practices of the home building industry and offered their products to an unsegregated market. Notable exceptions are California builder Edward P. Eichler and Morris Milgram of Modern Community Developers, both considered pioneers in the building of interracial housing communities.<sup>59</sup> Their experience has confirmed the existence of strong opposition to interracial housing by other builders, real estate and financial interests, and local government.<sup>60</sup> To allay this formidable opposition, nondiscriminatory builders have sought sites where the presence of nonwhites would meet with the least objection.<sup>61</sup>

The mass-production nature of the home building industry in the last two decades has magnified the power of

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<sup>59</sup>See *Race and Housing, An Interview with Edward P. Eichler, President, Eichler Homes, Inc.* (The Fund for the Republic, 1964). See also, Eunice and George Grier, *Privately Developed Interracial Housing: An Analysis of Experience* (Berkeley: University of California Press, 1960).

<sup>60</sup>Milgram was the developer who wished to build an interracial community on the outskirts of Deerfield, Illinois. In this celebrated case, the village government condemned the land that was to be utilized in building the project for a public park. After a number of appeals, this action was upheld by the courts in 1963.

<sup>61</sup>Despite their attempts, interracial developers have met concerted opposition in Western Springs, Illinois; Milpitas, California; Rutledge, Pennsylvania, and Creve Coeur, Missouri when it became known that integrated communities were being contemplated. See *Housing Report*, pp. 132-138.

builders to shape the character of communities. Modern developers build not just houses but communities and by doing so they have helped to determine the racial patterns of the developments that have been erected. In creating housing developments exclusively for whites and others exclusively for nonwhites, they have intensified residential segregation. Builders permit nonwhites to buy or rent only in developments specifically intended for minority occupancy. Since there are very few of these, the result is to exclude nonwhites from the larger and better part of the new housing supply.<sup>62</sup>

The power of private builders explains the increased growth of residential segregation in the last twenty years. Their power is the initial impact of sales as their control of occupancy here ends. But once a pattern of exclusion has been established in an entire community, it becomes increasingly difficult to change. Most builders rationalize by claiming business necessity. They claim that financial institutions and local governments insist upon racial segregation as a condition for their cooperation in home building enterprises.<sup>63</sup> The prevalent attitude among builders is that if Negroes were admitted to a development in a white area, they would lose their ability to obtain funds to finance the project or they would be hampered by local govern-

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<sup>62</sup>*Where Shall We Live?*, p. 26.

<sup>63</sup>*Ibid.*, p. 27.

ments from gaining the necessary building permits and approvals that have to be granted by these authorities. A non-discriminatory policy is considered a business risk which the large majority of builders have decided not to undertake.

### Financial institutions

Mortgage finance institutions have provided major support for racial segregation by their policy of lending to nonwhites only in certain areas and refusing to finance the purchase of housing in white neighborhoods. Since World War II Negro home buyers have frequently been able to obtain mortgage funds. However, these funds have been granted under conditions that have caused Negroes to pay a differential for their mortgages because of the age and location of the homes they can purchase. Generally, the mortgage loans they can obtain are for housing in segregated or depressed neighborhoods. This restriction to certain racial districts is a serious form of discrimination. It not only serves to sustain segregation but it places Negroes at a disadvantage in terms of mortgage credit because the properties in the areas where they can buy are riskier from the lender's standpoint.<sup>64</sup>

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<sup>64</sup>*Ibid.*, p. 29.

There are notable exceptions to the general conditions described above. The Section 221 program, having the potential for aiding low-income nonwhites to obtain decent housing and improve their environment, has worked well in areas where local FHA offices took special measures to assure its success. According to the Commission on Civil Rights, the accomplishments of Section 221 have been striking in some communities. In Atlanta and Little Rock, the difficult mechanics of the program have been unraveled by FHA directors. Realistic underwriting standards were applied by the local

Whatever mortgage credit is made available to Negroes costs more in terms of financing the loans. Also, it brings about the prospect of buying themselves deeper into the segregation of the central city or those rare islands of Negro suburbia.

The pressure of financial conservatism and investor influence makes lending to Negroes in all-white areas a taboo. Two principal justifications have been cited by lenders who only adhere to lending in defined racial areas.<sup>65</sup> They are the beliefs that the entry of Negroes in all-white neighborhoods causes property values to fall and hence the security of real estate investments; and the desire to avoid the wrath of property owners, brokers, depositors and other lenders for helping to "break" a white neighborhood. The former rationalization has been weakened in recent years.<sup>66</sup> Consequently, the latter motive has become for lenders the chief basis for withholding loans to nonwhites in white neighborhoods. This shift in emphasis has tended to make their lending policy vague and variable. By shifting their emphasis to maintaining good public relations with their constituents, lending agencies are left a lot of room for differing judgments about the extent of adverse

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directors in the two cities and Section 221 has been relatively successful. See *Housing Report*, pp. 94-96.

<sup>65</sup>*Where Shall We Live?*, p. 29.

<sup>66</sup>For an account of the undermining of this theory see Luigi Laurenti, *Property Values and Race* (Berkeley: University of California Press, 1960).

reactions to a particular loan and the probable consequences for the lending institution.<sup>67</sup>

### Summary

Since World War II, the influx of large Negro populations has aggravated the growing problems of the large cities. Increased Negro migrations, their concentration, and dearth of housing involved difficult political, economic, and cultural stakes for the affected areas. The lack of adequate housing and the spreading Negro slums intensified the vast social imbalance that arose between the suburban areas and decaying central cities. Residential segregation and inferior housing have contributed to the social ills of the Negro. In short, segregated housing has added to their culture of poverty and their limited horizons and aspirations. Sustaining the existing condition has been the practice of the housing industry.

The housing industry comprises building, brokerage and lending institutions. Some of these institutions are active in more than one phase of this industry. They have fostered housing patterns that have sharply defined racial lines. Furthermore, most members of the industry have respected these lines. By their maneuvering they all but proved themselves unwilling participants in breaking the patterns of segregation. Skeptical of experimental solutions to break the status quo, they have persisted in the

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<sup>67</sup>*Where Shall We Live?*, p. 29.

tried and true measures that have enlarged the racial ghettos. By complementing, cooperating and complying with each other's views, they enhanced and spread the concept of discrimination in housing.

The predispositions of the housing industry gave no indication that a reform in housing discrimination would come from within the industry itself. Because of this failure to reform, the lever for breaking the racial patterns had to come from the institution of government. With the growing political alertness of Negroes, aided by allies among the civil rights groups, means and approaches to governmental institutions were sought whereby equality in housing could be realized. At the close of World War II there began a dedicated effort by Negro and civil rights groups to reach the stage of legal, economic and social fulfillment of equal opportunities in housing. Seeking the realization of this quest, Dennis Clark has averred:

No relief is in sight other than this kind of government influence that will form a counter-force to the inertia and paralysis of the industry itself. There may be grave misgivings in some circles about the intrusion of government into the process of property transfer in outlawing ethnic restrictions, but no responsible or effective alternative has been suggested.<sup>68</sup>

It is to the course taken by civil rights groups seeking the "intrusion of government" that the remainder of this study is devoted.

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<sup>68</sup>Clark, *op. cit.*, p. 104.

## CHAPTER IV

### THE DIRECT APPROACH TO THE LEGISLATIVE BRANCH: ATTEMPTS TO DESEGREGATE THE HOUSING PROGRAM THROUGH CONGRESSIONAL ACTION

Congress makes policy in a negative sense, too. When it denies its approval to proposals for legislative action, policy is being made in a way equally significant as when it grants such approval.<sup>1</sup>

Donald C. Blaisdell

Why does the Senator wish to spell out specific provisions in the law, when the bill in itself as it is written would definitely provide that there could be no discrimination? Is not that the truth? If the Administrator were acting in accordance with the act, he would find nothing in the act which would compel him to discriminate or to exclude.<sup>2</sup>

Senator Edward Thyne

As a potential access point for interest groups, the legislative system of the United States Congress affords many opportunities for tactical movements in the quest for friendly public policies. Through legislative enactment, obstacles to groups posed by a hostile executive branch or indifferent political parties may be overcome. Groups successful in Congress gain access to key legislators, standing

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<sup>1</sup>Donald C. Blaisdell, *op. cit.*, p. 236.

<sup>2</sup>U. S., *Congressional Record*, 81st Congress, 1st Session, 1949, XCV, Part 7, 4797.

committees and to the party leadership. Accommodating themselves to the legislative process, interest groups find that "access based upon a sympathetic attitude on the part of the legislator"<sup>3</sup> serves as a source of privileged treatment.

Civil rights groups have not enjoyed an extensive "sympathetic attitude" among legislators in Congress. For example, no civil rights legislation had been enacted from 1875 until the passage of the Civil Rights Act of 1957. Yet, with all the pitfalls encountered in the legislative process, they have pressed for laws ending discrimination in American life. As for the federal housing programs, enactment of legislation, they felt, would be constructive and necessary to terminate existing discriminatory practices. Since the federal government "created many of the aids to segregated living by administrative discretion,"<sup>4</sup> advocates of civil rights legislation sought to remove these fiats from the governmental housing programs.<sup>5</sup>

Such an opportunity presented itself when the national government prepared passage for comprehensive housing legislation after World War II. This legislation raised for

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<sup>3</sup>Abraham Holtzman, *Interest Groups and Lobbying* (New York: The Macmillan Company, 1966), p. 88. See also Harmon Zeigler, *Interest Groups in American Society* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1964), pp. 267-270.

<sup>4</sup>Reginald A. Johnson, "Open Occupancy in Housing," *Social Action*, XXIX, No. 9 (May, 1963), 5.

<sup>5</sup>For an account of the importance and priority the National Association for the Advancement of Colored People (NAACP) placed on the elimination of segregated housing, see Walter White, *How Far the Promised Land* (New York: Viking Press, 1956), p. 131.

civil rights groups a question in the choice of tactics, that is, whether to seek the outlawing of discrimination by statute. Anti-discrimination legislation, they soon discovered, opened the way to subterfuges in the legislative process that almost destroyed the public housing program.

The Negro As A Pressure Group:  
Alone, A Limited Potential

Major Negro pressure groups such as the National Association for the Advancement of Colored People (NAACP) or the Urban League acting alone could not attain open occupancy for existing and future housing. As pressure groups, their political power was limited. Lacking a mass appeal among Negroes,<sup>6</sup> they sought at first to eliminate the existing inequalities in American life either through litigation or appealing to the social conscience of the American people. Negro groups and Negro leadership were aware of their limited potential to affect decisions producing social changes. Negroes, C. Eric Lincoln has said, have been aware of their subordinate roles vis à vis that of the white. He has observed that

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<sup>6</sup>Dr. Ralph Bunche, while assisting Gunnar Myrdal in the preparation of *An American Dilemma*, published in 1944, stated:

The National Association for the Advancement of Colored People does not have a mass basis. It has never assumed the proportion of a crusade, nor has it ever, in any single instance, attracted the masses of people to its banner. It is not impressed upon the mass consciousness. . . . It has shown a pitiful lack of knowledge of mass technique and how to pitch an appeal so as to reach the ears of the masses.

Quoted in Charles E. Silberman, *Crisis in Black and White*, p. 135.

From time to time . . . there have been varying degrees of adjustment within the systems of arrangements, but the power relationship has remained constant. Hence the capacity of Negroes to affect decisions relating to themselves and the system of values they hold to be important is not appreciable.<sup>7</sup>

Lincoln's observation concerning the inability of Negroes to alone change the social and political structure is not unduly pessimistic. An incontrovertible fact is that the Negro population, nationwide, is a ten per cent minority. Economically and politically, as a group, it exerts far less influence than even this ten per cent figure would seem to warrant. Negroes do not have the economic, political or physical power to achieve their goals against an entrenched and powerful ninety per cent majority. In light of these hard facts, the continuing racial policy looking toward the eradication of inequities has to be one of winning friends and influencing people among the white majority. In the quest for equality, a variety of nation-wide organizations

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<sup>7</sup>C. Eric Lincoln, "The Black Muslims As A Protest Movement," *Assuring Freedom to the Free*, ed. Arnold M. Rose (Detroit: Wayne University Press, 1964), p. 135. Lincoln's contention is that the Negro will never have a dependable share in the control of the decision-making apparatus of the country until he either controls a significant segment of the economy, or a much larger percentage of the vote than he had in 1964. The importance of the Negro vote in presidential elections has been publicized since 1948. An optimistic view of the power of the vote to solve major social problems can be found in Henry Lee Moon, *op. cit.*, p. 9. In the presidential election of 1960, the impact of the Negro vote was uncontestable. See *infra*, p. 245. Yet, Negroes were not represented in any equitable proportion in local, state, and national political power structures. After the 1964 elections, there were only 6 Negro members in the House of Representatives and with few exceptions, Negroes held minor posts on the state and local levels. An important factor here is

actively supported the movement for the full attainment of civil rights for Negroes. Among the major groups in the "minority coalition" formed after World War II were: the NAACP; the National Urban League; the National Conference of Christians and Jews; the American Jewish Committee; the Catholic Interracial Council; the American Civil Liberties Union; and the American Friends Service Committee.<sup>8</sup>

The groups dedicated to racial equality were not powerful. Operating with little money and with volunteer staffs, their capacity to campaign for objectives or to sustain action programs was limited. The power of these organizations could hardly be compared to business, professional or other interest groups in the political arena. Nevertheless, they eventually supplied a major part of the stimulus and leadership in the advances made toward racial equality. Lacking the resources for sweeping victories, their activities were confined to limited goals immediately after World War II. One of the objectives was the desegregation of housing. They tried to accomplish this by legislative and administrative action, by persuading the housing industry to modify its practices, by appeals to the courts and by education of the public. The latter tactic was to

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that the strength of the Negro vote on these levels is "gerrymandered" because of residential segregation. Much of the response to the civil rights on the national scene, therefore, is due to the greater impact the Negro vote has at that political level.

<sup>8</sup>Oscar Handlin, *Fire-Bell in the Night: The Crisis in Civil Rights* (Boston: Little, Brown and Company, 1964), pp. 23-25.

serve as a catalyst for a nation that eventually became "civil rights conscious."

By the middle of the twentieth century the nation was more receptive to the concept of racial equality. As John P. Roche has said, the receptiveness occurred "because we are now sensitive and concerned about civil rights."<sup>9</sup> For many of these groups their own security lay in asserting the right of all individuals to equality. The characteristic tactic of this period was to discourage or forbid discrimination on the basis of color, creed or national origin.<sup>10</sup>

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<sup>9</sup>John P. Roche, *The Quest for the Dream* (New York: The Macmillan Company, 1963), p. 259.

<sup>10</sup>Handlin, *op. cit.*, p. 28.

Negro civil rights organizations, allied in the "minority coalition" with unions, civil liberties organizations, church and interfaith groups, depended on the liberal alliance because of their limited strength. Gunnar Myrdal has described the Negro plight in attaining success by their own efforts. He stated:

Negroes can never cherish the healthy hope of coming into power. A Negro movement can never expect to grow into a democratic majority in politics or in any other sphere of American life. . . . Negroes can never . . . attain more in the short-term power bargain than white groups are prepared to give them.

See Myrdal, *op. cit.*, p. 853. However, his observations pointed to the obvious interest Negroes had in allying themselves with as many white groups as possible. He indicated that only through collaboration would there be practical accomplishments in civil rights.

Myrdal's statement pinpoints the swelling resentment of Negroes toward the "white liberal" in the 1960's. Resenting the status of junior partners in the liberal coalition and the deference to white judgment on strategy and tactics, many Negro leaders have voiced strong protests against the "white liberal" leadership of the civil rights movement. Charges by militant Negroes concern the fecklessness of their allies. Their aim was to have organizations

At the close of World War II, the civil rights groups intensified their activities. Aware that the institution of segregation would not fall of its weight or that progress toward equality was inevitable, the "minority coalition" energetically began to petition government at the national, state and local levels to erase discrimination. The liberal groups recognized that equal treatment of minorities in the United States would not be gained by the passive. Having gained a measure of political power and the ability to utilize it, they began to use this power to fight much more effectively for equality of opportunity.<sup>11</sup> Increases in education, in income, in political participation and in the effectiveness of the protest organizations made Negroes and other minorities better able to attack segregation.<sup>12</sup> Recognizing that social and economic change

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working on behalf of Negroes to be led and manned largely by Negroes. A reluctant but fond farewell is extended to the whites who do not subordinate themselves to the new Negro leadership. A strong proponent of this view is Loren Miller who as an NAACP lawyer in the *Shelley v. Kraemer* case worked closely with "white liberals." See Loren Miller, "Farewell to Liberals," *Nation*, CVC, No. 12 (October 20, 1962), 235-238. For early accounts of the impending schism see also Murray Friedman, "White Liberals' Retreat," *Atlantic Monthly*, CCXII, No. 1 (January, 1963), 42-46; Nathan Glazer, "Negro and Jews: The New Challenge to Pluralism," *Commentary*, XXXVIII, No. 6 (December, 1964), 29-34.

<sup>11</sup>J. Milton Yinger, *A Minority Group in American Society* (New York: McGraw Hill Book Company, 1965), p. 41.

<sup>12</sup>*Ibid.*

According to Arnold Rose, the rise of average real income among Negroes since 1940 had been two to three times that among whites, though all of that improvement occurred before the economic recession of 1955. These gains helped

in the United States might happen so rapidly that a handicapped group might fall further behind if it progressed more slowly than the rest of the population,<sup>13</sup> it was felt that any delay would be costly for the drive to equality.

Coming out of the war, minority groups now took on an increased sense of militancy. For the Negro who had benefited from earlier economic and social changes, there was implanted the hope for more. As described by Oscar Handlin, Negroes experienced a rising level of expectations which increased discontent and made "intolerable the grievances which the utterly hopeless accept as a matter of course."<sup>14</sup> The proximity to equality increased the desire for altering the social system. The small gains made by Negroes of one generation stimulated the expectations of the next.<sup>15</sup>

#### Early But Limited Access to the Chief Executive

Until World War II, the United States Supreme Court had been the principal instrument through which Negro

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to increase group identification and impatience among Negroes and they occurred at a time when desegregation might become a reality. See Arnold Rose, "The Negro Problem in the Context of Social Change," *The Annals*, CCLVII (January, 1965), 3-5.

<sup>13</sup>Handlin, *op. cit.*, p. 5.

<sup>14</sup>*Ibid.*, p. 21.

<sup>15</sup>James Q. Wilson, "The Changing Political Position of the Negro," *Assuring Freedom to the Free*, ed. Arnold M. Rose (Detroit: Wayne University Press, 1964), p. 164.

aspirations had been realized. Negro organizations, primarily the NAACP, placed their reliance on the courts. Limited victories were realized in voting and housing restrictions.<sup>16</sup> Successful litigation was spotty and the benefits were not far reaching. Nevertheless, the Supreme Court was the governmental agency that Negro leadership had to rely on at this time. Prior to the war, presidential action relating to the enforcement of Negroes' rights had varied with the Chief Executive in office.<sup>17</sup> Despite Franklin D. Roosevelt's appointment in the 1930's of a number of Negro aides and advisors to major government departments, the so-called "Black Cabinet," there had been no major attempt in his administrations to attack segregation.

Failing to receive any impetus from the Chief Executive, aid from Congress was unlikely. Here, the allotment of seats in both houses favored the rural population at the expense of Negro and other urban minorities, depriving them of influence proportionate to their numbers. The seniority system, together with the threat of a filibuster, gave southerners an effective veto on legislation which they disapproved. After 1938 it was even more difficult for northern liberal

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<sup>16</sup>Early successful litigation saw racial zoning ordinances held unconstitutional in the case of *Buchanan v. Warley*, 245 U. S. 60 (1917) and state imposed "white primaries" were overturned in the case of *Nixon v. Herndon*, 273 U. S. 536 (1927).

<sup>17</sup>Lomax, *op. cit.*, p. 221.

Congressmen to succeed in getting any broad social and economic legislation passed when the southern Democratic and midwestern Republican conservative bloc was created.<sup>18</sup>

Faced with an intransigent Congress and a President who did not appear to be actively fighting for equal rights, Negro leaders and intellectuals became more aggressive. New techniques and approaches were utilized to put an end to discrimination. Now the civil rights movement began to use a more direct approach. Seeking not only to eliminate any bias in the operations of government itself, the movement also wanted an authoritative statement outlawing discriminatory practices as contrary to public policy.<sup>19</sup> An event that shook the complacency of President Roosevelt occurred in 1941. Negro workers led by A. Philip Randolph threatened to march on Washington to protest discrimination in industries receiving government contracts. When efforts by the President failed to dissuade Randolph from going ahead with the march, he issued an executive order which forbade dis-

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<sup>18</sup>A federal aid to education bill was killed in the Senate in October of 1943. Senator Langer of North Dakota had included an amendment to the legislation barring any funds to segregated schools. Although Langer was considered an economic and social liberal while in the Senate, this was not true of most midwestern Republican Senators who would vote against any legislation of this nature. Joined by southerners who were against any provision that might undermine segregation, enough votes were available to defeat any similar measure. See William E. Leuchtenberg, "Politics of Segregation," *New Leader*, XXXIII, No. 2 (January 14, 1950), 6.

<sup>19</sup>Handlin, *op. cit.*, p. 227.

crimination in industries handling government contracts.<sup>20</sup> The march was called off. A Fair Employment Practices Committee (FEPC) was set up to investigate complaints. Having little authority, this Committee while in existence proved ineffective as far as Negro employment was concerned. When Randolph threatened another march, a new executive order was issued creating a second FEPC which proved to be more effective.<sup>21</sup>

Emboldened by this success, the post-war Negro leadership became more active. In addition to crusading for a permanent FEPC, they stressed again the vital areas of anti-lynching legislation, voting rights and desegregated housing. The decisive factor now in the extension of full civil rights for the Negro, they felt, had to come about by intervention of the federal government. Seeing what a "sympathetic" president could do, as in the case of Roosevelt's creation of an FEPC, pressure was first directed to the Executive Office. For Negro and civil rights groups the Office ultimately became more receptive and sensitive to their problems and political strength.

A real breakthrough occurred in December, 1946, when President Truman appointed a Committee to investigate the state of civil rights in the nation. *To Secure These*

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<sup>20</sup>U. S. Commission on Civil Rights, *A Report: Freedom to the Free* (Washington: U. S. Government Printing Office, 1963), p. 116.

<sup>21</sup>*Ibid.*, p. 117.

*Rights*,<sup>22</sup> the report delivered to him by the Committee a year later, urged more constructive leadership by the federal government in bringing about the nation's historic goals of freedom and equality through law. The President's Committee on Civil Rights called for a responsible commitment by the federal government to attain these goals. Ranking it as one of the great documents in the tradition of our free society, John Roche has asserted:

It is doubtful if any official body has ever delivered such a scorching autocritique, has ever probed so deeply into a fundamental social problem and emerged with such blunt recommendations.<sup>23</sup>

After receiving the report, President Truman asked Congress to implement the report by passing the necessary civil rights legislation.<sup>24</sup>

Among the many observations in the report was the problem of segregated Negro housing. The basic right, the Committee said, for the "equality of opportunity to rent or buy a home should exist for every American."<sup>25</sup> Yet discrimination in housing was prevalent throughout the country, stemming either from private business practices or community prejudices. To remedy the situation, three of the Committee's forty recommendations dealt with racial restrictive

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<sup>22</sup>President's Committee on Civil Rights, *The Report, To Secure These Rights* (New York: Simon and Schuster, 1947). Hereafter cited as *To Secure These Rights*.

<sup>23</sup>Roche, *op. cit.*, p. 238.

<sup>24</sup>*Ibid.*, p. 239.

<sup>25</sup>*To Secure These Rights*, p. 67.

covenants. One favored "the enactment by the states of laws outlawing restrictive covenants," another asked for legislation by Congress toward the same end in the District of Columbia. A third recommended "renewed court attack, with intervention by the Department of Justice, upon restrictive covenants."<sup>26</sup>

Heartened by the Committee's report and President Truman's request to Congress to implement its goals, Negro and civil rights groups pressed for a strong version of any contemplated program. It seemed that government was going to be a positive force for equality in voting, housing and employment. Until now the focal point of promoting equality had been through the courts. In the various decisions handed down by the courts, restraints had been placed upon state legislatures and public officials from unconstitutional discrimination.<sup>27</sup> Judicial review on the face of the record proved to be a function of the greatest importance in the civil rights movement. However, more than the intervention of the courts was needed. Civil rights groups felt that firm and positive policy guidelines had to be set down by both Congress and the Chief Executive. Indications of support had come from President Truman with his creation of

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<sup>26</sup>*Ibid.*, pp. 169, 171.

<sup>27</sup>*Supra*, note 16. In 1944, the growth of the Negro suffrage was enhanced in the case of *Smith v. Allwright*, 321 U. S. 649 (1944). Litigation in the case was handled by the NAACP.

a Civil Rights Committee and his request to Congress to fulfill its Report. Renewed efforts were made on Congress to become a more constructive force in the passage of civil rights legislation.<sup>28</sup>

Postwar Housing Legislation And  
Proposals to Bar Segregation

The opportunity to seek desegregation in the federal government's housing program presented itself immediately after World War II. A critical housing shortage faced the nation. The dearth of housing available loomed as one of the major post-war problems. For low-income groups in the United States the scarcity of housing hindered their continued quest for shelter as the low-rent program had been suspended during the war. On August 1, 1945, a housing subcommittee of the Senate Special Committee on Postwar Economic Policy and Planning, headed by Senator Robert A. Taft, reported on the housing situation in the United States. In order to make up the deficit of housing due to the lack of building during the 1930's and also to house the growing population, the subcommittee estimated it would be necessary

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<sup>28</sup>President Truman failed to receive congressional endorsement for his views on civil rights. The 81st and 82nd Congresses failed to pass proposed measures ranging from anti-lynching to fair employment practices legislation. Yet, he had placed the great moral and political force of the Presidency behind the drive for equality. Through the issuance of executive orders in 1948, he initiated the desegregation of the armed forces and instituted fair employment practices within the federal government's civilian agencies. See Roche, *op. cit.*, pp. 240-241.

to build nearly 1,500,000 housing units over the next decade. Two-thirds of the units would be needed by families who could not pay more than forty dollars a month for rent. The House Special Committee on Postwar Economic Policy and Planning, which reported on July 3, 1945, had reached the same general conclusions.<sup>29</sup>

Congress did not formulate a comprehensive post-war housing policy until the passage of the Housing Act of 1949.<sup>30</sup> From 1945 to 1949 the housing measures enacted by Congress were makeshift and stop-gap programs that neglected the needs of low-income families. The FHA's system of mortgage insurance making credit available to home purchasers with long-term, low down payments and low interest rates was extended. For veterans, the VA administered a similar program of mortgage guarantees after the passage of the Servicemen's Readjustment Act of 1944. Beyond aiding middle-income groups through the FHA and VA, no legislation geared to low-rent housing or slum clearance was forthcoming. While the goal of a national housing policy continued to be debated during these years,<sup>31</sup> civil rights groups tried to incor-

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<sup>29</sup>*Congressional Quarterly Almanac*, II (Washington: Congressional Quarterly, Inc., 1946), 651-652.

<sup>30</sup>*Housing Act of 1949*, Public Law 171, 81st Congress, 1st Session, 1949.

<sup>31</sup>The nature of the study is not concerned with the details of the proposals considered by Congress during the 1945-1949 period. Leading proponents of a general housing program were Senators Robert Taft, Allen Ellender and Robert Wagner who sought federal aid to private builders and public authorities through mortgage insurance, loans, and annual

porate in the contemplated national housing policy the stipulation that the benefits of government housing programs be made available to all groups on an equal basis.

With the prospect of general housing legislation imminent, civil rights spokesmen supporting low-income housing tried to include provisos barring segregation in the proposed program.<sup>32</sup> When the Senate Banking and Currency Committee held hearings on legislation seeking the establishment of a national housing policy in 1945, leaders

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contributions to keep rentals within the reach of low-income families. The legislation that they submitted in 1946 was the basic plan eventually incorporated in the Housing Act of 1949.

Aiming to replace a major portion of the substandard housing in the country, the Taft-Ellender-Wagner bill, S. 1592 introduced in 1946, wanted to facilitate the construction of 1,500,000 housing units over the next ten years. The stumbling block in the legislation was the strong opposition to public housing. Passing the Senate in 1946, it was killed in the House Banking and Currency Committee that session. Subsequently in the 80th Congress, their bill, S. 866, was passed in 1948 by the Senate but blocked in the House Rules Committee. President Truman blamed the real estate lobby for failure of the bill's passage.

After the defeat in 1948, Senator Taft promised continued efforts in the 81st Congress for a housing policy that would include public housing and slum-clearance measures. He said: "So far as I myself am concerned, I propose to introduce at the next session a bill reinstating the general program of public housing and slum clearance. . . ." Quoted in *Congressional Quarterly Almanac*, IV (Washington: Congressional Quarterly, Inc., 1948), 143.

<sup>32</sup> Many strong lobbies began to line up against any long range housing bill that included public housing. Realtors, homebuilders, and savings and loan associations were the most vocal opponents of public housing. Labor and veterans' groups supported it. Groups in favor of public housing and who likewise sought the discontinuance of governmental practices supporting segregated housing were: NAACP; National Negro Council; Urban League; National Council of Negro Women; American Council on Human Rights; CIO; American Association of University Women.

for civil rights voiced strong concerns for legislative support in curbing racial discrimination in federally assisted housing. A statement by Caroline Ware, representing the American Association of University Women, was typical of the groups favoring equal opportunity in government aided housing. She stated:

The bill contains no nondiscrimination clause. . . . Whether or not this is a serious weakness will depend upon the administrative policies established for the carrying out of each section. . . . Inclusion of a blanket nondiscrimination clause, however, would reassure those who realize that no program of housing and community development can be adequate unless it meets the needs of all the people. If no anti-discrimination clause is to be included in the bill, the legislative history should provide a clear guide to the administrative agencies on this point.<sup>33</sup>

William Hastie, representing the NAACP, supported the public housing section of the bill, describing its great importance to Negroes. He also pointedly attacked the existing federal housing program. Criticizing the racial restrictions in the *Underwriting Manual* of the FHA and desiring to eradicate race as a factor in applying for mortgage insurance, Hastie asserted:

I think one thing that has happened is that the persons in charge of administering such a law have been, and understandably so, themselves professional real estate operators, or persons whose concern and interest traditionally has been on the mortgagee's point of view.<sup>34</sup>

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<sup>33</sup>U. S., Congress, Senate, Committee on Banking and Currency, *Hearings, General Housing Act of 1945, A Bill to Establish a National Housing Policy and Provide for its Execution*, Part I, 79th Congress, 1st Session, 1946, p. 271.

<sup>34</sup>*Ibid.*, Part II, p. 755.

In more general terms Mrs. Mary McLeod Bethune, President of the National Council of Negro Women, endorsed the bill.

Seeking the inclusion of a nondiscrimination clause, Mrs.

Bethune said:

. . . I would urge that this bill contain a sweeping clause which would require that wherever federal funds, powers, or instruments are utilized to guarantee aid, or subsidize slum clearance or housing development, the benefits of the bill be extended in accordance with need and economic qualifications and without regard to race, creed, color, religious or political affiliation.<sup>35</sup>

In 1949, the Congress finally passed the long and heatedly debated housing legislation that had been in the offing since World War II. The two provisions most controversial were federal supports and aid for public housing and the clearance of urban slums. Public housing had produced great passion on the part of groups opposed to the legislation, passion strong enough to have the National Association of Real Estate Boards label Senator Taft's sponsored bill as "communistic."<sup>36</sup> With the Housing Act of 1949 Congress authorized 810,000 public housing units to be built during a six-year period.<sup>37</sup> Designed to aid low-income slum dwellers, Negroes and other minority groups would have a greater share in public housing than in the federal housing aids distributed through the private market. The public housing provision was incorporated in 1949 only after civil rights groups,

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<sup>35</sup>*Ibid.*, p. 858.

<sup>36</sup>*Congressional Quarterly Almanac*, IV, 137.

<sup>37</sup>*Housing Act of 1949*, Public Law 171, 81st Congress, 1st Session, 1949.

chiefly the NAACP, utilized a questionable approach in opposing the Housing Act of 1949 because of its failure to include an anti-discriminatory clause.

#### Public Housing or the Cain-Bricker Amendment?

One of the most difficult questions to resolve by the civil rights organizations was whether to seek the outlawing of discrimination through legislative enactment. The question raised a crucial choice of tactics in the fight for equality in housing. As the supporters of equal rights discovered in the debate over enactment of the Housing Act of 1949, the resort to anti-discrimination legislation as a main weapon opened the way to subterfuges that might destroy social legislation beneficial to the same minority groups. An anti-discrimination amendment attached to the Housing Act of 1949, the Cain-Bricker amendment, caused a split among liberal groups and almost succeeded in killing housing for low-income groups. The amendment was a canard injected by opponents of public housing so as to destroy a federal program that Charles Abrams affirmed "did more to demonstrate the practicability of nondiscriminatory living than any anti-discrimination legislation ever enacted."<sup>38</sup>

After four years of intensive discussion, Congress in 1949 considered and was set to pass legislation outlining a national goal in housing. Millions had been spent by pressure groups and hundreds of organizations had testified

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<sup>38</sup>*Forbidden Neighbors*, p. 354.

before congressional committees. The point of friction in the legislation involved the question of including the building of 810,000 housing units for low-income people.<sup>39</sup> Opponents of public housing realized that there was strong sentiment in both houses for the measure. Failing to have enough support to strike low-income housing from the impending legislation, the real estate lobby and its allies conceived a ruse, the Cain-Bricker amendment, which threatened to alienate the support of southern Congressmen whose votes were necessary for enactment of the public housing legislation. There then was offered by Senators Cain and Bricker an anti-discrimination clause to the national housing legislation. The proposed amendment stated:

In recognition of the fact that public policy requires equality of treatment of all people and prohibits discrimination or segregation on account of race, color, creed, national origin, or ancestry in regard to public housing, every contract made pursuant to this act for annual contributions for any low-rent housing project initiated after March 1, 1949, shall provide that the housing project to which the contract refers shall be operated without discrimination or segregation.<sup>40</sup>

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<sup>39</sup>The views representing the more powerful lobbies on the question can be summarized by the following statements: the United States Chambers of Commerce felt that housing was a local problem and the public housing legislation was "creeping socialism"; the National Association of Home Builders and National Association of Real Estate Boards desired more government guarantees on mortgages through the FHA, which in turn would stimulate more low-cost home building thus avoiding the public housing program; the American Federation of Labor and the Congress of Industrial Organizations said that private industry had showed that it was unable to provide low-cost housing; the American Legion supported public housing with the reservation that veterans should have preference in the units to be built.

<sup>40</sup>U. S., *Congressional Record*, 81st Congress, 1st Session, 1949, XCV, Part 7, 4791.

The Cain-Bricker amendment and a similar provision in the House of Representatives by Congressman Vito Marcantonio<sup>41</sup> were strongly opposed by many civil rights supporters. They claimed that such provisions would prevent the ultimate passage of low-income housing and deprive Negro families of a large percentage of the public housing units they would be entitled to occupy under the program. Most liberals felt that even if the amendments were included in the legislation, they would be ineffective in the South.<sup>42</sup> However, a split did develop among the civil rights groups, a split generated by the NAACP. The latter opposed any form of housing that perpetuated segregation patterns, contending that approval of segregated housing projects could create Jim Crow structures lasting for a hundred years.<sup>43</sup>

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<sup>41</sup>*Ibid.*, p. 8656. A more sweeping amendment had been offered by Representative Vito Marcantonio to the House's version of the housing legislation. Although Representative Marcantonio was not in collusion with the real estate lobby, his amendment would have had the same effect as the Cain-Bricker one, that is, the defeat of public housing. In part, it read:

Every contract or commitment entered into by the government or any agency or instrumentality thereof as authorized herein with regard to any housing provided for in this act shall contain a provision prohibiting discrimination by reason of race, color, creed, or national origin. . . .

Marcantonio's anti-discrimination clause was turned down by a 122-173 vote in the House. *Ibid.*, p. 8658.

<sup>42</sup>William E. Leuchtenberg, *New Leader*, XXXIII, No. 2, 6.

<sup>43</sup>*Ibid.*

The organization's views had been set forth in both Senate and House hearings on the Housing Act of 1949. The testimony of Leslie S. Perry, representing the NAACP, showed the organization's position to be absolute and adamant. When questioned at a length before the House Banking and Currency Committee concerning an anti-discrimination provision in the legislation, Perry adhered to the strict principle of extending housing to everybody on an equal basis. After submitting a statement to the Committee asking for an amendment assuring that there be no discrimination in all federally assisted housing, the following interchange took place between Representative Albert M. Cole<sup>44</sup> (Kansas) and Perry.

Representative Cole: It has been said that we should not consider questions of civil rights in this bill, because it might defeat the bill. . . . I do want to get an expression from you . . . as to whether or not you would prefer that the amendment be attempted to be placed in . . . irrespective of whether the bill is passed or not.

Mr. Perry: . . . there are things which are basic in terms of principle. I do not think Congress should surrender to the threats to enforce the undemocratic customs of a small section of this country. . . . I should like to see all of these amendments offered in this legislation.<sup>45</sup>

Before the same committee Mrs. Mary McLeod Bethune voiced the viewpoint that prevailed among the other liberal groups.

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<sup>44</sup>Representative Cole was named head of the HHFA by President Eisenhower in 1953.

<sup>45</sup>U. S., Congress, House, Committee on Banking and Currency, *Hearings, Housing Act of 1949*, 81st Congress, 1st Session, 1949, pp. 230-231.

She argued that merely blocking federal grants for housing would not change southern attitudes or aid appreciably in the struggle against segregation. Mrs. Bethune said: ". . . the National Council of Negro Women strongly opposed amendments which would serve no purpose other than to obstruct an expanded housing program."<sup>46</sup>

On the Senate side, Leslie Perry's testimony was similar to his previous encounter in the House Banking and Currency Committee. Here, the question reappeared with the interrogation of Perry by Senator John Sparkman. Sparkman asked:

. . . would you still insist on this being written into the law, knowing that it would deny to the greatest concentration of your people in this country the privilege of getting some enjoyment out of this kind of a program?<sup>47</sup>

In response, Mr. Perry declared:

. . . I am not going to assume that the inclusion of non-segregation amendments will defeat slum clearance and the public housing provisions of this legislation.<sup>48</sup>

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<sup>46</sup>*Ibid.*, p. 681. Joining the NAACP in an anti-discrimination amendment was Edgar Brown, Director of the National Negro Council. He stated that "an anti-discrimination and anti-segregation amendment is imperative, in our judgment, in this legislation." *Ibid.*, p. 235.

<sup>47</sup>U. S., Congress, Senate, Subcommittee of the Committee on Banking and Currency, *Hearings, General Housing Legislation*, 81st Congress, 1st Session, 1949, p. 737.

<sup>48</sup>*Ibid.*, p. 738. Heeding the experience gained in the fight for public housing, civil rights groups did not press for tacking on a nonsegregation rider to the proposed federal aid to education bill in the 82nd Congress. They feared that such action would alienate the support of southern Congressmen. In this instance, Representative Barden's bill backed by liberal organizations avoided explicit

The split between liberals continued when the housing legislation was debated in the Congress. Here northern Democratic Congressmen were caught in the dilemma of defeating the Cain-Bricker amendment to save public housing while at the same time voting against an anti-discrimination amendment. For liberal Democrats it proved particularly grating since they had split the party with the inclusion of a strong civil rights platform in 1948. The irony of the situation was expressed by Republican Senator Langer who goaded liberal Democrats to vote for the Cain-Bricker amendment. Taunting them with the echoes of the 1948 Democratic National Convention he said:

They promised the Negroes in the 1948 campaign that they were going to change things in the United States for civil rights completely. However, at this time at one of the very first opportunities they have to make the fight, what position do they take? . . . they are running like scared rabbits . . .<sup>49</sup>

Senator Langer's remarks illustrated the predicament for civil rights groups in seeking to outlaw discrimination in housing by statute. Anti-discrimination or non-segregation amendments would be used to defeat social

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recognition of segregated schools. Instead, they backed the bill's provision that funds should first be used to bring the expenditures per pupil to a stated minimum. This stipulation intended that Negro schools should first be brought to the level of white schools before federal funds would be spent on the latter. See Will Maslow and Joseph Robison, "Civil Rights Legislation and the Fight for Equality, 1862-1952," *The University of Chicago Law Review*, XX, No. 3 (Spring, 1953), 391.

<sup>49</sup>U. S., *Congressional Record*, 81st Congress, 1st Session, 1949, XCV, Part 7, 4859.

legislation whose main recipients would be Negroes and other minority groups. As liberals discovered in subsequent sessions of Congress, civil rights amendments were utilized again and again to defeat the extension of public housing and federal aid to education legislation. The 1949 debate in the Senate clearly indicated to Senate progressives that civil rights amendments attached to social legislation would not solve the segregation issue but would succeed in defeating badly needed housing for Negroes. At stake was a public housing program which would be of broad benefit to low-income families or a measure that would in effect kill it. They were placed in a position of decrying discrimination at the expense of pressing social needs.

Two of the severest opponents of public housing had been Senators Cain and Bricker. Both had fought the proposal since 1945 when introduced and supported by Senators Taft, Ellender and Wagner. The two were regarded as the chief spokesmen of the real estate lobby in the Senate.<sup>50</sup> Morton Bodfish, Washington lobbyist for the United States Savings and Loan League, boasted of the close association between the League and its long-time friends who could be counted upon "whenever legislation affecting our institutions or their instrumentalities in Washington is in the hopper."<sup>51</sup>

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<sup>50</sup>Karl Schriftgiesser, *The Lobbyists* (Boston: Little, Brown and Company, 1951), p. 211.

<sup>51</sup>Quoted in Schriftgiesser, p. 220.

Among the League's friends were Senators Cain and Bricker.

The strategy of the United States Savings and Loan League was disclosed in the investigation of the League by the Select Committee on Lobbying Activities in 1950. An office memo to Bodfish disclosed how public housing might be defeated. An aide to Bodfish wrote:

You will note that I have named the amendment the "civil-rights amendment." Also, the public housing lobby is very firmly committed to the declaration of national housing policy because it is a commitment of the United States to socialize housing. I have therefore suggested that this amendment be made a part of such declaration of national housing policy. It will be difficult for some Democrats and some Republicans to vote against the amendment either in committee or on the floor. It will be difficult for a majority of Democrats and a majority of Republicans to vote for the bill with the amendment, especially if draft 1 is adopted.<sup>52</sup>

For Republican advocates of public housing, the amendment was needless and unnecessary. Senators Taft and Thye opposed it saying that if the program was fairly administered and since the statute did not require discrimination, the administrator could operate the program fairly.<sup>53</sup> For liberal Democrats who might suffer politically with their stand against the amendment, there was much more soul searching. Defending his opposition to the Cain-Bricker

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<sup>52</sup>U. S., Congress, House, Select Committee on Lobbying Activities, *Report, United States Savings and Loan League*, Report No. 3139, 81st Congress, 2nd Session, 1950, pp. 93-94. Draft 1 applied to all public housing plus all private housing aided by the government by grants, loans, loan guarantees, or mortgage insurance. The Cain-Bricker amendment followed a more practicable suggestion, draft 2, which applied only to public housing. *Ibid.*, p. 93.

<sup>53</sup>*Supra*, note 2, p. 98.

proposal, Senator Paul Douglas said:

It necessarily creates a sharp conflict within the hearts of all of us who want, on the one hand, to clear the slums and to provide decent housing for the slum dwellers and who, at the same time, feel very keenly that we should not treat any race as second-class citizens.<sup>54</sup>

Douglas, who led the floor discussion in opposition to the amendment, alluded to the nondiscrimination amendment introduced by the opponents of public housing when he posed the question:

What would happen if we voted for and hence adopted the Bricker amendment? The answer is very simple. It would inevitably defeat the whole housing bill itself. . . . it would compel virtually all of the some thirty southern and border state Senators to vote against the housing bill as a whole, once this amendment were (sic) included in it.<sup>55</sup>

Summarizing liberal opposition to the Cain-Bricker amendment, he said that congressional rejection of the nondiscrimination clause should be intended as a postponement of a solution to the issue rather than condonation of segregation in public housing. Douglas stated:

It is simply that we who oppose this amendment place the cause of existent housing as the most important thing, and we do not want to endanger it by adopting a provision which will throw the whole South into opposition to the measure.<sup>56</sup>

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<sup>54</sup>U. S., *Congressional Record*, 81st Congress, 1st Session, 1949, XCV, Part 7, 4850.

<sup>55</sup>*Ibid.*, p. 4851. A similar defense of his opposition to Vito Marcantonio's amendment, *supra*, note 41, was made in the House debate by Representative Frank Buchanan. *Ibid.*, p. 8657.

<sup>56</sup>*Ibid.*, p. 4855.

The Senate went ahead and defeated the Cain-Bricker amendment.<sup>57</sup>

The Legislative History: An Absence of  
Guidelines to Administrative Agencies

Public housing statutes, therefore, contained no explicit directives on the matter of segregation. Since Congress voted down proposed amendments which would have expressly barred segregation in public housing, the PHA left decisions on segregation to local authorities, except for a requirement that equitable provision be made for all racial groups. As has been pointed out in Chapter II, a "racial equity" policy was designed by the PHA in its contracts, requiring local authorities without "open occupancy" laws to distribute housing units among Negro and whites in proportion to their housing needs.<sup>58</sup> Where "racial equity" was accomplished through segregated projects within the same community, the PHA approved the housing allocations to whites and Negroes in its contract with the local housing authority.<sup>59</sup>

Under this definition of the federal government's role, the PHA left to local authorities most of the critical decisions concerning the participation of minority groups in the housing program. Notwithstanding Senator Thye's state-

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<sup>57</sup>*Ibid.*, p. 4860. It was voted down, 31-49.

<sup>58</sup>*Supra*, Chapter II, pp. 54-57.

<sup>59</sup>Greenberg, *op. cit.*, p. 289.

ment that "If the Administrator were acting in accordance with the act, he would find nothing in the act which would compel him to discriminate or to exclude,"<sup>60</sup> housing administrators deferred to local pressures and frequently discriminated against the "very people for whose benefit the program was instituted."<sup>61</sup> Lacking legislative guidance and the absence of standards, administrators were hesitant to lay requirements down at variance with local community customs. Congress, refusing to include a positive ban against discriminatory practices in the Housing Act of 1949, repeatedly rejected proposed amendments in subsequent legislative sessions prohibiting discriminatory provisions in housing legislation. As in 1949, the inferences drawn were that the defeat of the nondiscriminatory provisions were considered to be a *sine qua non* for the passage of the statutes.<sup>62</sup>

The legislative history has indicated that Congress did not impose upon builders or local authorities a statutory duty not to discriminate in the field of housing. Here,

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<sup>60</sup>*Supra*, note 2, p. 98.

<sup>61</sup>Ann Fagan Ginger and Milton L. McGhee, "The House I Live In--A Study of Housing for Minorities," *Cornell Law Quarterly*, LVI (1960-1961), 197. Jack Greenberg pointed out that "A racial rather than an individualized system of evaluation creates thus the situation in which applicants are denied vacant apartments solely because the quota for their race has been filled." Greenberg, *loc. cit.*

<sup>62</sup>*Supra*, Chapter II, note 90. The last attempt (within the scope of the study) to prohibit discrimination in federally supported public housing was offered by Representative John V. Lindsay to the housing legislation of 1961. It was defeated, 132-178, by the House. U. S., *Congressional Record*, 87th Congress, 1st Session, 1961, CVII, Part 13, 10344.

the lack of legislative guidance reflected the divided opinion within Congress which prevented it from enacting any civil rights legislation. In the absence of direction from Congress or by the President (until President Kennedy's Executive Order 11063 in 1962) the agencies administering the housing legislation did not interpret their powers to impose a racial ban. David McEntire, noted housing expert and adviser to the Commission on Race and Housing, has asserted that the Housing Act of 1949 implied that governmental housing benefits should have been equally available to all people.<sup>63</sup> McEntire has stated:

It can also be urged, with logic, that Congress, being bound by the Constitution, could not intend otherwise than equal treatment of all citizens under any legislation. Nevertheless, although Congress has prohibited discrimination in public housing against families with children or against families receiving public assistance, it has been silent on racial discrimination.<sup>64</sup>

Under the circumstances, the housing agencies were not left to formulate any racial policies on their own initiative and the "neighborhood patterns of occupancy" continued to foster segregation between whites and nonwhites. Housing administrators did not take firm action to ensure equality for to do so might incur the wrath of a powerful member of Congress whose pro-segregation attitude might endanger the housing program. This consideration restrained government officials more effectively than interpreting

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<sup>63</sup>McEntire, *op. cit.*, p. 295.

<sup>64</sup>*Ibid.*, pp. 295-296.

their legal authority to act.<sup>65</sup> Insistence on segregation was the price set by southern Congressmen in their continued support of housing legislation. One Senator even threatened to oppose public housing because of a judicial decision against segregated housing projects. The latter event occurred in 1954 while the Senate debated the Housing Act of 1954. Senator Maybank of South Carolina, a strong supporter of public housing, offered an amendment striking public housing out of the housing legislation.

Senator Maybank's opposition came after the United States Supreme Court let stand a California decision that upset the policy of segregation laid down by the Housing Authority of San Francisco.<sup>66</sup> He claimed this action made

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<sup>65</sup>*Ibid.*

<sup>66</sup>*Housing Authority of the City and County of San Francisco v. Banks*, 120 Cal. App. 2d 1, 260 P. 2d 668, cert. denied 347 U. S. 974 (1954).

Judicial decisions concerning housing desegregation will be discussed in Chapter V, *Discrimination In Housing And The Federal Courts*. In the above-mentioned case the legislative picture was further complicated. The United States Supreme Court in denying certiorari in this case seemed to point the way toward the elimination of segregation in public housing. The California Court invalidated the neighborhood pattern of occupancy in public housing projects created by the San Francisco Housing Authority on the ground of the denial of the equal protection clause of the 14th Amendment. However, the Banks decision was not decided on its merits by the Supreme Court. Excluding racial zoning and restrictive covenants the Supreme Court had not spoken authoritatively on the matter of residential segregation and discrimination in the sale or renting of dwelling units in public housing projects or in publicly assisted private housing constructed under the federal government's mortgage insurance on urban renewal programs. *1959 Report*, p. 453.

The Banks case was considered by the U. S. Supreme Court at the same time as the *Brown v. Topeka* decision was

it impossible for him to support any public housing. Re-appraising his position, he offered an amendment which in effect would have erased from the Housing Act of 1954 any reference to public housing.<sup>67</sup> Maybank's amendment was quickly voted down by the Senate. However, as Davis McEntire pointed out: "This episode, obviously, must have been an object lesson to any federal administrator contemplating action against segregation."<sup>68</sup>

Failure of Administrative Activism  
In the Eisenhower Years

At the outset of the Eisenhower Administration a Presidential Committee was set up to study and reassess the federal government's role in the housing program. Reporting to President Eisenhower in December, 1953, the Committee

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about to be announced. For this reason, the denial of certiorari in the Banks case caused more than the usual speculation. Conjecture was that the Supreme Court felt that the answer was so clear, in light of the Brown decision, that consideration of the same issue in housing was not necessary. See: Note, "Discrimination Against Minorities in the Federal Housing Programs," *Indiana Law Journal*, XXXI (1955-1956), 505.

A different view was advanced by Charles Abrams who said that under the customary interpretation of a denial of certiorari, the Supreme Court remained uncommitted on the issue of segregation in public housing. Referring to Senator Maybank's surmising that the Supreme Court had outlawed segregation in public housing, Abrams said: "The Senator had evidently mistakenly construed the meaning of a denial of certiorari as an affirmance, when, as the Court has repeatedly asserted, such a denial had no significance whatever." *Forbidden Neighbors*, p. 300.

<sup>67</sup>U. S., *Congressional Record*, 83rd Congress, 2nd Session, 1954, C, Part 6, 7618.

<sup>68</sup>McEntire, *loc. cit.*

recommended continuation of the low-rent public housing program that had been enacted by Congress in 1949.<sup>69</sup> The Committee expressed deep concern with the housing problems of minority groups. To aid minority groups in their quest for housing, the Committee suggested:

The recommendations . . . if supplemented by changes in the attitude of private investors and bolstered by vigorous administrative practice, offer a basis for substantial improvements in the housing conditions of minority groups. . . . The legislation recommended will help, and along with vigorous activities by public officials and private organizations throughout the nation, real progress can be made in this field.<sup>70</sup>

President Eisenhower, on the basis of his Advisory Committee's recommendations, submitted his 1954 Housing message to Congress. He maintained the government's responsibility for assuring equal opportunity in housing saying that

It must be frankly and honestly acknowledged that many members of minority groups, regardless of their income or economic status, have had the least opportunity of all of our citizens to acquire good homes. . . . The administrative policies governing the operation of the several housing agencies must be, and they will be, materially strengthened and augmented in order to assure equal opportunity for all of our citizens to acquire, within their means, good and well located homes.<sup>71</sup>

These pronouncements implied that there had existed discriminatory policies within the federal housing program.

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<sup>69</sup>U. S., President, Advisory Committee on Government Housing Policies and Programs, *Report, Recommendations on Government Housing Policies and Programs* (Washington: U. S. Government Printing Office, December, 1953), p. 2.

<sup>70</sup>*Ibid.*

<sup>71</sup>*New York Times*, January 26, 1954, p. 12.

Changing these policies and fulfilling these pronouncements was another matter. During the Eisenhower Administration, neither the Congress nor the President offered any real program to meet the housing needs of minorities.

Except for Section 221 of the Housing Act of 1954, the Administration's legislative recommendations actually threatened to aggravate the low-rent housing program.<sup>72</sup> More favorable insurance terms for the home buyer, builder and lender were proposed but little was extended to minorities. In fact, during the Eisenhower years, public housing appropriations that benefited minorities and other low-income families were all but scrapped.<sup>73</sup> As far as improving housing conditions for minority groups through "vigorous administrative practice," the housing agencies continued to put a premium on segregated and discriminatory housing while general policy statements in favor of equal access to housing benefits continued to be issued.

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<sup>72</sup>*Forbidden Neighbors*, p. 345.

<sup>73</sup>Congress in passing the Housing Act of 1949 authorized 810,000 units to be built--135,000 per year during a 6-year period. After 1949, Congress or the President placed a lower limit on the rate of building public housing units. President Truman in 1950, because of the Korean War, asked that the program be cut back. The Housing Act of 1954 authorized the construction of 35,000 new units for one year, and the program was limited to FHA, Title I slum clearance and urban renewal projects and to localities where a certified need existed to house displaced families. In 1955, President Eisenhower asked and Congress approved the building of 35,000 units for the next three years. From 1949 to 1959, 230,000 units had actually been built under the authorizations of Congress. Housing and Home Finance Agency, *Housing Statistics* (Washington: U. S. Government Printing Office, August, 1959), p. 84.

A change in the White House saw a repetition of the older habitual administrative practices. It was evident to civil rights groups that administrators of the HHFA failed to demonstrate through action their proclaimed goals of equal opportunity in housing. They interpreted their roles strictly, that is, what they considered their legal authority within the federal housing program. Basic policy created by Congress directed HHFA Administrators to help and work with private business and local public authorities. The Administrators determined the legislative directive to mean that federal aid to housing should take the form of encouragement and assistance to the housing industry with as few restrictions as possible. Albert M. Cole, Administrator of the HHFA, clearly epitomized this approach to Senator Prescott Bush who had asked Cole what the housing agencies were doing about discrimination. In a letter submitted to Senator Bush, Cole stated:

All of the programs administered by this agency rely basically upon private and local initiative and place heavy reliance upon local responsibility in meeting housing needs. The role of the federal government in the housing programs is to assist, to stimulate, to lead and sometimes to prod, but never to dictate or coerce, and never to stifle the proper exercise of private and local responsibility. This is as it should be, not only because housing needs and problems are peculiarly local but also because undue federal intervention is incompatible with our ideas of political and economic freedom.<sup>74</sup>

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<sup>74</sup>Letter from Albert M. Cole to Senator Prescott Bush, in the *Congressional Record*. U. S., *Congressional Record*, 84th Congress, 2nd Session, 1956, CII, Part 8, 10746.

In a more explicit statement, Cole in 1958 described the approach of the federal agencies to housing discrimination.

The *New York Times* reported:

. . . he believed the federal government had no responsibility to promote the ending of racial discrimination in residential accommodations. . . . in insuring mortgages on private housing and in providing funds for public housing, the various federal bodies under his jurisdiction were instructed to "take cognizance" of state and local laws prohibiting discrimination. . . . beyond this observance Mr. Cole rejected any more positive anti-segregation role for the federal government.<sup>75</sup>

Housing administrators then lacked an effective administrative check on the private housing industry and local public agencies in banning discriminatory practices. They determined their own powers strictly within the guidelines

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<sup>75</sup>*New York Times*, November 14, 1958, p. 46.

The successor of Albert M. Cole as Administrator of the HHFA was Norman P. Mason. His outlook was similar to Cole's. He said: "The Federal Housing Administration does not attempt to enforce state or city laws respecting housing. We have taken the position that this is a matter strictly for the local enforcement agency or commission." See U. S. Commission on Civil Rights, *Hearings, Conference with Federal Housing Officials* (Washington: U. S. Government Printing Office, June 10, 1959), II, p. 15.

Robert C. Weaver, named Administrator of the HHFA in 1961 by President Kennedy, admitted his inability to prevent builders aided by FHA mortgage insurance from discriminating against Negroes. In a letter to Paul Cooke, National Vice Chairman of the American Veterans Committee, Weaver said:

As you know, I am on record unequivocally for open occupancy in housing. . . . You are also aware, I am sure, as indicated in the congressional hearings on my appointment to this position, that I do not believe I could or should undertake to impose an open occupancy requirement without such a policy directive from either the Congress or the Executive.

Letter cited in U. S. Commission on Civil Rights, *Hearings, Housing in Washington, D. C.* (Washington: U. S. Government Printing Office, 1962), p. 239.

of congressional directives. Under their definition of the federal government's role, the housing agencies left the crucial decisions to the building and real estate industries and the local housing authorities concerning the participation of minority groups in federal housing programs. In the absence of any direction from the Congress or the President, they were not free to upset the custom of segregation found in the local communities.

#### Summary

The legislative struggle indicated to the minority-group bloc that statutory law could not be regarded as the sole weapon in altering the segregated housing patterns that evolved and were abetted by the federal housing program. Civil rights groups realized after the travail of attempting to have incorporated an anti-discrimination amendment to the housing programs that this particular type of legislation was not a panacea. The resort to anti-discrimination legislation as the main weapon in defeating residential segregation might open the way to "subterfuges that destroy social legislation."<sup>76</sup> Although they continued to press for this legislation, the civil rights groups, however, sought other means to bring about equality in housing. Anti-bias legislation was only one tool; if not successful, legislative submittal could serve as an educational function

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<sup>76</sup>*Forbidden Neighbors*, p. 354.

and could be combined with resolutions for investigations into housing discrimination. On the other hand, even if the legislation was enacted, it had to be followed through on every step of its administration to guard against its perversion.<sup>77</sup> Charles Abrams has cited that anti-discrimination legislation should be considered as only one of the arsenal of weapons available in desegregating the federal housing program. He has said:

Resort to federal statute instead of to administrative pressure should be sought only after it appears clear that the administration refuses to conform or after the courts have ruled adversely, leaving statute as the only remedy.<sup>78</sup>

In fact, as Abrams has stated, to seek statutory protection "is an admission of the need for a special law and may be a retreat from rights already vested."<sup>79</sup>

The drive for a legislative remedy had to be considered as having constructive utility only in a certain context. Instead, the minority bloc felt that no statute was

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<sup>77</sup>Congress had recognized the principle of equal rights in housing when it enacted the Civil Rights Act of 1866. The Act, still a part of the *United States Code*, contained the declaration that: "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property." 14 *Stat.* 39 (1866). Obviously, this law has had little practical effect in Negroes attaining equal access to housing in the United States.

<sup>78</sup>*Forbidden Neighbors*, p. 356.

<sup>79</sup>*Ibid.* Since housing statutes do not expressly permit segregation, references to housing for "every American family" and for "all the people" (Housing Act of 1949) implied that governmental housing benefits should be equally available to all persons.

needed to outlaw racial discrimination by the FHA, the PHA, or other federal agencies. Statutory provisions forbidding segregation became less of a compelling force. Direct efforts were made to prohibit the use of the power of the national government in tacitly endorsing segregated housing. The housing agencies, reasoned the minority bloc, were agents of the national government. Therefore, they assumed that the agencies should be color blind in the dispensation of their benefits. To reverse the actions of local housing authorities and the private housing industry who acted as agents and used the power of the national government, pressure for racial equality was exerted against the federal housing agencies, distributors of the governmental benefits. However, yet to be defined was an authoritative sweeping judicial decision affecting the federal housing agencies. What was needed was a standard, spelling out a constitutional principle from the most authoritative source, the United States Supreme Court. If a favorable decision could be gained, it would not be possible for the federal housing agencies to continue to endorse the racially restrictive practices depriving Negroes equality in housing. With a favorable court ruling, the civil rights groups assumed that any recipients of the federal housing program could no longer engage in the devices utilized in depriving Negroes of adequate housing. The possible route for the fulfillment of equality in housing lay in the hands of the United States Supreme Court. A clear statement of the principle of

equality in housing was necessary. Civil rights groups turned to the federal courts for an expected final determination.

## CHAPTER V

### DISCRIMINATION IN HOUSING AND THE FEDERAL COURTS

. . . Supreme Court cases involving larger issues are contests between opposing forces rather than lawsuits between individuals. They are cast as individual pieces of litigation because the Constitution guarantees the rights of individuals rather than those of groups. However, as a practical matter the individual is unable to pursue his rights to the ultimate, and hence the job is done by groups of people who find themselves situated as the individual is situated and who secure their own rights by securing the rights of the similarly situated individual.<sup>1</sup>

Loren Miller

Interest groups that have weak access to the legislative or executive branches of government frequently resort to appeals to the judicial system for favorable decisions in their behalf. Minority groups, particularly, have utilized the judiciary to resolve conflict and to render authoritative decisions on public policy. Having the power to rescind legislative and executive action, the judiciary also interprets, within the constitutional framework, the

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<sup>1</sup>Loren Miller, now a Los Angeles municipal judge, is both a Vice-President of the NAACP and the National Committee Against Discrimination in Housing. As a lawyer for the NAACP, he was involved in a number of housing segregation cases before the United States Supreme Court and California courts. The above-mentioned description of the legal process as a form of pressure group activity was in a letter to author Clement E. Vose. Cited in Clement E. Vose, *Caucasians Only* (Berkeley and Los Angeles: University of California Press, 1959), p. 241. Hereafter cited as *Caucasians Only*.

policies decided upon by these two branches of government. Recognizing that the judiciary is an area of government for effective decision-making, civil rights groups have intensely engaged themselves in the judicial process. Through the courts, substantial legal victories have been gained, serving to fill the vacuum caused by legislative or executive inaction in the fight for equal opportunities in American life.

The legislative history has indicated that Congress did not intend to impose upon public housing authorities, builders or any other beneficiaries of the federal program, a statutory duty not to discriminate in the area of housing. Congress refused to include in the federal housing program a positive ban against discriminatory practices based on race. In the absence of any standards, administrators deferred to local pressures, which in essence defeated the plan for a uniform housing program and discriminated against the people for whose benefit the program was instituted. Negroes and their civil rights allies then renewed their efforts through the courts seeking favorable decisions in order to break down patterns of residential segregation where there was government involvement.

#### Utilization of Litigation By The NAACP

Negro protest against inequality has been directed against an inferior legal status, either defined by law (in

the South) or as applied in practice (in the North).<sup>2</sup> When the NAACP was formed, the organization sought to use the processes of the courts to improve the status of the Negro under law. William E. B. DuBois, one of the founders of the NAACP, in issuing the official call to organize the NAACP, posed the question in 1909 when he asked:

How far has it [the Emancipation Proclamation] gone in assuring to each and every citizen, irrespective of color, the equality of opportunity and equality before the law, which underlie our American institutions and are guaranteed by the Constitution?<sup>3</sup>

The NAACP, since its inception, has led the drive to affirm for Negro citizens their basic constitutional status. From the outset, the Association realized that in the area of civil rights, neither Congress, for political reasons, nor the President (until after World War II) were receptive to the redress of Negro grievances. The avenue that was utilized most successfully was the judicial process. Once used, the judicial process was found to be an effective way to reaffirm and redefine the legal status of the Negro.<sup>4</sup>

By 1959 the NAACP was involved in fifty-five cases decided by the United States Supreme Court in the area of

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<sup>2</sup>Pauli Murray, "Protest Against the Legal Status of the Negro," *The Annals*, CCCLVII (January, 1965), 56.

<sup>3</sup>Quoted in Roy Wilkins, "Emancipation and Militant Leadership," *100 Years of Emancipation*, ed. Robert A. Goldwin (Chicago: Rand McNally and Company, 1964), p. 28.

<sup>4</sup>Blaisdell, *op. cit.*, p. 279.

race relations.<sup>5</sup> By presenting test cases to the Supreme Court, the NAACP gained successive victories protecting the right of Negroes in voting, transportation, education, service on juries and housing. The success enjoyed by the NAACP may be explained, according to Donald C. Blaisdell, by the fact that the rights of individuals are a subject for determination by the courts.<sup>6</sup> But as Clement E. Vose, perhaps the richest source of information on group litigation, has stated, ". . . organizations--identifiable by letterhead--often link broad interests in society to individual parties of interest in Supreme Court cases."<sup>7</sup> In efforts to obtain favorable policy determination from the courts, "the NAACP has succeeded in asking the questions from which the Supreme Court has been able to select those which it desired to answer."<sup>8</sup>

When the Legal Defense and Educational Fund of the NAACP was created in 1939, a basic approach was formalized. The Legal Defense Fund's lawyers did not construe their purpose as that of a legal aid society. They sought to seek racial equality before the law on a broad basis. In convincing the Supreme Court "to select those which it

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<sup>5</sup>Jack Greenberg, *op. cit.*, p. 37. By 1957, the NAACP had gained no less than forty victories in the Supreme Court.

<sup>6</sup>Blaisdell, *op. cit.*, p. 267.

<sup>7</sup>Clement E. Vose, "Litigation as a Form of Pressure Group Activity," *The Annals*, CCCXIX (September, 1958), 21.

<sup>8</sup>Blaisdell, *op. cit.*, p. 35.

desired to answer,"<sup>9</sup> the Legal Defense Fund entered cases only "when they involve racial discrimination, touch a fundamental right of citizenship, and establish a significant legal precedent."<sup>10</sup> Clement E. Vose, describing the tactics of the NAACP's Legal Defense Fund, said:

With care in the selection of issues, with the tact and maturity acquired by experience, and with the development of strong supporting organizations, the NAACP legal staff has become one of the ablest in the nation.<sup>11</sup>

The NAACP legal staff discovered early in its operations that the bulk of litigation in the lower courts raised a few issues of concern other than to the parties immediately involved.<sup>12</sup> For the most part, in such cases, important questions of law or policy were not developed nor were coherent efforts made to develop a well-articulated body of precedents favorable to the civil rights cause.<sup>13</sup> The victory

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<sup>9</sup>*Ibid.*

<sup>10</sup>*Caucasians Only*, p. 49.

<sup>11</sup>*Ibid.* For descriptions of the tactics, personnel and legal staff, and resources available in the early days of the Legal Defense Fund see the following: *Caucasians Only*, pp. 39-49; Jack Greenberg, *op. cit.*, pp. 22-23; Langston Hughes, *Fight for Freedom: The Story of the NAACP* (New York: W. W. Norton and Company, 1962), pp. 122-139.

<sup>12</sup>Greenberg, *op. cit.*, p. 35.

<sup>13</sup>*Ibid.* By 1934, however, the legal staff of the NAACP coordinated its activities throughout the country so as to best utilize the small financial resources available. Rather than attack all vestiges of inequality, the legal staff decided that major emphasis should be placed upon educational inequalities. The NAACP Annual Report of 1934 stated: "It should be made clear that the campaign is a carefully planned one to secure decisions, rulings and public opinion on the broad principle instead of being devoted

garnished by litigation in the lower courts may have provided relief to the individuals concerned but they failed to benefit the Negro as a group. In time, the NAACP and civil rights groups realized that as cases moved from the lower to the higher courts and eventually to the United States Supreme Court, broader ramifications were involved for the civil rights movement. How to curb the circuitous course of the judicial process became a key to the litigation carried on by the Legal Defense Fund.

David B. Truman has noted that organized groups are not concerned in the same way with courts and court decisions as they are with the functions of the other branches of government.<sup>14</sup> Yet the impact of interest groups upon judicial behavior is well marked.<sup>15</sup> The judiciary has reflected the play of interests and organized groups cannot afford to be indifferent to its activities.<sup>16</sup> There are degrees of difference between the means of access to the judiciary and the other two branches of government. Truman has pointed out that these differences not only define the

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to merely miscellaneous cases." Cited in Greenberg, *op. cit.*, p. 35.

<sup>14</sup>Truman, *op. cit.*, p. 479.

<sup>15</sup>In addition to *Caucasians Only* and Vose, *The Annals*, CCCXIX, 20-31, see the following for the activity of interest groups in the courts: Arthur F. Bentley, *The Process of Government* (Bloomington: The Principia Press, 1949), pp. 382-399; Nathan Hakman, "Business Influence in the Judicial Process," *Western Business Review*, I (August, 1957), 124-130; David B. Truman, *op. cit.*, pp. 478-498.

<sup>16</sup>Truman, *op. cit.*, p. 479.

place of the courts in the governmental process but also highlight the significance of interest groups in the entire system.<sup>17</sup> Group action through the courts can be called an extension of interest group activity carried on in the other branches of government by other means. Entering in the judicial process, interest group activity can be either indirect or direct. At the highest level, the United States Supreme Court, groups have made contact with the justices primarily through the record of the lower court proceedings, through the briefs of counsel and *amici curiae* presented to the Supreme Court and through oral argument before the nine justices.<sup>18</sup>

In its quest for access to the courts, the NAACP has found that group activity is the medium through which the most effective civil rights tactics work.<sup>19</sup> On questions of public policy in the field of civil rights, litigation sponsored by the NAACP has often been group supported. The NAACP has always received aid from groups working against discrimination whether the approach used be through legislative or judicial action.<sup>20</sup> While the impetus and

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<sup>17</sup>*Ibid.*, p. 482.

<sup>18</sup>Robert Scigliano, *The Courts: A Reader in the Judicial Process* (Boston: Little, Brown and Company, 1962), p. 177.

<sup>19</sup>Greenberg, *op. cit.*, p. 23.

<sup>20</sup>Groups submitting *amici curiae* briefs in the racial covenant cases are listed in Appendix B.

motivation behind judicial lobbying came from the NAACP's Legal Defense Fund, an important part of the work has been supplied by organizations whose general inclination was to support the cause of equality even though that cause was not the primary reason for their existence.<sup>21</sup> They contributed to NAACP litigation because they considered it a part of the credos which they espoused, whether their philosophies be religious, fraternal, economic, or political.<sup>22</sup> Major support from civil rights groups came through independent research submitted to the Supreme Court in the form of *amici curiae* briefs in leading test cases conducted by the NAACP. For civil rights groups, the Supreme Court has been looked upon as the guardian of the "rules of the game." They expected the Supreme Court to identify themselves with those "rules" and to furnish privileged access to the interests that reflected them.

Seeking an end to racial discrimination through judicial decisions, decisions that could implement the "rules of the game," was the basic tactic used by the NAACP after World War II. The NAACP and civil rights groups were aware

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<sup>21</sup>Joseph B. Robison, "Organizations Promoting Civil Rights and Liberties," *The Annals*, CCLXXV (May, 1951), 22.

<sup>22</sup>*Ibid.* For example, after World War II, the NAACP actively built alliances with organized labor and strengthened old ones with liberal interest groups. Union support for NAACP objectives grew after the Association denounced the passage of the Taft-Hartley Act of 1947.

of the judiciary's role in the adjustment of social power and group rights.<sup>23</sup> Frequent use of the courts was then made by the NAACP on a wide basis. Its resources and strength were used to secure a series of favorable rulings which have resulted in the fact that "the NAACP has won more victories in the Supreme Court than any other single organization."<sup>24</sup> Success through judicial decisions, however, as the NAACP learned, need not be clear cut or total victories. For as David B. Truman has stated:

Any court system may find its position challenged. . . . A system of constitutional courts, exercising the power to review the acts of other governmental agencies to which the affected interests have previously achieved effective access, cannot ignore the possibility that its decisions may be defied. A judiciary with power will inevitably be an object of the struggle for control.<sup>25</sup>

Although courts act only in cases between parties with concrete interests at stake, organizations concerned with the impact of the decision become active participants by sponsoring test cases brought in the name of a private party, by aiding government attorneys in a case, or by filing briefs as an *amicus curiae*.<sup>26</sup> Major efforts used by the NAACP to influence public policy through litigation have

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<sup>23</sup>The strength of business groups was weakened during the New Deal period. To maintain some power of decision making in the economy, business groups initially found ready access to a sympathetic United States Supreme Court.

<sup>24</sup>Blaisdell, *op. cit.*, p. 268.

<sup>25</sup>Truman, *op. cit.*, p. 485.

<sup>26</sup>Vose, *The Annals*, CCCXIX, 31.

seen the development of new theories of legal interpretation and the preparation of specific actions in the courts to challenge existing precedent.<sup>27</sup>

To accomplish these tasks, the NAACP has sponsored and promoted test cases as the most effective way of influencing litigation. The advantages to the individuals concerned and the NAACP supporting the litigation were manifest.<sup>28</sup> First, the NAACP selected individual cases having broad constitutional ramifications. Although they were not parties to the cases, groups having an indirect interest in the litigation participated in the drive for equal rights by means of *amicus curiae* briefs. Secondly, the NAACP lawyers, through local chapters, provided advice, information and related services to litigants or prospective litigants. Thirdly, the NAACP furnished the financial assistance to individuals necessary to carry on the litigation ranging from the payment of attorney and court fees. Finally, the NAACP lawyers through long and common associations have developed a consensus on the correct timing in the quest for equality through litigation.<sup>29</sup> United in purpose and strategy, a

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<sup>27</sup>*Ibid.*

<sup>28</sup>For a concise summary of the major tactics used by interest groups in the courts see Hakman, *op. cit.*, pp. 124-130.

<sup>29</sup>The role of Howard University Law School in Washington, D. C., has been crucial in civil rights cases. The Law School provided the NAACP with many lawyers who along with members in the Negro National Bar Association have contributed to the consensus.

leading Negro lawyer, Charles Houston, could in 1935 point to the NAACP's plans of seeking out litigation ". . . to secure decisions, rulings and public opinion on the broad principle instead of being devoted to merely miscellaneous cases."<sup>30</sup>

The effectiveness of group supported litigation is apparent when viewed in terms of the obstacles individual action would meet when drawn into the judicial process step by step and appeal by appeal.<sup>31</sup> It is estimated that with no delays a case takes an average of from two to five years to pass through the two lower courts to the Supreme Court of the United States.<sup>32</sup> Meeting the court costs alone would be an undue burden for individual Negroes fighting racial discrimination. In response to a query of Senator Jacob K. Javits regarding the costs of litigation that was involved in establishing the right to attend desegregated public schools where there was strong local opposition, Gordon M. Tiffany former Staff Director of the United States Commission on Civil Rights estimated:

. . . a case fought from the district court, through the court of appeals to the Supreme Court . . . since the Brown decision, appears to be about \$15,000 to \$18,000. This estimate does not include the fair value of services of the Negro lawyers who serve without compensation. It is also lower than it would otherwise be because the attorneys for the National Defense and Educational Fund of the NAACP . . . are employed on an annual salary

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<sup>30</sup>Herbert Hill and Jack Greenberg, *Citizens Guide to Desegregation* (Boston: Beacon Press, 1955), p. 56.

<sup>31</sup>Samuel Krislov, *The Supreme Court in the Political Process* (New York: The Macmillan Company, 1965), p. 42.

<sup>32</sup>*Ibid.*, p. 41.

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Judicial Lobbying Through Use of *Amicus*  
*Curiae* Briefs and Law Periodicals

In instigating private lawsuits to affect public interest, the NAACP and civil rights groups have been the leading filers in the federal courts of *amicus curiae* briefs aimed at social changes. *Amicus* briefs, such as in the *Shelley v. Kraemer*, *Brown v. Board of Education*, and in other cases concerning broad interests, have been welcomed by courts as clarifiers of widely competing interests. The utilization of *amicus* briefs in the courts is then an accepted tactic used by organized interest groups. As the interest of large numbers of groups has been specifically cited as grounds for the granting of certiorari by the Supreme Court,<sup>34</sup> many well-constructed and forceful briefs from numerous organizations can serve to strengthen the

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<sup>33</sup>Letter to Senator Jacob K. Javits from Gordon M. Tiffany printed in the U. S., *Congressional Record*, 86th Congress, 2nd Session, 1960, CVI, Part 3, 3663. Average costs to the NAACP in cases "in which the fundamental rules governing racial problems are laid down" have ranged from \$50,000 to \$100,000 and the costs to the NAACP leading to the *Brown v. Board of Education* decision came to \$200,000," according to Krislov, *op. cit.*, p. 41.

The NAACP in its fight through the courts to strike down racial zoning and racial restrictive covenants spent \$100,000, according to Walter White, former Executive Secretary of the Association. These expenditures were met over a thirty-one year period of time beginning in 1917 and ending in the *Shelley v. Kraemer* decision of 1948. See *Caucasians Only*, p. 213.

<sup>34</sup>Krislov, *op. cit.*, p. 42.

litigant's plea before the Court.<sup>35</sup>

What should be said to buttress a legal argument creates a broad problem. Advising the American Civil Liberties Union and the American Jewish Committee in *amicus curiae* briefs to be submitted for Negro litigants in the racial covenant cases of 1948, Charles Abrams, then a New York housing consultant said:

I have always viewed the function of the *amici* to take up and emphasize those points which are novel or which, if stressed in the main brief, might dilute or weaken the main forceful arguments.

I have never thought there was much cumulative force in the repetition of logic by eighteen briefs. Unlike good poetry, repeated it has a tendency to bore. But a weak legal argument, with a moral quality, forcefully presented by an "outsider" will not detract from the force of the main argument. If it creates a healthy doubt or insinuates even a slight justification for itself on moral grounds, it may bend the judge toward adopting the law advocated in the main brief.<sup>36</sup>

The appearance of organizations as *amici curiae* has been the most overt form of group representation in Supreme Court cases. Their introduction and reception by the Supreme

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<sup>35</sup>The number of briefs sometimes can be a problem. Preparing for the racial covenant cases before the Supreme Court in 1948, the NAACP coordinating committee of lawyers feared that too many *amicus curiae* briefs, submitted without force planning or repetitious ones would not help the cases very much. Fourteen organizations initially were slated to submit briefs to the court. Eventually, 19 were accepted by the Court. As counsel for the parties in the covenant cases, the NAACP had to give consent for the filing of each *amicus curiae* brief but no thought was given to formally restricting "misguided friends who wanted to help." See Clement E. Vose, "NAACP Strategy in the Covenant Cases," *Western Reserve Law Review*, VI (Winter, 1955), 120-127.

<sup>36</sup>Letter from Charles Abrams to Norman Levy, Counsel for the American Jewish Committee. Quoted in *Caucasians Only*, p. 166.

Court can be viewed as a battle between interests larger than isolated individuals when the Court allows them to participate in the proceedings.<sup>37</sup>

The decision by groups to go to court for redress of grievances may be made because of their weakness in attempting to deal with other branches of government. For Negro and civil rights groups, however, the federal courts have been a favorable agency through which to bring about policy changes. Sometimes, federal agencies have appeared as *amici curiae*. As a friend of the court, the Department of Justice has filed briefs in the restrictive covenant cases and in the school segregation cases.<sup>38</sup> By obtaining an ally in the executive branch of the government for the pleading of their cause, civil rights groups have utilized an invaluable technique in judicial lobbying. Functioning as the law office of the United States Government, the Department of Justice is charged with enforcing the laws of the United States.<sup>39</sup> Within the Department, the Solicitor General's Office handles the litigation when the Government is a party. In roughly half of the cases heard before the Supreme Court, the United States Government is a party or *amicus*.<sup>40</sup> The

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<sup>37</sup>Carl A. Auerbach, *et al.*, *The Legal Process* (San Francisco: Chandler Publishing Company, 1961), p. 228.

<sup>38</sup>*Ibid.* The cases were: *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Hurd v. Hodge*, 334 U. S. 24 (1948); *Brown v. Board of Education*, 347 U. S. 483 (1954); *Bolling v. Sharpe*, 347 U. S. 497 (1954).

<sup>39</sup>Vose, *Western Reserve Law Review*, VI, 125.

<sup>40</sup>Krislov, *op. cit.*, p. 48.

success that the Solicitor General's Office has had in winning cases in which it participated has hovered "consistently year after year at or above the sixty per cent mark."<sup>41</sup> Having the Solicitor General on your side naturally has made the Office a powerful ally in any Supreme Court case.

Philip Perlman, Solicitor General during the Truman Administration, recounted how the Department of Justice filed an *amicus curiae* brief on behalf of the Negro plaintiffs in the racial restrictive covenant cases of 1948. The decision to enter the cases was announced by Tom C. Clark, then Attorney General, and came not only as a response to "Negro pressures, the President's Committee on Civil Rights and the President himself but to the wishes of official groups within the Executive Branch."<sup>42</sup> Perlman has written that prior to the decision:

There was a number of letters filed with the Attorney General and also with me by different religious, racial, welfare and civil rights organizations, urging the Government to enter the litigation. I believe it was the first time that the Department of Justice had filed a brief in litigation of this character to which it was not a party. It was also decided . . . that I should ask the Court for leave to present an oral argument. . . . in that case the Government filed a brief and argued the merits.<sup>43</sup>

The Government's entry on the side of the civil rights groups enhanced the discontinuance of the judicial enforcement of

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<sup>41</sup>*Ibid.*

<sup>42</sup>Vose, *Western Reserve Law Review*, VI, 126.

<sup>43</sup>Letter from Philip Perlman to Clement E. Vose. Quoted in Vose, *Western Reserve Law Review*, VI, 126.

racial restrictive covenants, when the cases were heard by the Supreme Court.

In using litigation as a form of pressure group activity, the NAACP has not only taken test cases to the Supreme Court from the lower courts but also encouraged writings on the sociology of law, getting them printed in the law reviews of the country. Analyzing this form of judicial lobbying, Donald C. Blaisdell has opined that beneficial results have occurred through

. . . squeezing the last drop of their propaganda value by using them in briefs filed as friends of the court where judges would see and use them. In short, it has provided a superb illustration of the lobbyist's principal duty of seeing that the decision-maker's attention is kept concentrated on the "right" facts.<sup>44</sup>

Efforts by the NAACP to win the restrictive covenant cases exemplified the assembling of sociological material so that a favorable decision might be rendered by the Supreme Court.<sup>45</sup>

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<sup>44</sup>Blaisdell, *op. cit.*, p. 267.

<sup>45</sup>The most prominent use of social scientists was in the school segregation cases of 1954. Here, opinions of social scientists were placed before the Court regarding the effect of racial classification and "separate but equal" upon the minds of young Negro children. In the racial restrictive covenant cases the sociological briefs submitted to the Court condemned the housing restrictions on Negroes and their effects on the Negro community. In the area of civil rights, there has been a marked trend of collaboration between the jurisprudents and social scientists at the trial level.

Arnold Rose has observed: "What the social scientist can do in the courtroom is to present certain social facts that serve as conditions affecting the outcome of the case. That is, there are certain cases in which the judge must assume certain social facts to be true before he can arrive at any decision. . . ." Arnold Rose, "The Social Scientist as an Expert Witness," *Minnesota Law Review*, XL (1955-1956), 215.

Facing legal precedents that favored white homeowners who had signed racial restrictive covenants, Negro lawyers felt as they carried these cases to the Supreme Court in 1947 that if they were to win, they would have to rely heavily on nonjudicial material. To offset this disadvantage, the NAACP tried to convince the Court that judicial enforcement of covenants violated the Fourteenth Amendment as it involved state action.<sup>46</sup> *Amicus curiae* briefs would also point to the social results that evolved from enforcement of the restrictive covenants. But the lawyers working on the cases thought that legal reasoning nor raw statistics would be sufficient for presentation in legal briefs. For a broader appeal, they decided there should be published citations of articles and books whose relevant facts might have been overlooked by the Justices of the Supreme Court.<sup>47</sup> At an NAACP conference in the fall of 1947 representatives of civil rights organizations agreed to have prepared and published, sociological material that could be used in briefs to be presented before the Supreme Court. The NAACP had already published some material but here the conference's objective was to gain new sources augmenting its presentation to the Court. Soon a large number of independently written

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<sup>46</sup>*Caucasians Only*, p. 160.

<sup>47</sup>*Ibid.*

articles were published.<sup>48</sup> With the raft of articles appearing in the various journals, the NAACP could tell the Supreme Court that the writing public was aroused.

The use of the testimony of social scientists in judicial lobbying has raised the issue that the Supreme Court has decided cases on the basis of the tenets of a particular school of sociology or social psychology rather than legal precedents. After the *Brown v. Board of Education* decision in 1954, an impression grew that the outcome was due to the testimony and opinions of the social scientists. Edmond Cahn criticized the role played by them stating that he would not have the "constitutional rights of Negroes . . . rest on any such flimsy foundation as some of the scientific demonstrations in these records."<sup>49</sup> Fearing the inability of the behavioral sciences to predict human behavior, Cahn has pointed out:

Recognizing as we do how sagacious Mr. Justice Holmes was to insist that the Constitution be not tied to the wheels of any economic system whatsoever, we ought to keep it similarly uncommitted in relation to the other social

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<sup>48</sup>*Ibid.*, p. 161. Among the journals that had lengthy articles were: *The Annals*, *Yale Law Journal*, *University of Chicago Law Review*, *National Bar Journal*, *Architectural Forum*, *National Lawyers Guild Review*, *Journal of Land and Public Utility Economics* and *Survey Graphic*. Also published were two books on the subject, one by Robert C. Weaver, *The Negro Ghetto* and *People v. Property: Race Restrictive Covenants in Housing* by Herman H. Long and Charles S. Johnson of Fisk University.

<sup>49</sup>Edmond Cahn, "A Dangerous Myth in the School Segregation Cases," *New York University Law Review*, XXX (1955), 153.

sciences.<sup>50</sup>

Jack Greenberg, former Director-Counsel of the NAACP Legal Defense Fund, has argued to the contrary. The school segregation decision, he felt did not flow from the evidence presented by social scientists as the Court did not refer to the testimony, nor did it affirm or reverse the findings on the effects of segregation.<sup>51</sup> A basic question for the judge said Justice Frankfurter is "How to inform the judicial mind, as you know, is one of the most complicated problems."<sup>52</sup> For Greenberg, then, the use made of the social sciences by the NAACP in litigation is justified. Since law deals more and more with issues of great public consequence, there is a basic need to increase the judiciary's knowledge. Therefore lawyers must more and more produce facts bearing on issues that concern the public. By means of this sophisticated form of lobbying, the NAACP, civil rights groups and social scientists have helped to shape judge-made law in providing the relevant facts needed to make decisions.

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<sup>50</sup>*Ibid.*, p. 166.

<sup>51</sup>Jack Greenberg, "Social Scientists Take the Stand: A Review and Appraisal of their Testimony in Litigation," *Michigan Law Review*, LIV (1955), 961.

<sup>52</sup>Quoted in *Ibid.*, p. 953.

The Racial Restrictive Covenant Cases: The  
Quest to Eliminate Judicial Enforcement  
of Racial Restrictions in Housing

In the drive for a United States Supreme Court decision to overturn judicial enforcement of racial restrictive covenants, the NAACP made a full-fledged trial run in pressing for the expansion of Negro rights. The drive made use of the perfected techniques developed by the NAACP in twenty-five cases during the period from 1909 to 1947 when the United States Supreme Court agreed to hear the first four covenant cases.<sup>53</sup> Earlier litigation conducted by the NAACP did not compare in scope to the organization's attempt to eliminate the judicial enforcement of racial restrictions in housing. The basic approach utilized by the NAACP to overcome the legal precedents that stood against them was the reliance on the constitutional theory of "state action" with the latest socio-economic facts about discrimination in housing.<sup>54</sup>

Early judicial efforts

The first experience the NAACP had in relation to racial segregated housing came in the year 1911 upon the appeal from a group of Kansas City Negroes who had been the victims of a mob action after moving into a formerly all

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<sup>53</sup>*Caucasians Only*, p. ix.

<sup>54</sup>*Ibid.*

white area.<sup>55</sup> Violence was opposed from the outset by the NAACP in order to protect the right of Negroes to live in any section of a city. However, the earliest celebrated legal action, undertaken by the NAACP came as an aftermath of a housing riot in 1925.<sup>56</sup> But it was more invidious practices, however, that threatened forced residential segregation, that is, passage of special housing laws by a number of cities, prescribing where Negroes could live or not live. City councils in Baltimore, Richmond, Winston-Salem, Louisville, Birmingham and a number of smaller communities had enacted segregation ordinances by 1915.<sup>57</sup> The NAACP feared that racial zoning laws might sweep the country.

In most cases these laws created Negro and white blocks. Richmond, Virginia, forbade residence on a block "where the majority of residences on such streets are occupied by those with whom said person is forbidden to inter-

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<sup>55</sup>Hughes, *op. cit.*, p. 117.

<sup>56</sup>In the city of Detroit, a Negro surgeon, Dr. Ossian Sweet, purchased a home in a white neighborhood. After moving in, his home was attacked by a white mob. At the time of the attack Dr. Sweet had assembled a number of relatives and friends in his home. As the mob moved on Sweet's home, shots rang out from his house resulting in the death of a member of the mob. Sweet, ten relatives and friends were indicted on the charge of first degree murder. The national office of the NAACP and its Detroit branch carried the burden of their defense, retaining Clarence Darrow as chief counsel. Eventually, in a second trial a brother of Sweet was acquitted of the murder charge. The total charge of both trials came to \$37,849, most of which was paid by the national office of the NAACP. Hughes, *op. cit.*, pp. 117-118.

<sup>57</sup>*Caucasians Only*, p. 51.

marry."<sup>58</sup> New Orleans passed an even more complicated law requiring the consent of the majority of residents before a Negro could move into a particular area. The city of Louisville completed the process by zoning the entire city into white and Negro districts, forbidding occupancy by members of one race in areas where the majority of houses were occupied by members of the other. A test case of the Louisville zoning law was made by the NAACP in the year 1917.<sup>59</sup> The rationalization of residential segregation by means of zoning laws in the city of Louisville was the promotion of public peace by preventing racial conflicts; the maintenance of racial purity; the prevention of the deterioration of property owned and occupied by white people which was sure to follow with the occupancy of property by Negroes in areas adjacent to the whites.<sup>60</sup>

In a narrowly based decision, the Supreme Court relied to a great extent on a pro-property rights attitude rather than the right to live anywhere as a basic civil right. The decision rested on the common law's tradition of freedom in the alienation and use of land. Upholding the right to buy and sell property freely, the Supreme Court,

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<sup>58</sup>Ian D. McMahan, *The Negro in White Suburbia* (New York: Freedom of Residence Foundation, Inc., 1963), p. 9.

<sup>59</sup>*Buchanan v. Warley*, 245 U. S. 60 (1917).

<sup>60</sup>Described in the *Buchanan v. Warley* decision by Justice Day who delivered the opinion of the Court, and cited in Joseph Tussman (ed.), *The Supreme Court on Racial Discrimination* (New York: Oxford University Press, 1963), p. 275.

overturned the Louisville law and eventually the other laws cited in the cities above. In the 1917 decision, the Court found that the Fourteenth Amendment extended the right of purchasing, leasing, selling and conveying property to cover actions by state and local governments. Citing one section of the Civil Rights Act of 1866, Justice Day, speaking for the Court, said:

The statute of 1866 . . . expressly provided that all citizens of the United States in any state shall have the same rights to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. The 14th Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.<sup>61</sup>

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<sup>61</sup>*Ibid.*, p. 279. In two later cases reaching the Supreme Court, *Harmon v. Tyler*, 273 U. S. 668 (1927) and the *City of Richmond v. Deans*, 281 U. S. 704 (1930), the national office of the NAACP successfully overturned the racial ordinances of New Orleans and Richmond, Virginia. The ordinance in New Orleans, struck down in the *Harmon v. Tyler* decision, was held unconstitutional on the basis of the *Buchanan v. Warley* rule. In the decision effecting the *City of Richmond*, the Supreme Court affirmed without opinion the action taken by the Circuit Court of Appeals for the Fourth Circuit, which held that this restriction fell within the *Buchanan v. Warley* rule because the legal prohibition of intermarriage is itself based on race.

Since 1929, according to Vose, racial segregation by ordinance has been a rarity of no consequence. *Caucasians Only*, p. 52. However as late as 1949, the city of Birmingham, Alabama, was enforcing racial zoning laws. In *City of Birmingham v. Monk*, 185 F. 2d 859 (5th Cir.); *cert. denied*, 341 U. S. 940 (1951), the Court of Appeals for the Fifth Circuit affirmed an injunction against the Birmingham zoning law, holding immaterial allegations that Negroes moving into white neighborhoods provoked violence.

While the Court decisions had put an end to racial zoning legislation legally, they did not end the use of the zoning weapon against minorities. Communities no longer resorted to overt laws exposing themselves to judicial attack. The methods became more subtle and exclusions more effective as the techniques used had nothing to do with race. Thus some zoning regulations barred cooperatives which might sell to minorities, others imposed acreage or financial requirements which were modified easily for whites but enforced strictly for Negroes.<sup>62</sup> Finally, land has been condemned for municipal use following the proposed movement of Negroes into an area where they were not wanted. An outstanding example of the latter technique occurred in Deerfield, Illinois. In 1959, the city blocked an interracial housing development by taking over the housing site on the pretext of the need for a public park.

#### Building precedents to undermine restrictive covenants

The legal victories gained by the NAACP in the racial ordinances decisions caused white supporters of residential segregation to increase the use of racial restrictive covenants and to rely upon their judicial enforcement. After the *Buchanan v. Warley* decision, the defenders of the status quo as far as Negro housing was concerned fell back on the racial covenant. Typically, racial restrictive cove-

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<sup>62</sup>Greenberg, *Race Relations and American Law*, p. 278.

nants were compacts entered into by a group of property owners and real estate operators, or developers in a certain area, who agreed not to sell, lease or convey their property to certain minority groups, particularly Negroes, for a definite period of time.<sup>63</sup> The most common device for enforcing these covenants were the neighborhood "protective association," which had as their major purpose keeping the neighborhood all white. Pointing to the effectiveness of the racial covenant, Robert C. Weaver wrote:

. . . of all the instruments that effect residential segregation, race restrictive covenants are the most dangerous. Such covenants give legal sanction and the appearance of respectability to residential segregation.<sup>64</sup>

Seeking to eliminate judicial enforcement of racial covenants, the NAACP was faced with two basic legal precedents. The first was the degree to which the right of the free-alienation doctrine of the common law could be adjusted to prevent court enforcement of the privately drafted agreements which excluded Negroes from specified property.<sup>65</sup>

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<sup>63</sup>An example of a racial restrictive covenant was the one that led to *Shelley v. Kraemer*, 334 U. S. 1, 20 (1948). In part it stated: ". . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date . . . and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

<sup>64</sup>Weaver, *op. cit.*, p. 232.

<sup>65</sup>*Caucasians Only*, p. 4.

Although the right to hold or convey real property is subject to certain restrictions, such as the power of eminent domain, the general principle is, the fewer such restrictions the better. A racial restrictive covenant which restricted one's power to transfer property and which was binding on future owners of such property, sometimes for a period of ninety-nine years, clearly raised some questions about the meaning of the right of free-alienation of property.

At the time the NAACP began to chart and plan a legal attack on racial covenants, the organization met another hurdle posed by the American Law Institute. In its *Restatement of Property*, the American Law Institute stated that all that was necessary to make an exception to the general rule regarding the free disposal of property was that "social conditions render desirable the exclusion of the racial or social group in question."<sup>66</sup> According to the Law Institute two benefits would occur which would outweigh the evils resulting from the curtailment of the power of alienation; the avoidance of unpleasant racial and social relations and the stabilization of the value of the land.<sup>67</sup> In the area of property, developed solely through judicial action and without a controlling decision from the United States Supreme Court, the *Restatement* of the American Law Institute was of great significance. As Clement E. Vose observed:

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<sup>66</sup>Cited in *Ibid.*

<sup>67</sup>*Ibid.*

The practices from which the exceptions to free alienation of land described in the *Restatement* . . . were developed mainly after segregation by ordinance was held unconstitutional. When the ends sought could not be attained by legislation, they were gained by private agreements enforced under the common law. . . . Quietly and unobtrusively, except for those against whom the covenants were directed, a legal means was developed to continue racial segregation despite constitutional and common-law doctrines of a contrary import.<sup>68</sup>

The second legal issue raised by restrictive covenants and faced by the NAACP was: even if such private agreements were legal, could they legally be enforced by the state? In the *Buchanan v. Warley* decision, the United States Supreme Court had held that the Fourteenth Amendment extended the protection of the Civil Rights Act of 1866 to cover action by state and local authorities.<sup>69</sup> The question which arose and was pondered by the NAACP was whether action by a civil court in enforcing a private agreement came under that ruling. If so, it did not matter whether the restrictive covenants were legal since the courts could not enforce them. Faced with a constant housing shortage that was worsened by the scarcity after World War II, the NAACP picked up the attack on the racial restrictive covenants whose judicial enforcements were now circumscribing the small

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<sup>68</sup>*Ibid.*, p. 5. One of the aims of the American Law Institute since its formation in 1923 had been to unify the diverse and often irreconcilable rules of the common law. The *Restatement of Property*, completed in 1944, was the work of nine authorities on property who contributed time from their teaching in law schools, the bench, or at the bar, over a fifteen-year period. Founded by Elihu Root, it has always had in its membership leading lawyers of the nation.

<sup>69</sup>*Supra*, p. 160.

housing supply available. The tack decided upon by the NAACP was that a court enforcing private restrictive contracts constituted state action. Racial agreements then upheld by the courts would come under the stipulations of the Fourteenth Amendment.

A difficult task to overcome, however, had been the failure of the NAACP in an earlier case to overturn judicial enforcement of restrictive covenants. The first important case that arose involving restrictive covenants was *Corrigan v. Buckley*.<sup>70</sup> In the case, a breach of a covenant brought the NAACP into its first major effort to persuade the courts to hold such a restriction unenforceable under the Fourteenth Amendment. Under the precedent of the *Civil Rights Cases* of 1883, the lower federal courts refused to do so. An appeal to the United States Supreme Court by the NAACP's lawyers was dismissed. The Supreme Court declared it lacked jurisdiction stating that "none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property."<sup>71</sup>

Although the NAACP was defeated in the case, the Association's two lawyers who prepared the appeal brief to

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<sup>70</sup>271 U. S. 323 (1926).

<sup>71</sup>Cited in the *Corrigan v. Buckley* decision by Justice Sanford in Tussman (ed.), *op. cit.*, p. 284. The *Civil Rights Cases*, 109 U. S. 3 (1883) held that in enforcing the Fourteenth Amendment, Congress could not prevent discrimination against Negroes by private persons.

the Supreme Court, Louis Marshall and Moorfield Storey, developed a line of argument that presaged later efforts to have the judicial enforcement of racial covenants declared to be an unconstitutional expression of state action.<sup>72</sup>

They felt that nothing was to be gained by attacking the conclusions of the Supreme Court in the *Civil Rights Cases*. Rather than attack that decision, Marshall concluded that

. . . the legislature may not segregate; the governing body of a city or village may not do so. Can a court, acting as a branch of the government, by its mandate bring about segregation without running foul of the decision in *Buchanan v. Warley*, 245 U. S. 45? I think not.<sup>73</sup>

After the Supreme Court dismissed the *Corrigan v. Buckley* case, local NAACP chapters participated in litigation in a number of states. A slight breakthrough came in 1940 when the Chicago branch of the Association carried the case of *Hansberry v. Lee*<sup>74</sup> to the United States Supreme Court. The Hansberrys, whose daughter, Lorraine, later became the famous playwright and author of *Raisin in the Sun*, succeeded in purchasing a home in a white area covered by a racial restrictive covenant.<sup>75</sup> When the Illinois State Supreme Court upheld the provisions of the covenant and barred the Hansberrys, the NAACP engaged a group of attorneys to carry an appeal to the United States Supreme Court. The

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<sup>72</sup>*Caucasians Only*, p. 53.

<sup>73</sup>*Ibid.*

<sup>74</sup>311 U. S. 32 (1940).

<sup>75</sup>Hughes, *op. cit.*, p. 118.

Supreme Court reversed the decision of the Illinois State Supreme Court but did not comment on the constitutionality of restrictive covenants. Deciding the case on narrow grounds, the Supreme Court said that the Illinois State Supreme Court decision upholding the covenant could not bind persons who were not parties to it. Since the covenant in question called for the signatures of ninety-five per cent of the property owners in the neighborhood and the goal had not been achieved, the covenant was not binding. Although the decision did succeed in opening up a twenty-seven-block area in Chicago to Negroes, the case had no significance in the development of a legal doctrine which might challenge the court enforcement of restrictive covenants generally.<sup>76</sup>

It was not until 1945, under the pressure of the post-war housing shortage, aggravated by the influx of Negro workers into northern industrial areas throughout the war, that the NAACP put the question of housing segregation, particularly racial covenants, high on their list of priorities. At a conference of lawyers and race relations experts held in Chicago in July, 1945, it was decided to press the attack on restrictive covenants as soon as suitable cases could be developed. Attending the Chicago conference were major figures of the NAACP ranging from Walter White, the Association's National Secretary; Roy Wilkins, President; William Hastie, then Governor of the Virgin Islands; and

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<sup>76</sup>*Caucasians Only*, p. 56.

Thurgood Marshall, Special Counsel of the NAACP. A number of the thirty-three persons in attendance were Negro lawyers who in their various localities had dealt with litigation in restrictive covenant cases. At the conference mutual experiences were exchanged. The basic consideration was how difficulties, in treating restrictive covenants as a national problem, might be solved by mutual legal work.<sup>77</sup>

Discussions covered every conceivable opportunity of attacking racial restrictive covenants. Comments were made on the advantages of aggressiveness in and out of the courtroom, previous covenant cases were rehashed, which cases to select for appeal, what issues to raise, how to win in the Supreme Court, and how to exploit public opinion to advantage.<sup>78</sup> At the end of the conference Thurgood Marshall announced that the national office of the NAACP would devote special attention to the problem of restrictive covenants. He promised a campaign of publicity against "the evils of segregation and racial restrictive covenants."<sup>79</sup>

During 1945 and 1946 numerous restrictive covenant cases developed throughout the country. Although the Negro litigants lost them all, they did come closer to an ultimate test of the constitutionality of their judicial enforcement in the United States Supreme Court. In one case, the

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<sup>77</sup>Vose, *Western Reserve Law Review*, VI, 105.

<sup>78</sup>*Caucasians Only*, pp. 57-64.

<sup>79</sup>*Ibid.*, p. 64.

enforcement of a restrictive covenant by the lower federal courts offered a glimmer of hope to Negro attorneys. Court action in the *May v. Burgess*<sup>80</sup> decision meant that another Negro was prevented from residence in a protected white area but hopeful signs appeared in the process. The federal district court enjoined the plaintiff from occupying a house she had purchased, the injunction was affirmed by the Court of Appeals for the District of Columbia and certiorari was denied by the United States Supreme Court. In refusing certiorari dissents were voiced by Supreme Court Justices Murphy and Rutledge, and on two occasions Judge Henry Edgerton wrote dissenting opinions when the Court of Appeals supported the enforcement of the racial restrictive covenant. Judge Edgerton's dissent from the decision of the Court of Appeals pictured the difficulties Negroes faced in finding adequate housing in Washington, D. C. Edgerton asserted that the shortage of housing for Negroes was so acute that enforcement of the restrictions was contrary to public policy.<sup>81</sup>

The *Shelley v. Kraemer* Decision: An End  
to Racial Restrictive Covenants

What were to become the crucial cases before the United States Supreme Court in the final attack were already

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<sup>80</sup>147 F. 2d 869, 152 F. 2d 123 (D. C. Cir., 1945); cert. denied, 395 U. S. 858, rehearing denied, 325 U. S. 896 (1945).

<sup>81</sup>*Caucasians Only*, p. 57.

in the lower courts at that time. The cases that eventually were selected by the NAACP for final appeal before the United States Supreme Court in 1948 and were now in the litigation process emanated from the following cities: Washington, D. C.; St. Louis, Missouri; Detroit, Michigan.<sup>82</sup> The enforcement of restrictive covenants in these cities seemed the most representative cases in which to apply for a writ of certiorari. If the United States Supreme Court was to consider the problem of racial restrictive covenants, NAACP attorneys felt, it would do so by hearing these particular cases.

To overcome the precedent set in the *Corrigan v. Buckley* decision, that is, the Constitution did not prohibit "private individuals from entering into contracts respecting the control and disposition of their own property,"<sup>83</sup> a new legal theory had to be espoused. In March, 1945, with the publication of an article in the *California Law Review* by Professor Dudley O. McGovney entitled "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions of Deeds is Unconstitutional," a new approach was given the Negro cause to attack the older

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<sup>82</sup>The cases led to the decisions of: *Hurd v. Hodge* and *Urciolo v. Hodge*, 334 U. S. 24 (1948), the District of Columbia cases, and *Shelley v. Kraemer* and *McGhee v. Sipes*, 334 U. S. 1 (1948), cases from St. Louis, Missouri, and Detroit, Michigan, respectively. Following common practice the Supreme Court ordered the two federal cases consolidated (*Hurd v. Hodge* and *Urciolo v. Hodge*), and also the two state cases (*Shelley v. Kraemer* and *McGhee v. Sipes*).

<sup>83</sup>*Supra*, note 71.

notions of the law.<sup>84</sup> Professor McGovney attacked the judicial enforcement of restrictive covenants for two reasons. First, he argued that state court enforcement of restrictive covenants was state action under the Fourteenth Amendment and, second, that this is forbidden because it denied Negroes the equal protection of the laws.<sup>85</sup> Although similar arguments had been used by the attorneys of Negro litigants,<sup>86</sup> McGovney took a fresh view in that he suggested:

. . . individuals can make such a contract but [he] stressed that enforcement of the restriction brought the government into the picture. This amounted to state action under the Constitution. The situation did not parallel the problem of the *Civil Rights Cases* which held that private action unaided and unsupported by the state government could not be limited by federal statutes enacted under the authority of the Fourteenth Amendment.<sup>87</sup>

Enforcement of restrictive covenants was also a violation of the equal protection clause of the Fourteenth Amendment according to McGovney because of the line of reasoning developed out of cases beginning with the *Buchanan v. Warley* decision. Here the United States Supreme Court had negated the enforcement of racial segregation by city

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<sup>84</sup>*Caucasians Only*, pp. 68-71.

<sup>85</sup>*Ibid.*, p. 69.

<sup>86</sup>The NAACP counsel in the *Corrigan v. Buckley* decision, Louis Marshall, had argued against the constitutionality of court enforcement of racial covenants. Later, NAACP attorneys successfully used the state action theory in the white primary decision, *Smith v. Allwright*, 321 U. S. 649 (1944).

<sup>87</sup>*Caucasians Only*, p. 69.

ordinance. If a statute or ordinance enforcing segregation was unconstitutional, reasoned McGovney, enforcement by a court was also unconstitutional. McGovney's law review article provided NAACP attorneys with an approach that was needed to attack racial restrictive covenants. Articles similar to McGovney's soon followed in leading law journals. With the sociological material drawn up for use in briefs,<sup>88</sup> the NAACP was well prepared to furnish its argument before the United States Supreme Court in 1948. The importance of law review articles, especially in this instance, Professor McGovney's, are not to be overlooked. They can have decided effect on judges. Evidence of this effect is found in the words of Charles Evans Hughes who once said, "in confronting any serious problems, a wide-awake and careful judge will look at once to see if the subject has been discussed or the authorities collated and analysed, in a good law periodical."<sup>89</sup>

After the *Mays v. Burgess* decision, the NAACP leaders knew after Justices Murphy's and Rutledge's dissent, that only two more votes were needed from the seven other justices in any subsequent applications for the writ of certiorari.<sup>90</sup>

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<sup>88</sup>*Supra*, note 35.

<sup>89</sup>Quoted in *Caucasians Only*, p. 71.

<sup>90</sup>The writ of certiorari is granted by the Supreme Court when four justices feel that the issues raised are of sufficient public importance to merit consideration. According to the Revised Rules of the Supreme Court, "a review on writ of certiorari is not a matter of right, but of sound

Meeting at Howard University in February, 1947, Negro leaders remarked, "it is necessary that we provide . . . Murphy and Rutledge with leverage . . . to bring two more Justices to their side . . . to grant us certiorari."<sup>91</sup>

At the Howard University conference, Negro lawyers from each of the aforementioned cities were eager to file for a writ of certiorari. The Detroit lawyers felt that the case of *McGhee v. Sipes* would be a suitable test. However, the conference decided that additional cases should be allowed to develop before applying for certiorari in any one case. However, the NAACP's hand was forced and plans went awry when the St. Louis attorney, George Vaughn, took unilateral action by filing a petition for certiorari with the United States Supreme Court in *Shelley v. Kraemer* in April, 1947. This provoked NAACP leaders in New York into taking quick action and subsequently in May, 1947, a petition was also filed for the McGhee case. The Supreme Court agreed to consider these two cases by granting writs of certiorari to the Supreme Courts of Missouri and Michigan.<sup>92</sup> Finally, in October, early in the Court's new term, certiorari was granted in the

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judicial discretion, and will be granted only where there are special important reasons therefor." Only a few of the total number of petitions for writs of certiorari filed each year are granted by the Court. See Rocco J. Tresolini, *American Constitutional Law* (New York: The Macmillan Company, 1965), p. 33.

<sup>91</sup>Vose, *Western Reserve Law Review*, VI, 126.

<sup>92</sup>*Ibid.*, p. 128.

cases of *Hurd v. Hodge* and *Urciolo v. Hodge*. With briefs to be filed, oral arguments set for January, 1948, and a final decision by the Court in the Spring of 1948, the history of the *Restrictive Covenant Cases* would be finished after four years in the Courts.<sup>93</sup> The broad interests of Negroes respecting the opening of vitally needed housing by means of the negation of racial restrictive covenants was at hand.

In scrutinizing the NAACP's part in the successful litigation which ended the court enforcement of racial restrictive covenants there can be observed the techniques used by a pressure group dealing with the judiciary. The Association planned its test cases and encouraged publication of articles for use in its legal briefs.<sup>94</sup> Finally, the NAACP used adept measures in bringing into the litigation the executive branch by winning support of the Justice Department. Not to be overlooked was the common approach of Negroes and civil rights allies who filed *amici curiae* briefs in the *Restrictive Covenant Cases*.<sup>95</sup> By viewing a Supreme Court decision as a battle of broadly based interests in American society linked to individual parties, the NAACP's performance in utilizing the techniques of judicial lobbying were far superior to that of their legal opponents.

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<sup>93</sup>*Ibid.*, p. 129.

<sup>94</sup>*Supra*, note 48.

<sup>95</sup>For a list of the organizations submitting *amici curiae* briefs for the NAACP, see Appendix B.

The latter were local organizations from the cities where the restrictive covenant cases originated. They were allied with powerful real estate interests. Their strength was grounded in local areas where they had brought their power and resources to bear successfully on the judiciary at these levels. When the cases reached the United States Supreme Court, the provincialism of the white organizations was a debit where it had been an advantage before.<sup>96</sup> Unlike the NAACP, they lacked national organizations, strong allies, theoreticians or an understanding of the new value of sociological jurisprudence.<sup>97</sup>

The provincialism of the white groups supporting restrictive covenants was evident because there was little co-ordination between themselves. Absence of co-ordinated planning of briefs and the arguments of the white property owners was best explained by the local nature of their organizations. Basically they were "improvement" or "protective" associations springing out of a neighborhood restricted district. Conditioned to local appeals, they made no attempt to broaden their campaign, as the NAACP had done, to defend the validity of the enforcement of restrictive covenants into a nation-wide movement.<sup>98</sup> Nor did they receive much help in legal periodicals as contrasted with the

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<sup>96</sup>*Caucasians Only*, p. 251.

<sup>97</sup>*Ibid.*

<sup>98</sup>*Ibid.*, p. 175.

volumes of writing which assisted the Negro cause.

The brief filed by the NAACP before the United States Supreme Court for the petitioners in *McGhee v. Sipes* (this was the official NAACP case) covered ninety-two pages. Broader than the briefs submitted in the other restrictive covenant cases and those filed by the NAACP's allies, the NAACP brief encompassed thoroughly their line of argument.<sup>99</sup> Six arguments were presented in the NAACP brief.<sup>100</sup> Briefly stated, they covered the following areas. First, restrictive covenants in America had deprived the ownership and occupancy of homes by unpopular minority groups. Secondly, the right to use and occupy real estate as a home was a civil right guaranteed and protected by the Fourteenth Amendment and the Civil Rights Act of 1866. Thirdly, no state may deny a person his civil rights solely because of race. Fourthly, judicial enforcement of the racial restrictive covenant in the case (*McGhee v. Sipes*) constituted a denial of the State of Michigan of the petitioners' civil rights. Since the decree of the state court was based on the

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<sup>99</sup>The brief filed by Negro lawyers in *Shelley v. Kraemer* placed reliance on the argument that judicial enforcement was state action in enforcing covenants and was contrary to public policy and to the Constitution. Negro lawyers filed a brief for *Hurd v. Hodge* that stressed the sociological and economic ramifications of residential housing. The brief for the Justice Department argued that racial covenants were the cause of overcrowded housing conditions for Negroes. Finally, *amicus curiae* briefs filed by the civil rights organizations supporting the Negro side fell into the category of the effect of racial discrimination upon racial, ethnic or religious minorities.

<sup>100</sup>*Caucasians Only*, pp. 184-187.

race of the petitioners, their eviction by the state court constituted invalid state action. The fifth point, a sociological argument, showed that judicial enforcement of racial covenants had created a uniform pattern of overcrowding and congestion in the housing of Negroes in Detroit, Michigan. Conditions prevalent in the city of Detroit: slums, crimes, disease, racial tensions and mob violence, were the same in other cities. The factual evidence to support these contentions were drawn from more than sixty articles, books and official reports on living conditions for Negroes in American cities. Finally, basing the sixth argument on public policy, the brief of the petitioners said that judicial enforcement of this restrictive covenant violated the treaty entered into between the United States and members of the United Nations under which the agreement (the restrictive covenant) here sought to be enforced was void.

The *Restrictive Covenant Cases* were decided by the United States Supreme Court in May, 1948. The Court, in a six-zero decision ruled that judicial enforcement of racial restrictive covenants was invalid as such enforcement was held to be state action covered by the Fourteenth Amendment. The decision was presaged with a question by Justice Frankfurter to one of the counsels for the white property owners. He asked:

. . . the citizens couldn't enforce it themselves. They need the full strength of the state's judicial power to enforce something which the state could not itself declare as state policy. Is that a fair statement of the

case?<sup>101</sup>

Chief Justice Vinson discussed the state and federal cases separately. In commenting on the question, "Did the judicial enforcement of private arguments amount to state action?" Vinson said for the Court:

. . . from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.<sup>102</sup>

On the question had the Negro petitioners been denied equal protection before the law, Vinson said there had been discrimination and it was imposed by the state courts in these cases. The Chief Justice said:

. . . in granting judicial enforcement of the restrictive agreements . . . the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. . . . Because of the race or color of these petitioners, they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.<sup>103</sup>

In the federal cases, the decision set down in *Hurd v. Hodge*, Chief Justice Vinson arrived at the same result but

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<sup>101</sup>*Ibid.*, p. 203.

<sup>102</sup>Cited in the *Shelley v. Kraemer* decision in Joseph Tussman (ed.), *op. cit.*, p. 293.

<sup>103</sup>*Ibid.*, p. 295.

by a different line of reasoning. Vinson's opinion for the Court said that the Civil Rights Act of 1866 did not invalidate private agreements privately enforced as it was directed only against governmental authority. But the scope and purpose of the statute was identical with the Fourteenth Amendment. The Chief Justice then applied this interpretation to the facts of the cases before him and found that the Negro petitioners were denied the right to own and occupy property by virtue of the action of the federal courts of the District of Columbia. Vinson then declared that even in the absence of the statute, judicial support of racial restrictions was contrary to the nation's public policy and should be corrected by the Supreme Court.<sup>104</sup>

After many long years of litigation, the Supreme Court had held that, although private individuals could still contract to "protect" their neighborhood by not selling their homes to those they disapproved of, judicial enforcement of such agreements implicated the state in racial discrimination. When the state used its judicial machinery in this way, the

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<sup>104</sup>Tussman (ed.), *op. cit.*, pp. 299-301. Despite the fact that after the *Shelley* and *Hurd* cases the violators of restrictive covenants could not be enjoined by the courts, some covenantors filed damage suits against them. Once again the NAACP became involved because if the damage suits were borne out, the decision of the *Restrictive Covenant Cases* would be meaningless. Supporting the defendant Jackson in the case of *Barrows v. Jackson*, 346 U. S. 249 (1953), the NAACP once again received a favorable decision from the Supreme Court. Here the Supreme Court ruled that a racial restrictive covenant may not be enforced under law by a damage suit. The Court said that awarding of damages by a court would be state action as surely as a restraining injunction to uphold the covenant.

equal protection of the Fourteenth Amendment was violated. The decision in the *Restrictive Covenant Cases* had marked a new sophistication in comprehending the power of the state and particularly of the courts as an arm of government in enforcing rules of social conduct.<sup>105</sup> However, the decision was limited in scope as the removal of a legal barrier to housing for Negroes did not end the economic and social limitations that still persisted. The FHA and the VA took hesitant and qualified steps.<sup>106</sup> The FHA finally dropped its restrictive covenant policy and modified the language of the *Underwriting Manual*. Nevertheless, the FHA continued its policy of allowing builders and lenders freedom as to who could buy or rent FHA-insured houses. In effect, the change meant little more than that the federal agencies no longer had a declared policy of racial discrimination in housing.<sup>107</sup>

For the private sector in the American housing industry, practically speaking, the restrictive covenant, like racial zoning, was dead. Aside from a temporary improvement in the moral climate and the release of some property to Negroes, no large areas were opened for Negro occupancy.<sup>108</sup> Capitalizing on the part of the racial covenant

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<sup>105</sup>*Caucasians Only*, p. 248.

<sup>106</sup>*Supra*, Chapter II, p. 38.

<sup>107</sup>H. Frank Way, *Liberty in the Balance* (New York: McGraw-Hill Book Company, 1964), p. 25.

<sup>108</sup>*Forbidden Neighbors*, p. 223.

decision which held restrictions valid between parties, the building and real estate groups soon learned to adapt themselves to the situation. A number of ploys were used to discourage the entrance of Negroes into white neighborhoods. Deeds were now drafted in such a way so as not to specifically mention the minority to be banned. Some deeds kept the racial covenant in tact on the premise that everyone did not know they could not be enforced by court action. Since they were not invalid if they were voluntarily enforced, there was always the chance of the moral or psychological effect upon a prospective purchaser encompassed by the restriction. Community conservation agreements were also utilized whereby standards of occupancy, such as limiting the number of persons per room or requiring proper care of the premises, indirectly achieved the same ends sought by racial restrictions. Exclusive property-owners' clubs were formed to exclude well-to-do Negroes. Before allowed to occupy a home in the area, a new neighbor had to receive the approval of a permit committee or a board of directors. Another example of the many devices utilized was the "Van Sweringen covenant,"<sup>109</sup> which prevented the sale of property without the consent of the original owner of an undeveloped tract. Despite the covenant decisions, devices to keep out members of minority groups were effective where the community bias was still strong.

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<sup>109</sup>*Ibid.*, p. 224.

The Federal Courts and the Concept  
of State Action: A Summary

The unanimous decision in the *Racial Covenant Cases* has had vast and potential significance as far as civil rights are concerned. For it seemed to mean that when state and local judges, police, and administrators enforced private preferences, those preferences tended to become policies for which the state must be held constitutionally responsible.<sup>110</sup> Whatever the *Shelley* and *Hurd* decisions meant in the field of residential housing, the machinery of the law may no longer be utilized to maintain racial segregation.

However, explicit as the decisions might be in the area of housing, the federal courts left uncharted what decisively constituted state action. The United States Commission on Civil Rights has pointed out that except as to racial zoning and restrictive covenants the Supreme Court has not spoken authoritatively on the matter of residential segregation and discrimination in the sale or renting of dwelling units in public housing projects or in publicly assisted private housing constructed under government mortgage insurance on urban renewal programs.<sup>111</sup> Neither the policies and practices of the federal housing agencies nor state and municipal ordinances designed to outlaw discrimi-

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<sup>110</sup>Louis H. Pollak, "Emancipation and Law," *100 Years of Emancipation*, ed. Robert A. Goldwin (Chicago: Rand McNally and Company, 1964), pp. 171-172.

<sup>111</sup>1959 Report, p. 453.

nation in private or publicly assisted housing has been reviewed by the Supreme Court.<sup>112</sup> In the lower federal courts and in the state courts there has been considerable litigation involving segregation and discrimination in public housing projects, publicly assisted housing and urban renewal projects.

While federal and state courts have regularly condemned segregation in public housing since the *Brown v. Board of Education* decision in 1954, there has been no clear principle citing the constitutional limitations as to what the courts are prepared to view as "state action." Hence, there has been some question as to whether the courts can be used to halt discrimination in publicly assisted housing, the housing owned and operated by nongovernmental corporations or other agencies which have received some form of assistance from a governmental agency. The efforts through the courts until 1962 subjecting such housing to constitutional restraints showed no definite pattern. But though no sweeping decision was laid down by the United States Supreme Court, the concept of state action continued to expand in relation to publicly assisted housing. The ambiguity of cases where action was neither clearly all "private" nor all "state" housing receiving governmental financial supports have reflected the extent of governmental involvement. What has been held state action in the federal lower courts

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<sup>112</sup>*Ibid.*, p. 454.

and state courts so far can be generalized from *American Communications Association v. Douds*, in which Chief Justice Vinson wrote:

. . . when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.<sup>113</sup>

The United States Commission on Civil Rights has pointed out that federal decisional law in the field of discrimination in housing is in a state of flux.<sup>114</sup> The United States Supreme Court or any federal court has not gone so far as to indicate a further change in the legal climate stemming from the *Restrictive Covenant Cases*, that is, the elimination of the state's power to operate segregated housing projects.<sup>115</sup> In no decision by the Supreme Court or the lower federal courts has there been such a sweeping statement as in the decision of *Ming v. Horgan*<sup>116</sup> by a California Superior Court. Negroes were prohibited by tract developers in Sacramento County from purchasing homes in subdivisions. Even though they were the recipients of aid from the FHA and VA, in the form of insured mortgages, the developers argued that federal commitments and other services

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<sup>113</sup>339 U. S. 382, 401 (1950). Cited in Greenberg, *Race Relations and American Law*, p. 51.

<sup>114</sup>1959 Report, p. 456.

<sup>115</sup>Murray C. Goldman and Philip G. Averbach, "Racial Discrimination in Housing," *University of Pennsylvania Law Review*, CVII (1958-1959), 517.

<sup>116</sup>*Ming v. Horgan*, No. 97130, Calif. Super. Ct., County of Sacramento, Calif. (1958); 3 Race Rel. L. Rep. 693 (1958).

received did not transform the character of the building from private to governmental housing. The California Superior Court concluded that because of state regulation of the developers in addition to the federal assistance granted, they were governmental agents. Holding that there was sufficient governmental action, the Court upheld the plaintiff's argument that "when one dips one's hand into the Federal Treasury, a little democracy necessarily clings to whatever is withdrawn."<sup>117</sup>

In the only two cases of public housing to have reached the Supreme Court, the opportunity to resolve the conflict was declined by the denial of certiorari in both instances.<sup>118</sup> The two cases represent ramifications of the option that the PHA has granted to local housing authorities, that is, the permission to segregate whites and non-whites on the basis of a neighborhood pattern of occupancy. The opinion of the state court in the *Banks* case viewed the enforced neighborhood segregated pattern of occupancy imposed by the San Francisco Housing Authority unconstitutional as its action violated the equal protection clause of the Fourteenth Amendment. While in *Cohen v. Public Housing Authority*, the lower federal courts stated that the law required only

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<sup>117</sup>1959 Report, p. 456.

<sup>118</sup>*Housing Authority of the City and County of San Francisco v. Banks*, 120 Cal. App. 2d 1, 260 P. 2d 668, cert. denied 347 U. S. 974 (1954); *Cohen v. Public Housing Administration*, 257 F. 2d 73 (5th Cir.); cert. denied, 79 S. Ct. 315 (1959).

the provision of separate but equal facilities. The latter decision upheld the PHA's interpretation of the public housing statute. In *Cohen v. Public Housing Administration*, the Fifth Circuit Court of Appeals opinion seemed to endorse the view that the issue should not be pressed, citing testimony to the effect that "actual segregation is essential to the success of the program of public housing in Savannah."<sup>119</sup> Implications drawn from the decision would be that public housing would be abandoned in the South if segregation were outlawed. Opinions in the lower federal and in the state courts then have had wide variance.

In the lower federal courts there has been a considerable amount of litigation involving segregation and discrimination in public housing. Except for the two racial segregation cases in housing projects mentioned, *Cohen v. Public Housing Administration* and *Heyward v. Public Housing Administration*,<sup>120</sup> both originating in the South, Negroes have successfully challenged segregated public housing in a number of northern cities. Since there has not been conclusive adjudication of the PHA's duty, suit after suit has been

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<sup>119</sup>Cited in Greenberg, *Race Relations and American Law*, p. 290. In a case after the *Banks* and the *Brown v. Board of Education* decision in 1954, the federal courts upheld segregation in public housing constitutional under a literal application of the separate but equal rule. *Heyward v. Public Housing Administration*, 238 F. 2d 689 (5th Cir., 1956). See Note, "Discrimination Against Minorities in the Federal Housing Programs," *Indiana Law Journal*, XXXI (1955-1956), 505.

<sup>120</sup>*Supra*, note 119.

filed against local public housing authorities. A dozen cases have held that where local authorities segregate, they are violating the Fourteenth Amendment.<sup>121</sup> According to the United States Commission on Civil Rights, significance must be attached to the action of the Sixth Circuit Court of Appeals which affirmed a district court decision holding segregation in public housing unconstitutional. The Sixth Circuit Court relied on the Supreme Court's decision in the racial zoning, the restrictive covenant and the school desegregation cases.<sup>122</sup> Authors Murray C. Goldman and Philip G. Auerbach have declared that since the school segregation cases every final state and lower federal court decision on the merits of the question has "denied the existence of state power to provide separate but equal housing facilities."<sup>123</sup> The only implication to be drawn from the overwhelming weight of decisions of both the Supreme Court and lower courts, they state, is that government imposed segregation per se is a violation of constitutional guarantees.<sup>124</sup>

A more difficult legal question to be resolved by the courts was whether the federal government's participation in private housing, through public assistance in the clearance and sale of land under urban renewal or mortgage

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<sup>121</sup>Greenberg, *Race Relations and American Law*, p. 290.

<sup>122</sup>*Detroit Housing Commission v. Lewis*, 226 F. 2d 180 (6th Cir. 1955). See 1959 Report, p. 454.

<sup>123</sup>Goldman and Auerbach, *op. cit.*, p. 518.

<sup>124</sup>*Ibid.*

loan insurance extended the Constitution into this field. The question of whether housing accommodations could be disposed of on a nondiscriminatory basis was far from settled where the government and private individuals combined in the production of housing facilities. Provisions of the Fourteenth Amendment and the Fifth Amendment are directed to the states and the national government alone, while jointly produced housing is generally in the hands of private individuals by the time of their lease or sale. In urban renewal programs the courts have not deemed in light of the *Restrictive Covenant Cases* that persons who have been aided by the power of the state to perform an activity cannot use methods prohibited to the government itself.<sup>125</sup>

Through 1962, there had been no clear legal test of the right to exclude Negroes from federal urban renewal dwellings. Two cases related to federal urban renewal projects reached the federal courts. Neither of them provided an answer to the question how much assistance must be present in order to transform the activity from private to governmental action.<sup>126</sup> Before issuance of President Kennedy's

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<sup>125</sup>*Ibid.*

<sup>126</sup>*Tate v. City of Eufaula, Alabama*, 165 F Supp. 303 (M. D. Alabama, 1958). Here Negroes complained that an agreement between the city and private developers excluded them from new housing to be built and that schools and parks planned for the area would also be segregated. The suit was dismissed as premature and based only on speculation that the city officials would ignore constitutional provisions banning enforced segregation based on race or color. In the other case, *Barnes v. City of Gadsden, Alabama*, Civil No. 1091 (N. D. Alabama,

Executive Order 11063, the possibility for legal controls was limited since the United States Congress was reluctant to intervene with a positive requirement of nondiscrimination. One state court decision brought out the problem of what constituted state involvement in the absence of enabling legislation. In the case of *Dorsey v. Stuyvesant Town Corporation*,<sup>127</sup> the New York Court of Appeals determined that the aid rendered by New York City was insufficient to make the corporation an arm of the State. The Court decided this in spite of the fact the Stuyvesant project received considerable assistance from both the state and the city of New York in the form of millions of dollars of tax exemptions, condemnation through the power of eminent domain and of public streets conveyed to it. In refusing to grant the requested relief, the New York Court of Appeals held that in the absence of positive legislation governing the lease of such projects, the corporation was free to refuse to lease accommodations to Dorsey.<sup>128</sup> The United States Supreme Court

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1958), Race Rel. L. Rep. 712, Negro plaintiffs tried to enjoin the city of Gadsen from undertaking two urban renewal projects on the ground that the projects were designed to perpetuate a pattern of segregation. In the decision, there was found no proof that any unlawful discrimination was indicated in the two plans or that the defendants would enforce segregation in carrying them out.

<sup>127</sup>299 N. Y. 512 (1949); *cert. denied*, 339 U. S. 981 (1950).

<sup>128</sup>Milton L. McGhee and Ann Fagan Ginger, "The House I Live In--A Study of Housing for Minorities," *Cornell Law Quarterly*, XLVI (1961), 207.

denied certiorari. Jack Greenberg claimed that passage of New York City legislation forbidding discrimination in all similar future projects solved the problem for the city and obviated the need for a far-reaching constitutional decision by the Court at that time.<sup>129</sup>

The one decision by a federal court involving racial discrimination in the sale of houses under the mortgage insurance programs administered by the FHA and VA was *Johnson v. Levitt and Sons*.<sup>130</sup> This concerned the policy of a large builder, William Levitt, who constructed homes for a mass market. Levitt's ability to merchandise his homes was made with the FHA's assistance. By 1959, FHA-aided Levittown, New York, and Levittown, Pennsylvania, had populations in excess of 50,000 each. In the Pennsylvania project, Levitt had an announced racial policy and barred Negroes from occupancy.<sup>131</sup> The plaintiffs in the case brought action against the federal government and the developers of Levittown, Pennsylvania, seeking a declaratory judgment and injunctive relief. According to the plaintiffs, the government had not

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<sup>129</sup>Greenberg, *Race Relations and American Law*, p. 296.

<sup>130</sup>131 F. Supp. 114 (E. D. Pa. 1955).

<sup>131</sup>In building Levittown, New Jersey, Levitt planned a development of 16,000 homes. He was quoted in the press in early 1958 that no homes would be sold to Negroes. Since this would be a violation of New Jersey law, the state's Division Against Discrimination proceeded to take action on the matter. While Levitt challenged the constitutionality of the action by the state, he secured 4,451 conditional loan commitments from the FHA of which 1,265 were converted into insured loans. See *1959 Report*, p. 466.

acted to prohibit the discriminating practices of the developers who because of the governmental assistance provided were now governmental agents.<sup>132</sup>

The federal district court dismissed the suit against the governmental agency, the FHA, by saying no such duty to bar discrimination had been placed on the agencies administering the housing assistance program. Dismissing the suit against the government, the court said:

. . . what the plaintiffs are saying in effect is that these agencies ought to be charged with the duty [of preventing discrimination in sales of housing project properties]. . . . But that is something which can be done only by Congress.<sup>133</sup>

The court followed the familiar argument that when Congress acts with respect to a matter, but was silent as to certain of its details, such silence was to be construed as an intent not to regulate those aspects not specifically mentioned.<sup>134</sup> As for Levitt, the court held the relationship with the government was not sufficient to constitute federal governmental action. The court reasoned that the assistance given to Levitt was not enough to warrant subjecting his actions to the standard imposed upon the federal government by the Fifth Amendment.

On the other hand, in the *Ming v. Horgan* decision, the California court had a different interpretation of what

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<sup>132</sup>McGhee and Ginger, *op. cit.*, p. 209.

<sup>133</sup>Cited in Greenberg, *Race Relations and American Law*, pp. 299-300.

<sup>134</sup>McGhee and Ginger, *op. cit.*, p. 209.

constituted state action. Here, the court agreed with the plaintiff's contention that the element of governmental assistance inherent in the federal mortgage insurance system rendered the builder the agent of the federal government. The *Ming v. Horgan* decision seemed to rest primarily on the ground that the discriminatory practices of the operative builder violated a duty imposed upon him by the national housing legislation.<sup>135</sup>

As was stated earlier, federal decisional law in the field of discrimination in housing was in a state of flux for civil rights groups attempting to attain desegregation by court decisions. The Supreme Court and the lower federal courts had not uniformly applied the principle of equal protection in the governmental housing programs, whether they were public housing or publicly assisted housing programs. Implications drawn from the decisions by legal authorities have indicated that if the Supreme Court rendered a decision on public housing, it would follow the precedent set by *Brown v. Board of Education*. To the question of what constitutes state action in publicly assisted housing, the legal situation was not clearly drawn. According to lawyers Milton L. McGhee and Ann Fagan Ginger, from the precedents set by the lower federal and state courts, the question had yet to be answered by definite legal norms.<sup>136</sup> In other

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<sup>135</sup>Goldman and Auerbach, *op. cit.*, p. 519.

<sup>136</sup>McGhee and Ginger, *op. cit.*, p. 214.

words, was there a common thread to determine what amount of assistance must be present in order to transform the activity from private to governmental action? The relevant factors the courts must consider in determining whether a particular activity has ceased to be merely private and has taken on a governmental character would be the following: What control has the government over the private activity? What aid did the private person or groups receive, and in what manner was it given, directly or indirectly? To what extent did the private activity displace, duplicate or otherwise partake of what heretofore had been classified as a governmental decision?<sup>137</sup>

In a postscript to these judicial proceedings the NAACP and allied organizations learned that litigation did not provide the sweeping victories needed to desegregate federally assisted housing. Advantages drawn from the *Restrictive Covenants Cases* had distinct limitations. Major reliance on the Supreme Court, the lower federal courts and state courts appeared to be unwarranted. The courts could not afford full protection to gain equal opportunity in housing as the courts were "only a single implement in the democratic armory"<sup>138</sup> and offered no certain protection to Negroes in the quest for housing. Winning a major case in law did not mean winning it in fact. Since the courts could

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<sup>137</sup>*Ibid.*

<sup>138</sup>*Forbidden Neighbors*, p. 305.

not police civil rights or enforce their orders easily, a favorable court decision while important in the total fight might be only an advance in principle.<sup>139</sup>

A conclusion to be drawn from the tactic of judicial activity as carried on by the NAACP and civil rights groups is that the courts are not all there is to law and it is unwise to rely so heavily on judicial mechanisms. As courts are insulated from the public, other political institutions are more directly responsive to the people. The United States Commission on Civil Rights has pointed out that courts will, as a matter of law, require nondiscrimination by private builders and developers, should the Congress or the President, by executive order, forbid segregated housing practices as a condition for the receipt of federal aid in housing.<sup>140</sup> So the ultimate determination has not been a matter of law but of policy. Congress had not used its power to set policy imposing nondiscriminatory provisions upon the operative builders as the legislative history of the national housing has shown, and executive action of the President barring racial discrimination in housing built with federal subsidies or insurance was still in the offing.

However, still another avenue to forbid segregated practices in housing tied to governmental assistance lay in the direction of state and municipal governments. Seeking

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<sup>139</sup>*Ibid.*, p. 304.

<sup>140</sup>*1959 Report*, p. 457.

access at every level of government, the civil rights movement turned to the state legislatures and city governments for a positive approach to nondiscrimination in governmental assisted housing. There then was conducted a drive for fair housing laws prohibiting racial discrimination not only in public and publicly assisted housing but also in private housing. Faced with the problems of numerous and ambivalent court decisions as the civil rights groups witnessed, the quest for equal housing opportunities might be enhanced with the adoption by local authorities of nondiscriminatory policies in the selection of tenants for public housing projects and by the passage of state and city legislation prohibiting discrimination in publicly assisted housing.

## CHAPTER VI

### STATE LAWS AGAINST DISCRIMINATION IN PUBLICLY ASSISTED HOUSING

The philosophy of the enforcement agency, the depth of its commitment, and the competence of its staff are crucial to the law's effectiveness. The strongest fair housing law will have little meaning if its enforcement is weak.<sup>1</sup>

Frances Levenson

. . . The announcement of the Real Estate Brokers Association some time ago advising their members not to pay any attention to fair-housing laws, that property rights still came first; and when you think of the billions of dollars in this country tied up in real estate, there isn't much that the President of the United States could do by going to look at some slums. . . . The real power and obstacle there is the property-rights structure in this country, which isn't concerned . . . how many people live in slums.<sup>2</sup>

Roy Wilkins

Although the major concern of the study deals with the quest for access at the national level of government,

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<sup>1</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2. Frances Levenson served as Director of the National Committee Against Discrimination in Housing for ten years. She accepted the appointment as Counsel to the New York City Commission on Human Rights in February, 1964.

<sup>2</sup>Cited in "The Management of the Civil-Rights Struggle," *Freedom Now*, ed. Alan F. Westin (New York: Basic Books, Inc., 1964), p. 37. Mr. Wilkins' statement was made on a symposium on civil rights broadcasted out of Boston, Massachusetts, July 23, 1963. Other participants were Kenneth Clark, Whitney Young, James Farmer, Martin Luther King, Jr., and James Forman.

many states have passed legislation making illegal certain forms of discrimination in housing. American federalism, with its legal dispersion of authority, furnishes interest groups another vantage point to influence governmental decisions. Substantial results may be realized by interest groups acting through state governments after frustrations have occurred on the national scene. The federal system at the same time offers an opportunity for a variety of strategies and tactics leading to simultaneous campaigns both at the national and state levels of government.

Civil rights groups have conducted their anti-housing bias campaign with measured success through a number of states while continuing to seek action from the national government. Fundamentally, the approaches they have utilized in gaining access to state governors, legislatures and the courts have been the same as those used on the national institutions. This chapter does not discuss the tactics employed to gain anti-discrimination in housing legislation. It deals with the progress made on these laws, that is, their scope, operations, enforcement, legality and effect on residential segregation. In the states where civil rights groups have been successful with the passage of such legislation, this can be accounted for in that they have initially accepted limited laws which in time served as the basis for future broader coverage.

State Open Occupancy Legislation: Efforts  
to Overcome Prejudice and Discrimination

Early state action

Despite the importance of residential housing and its impact upon discrimination in other areas of community life, such as schools, recreational facilities, health and welfare services, and even employment opportunities, segregated housing was the last major area that northern and western state and local governments were willing to attack. Long before the passage of meaningful housing legislation, state governments had prescribed fair employment practices, public accommodations and fair educational practices. Although several states had laws prior to 1949 prohibiting discrimination in public housing projects, no effective remedies were available to the person victimized by such discrimination until Connecticut extended the jurisdiction of its Civil Rights Commission in 1949 to include complaints involving public housing.<sup>3</sup> In the states, the direct legislative approach to discrimination in housing was used only sparingly until after World War II. Where early state and local laws dealing with housing discrimination existed, no clear pattern evolved.<sup>4</sup>

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<sup>3</sup>Milton R. Konvitz and Theodore Leskes, *A Century of Civil Rights* (New York: Columbia University Press, 1961), p. 236.

<sup>4</sup>A 1921 Kansas law prohibited discrimination by planning commissions. Colorado in 1923 barred racial zoning restrictions. In the early 1940's, Illinois and Indiana prohibited discrimination in the hiring of minority groups to construct redevelopment projects. In 1919 Minnesota statute

Scope of existing state and local governments' legislation

Although the governmental housing program has drawn its impetus and direction at the national level, state and local governments play a critical role in determining how the national housing program will be carried out.<sup>5</sup> To prevent residential segregation at their respective levels, a number of states and cities have taken legislative and administrative action to end discrimination. Legislation has in some instances been extended to private as well as public and publicly assisted housing. By 1964 fourteen states and thirty-four cities had enacted fair housing laws which banned discrimination in certain privately financed housing units. Six other states plus the District of Columbia, Puerto Rico, the Virgin Islands, and more than sixty cities had statutes applicable to various categories of publicly assisted housing.<sup>6</sup>

Prior to 1962, when President Kennedy issued Executive Order 11063, barring discrimination in publicly assisted housing, major governmental moves to end discrimi-

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prohibited restrictive covenants that were based on religion. Cited in Joseph B. Robison, "Housing--The Northern Civil Rights Frontier," *Western Reserve Law Review*, XIII (December, 1961), 110.

<sup>5</sup>*Housing Report*, p. 119.

<sup>6</sup>Housing and Home Finance Agency, *Fair Housing Laws* (Washington: U. S. Government Printing Office, September, 1964), p. 3. Hereafter cited as *Fair Housing Laws*. For a list of the states with legislation affecting discrimination in housing see Appendices C and D.

nation against minorities occurred primarily at the state and local levels. Where legislative activity at these levels had been initially concerned with promoting equal rights through fair employment practice and public accommodations laws, after World War II down to the present, the pattern has evolved into the promulgation of fair housing laws.

To the extent that they are effective, state and local laws have tried to fill the void in the absence of federal legislation barring discrimination in governmental housing programs. Aside from one of the civil rights laws enacted by Congress during the post-Civil War Reconstruction period, no other federal laws have been adopted, although many attempts have been made to add anti-discrimination provisions to pending federal housing bills.<sup>7</sup> Section 1982 of title 42 of the United States Code, a section of the Civil Rights Act of 1866, states:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.<sup>8</sup>

Unlike other civil rights legislation passed in the post-Civil War period, this provision has survived. Its survival, however, has made little impact on government's role in frustrating discriminatory housing practices directed

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<sup>7</sup>*Supra*, Chapter II, note 90, for amendments introduced in Congress since 1949, to bar discrimination in the federal housing program.

<sup>8</sup>14 Stat. 27 (1866), as amended, 42 U. S. C. Sect. 1982 (1958).

against Negroes. The provision has been utilized mainly in court decisions to counterweight the Fourteenth and Fifth Amendments, thus duplicating the restraints of the two amendments in limiting government action.<sup>9</sup>

Civil rights groups have had marked success in gaining legislation in states passing such laws when the obstacles encountered are viewed. In light of these obstacles, it is remarkable that any pertinent measures have become law at all. Unlike powerful pressure groups such as business interests who historically have had access to state legislatures, proponents of fair housing legislation had difficult hurdles to overcome. Before the United States Supreme Court decisions, *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964), under-representation of the urban population in state legislatures and over-representation of rural groups was widespread. The absence of equitable representation was heightened by the similar views on economic and social matters held by the state representatives of the rural areas and those from urban districts where business interests, real estate brokers, mortgage-lenders and white neighborhood housing associations were strong.

The disproportionately large share of political power of rural areas combined with the community of interest of urban legislators facilitated the blocking of fair housing legislation. This has been the basic plight of urban minori-

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<sup>9</sup>The Supreme Court stressed the statute in *Hurd v. Hodge*, 334 U. S. 24 (1948); *Corrigan v. Buckley*, 271 U. S. 323 (1926); *Buchanan v. Warley*, 245 U. S. 60 (1917).

ties in the quest for open occupancy housing laws. States like Illinois and Indiana bear this out. Both states have large Negro populations. Yet, Illinois only forbids segregation in public housing projects<sup>10</sup> while the Indiana state legislature in 1964 and 1965 finally enacted fair housing laws barring racial discrimination in publicly assisted and private housing.<sup>11</sup>

With reapportionment according to population, a basic assumption has been that cities would have the dominant voice in state government resulting in urban benefits. Projecting the effect upon urban minorities, especially Negroes, housing and welfare programs could be extended. For fair housing advocates, strong measures could be enacted. However,

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<sup>10</sup>See Appendix C.

<sup>11</sup>*Trends in Housing*, IX, No. 2 (March-April, 1965), 1. It is difficult to generalize and say that the greater the rural over-representation in a state, the smaller the probability of passage of meaningful fair housing legislation. Other factors have to be considered such as the extent of a state's urbanization, the size of the state's Negro population and the effectiveness of civil rights groups' leadership. For example, Connecticut and Massachusetts are states that passed early and positive fair housing laws. See *Fair Housing Laws*, pp. 10-12. Yet, they do not have sizable Negro populations. Connecticut had one of the most malapportioned state legislatures in the nation before the federal district court ordered the state to reapportion. The state of Rhode Island, highly urbanized and having a small Negro population, passed comprehensive legislation forbidding discrimination in all publicly assisted and private housing as late as April, 1965. See *Trends in Housing*, IX, No. 2 (March-April, 1965), 1, 8. There is a dearth of Negro leadership in Illinois, particularly the City of Chicago with its large Negro population. Aside from a few Negro leaders involved in the 1965 school boycott in Chicago, it was necessary to bring Martin Luther King, Jr., to the city in the summer of 1965 to hold mass demonstrations protesting the segregated schools.

closer examination of the reapportionment of state legislatures has revealed that the big winners have not been the cities but the suburbs.<sup>12</sup> With the advent of reapportionment, it is unlikely that the representatives of "white" suburbs will extend coverage or strengthen existing laws that will open the area to prospective Negro families.

But measures banning housing discrimination have become the law of various states even with the practical political problems involved. The obstacles met have accounted for the wide divergence among the various laws on the scope of coverage. They reflect a number of practical considerations, chief among which is legislative strategy.<sup>13</sup> Civil rights organizations have sought wide coverage in contemplated legislation but grudgingly have accepted limitations dictated primarily by the fact that a limited bill has a better chance of enactment. Joseph Robison, Chairman of the Legal Committee of the National Committee Against Discrimination in Housing (NCDH), has observed:

Sometimes, the limitations are introduced while the bill is pending, as a part of the process of compromise that figures so large in any deliberative body. At other times, the limitations appear in the bill as originally introduced with the support of the organized civil rights forces. That is done without any concession that principle requires exclusion of the small landowner but merely in recognition of the efficacy of the step-by-step process.<sup>14</sup>

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<sup>12</sup>Andrew Kopkind, "Baseball, Pure and Undefined," *The New Republic*, CLIII, Nos. 6-7 (August 7, 1965), 9.

<sup>13</sup>Joseph Robison, *Western Reserve Law Review*, XIII, 118.

<sup>14</sup>*Ibid.* Robison also has pointed to the practical

## Law and collective attitudes

The basic belief of supporters of equal opportunity in housing has been that national or state legislation can be a potent force for changing social habits and can indirectly modify attitudes. Their argument has run counter to the claims expressed by many to the possibility of promoting racial equality by law. They feel social customs cannot be changed by legislation and that law cannot change attitudes basic to the race problem. Legislative failures in the past demonstrate to them that passage of laws are not infallible cures for a social evil.<sup>15</sup>

However, supporters of civil rights legislation have not concluded that law is of no avail even though the desired results have not been directly attained. Will Maslow has described the psychological research that has demonstrated that a person's attitudes are largely shaped by experiences and factors in his environment. The research, he has stated, has led to the conviction that

We can no longer accept as a simple axiom that prejudice

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arguments that can be made for these limitations, namely, the exclusion of the owner-occupied home. He feels that the government should be primarily concerned with those who deal in housing as a business. Since large commercial operators and real estate brokers have played a great part in setting patterns of occupancy, the housing market as a whole would open for Negroes if they abandoned their segregated practices.

<sup>15</sup>*Where Shall We Live?*, p. 45. Here the failure of prohibition is often cited; also the failure of the federal civil rights laws enacted after the Civil War and the non-enforcement of state laws against discrimination in public accommodations adopted during the latter part of the last century. For a view pointing to the difficulties involved in

causes all discrimination and that removing the latter is impossible unless the former likewise is extirpated.<sup>16</sup>

Subsequently, it is held that laws against racial discrimination, even though they run counter to customary practice, are consistent with the moral and political ideals held by most Americans and may expect public support for that reason. Moreover, American laws in the quest for equal opportunity, do not require any persons to hold or change any attitudes but only to refrain from certain acts. Laws set a standard for the community which over the long run, according to Jack Greenberg, will probably be effective.<sup>17</sup>

Legislation, if enforced, is a tool in the battle against discrimination. Law can weaken or sometimes remove the environmental supports and thereby lead to a change in attitudes. One of the major supports to race prejudice is discrimination itself and the results of discrimination. For supporters of legislation leading to equal opportunity, action that prevents discrimination will lead to a reduction of racial prejudice. Gordon W. Allport has stated that legislative policy indirectly serves in the reduction of group

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changing attitudes on questions of race by means of law, particularly by court decisions, see Walter Berns, "Racial Discrimination and the Limits of Judicial Remedy," *100 Years of Emancipation*, ed. Robert A. Goldwin (Chicago: Rand McNally and Company, 1964), pp. 182-217.

<sup>16</sup>Will Maslow, "Prejudice, Discrimination, and the Law," *The Annals*, CCLXXV (May, 1951), 11.

<sup>17</sup>Jack Greenberg, *Race Relations and American Law*, p. 311.

tension. Allport has said:

Legal action . . . has only an indirect bearing upon the reduction of personal prejudice. . . . Law is intended only to control the outward expression of intolerance. But outward action, psychology knows, has an eventual effect upon inner habits of thought and feeling. And for this reason we list legislative action as one of the major methods of reducing, not only public discrimination, but private prejudice as well.<sup>18</sup>

Advocates of fair housing legislation, Eunice and George Grier, scholars in human relations and interracial housing, have pointed to the legal path when they said:

The power of law . . . offers the greatest potential for widespread elimination of inequality in housing. Unlike "voluntary" approaches, it does not make minorities totally dependent on the goodwill of members of the majority. . . . Law has always been the bulwark of liberty in America; and in the matter of discrimination . . . it provides a standard of behavior which both represents the will of the people and commands their respect. Thus, legal prohibitions against housing discrimination, with adequate enforcement powers, are the ultimate goal to which every citizen concerned about the problem should work.<sup>19</sup>

#### Model fair housing legislation

If fair housing legislation was to be effective, what would be the essential provisions of a sound statute? In the opinion of Theodore Leskes, Director of the Legal Division of the American Jewish Committee and a member of the Legal Committee of the NCDH, it should:

1. Apply to public, publicly aided, redevelopment,

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<sup>18</sup>Gordon W. Allport, *The Nature of Prejudice* (Boston: The Beacon Press, 1954), p. 477.

<sup>19</sup>Eunice and George Grier, *Discrimination in Housing: A Handbook of Fact* (New York: Anti-Defamation League of B'nai B'rith, 1960), p. 65.

urban renewal and private housing, as well as to housing financed by government-insured loans;

2. Cover vacant land and parcels of real property intended for the construction of homes;

3. Prohibit oral or written inquiries or records of the race, religion or ethnic origin of persons seeking to rent or buy housing, as well as the printing or circulation of discriminatory advertisements;

4. Reach the activities and listings of those engaged in the business of selling or renting housing;

5. Reach the activities of mortgage-lenders;

6. Make it unlawful for any person to plan or carry out a program of public or publicly assisted housing, urban redevelopment, or tenant relocation, in such a way as to create, within the program area or elsewhere, discrimination or segregation in housing.<sup>20</sup>

In addition, he recommended that proper authorities be empowered to suspend or revoke the license of real estate operators found to have violated the law.<sup>21</sup> To Leskes' model statute there must be added state commissions able to deal with cases arising under the legislation with adequate enforcement powers to gain compliance. State, rather than local commissions, would best be able to deal

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<sup>20</sup>Milton R. Konvitz and Theodore Leskes, *op. cit.*, pp. 241-242.

<sup>21</sup>*Ibid.*, p. 242.

with these cases because it would be far removed from local pressures. To be successful state anti-discrimination commissions must have an adequate staff, adequate appropriations, adequate authority, and freedom from political influence. Charles Abrams said they should have

. . . power to investigate and hold hearings on racial problems not only in housing but also in employment, recreation, education, and civil rights. They should be able to cope with tensions, as when minorities move into public housing projects. To improve group relations, they should educate the public in racial integration and recruit the support of influential citizens.<sup>22</sup>

To the extent that state fair housing statutes have met these criteria, it is necessary to turn to an overview of existing legislation.

#### An Overview of State Anti-Discrimination Legislation in Housing

A compilation of state laws in 1949 showed that eleven states had some form of anti-discrimination law in the housing field.<sup>23</sup> By 1959, seventeen states and fifteen cities had statutes, ordinances or resolutions affecting some aspect of housing.<sup>24</sup> Much of this legislation was limited in scope, but there had been a trend in this ten-year period towards laws of broader coverage. As the number of states having fair housing legislation increased, their coverage eventually was extended to also encompass new areas

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<sup>22</sup>*Forbidden Neighbors*, p. 376.

<sup>23</sup>McEntire, *op. cit.*, p. 266.

<sup>24</sup>*Ibid.*, p. 267.

so that by 1963 twelve states had laws banning discrimination in private housing that did not receive government assistance. From 1959 to 1963, the number of states having such coverage tripled going from four to twelve.<sup>25</sup>

Initially, the legislation applied to housing which involved some public character, particularly public housing because of its unquestioned governmental character. Later, states whose laws became most comprehensive--Connecticut, Massachusetts, New Jersey, New York, Oregon and Washington--prohibited discrimination in all publicly assisted housing including developments built with government mortgage insurance.

Such legislation emerged largely following the decade since 1954, when New York City enacted the first legislation prohibiting discrimination and segregation in FHA-insured and VA-guaranteed loans.<sup>26</sup> During the following three years the above-mentioned states enacted similar statutes.<sup>27</sup> In 1957, New York City became the first governmental unit to

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<sup>25</sup>Indiana in 1964 and Rhode Island in 1965 became the thirteenth and fourteenth states to extend fair housing laws to private housing. *Trends in Housing*, IX, No. 2 (March-April, 1965), 1, 8.

<sup>26</sup>B. T. McGraw, "Equal Opportunity in Housing: Trends and Implications," *Phylon*, XXV, No. 1 (Spring, 1964), 10.

<sup>27</sup>Since 1961 the state of Washington's statute barring discrimination in publicly assisted housing has been inoperative. The Washington State Supreme Court upheld a lower court decision striking down on state constitutional grounds a law barring discrimination in publicly assisted housing, including FHA and VA housing. See *O'Meara v. Washington State Board*, *infra*, pp. 229-230.

extend its fair housing law to cover private housing. As of 1963, twelve states and twelve cities had comprehensive fair housing laws covering some portion of nonassisted private housing.<sup>28</sup> The evolution of housing statutes continued into 1963, when first Massachusetts then New York and Connecticut broadened their coverage to include all housing except owner-occupied two-family houses and rental of rooms in a private residence.<sup>29</sup> In these states the comprehensive legislation covered approximately ninety-five per cent of all housing within these three states.

The twelve states in 1963 having the broadest coverage, that is, private housing with no government assistance, vary greatly both in the portion of the housing market covered and in their enforcement procedures. Of principal importance is the "primary coverage"; that is, the kinds of housing as to which the law prohibits discrimination by the owner in sales and rentals.<sup>30</sup> Provisions range in comprehensiveness from Alaska, where an official commission administers a law covering all housing accommodations,<sup>31</sup> to New Hampshire, where no enforcement machinery is provided for

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<sup>28</sup>These twelve states had a population of over 74 million or over 41% of the total national population. Also, they had more than 4.7 million or 25% of the total Negro population and 40.5% of the other nonwhite population. McGraw, *op. cit.*, p. 11.

<sup>29</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2.

<sup>30</sup>Robison, *Western Reserve Law Review*, XIII, 113.

<sup>31</sup>*Fair Housing Laws*, pp. 22-24.

an ambiguous statute barring discrimination "in the matter of rental or occupancy of a dwelling in a building containing more than one dwelling."<sup>32</sup>

The scope of this description is confined to state legislation. However, it is worthwhile to note the measures taken by cities, particularly New York City, the pioneer of fair housing ordinances. The New York City 1957 ordinance applied only to new homes in developments of ten or more units and to apartment rentals.<sup>33</sup> Subsequently, amendments in 1961 and 1962 broadened coverage to all housing except rental of an apartment in a two-family owner-occupied private dwelling and rental of rooms within a single family private dwelling.<sup>34</sup>

Another city with broad coverage is Pittsburgh, Pennsylvania, whose city council in 1958 passed an ordinance prohibiting discrimination in sales or rentals by persons who own or control five or more housing units anywhere in the city.<sup>35</sup> Contrasted with New York City and Pittsburgh is Chicago, Illinois, a city the United States Commission on Civil Rights called "the most segregated city of more than 500,000 in the country."<sup>36</sup> By 1964 the city had not enacted

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<sup>32</sup>*Ibid.*, p. 122.

<sup>33</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2.

<sup>34</sup>*Fair Housing Laws*, p. 286.

<sup>35</sup>*Ibid.*, p. 321.

<sup>36</sup>*1959 Report*, p. 430.

any laws covering publicly assisted housing. Residential segregation has been compounded in Chicago by the fact that the State of Illinois had not enacted legislation outlawing discrimination in housing either. Chicago can be classified as "a classic example of the kind of solid Negro concentration in overcrowded central slum areas that gives rise to the description 'ghetto'."<sup>37</sup> However, a wedge was opened in 1963 when the Chicago City Council adopted a fair housing ordinance. The ordinance provided that city-licensed real estate brokers and persons who exercise any function of a real estate broker are prohibited from discriminating against prospective buyers or renters because of race, color or creed. Also barred was the use of panic peddling or "block-busting" tactics, such as soliciting property listings or attempting to induce sales on grounds of loss of value due to the entry into a neighborhood of minority group families.<sup>38</sup>

Briefly running down the list of some of the states having fair housing laws, Connecticut, Massachusetts, and New

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<sup>37</sup>*Ibid.*

<sup>38</sup>*Trends in Housing*, VII, No. 4 (July-August, 1963), 1, 2. The measure was passed despite a huge protest march on City Hall sponsored by the Property Owners Coordinating Committee, a group of neighborhood organizations which sought 500,000 signatures to a petition for a statewide referendum on whether the Illinois Legislature should enact open occupancy legislation. After passage of the ordinance the Chicago Real Estate Board announced it would institute court action in an effort to strike down the fair housing ordinance on grounds that it was unconstitutional and unenforceable. *Ibid.*

York utilize the broadest statutes.<sup>39</sup> Colorado,<sup>40</sup> Minnesota,<sup>41</sup> and Pennsylvania<sup>42</sup> exempt all or most owner-occupied houses. New Jersey's coverage is similar to New York City's 1957 ordinance in that it exempted one- or two-family dwellings unless it is part of a group of ten or more houses owned by the same person.<sup>43</sup> California exempted a dwelling having four or less housing units.<sup>44</sup> Michigan had no exemptions since the Attorney General ruled that the new Civil Rights Commission has sweeping powers under the state's new constitution to enforce nondiscrimination in all housing.<sup>45</sup>

In addition to their primary coverage of housing, most of the statutes apply to the transactions of real estate agents, financial institutions or mortgage-lenders. Some have provisions which authorize the enforcement or administrative agency to seek court injunctions to hold the housing at issue available until the final disposition of a complaint.<sup>46</sup>

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<sup>39</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 1.

<sup>40</sup>*Fair Housing Laws*, p. 15.

<sup>41</sup>*Ibid.*, p. 16.

<sup>42</sup>*Ibid.*, p. 18.

<sup>43</sup>*Ibid.*, p. 17.

<sup>44</sup>*Ibid.*, p. 15.

<sup>45</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2.

<sup>46</sup>See Appendix D.

The real estate broker is a key man in the majority of housing transactions and his policies are among the foremost influences that determine where the various racial groups live. As the United Commission on Civil Rights related, there was substantial evidence that discrimination in housing was generated by real estate brokers who acted independently of home owners and refrained from showing property in specified areas to minority groups they regarded as undesirable.<sup>47</sup> Of course, many of the statutes ban not only owners of homes from discriminating against minorities but also their agents. Thus, a real estate agent who discriminates on instruction from his client would be participating in an illegal practice under the law.<sup>48</sup> Massachusetts, Minnesota, New Jersey, and New York State prohibit discrimination by real estate brokers in all housing in which discrimination is prohibited on the part of the owner.<sup>49</sup> Excluding Alaska and Michigan,<sup>50</sup> all of the states covering discrimination in private housing have given attention to practices of real estate brokers.

As in the case of real estate brokers, there is substantial evidence that some discrimination originates with banks, insurance companies, and other financial institutions,

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<sup>47</sup>*Housing Report*, p. 123.

<sup>48</sup>Greenberg, *Race Relations and American Law*, p. 19.

<sup>49</sup>Robison, *Western Reserve Law Review*, XIII, 116.

<sup>50</sup>See Appendix D.

independent of the instructions of the seller.<sup>51</sup> Minority groups sometimes are prevented from buying property in specified areas, even after they have concluded a sales agreement with a willing owner, because they find it impossible to obtain a mortgage from any financial institution.<sup>52</sup> Nine states that have legislation affecting private housing prohibit discrimination by financial institutions.<sup>53</sup> Only Alaska, New Hampshire and Oregon did not.

States having fair housing statutes, with certain variances, have incorporated most of the provisions of Theodore Leskes' concept of a sound housing statute.<sup>54</sup> One feature neglected, however, by Leskes was the use of temporary injunctions. Frequently, after administrative hearings under the statutory proceedings have been completed there is no house or apartment available for the complainant. This was aptly reported by the Commission on Human Rights, the administrative agency enforcing New York City's fair housing law. The Commission's report in 1962 said:

. . . it is obvious that in a large proportion of cases the complainant was unable to wait until his case was settled. While action on his complaint was pending, he had been forced to find housing elsewhere or make other living arrangements. Therefore, he was not always in a position to accept the original or alternate dwelling unit when it finally was offered to him. During the

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<sup>51</sup>Robison, *loc. cit.*

<sup>52</sup>1959 Report, p. 514.

<sup>53</sup>See Appendix D.

<sup>54</sup>*Supra*, pp. 206-207.

same interval the dwelling unit at issue . . . was rented or sold to another applicant so that even an eventual settlement in the complainant's favor was often to him an empty victory, although from a larger view it represented another step toward the winning of compliance with the law.<sup>55</sup>

New York City amended its fair housing law in 1962 to give injunctive relief to complainants. Only four states utilize temporary injunctions pending a final determination of the proceedings.<sup>56</sup>

### The Enforcement Agency

Except in the case of New Hampshire, all of the fair housing laws provide for enforcement by official state agencies.<sup>57</sup> As a general rule, the agency is empowered to investigate complaints, to attempt settlement by conciliation, to hold public hearings, to compel the attendance of witnesses by subpoena, to issue findings of fact and orders, and to ask the courts for enforcement, if necessary. Some enforcement commissions must await the filing of complaints by individuals; others can move on their own initiative.<sup>58</sup> Most, if not all, of the enforcement agencies are handi-

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<sup>55</sup>Commission on Human Rights, City of New York, *Four Years of the Fair Housing Practices Law of the City of New York: Status of Complaints of Discrimination in Housing, April 1, 1958 - March 31, 1962*, June, 1962, p. 4.

<sup>56</sup>See Appendix D.

<sup>57</sup>*Ibid.*

<sup>58</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2.

capped by lack of adequate budgets and staffs.<sup>59</sup>

Whether a law will be effective in preventing discrimination depends upon its enforcement. Until recent years state laws against discrimination, mainly early public accommodation laws, made no workable provision for enforcement and no practical remedy for an aggrieved person. Lacking enforcement machinery, the older laws remained mere trappings on the statute books.<sup>60</sup> Since enactment of the first fair employment laws in 1945 in New York and New Jersey, the trend has been toward enforcement through administrative agencies. Starting in 1948, a number of states broadened the jurisdiction of their fair employment agencies by directing them to enforce the racial equality legislation applying to employ-

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<sup>59</sup>Lack of finances and a staff was the foremost complaint of James C. McDonald, former Executive Director of the State of Minnesota's Commission Against Discrimination. In an interview, October 8, 1964, with the writer, he described the difficulty of enforcing the state's fair employment practices and fair housing legislation with a staff of four people and a yearly budget of \$25,000. McDonald resigned his post in the spring of 1965 after the legislature failed to heed his proposal for a larger budget.

<sup>60</sup>Mere prohibitions accomplished nothing in the area of civil rights and the penalty provisions accomplished little more. Before World War II, state legislation in this field, pertaining mostly to public accommodations, provided no administrative machinery for enforcement. Depending on statutory provisions, an aggrieved person could sue for damages or file a criminal complaint. In either case, the burden of initiating proceedings and proving the case was on the complainant. Penalties for violation were small. Even when discrimination could be proved in court, it settled only that particular case and did not affect the discriminator's policy. The laws were seldom invoked and had little effect on discriminatory practices. McEntire, *op. cit.*, p. 277. See also Konvitz and Leskes, *op. cit.*, pp. 177-180.

ment, housing and other fields.<sup>61</sup> In 1956, the New York State Legislature empowered the Commission Against Discrimination to enforce the restrictions against discrimination in publicly assisted housing.<sup>62</sup> Today, most of the states having any major laws against discrimination in housing are administered by an official enforcement agency.<sup>63</sup>

The scope and powers of the official enforcement agencies vary but their methods of operation are substantially similar. All enforcement agencies try to minimize formal legal procedures and rely on conciliation, conference, persuasion and voluntary compliance with the laws. Another major activity of most state commissions is an attempt to educate the public through the publication of facts and problems. Here, an educational program is added to statutory restraints so as to secure public acceptance of the legislation and compliance with its provisions.<sup>64</sup> There is then in anti-discrimination laws a distinctive philosophy and method of enforcement as opposed to the earlier statutes. Experts on civil rights legislation would agree with Jack Greenberg in citing the efficacy of the enforcement agency when he said:

An administrative agency . . . can be more effective than private suitors or criminal prosecutors. . . . Statutes

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<sup>61</sup> Robison, *Western Reserve Law Review*, XIII, 112.

<sup>62</sup> *Ibid.*

<sup>63</sup> See Appendix C.

<sup>64</sup> *Where Shall We Live?*, p. 46.

may be sufficiently general to allow novel attempts at evasion or subterfuge to be caught. The expense of investigation and proceedings is borne by the government. There is no jury; on the contrary, an administrative body will become expert at discerning bias and its findings will be upheld if supported by evidence. Moreover, an administrative agency may be authorized to seek out the discrimination which members of a minority avoid, or to take complaints from civil rights organizations, although, of course, proceeding upon individual complaint remains an important mode of operation.<sup>65</sup>

The basic administrative activity of the state commissions is handling the complaints from individuals who feel they have been subjected to unlawful discrimination. Most of the laws in the different states have been modeled after those of New York and incorporate the same powers, procedures and even identical language.<sup>66</sup> The laws have in common four procedural stages for handling a complaint. First, the administration agencies have special procedures to attain legal control of discrimination.<sup>67</sup> Second, when complaints of unlawful discrimination are received, the commission investigates the facts. If the investigation shows discrimination was in evidence, the commission attempts by conference and conciliation to persuade the respondent to comply with the law.<sup>68</sup> Third, if informal conciliation fails, the commission invokes formal procedures, holding a public hearing or it may issue a cease and desist order if the evi-

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<sup>65</sup>Greenberg, *Race Relations and American Law*, p. 16.

<sup>66</sup>*Where Shall We Live?*, p. 46.

<sup>67</sup>*Ibid.*

<sup>68</sup>McEntire, *op. cit.*, p. 279.

dence warrants it. If the order is not obeyed, the Commission may seek enforcement through the courts.<sup>69</sup> Fourth is a provision for a program of public information and education designed to create public understanding and acceptance of the law and to generate a public opinion favorable to compliance.<sup>70</sup>

Since the role of administrative agencies in enforcing anti-bias housing legislation is a comparatively new one, it is difficult to weigh the effectiveness of the commissions. However, *Trends in Housing*, the publication of the National Commission Against Discrimination in Housing, reported in 1963 that "fewer complaints have been filed than either the laws' proponents or opponents had anticipated."<sup>71</sup> Over 4,000 individual charges of discrimination had been filed under the nine anti-bias housing laws which have administrative enforcement and which had been in effect more than one year. The report stated:

Overall figures indicate that approximately 50 per cent of all complaints have been satisfactorily settled; 25 per cent have been dismissed for lack of evidence; and 25 per cent were dropped by complainants. Very few cases have gone beyond the conciliation stage.<sup>72</sup>

Although statistics have indicated that complaints are increasing, civil rights groups have become increasingly

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<sup>69</sup>*Ibid.*

<sup>70</sup>*Where Shall We Live?*, p. 46.

<sup>71</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2.

<sup>72</sup>*Ibid.*

dissatisfied with the rate of progress under the laws. Criticism has revolved around the weaknesses in the statutes, particularly the fact that omission of the owner-occupied home leaves a large part of the housing market uncovered by a nondiscrimination requirement.<sup>73</sup> More specific criticism, however, is directed against the performance of the administrative agencies. Civil rights groups have charged that the enforcement commissions are overly cautious; their procedures are slow moving and cumbersome; and too great an emphasis is placed on lengthy conciliation rather than on vigorous enforcement of the law.<sup>74</sup>

Reporting to the United States Commission on Civil Rights concerning the status of the Boston area's Negro population, the Massachusetts Advisory Committee described the Negro confinement to well-defined housing areas. In its report the Committee identified patterns of discrimination among real estate brokers, developers, landlords and homeowners, and analyzed the effectiveness of public and private actions that have been taken against housing discrimination.<sup>75</sup> The Committee concluded:

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<sup>73</sup>*Ibid.* Only four governmental units--Connecticut, Massachusetts, New York State and New York City--have laws so extensive in scope as to reach approximately 95% of the housing supply.

<sup>74</sup>*Ibid.*

<sup>75</sup>U. S. Commission on Civil Rights Report, *Civil Rights '63* (Washington: U. S. Government Printing Office, 1963), p. 236. Hereafter cited as *Civil Rights '63*.

. . . although the Massachusetts fair housing practices law covers 90 per cent of the housing in the Boston area, its effectiveness was limited by cumbersome procedural and substantive provisions and by the inadequacy of the enforcement powers of the administering State Agency, the Massachusetts Commission Against Discrimination.<sup>76</sup>

Yet, Massachusetts is considered by fair housing law observers to have positive and forceful anti-bias housing legislation.

Similar criticism was voiced by the Civil Rights Committee of the New York County Lawyers Association in a critical analysis of the operation of the New York State Law Against Discrimination.<sup>77</sup> The Civil Rights Committee reported that the exhausting enforcement procedures had led to a feeling of cynicism on the part of members of minority groups both to the effectiveness of the law and the good faith of the administering agency.<sup>78</sup> The implication drawn from these observations explains to a large measure why a small number of complaints have been filed.

#### Court Decisions and Anti-Bias Housing Laws

Although the United States Supreme Court has not ruled on the fair housing statutes (within the scope of the study), there are several significant decisions by state courts, including one by the highest court of New Jersey,<sup>79</sup> involving the constitutionality of state anti-bias housing

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<sup>76</sup>*Ibid.*

<sup>77</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2.

<sup>78</sup>*Ibid.*

<sup>79</sup>*Infra*, pp. 228-229.

laws. Once fair housing measures went into effect, they were quickly challenged as to their validity and substantial litigation followed. Earlier equal rights legislation presented relatively few court challenges to the constitutionality of fair employment practices laws and none to the constitutionality of the educational practices acts or public accommodations statutes.<sup>80</sup> The housing laws, particularly publicly assisted and private housing pronouncements on discrimination, encountered a great amount of litigation. Joseph Robison has said:

That is again an indication of the depth of resistance to efforts to end discrimination in housing. Apparently, owners of housing believe that far more is at stake under an anti-discrimination order than do employers and resort owners.<sup>81</sup>

The cases relating to statutes affecting publicly assisted housing have raised two principal constitutional questions. First, did the states have the requisite police power to enact such legislation? And second, did the legislation create an unreasonable classification in violation of the Fourteenth amendment?<sup>82</sup> The states predicated their authority to enact anti-discrimination housing measures on their police powers which is the least limitable of state powers. It extends to the passage of all legislation which is reasonably necessary for the states' citizenry's health,

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<sup>80</sup>Konvitz and Leskes, *op. cit.*, p. 242.

<sup>81</sup>Robison, *Western Reserve Law Review*, XIII, 122.

<sup>82</sup>*Housing Report*, p. 131.

safety, morals and general welfare.

While opponents of such legislation would find it difficult to question a state's power to ban bias in the operation of state-subsidized projects, they have challenged a state's competence to impose anti-discriminatory regulations on housing receiving federal aid. The opponents of fair housing legislation have argued that to single out builders who enjoy federal mortgage insurance is unreasonable classification under the equal protection of the Fourteenth Amendment. An additional charge, to augment the former complaint, is that a state may not pass legislation concerning a federal program as it violates the national supremacy clause of the United States Constitution. Since Congress had not attached anti-discrimination amendments to the national housing program, the actions of state governments were unconstitutional as they placed a burden on federal function.<sup>83</sup> Since there was an absence of rulings by the United States Supreme Court, it is necessary to look at the critical decisions handed down by state courts as they affected the anti-bias housing legislation.

The first case to consider the constitutionality of a fair housing law arose in New York when a Negro filed a complaint with the State Commission Against Discrimination

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<sup>83</sup>By negating state law in this manner, real estate brokers and developers could maintain a "selective" sales or rental policy. The arguments, of course, were cited prior to President Kennedy's Executive Order No. 11063 issued in November, 1962.

charging that the owner of the Pelham Hall Apartments, Inc., refused to rent a unit to him because of his race. Here, the owner of the apartment units was covered by an FHA-insured mortgage loan. The Commission investigating the complaint found probable cause for the complainant and tried through conciliation to adjust the charge. When conciliation failed the Commission instituted court action to enforce a cease and desist order.<sup>84</sup> The owner of Pelham Hall defended his action on the ground that his apartment building did not come under the publicly assisted housing accommodations of the New York state law since the FHA commitment had been made before the legislation went into effect. Furthermore, it was charged that the act was unconstitutional because it created an unreasonable classification in violation of the equal protection clause of the Fourteenth Amendment.<sup>85</sup>

Justice Samuel W. Eager of the New York State Supreme Court ruled for the Commission. He rejected the respondent's contention that the law was not applicable because the FHA loan insurance was received before the legislation went into effect. The Court pointed out that although the FHA mortgage commitment was granted before New York barred discrimination in FHA-assisted housing, the actual financing and its insur-

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<sup>84</sup>*New York State Commission Against Discrimination v. Pelham Hall Apts.*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (1958).

<sup>85</sup>*Housing Report*, p. 127.

ance by the agency occurred after that date.<sup>86</sup>

Considering the constitutionality of the law, that is, the respondent's claim that a statute was illegal because it violated the right of an owner of private property to choose to whom he will sell or rent, Justice Eager also voided this argument. Acknowledging the place of private ownership and private property, he concluded:

. . . however, what is here involved is a conflict between the rights of the private property owner and the inherent power of the state to regulate the use and enjoyment of private property in the interest of public welfare . . . the power of the state, when reasonably exercised, is supreme.<sup>87</sup>

Furthermore, the court ruled:

. . . legislative acts . . . are to be stricken down by courts only if it appears that they are clearly arbitrary, discriminatory and without any reasonable basis. Where reasonableness of legislation such as this is fairly debatable the court may not question the legislative discretion in adopting it and these particular acts are not to be declared unconstitutional merely because they may tend to cut down the property rights of certain private owners and may result in some final loss to them. . . .<sup>88</sup>

Finally, the court answered the respondent's claim of denial of the equal protection provision of the Fourteenth Amendment because the statute covered only publicly assisted housing and not all housing. The court rejected this contention, saying that the prohibition against denial of equal

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<sup>86</sup>Arnold Forster and Sol Rabkin, "The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing," *New York Law Forum*, VI, No. 1 (January, 1960), 44-45.

<sup>87</sup>Quoted in *Ibid.*, p. 45.

<sup>88</sup>*Ibid.*, p. 46.

protection of the laws does not preclude a state from resorting to classification for purposes of legislation.<sup>89</sup> Declaring that the applied test was reasonable, Justice Eager decided:

. . . the court may take into consideration the fact that civil rights and anti-discrimination legislation in this state, and on the federal basis for that matter, has been and is a step by step proposition.<sup>90</sup>

The Court determined that the legislative classification in the New York statute was reasonable and granted the cease and desist order to the State Commission Against Discrimination.

The second case involving the constitutionality of a state law barring racial and religious discrimination in federally assisted housing occurred in New Jersey. In the case of *Levitt and Sons, Inc. v. Division Against Discrimination*,<sup>91</sup> the highest court of New Jersey upheld the constitutionality of that state's law against discrimination in FHA and VA housing. The Levitts refused to sell homes to Negroes, housing which the FHA had given written commitments to insure mortgage loans. When the New Jersey Division Against Discrimination, the Agency enforcing the state's fair housing law, undertook to process the complaints of the Negroes, the Levitts applied to the New Jersey courts challenging the jurisdiction of the Division. They argued that the New Jersey law

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<sup>89</sup>*Ibid.*

<sup>90</sup>*Ibid.*

<sup>91</sup>31 N. J. 514, 158 A 2d 177 (1960).

against discrimination, by including only publicly assisted housing, created an unreasonable and arbitrary classification in violation of the Fourteenth Amendment,<sup>92</sup> and that the state law invaded a legislative field preëmpted by Congress.<sup>93</sup>

An appellate division of the New Jersey Courts turned down the petition of the Levitts upholding the constitutionality of the state law and the jurisdiction of the State Division Against Discrimination.<sup>94</sup> An appeal was taken to the Supreme Court of New Jersey, which affirmed the appellate division and remanded the matter to the Division Against Discrimination for final disposition.<sup>95</sup> The New Jersey Supreme Court held that the Levitt project came within the term publicly assisted housing as used in the statute giving the Division Against Discrimination jurisdiction over complaints since FHA financing was available for their purchases. Respecting the question of federal preëmption, the Court said:

Congress did refuse to accept amendments to various versions of the National Housing Act . . . which would have expressly prohibited the discrimination with which plaintiffs are charged. . . . But to construe this action as establishing a congressional policy against state laws

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<sup>92</sup>Forster and Rabkin, *op. cit.*, p. 47.

<sup>93</sup>The Levitts were basing their case upon the favorable decision they received on the federal level in the earlier decision of *Johnson v. Levitt*, 131 F. Supp. 114 (E. D. Pa. 1955), *supra*, Chapter V, pp. 190-191.

<sup>94</sup>*Levitt and Sons, Inc. v. Division Against Discrimination*, 56 N. J. Super. 542 (1959).

<sup>95</sup>Konvitz and Leskes, *op. cit.*, p. 247.

having the same effect is not warranted by the circumstances.<sup>96</sup>

The United States Supreme Court refused to consider an appeal of the Levitt decision.<sup>97</sup>

In the Pelham and Levitt decisions, the courts approved the power of the states to require nondiscrimination of private parties, and that statutes limited to publicly assisted housing were not unreasonable or arbitrary. However, in the case of *O'Meara v. Washington State Board Against Discrimination*,<sup>98</sup> a Washington state court disagreed with these principles. O'Meara, the owner of an FHA-financed home, purchased in 1955, refused to sell his home to a Negro. The Washington law went into effect in 1957. Upon the issuance of a cease and desist order by the State Board Against Discrimination, O'Meara appealed the directive to the court.

The lower court held the statute invalid, under both the state and federal constitutions, on the ground that it made an unreasonable classification between housing having a federally insured loan and all other housing.<sup>99</sup> The court added that O'Meara had purchased the home prior to the passage of the state law. Furthermore, the court went on to declare that even if the state legislature were to correct the unreasonable classification aspect of the law by applying it

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<sup>96</sup>Quoted in *Housing Report*, p. 128.

<sup>97</sup>*Cert. denied*, 363 U. S. 418 (1960).

<sup>98</sup>No. 535996, King County Super. Ct., July 31, 1959.

<sup>99</sup>Robison, *loc. cit.*

to all housing, the law would be unconstitutional in that the state lacked the powers to require nondiscrimination of private individuals.<sup>100</sup> Thus, as reported by the United States Commission on Civil Rights "neither the 'step by step' rationale or the *Pelham* case nor the 'reasonable basis' conclusion of the *Levitt* case was acceptable to the O'Meara Court."<sup>101</sup>

Although statutes affecting private housing have not been in existence too long, their constitutionality has been attacked. In three major test cases, the courts have upheld their ban on discrimination. The arguments used by the opponents of the private housing laws have been that the regulations deprive them of exercising their judgment in selection of tenants, a discretion that should be beyond the power of the state. Massachusetts' private housing law was ruled constitutional by the Massachusetts Supreme Judicial Court in *Massachusetts Commission Against Discrimination v. Colangelo*.<sup>102</sup> This was the first decision handed down by the highest court of a state on a test of the validity of a private housing law. In the decision, the court stated:

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<sup>100</sup>Legal scholars have heatedly disputed this decision feeling that it was based upon unsound theory and should be reversed on appeal. See Forster and Rabkin, *op. cit.*, pp. 51-53. However, the Washington State Supreme Court affirmed the decision of the lower court, *O'Meara v. Washington State Board Against Discrimination*, 365 Pac. 2d 1 (1961) and in early 1962 the United States Supreme Court refused to consider an appeal, *cert. denied*; 360 U. S. 839 (1962).

<sup>101</sup>*Housing Report*, p. 130.

<sup>102</sup>182 N. E. 2d 595 (1962).

The Legislature possesses a large measure of discretion to determine what the public interests require and what means should be taken to protect those interests. The field for the legitimate exercise of the police power is co-extensive with the changing needs of society . . . neither property rights nor contract rights are absolute; for the government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.<sup>103</sup>

In Colorado, a trial court held that the state law was unconstitutional on the grounds that it entrusted an unlawful delegation of legislative power to the Colorado Anti-Discrimination Commission.<sup>104</sup> On the municipal level, New York City's private housing law was upheld by a New York State lower court. In furtherance of its powers, the City, the court concluded, could determine "where the individual must yield to what legislative authority deems is for the common good."<sup>105</sup>

Despite the adverse decision in the state of Washington, the case for the constitutionality of fair housing laws barring discrimination in publicly assisted housing is

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<sup>103</sup>Quoted in *Trends in Housing*, VII, No. 5 (September-October, 1963), 6.

<sup>104</sup>*Case v. Colorado Anti-Discrimination Commission*, No. 39682, El Paso County Colo. Dist. Ct., June 2, 1961. However, on Dec. 17, 1962, the Colorado Supreme Court reversed the lower court decision and upheld the constitutionality of the state's law covering private housing in *Colorado Anti-Discrimination Commission, et al. v. J. L. Case, et al.*, 380 Pac. 2d 34 (1962). The Court did strike down a provision in the statute which authorized the enforcement agency to order a respondent to make available comparable housing when the property at issue had been sold while the complaint was pending.

<sup>105</sup>*Martin v. City of New York*, 201 N. Y. S. 2d 111 (Sup. Ct. of N. Y. County, 1960).

very strong. President Kennedy's Executive Order on Equal Opportunity in Housing issued in November, 1962, directing federal agencies to act to prevent discrimination in the sale or rental of property owned, aided or assisted by the federal government, supplements the existing state laws. In the area of private housing, the answer is not as clear. Many commentators have argued that the constitutionality of such laws is proper in view of the attitude of the courts on related questions.<sup>106</sup> The most telling argument voiced is the United States Supreme Court decision, *Railway Mail Association v. Corsi*.<sup>107</sup> Here, the Association questioned the validity of the New York Civil Rights Law which prohibited discrimination by unions. Claiming the law violated the due process clause of the Fourteenth Amendment, the Association said their right to select its membership was destroyed and its freedom of contract was abridged. The Court held that it would be incongruous to invalidate a law aimed at racial equality by invoking a constitutional amendment passed to do away with the effects of slavery. Justice Frankfurter, in his concurring opinion said, "To use the Fourteenth Amendment as a sword against such state power would stultify that

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<sup>106</sup>See McGhee and Ginger, *Cornell Law Quarterly*, XLVI, 228-236; Goldman and Auerbach, *University of Pennsylvania Law Review*, CVII, 525-530; Forster and Rabkin, *New York Law Forum*, VI, No. 1, 55-58.

<sup>107</sup>326 U. S. 88 (1945).

Amendment."<sup>108</sup>

Effects of the Housing Laws on  
Racial Residence Patterns

Since the inception of the fair housing laws, there has been no dramatic change in racial housing patterns in the states having them in operation. Supporters of the anti-bias housing legislation feel that their long-run effect may be great, but for the time being not too much change can be expected from them. They feel it is still too early to draw any documented conclusions as to the success or failure of the fair housing laws enacted so far.<sup>109</sup> What changes brought about by them have been imperceptible, so minor that the United States Commission on Civil Rights reporting after its 1963 inquiries stated that "housing discrimination is perhaps the most ubiquitous and deeply rooted civil rights problem in America."<sup>110</sup> In a gloomier summation, Doctor Karl E. Taeuber, Professor of Sociology at the University of Wisconsin, after surveying the census data from two hundred and seven cities stated:

Whether a city is in the North, South or West; whether it is a large metropolitan center or a suburb, . . . whether nonwhites constitute forty per cent of the population or less than one per cent; in every case white and Negro residences are highly segregated from each other. There is no need for cities to vie with each other for the title of "most segregated city" ; there

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<sup>108</sup>Quoted in Robison, *Western Reserve Law Review*, XIII, 124.

<sup>109</sup>*Ibid.*, p. 125.

<sup>110</sup>*Civil Rights '63*, p. 237.

is room at the top for all of them.<sup>111</sup>

A 1963 survey, conducted by the NCDH in two cities and seven states where laws barring discrimination in private housing had been in operation for more than one year, showed that the laws were opening new housing opportunities for members of the Negro middle class.<sup>112</sup> There has been no increased flight of whites to suburbs as opponents of these laws had contended. Nor has the contention, voiced by opponents, been borne out that real estate values and building construction would decline in the states having fair housing laws.<sup>113</sup> What signs of change taking place, however, have not been startling for the average Negro family living in the "Black Ghetto." The fact that a number of middle-income minority group families have moved into housing previously denied to them, that real estate values have not dropped and that building construction has not declined, does not get to the core of the Negro housing problem.

Even with the housing laws, the number of complaints under them have been small.<sup>114</sup> The chief utilizers have been

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<sup>111</sup>Karl E. Taeuber, "Negro Residential Segregation: Trends and Measurement," *Social Problems*, XII, No. 1 (Summer, 1964), 48.

<sup>112</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 1.

<sup>113</sup>*Ibid.*, p. 4.

<sup>114</sup>*Supra*, pp. 220-222.

members of middle- and upper-middle-class families.<sup>115</sup> There has been then no sign that the lowered housing barriers have caused large numbers of Negroes to participate in an open housing market. Economic, social and cultural handicaps have tended to minimize minority group families from utilizing the opportunities that have been opened.<sup>116</sup> Describing New York City's fair housing ordinance, in effect since 1957, James Q. Wilson pointed out that by 1960, the law adjusted slightly more than two hundred complaints to the satisfaction of the Negro complainant.<sup>117</sup> He said:

This to be sure is a gain, but it is a trivial one when viewed in the perspective of the nearly one million Negroes in that city. . . . Lower-class Negroes, for whom the housing problem is perhaps most severe, hardly participated in the benefits of the open-occupancy law at all. And finally, nearly half the complaints were from Negroes who were already living in areas that were overwhelmingly white--from Negroes, that is, who had already broken out of the ghetto before they had recourse to the law.<sup>118</sup>

Yet, it must be remembered also that New York City's ordinances go just about as far as law can to assure equality in housing.

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<sup>115</sup>*Trends in Housing*, VII, No. 5 (September-October, 1963), 2, 3. Ninety-five per cent of the complainants, according to the survey, are Negroes under 45 years of age; the husbands and wives are professional or semi-professional people; both are more highly educated than the average American and usually have one or more college degrees; and the family income is above that of most middle-class households.

<sup>116</sup>*Where Shall We Live?*, p. 48.

<sup>117</sup>James Q. Wilson, *op. cit.*, p. 182.

<sup>118</sup>*Ibid.*

Karl Taeuber's recent study of residential segregation offers little comfort to civil rights leaders who profess that law can indirectly end prejudice by controlling behavior in that it results in changes of attitudes. Segregation, according to Taeuber, is not the result of factors commonly cited as the cause--such as poverty, lack of education, or other factors that could be altered by the courts, government programs or national policy. Instead, his studies have illustrated that segregation results from unchanging and apparently unchangeable human prejudice.<sup>119</sup> He has stated:

Discrimination is the principal cause of Negro residential segregation, and there is no basis for anticipating major changes in the segregated character of American cities until patterns of housing discrimination can be altered.<sup>120</sup>

Poverty as an explanation for residential segregation, has not provided a complete picture of the segregated housing patterns. Using census data, Taeuber indicated that Negro families having high incomes are not randomly scattered

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<sup>119</sup>*New York Times*, August 8, 1965, p. 58.

<sup>120</sup>Karl E. Taeuber, "Residential Segregation," *Scientific American*, CCXIII, No. 2 (August, 1965), 19. Professor Taeuber's statistical tool measuring residential segregation is the segregation index. A reading of 80 indicates that 80% of the Negroes in a city would have to be redistributed to predominantly or exclusively white blocks if the city were to achieve an unsegregated pattern of residence. The rationale of the segregation index is that if there were no forces working toward residential segregation in a city, any given neighborhood would show about the same proportion of whites, Negroes, and other races as one would find in the city as a whole. Thus, if the population of a nonsegregated city were half Negro and half white, the residents of any city block would be equally divided between the two races.

in the same neighborhoods as high-income whites in any city. Nor do low-income Negroes live in the same neighborhoods as the majority of low-income whites. Regardless of income, Taeuber said, most Negroes live in Negro neighborhoods and most whites live in white neighborhoods.<sup>121</sup>

For the advocates of fair housing laws, Taeuber offered a glimmer of hope although he has not expressly stated that such measures have brought any marked change. His segregation index has indicated that residential segregation in northern and western cities is gradually, almost imperceptibly declining while steadily increasing in southern cities. For example, Dr. Taeuber calculated that New York City's 1960 segregation index for Negroes was 79.3 per cent, a decline from 87.3 per cent in 1950; Los Angeles declined from 84.6 per cent in 1950 to 81.8 per cent in 1960; Detroit's from 88.8 per cent to 84.5 per cent; while Atlanta's increased from 91.6 per cent in 1950 to 93.6 per cent in 1960.<sup>122</sup> In the major northern and western cities with some segregation decline, these are municipalities whose states have passed some kind of anti-bias housing legislation. The increase in residential segregation in southern cities has occurred to maintain the extra-legal types of segregation such as in schools, parks and other public accommodations. While in the north, Taeuber has stated that:

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<sup>121</sup>*Ibid.*

<sup>122</sup>*Ibid.*, p. 16.

. . . the increasingly powerful legal and economic position of urban Negroes . . . may finally be overcoming the long-term trend toward increasing residential segregation.<sup>123</sup>

Laws against discrimination in housing have helped to a small degree lower the formal barriers imposed by discriminatory practices on the part of those who control the housing market. When adopted, they are a necessary preliminary to altering long entrenched practices. Although law alone cannot end them, the contribution it can make should not be minimized. Prejudice of the real estate industry and the public has prevented Negroes from attaining a share of the housing market. Also, the effect of any housing law is weakened with the lower level of Negro income and a scarcity of available housing. Considering the value of nondiscrimination laws in housing, Davis McEntire, Professor of Sociology at the University of California, has stated:

Their immediate importance must be judged in terms of the value of removing a stigma from the minority groups and of allowing to individuals who desire to leave the racial ghetto the opportunity for doing so. Over a longer period, the effects may be felt in a gradual decline of the segregated communities and the assumption by the minorities of the housing patterns common to other Americans.<sup>124</sup>

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<sup>123</sup>Taeuber, *Social Problems*, XII, No. 1, 50.

<sup>124</sup>McEntire, *op. cit.*, p. 286.

## CHAPTER VII

### CONCEPTS OF EXECUTIVE ACTION IN CIVIL RIGHTS, 1945-1962

. . . as liberty is increasingly absorbed into the legalism of the modern state, the executive becomes the central figure in determining the quality of the law's application. As chief executive a President may set the tone of enforcement and, in so doing, will have an inevitable impact on the rights of individuals affected by the law.<sup>1</sup>

Richard P. Longaker

If the Republican Administration were sincere about its pleas for civil rights, it would take action now-- executive action to end inequality in all federal housing programs as the Civil Rights Commission unanimously proposed nearly a year ago and which the President could do by a stroke of his pen. . . .<sup>2</sup>

Senator John F. Kennedy,  
September 1, 1960

Although the federal courts after World War II became the spearhead in the intensified quest for the expansion of Negroes' civil rights, little gain had been made in housing.<sup>3</sup>

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<sup>1</sup>Richard P. Longaker, *The Presidency and Individual Liberties* (Ithaca, New York: Cornell University Press, 1961), p. 12.

<sup>2</sup>During the 1960 presidential campaign, candidate Kennedy issued the statement signed by himself and 22 other Democratic Senators. Similar "stroke of the pen" statements were made during the course of the campaign. Cited in an editorial of the *New York Times*, January 17, 1962, p. 32.

<sup>3</sup>After the *Shelley v. Kraemer* decision, the availability of additional housing was felt near at hand by civil

Federal programs underwriting the national housing market had no practical effect on the rigid patterns of segregation that had been developed over the years. The few regulations and directives issued by federal housing officials barring discrimination in the governmental program had negligible results.<sup>4</sup> Reluctant federal housing agencies still claimed that their ability to act was curbed by congressional inaction. The perpetuation of segregation in the federal housing programs caused the NCDH, in 1961, to exclaim that

There is massive evidence that the federal government is actually promoting and strengthening nationwide patterns of residential segregation, and is violating clear constitutional principles by practicing racial discrimination in its own programs.<sup>5</sup>

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rights leaders. Thurgood Marshall, then chief counsel for the NAACP Legal Defense and Educational Fund, optimistically stated: "The decision is unquestionably one of the most important in the whole field of civil rights. With judicial enforcement of restrictive covenants . . . held to be a denial of the equal protection of the laws, it becomes possible for colored minorities to break out of crowded ghettos. . . ." Thurgood Marshall, "The Supreme Court and Equal Protection of the Laws," *The Annals*, CCLXXV (May, 1951), 107.

<sup>4</sup>*Supra*, Chapter II, pp. 39-42. By 1961, federally sponsored public housing was 80.5% segregated; 70% of the people displaced by urban renewal projects were nonwhite, while the program had resulted in a reduction in the total housing supply of more than 75,000 dwelling units; and less than 2% of the insured mortgages on 6 million homes in an amount exceeding 46 billion dollars through July, 1959, had been available to nonwhite families. NCDH, *A Call On The President of the United States For The Issuance of an Executive Order Ending Discrimination in All Federal Housing Programs* (September, 1961), pp. 4-6. Hereafter cited as *A Call On The President of the United States For The Issuance of an Executive Order*.

<sup>5</sup>*Ibid.*, p. 3.

The passage of a number of state and city anti-bias housing legislation through the decade of the 1950's had brought no solution to the Negro's housing problem.<sup>6</sup> The laws had helped to create a better moral climate and had some educational value. Aside from securing housing for a few middle-income Negro families, these laws had not provided the means for ending discrimination. Because of the ineffectiveness of the previous approaches used, civil rights groups now turned to the executive branch of government for justice. Presidential action, of course, had been considered in addition to the other access routes employed to desegregate the housing program. With the insignificant victories obtained, it became clear that the broad problems of discrimination and segregation were too tightly linked to be solved with piecemeal changes in federal or state policies. During the 1950's, later intensified as the 1960 presidential election approached, organizations concerned with opening up the federal housing programs to Negroes began a concerted drive to bring pressure upon the President of the United States to issue a comprehensive executive order barring discrimination in all housing receiving federal assistance. For contemporary civil rights organizations, the words of Arthur Bentley had great impact. Bentley, writing the *Process of Government* in 1908, had said that "the history of the presidency . . . has been the history of interests which chose it as their best medium of expression

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<sup>6</sup>*Supra*, Chapter VI, pp. 233-238.

when they found other pathways blocked."<sup>7</sup>

Presidential Leadership, Responsibilities  
and Civil Rights

The President, particularly since World War II, has been drawn into civil rights problems because he has been viewed by the electorate and civil rights organizations as the "only clear defensible national leader."<sup>8</sup> Because of his position, presidential action has been requested when racial discrimination became a vital issue in American life. Endowed with the responsibility for moral leadership, Presidents have been asked by civil rights leaders to become the collective conscience of the nation. Although not known for his activism in the civil rights field, President Franklin D. Roosevelt's statement had great meaning for later day anti-discrimination adherents when he said:

The Presidency is not merely an administrative office. . . . It is preeminently a place of moral leadership. All of our great Presidents were leaders of thought at times when certain historic ideas in the life of the nation had to be clarified.<sup>9</sup>

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<sup>7</sup>Cited in Truman, *op. cit.*, p. 402.

<sup>8</sup>Richard P. Longaker, "The President and the Civil Rights of Negroes," *American Government Annual, 1962-1963* (New York: Holt, Rinehart, and Winston, Inc., 1962), p. 56. Cited hereafter as Longaker, *American Government Annual, 1962-1963*.

<sup>9</sup>Quoted in James MacGregor Burns, "What Sort of Man? What Sort of President?" *Political Leadership In American Government*, ed. James D. Barber (Boston: Little, Brown and Company, 1964), pp. 29-30.

The Presidency can serve as a focal point whereby all the acts of the occupant receive national attention and set an example for all Americans.

Beyond the question of moral leadership, the President has been inevitably drawn into civil rights matters. The theory of the modern Presidency and its capacity for action, the dictates of domestic and foreign policies, and the unique position of the Chief Executive in the American system, have pushed the President toward constant involvement with civil rights.<sup>10</sup> Advocates of civil rights have not been satisfied with presidential silence on this emotionally charged issue. Positive action has been demanded by interest groups to meet his constitutional obligations, to personify moral leadership and to fulfill promises of racial equality for his political survival. Additionally, with the exigencies of the cold war, Presidents must respond to Negro aspirations or face the prospect of damaging American prestige abroad.

#### Political considerations

Few executive decisions are made without the consideration of immediate or eventual political consequences. In fact, a powerful force activating the Chief Executive in the area of social justice is the pressure of political rivals.<sup>11</sup>

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<sup>10</sup>Longaker, *The Presidency and Individual Liberties*, p. 32.

<sup>11</sup>Louis W. Koenig, *The Chief Executive* (New York: Harcourt, Brace and World, Inc., 1964), p. 300.

To win election or reëlection, he must be inclusive, appealing to as many diverse groups as possible. The abundant resources of executive action for the fulfillment of civil rights for Negroes has evoked marked political responses that an incumbent President or presidential candidate cannot ignore.<sup>12</sup> Since the election of 1948, presidential aspirants cannot avoid the consequences of the Negro vote. Concentrated in areas of strategic significance for presidential elections, the Negro vote can be crucial because of its northern urban focus. States prized for their electoral vote have heavy concentrations of Negro voters and has meant "their dissatisfactions cannot be discouraged."<sup>13</sup>

The states possessing a large urban Negro population are considered by politicians as swing states, that is, not safe for one political party or the other. Heatedly fought over by both parties, a shift in the political support of one of the major groups in these states can affect the electoral vote count and ultimately a party's loss of the Presidency. States having a sizable Negro population--New York, California, Pennsylvania, Illinois, Ohio, Michigan and New

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<sup>12</sup>See Moon, *op. cit.*, *passim*.

<sup>13</sup>Longaker, *American Government Annual, 1962-1963*, p. 54. To say that one factor is the sole determinant in winning these states is to ignore many unpredictable variables. The Negro vote for President Kennedy was, in several northern states, greater than the margin by which he carried those states in 1960. Yet, as James Q. Wilson has pointed out, the same can be said for the Jewish, Catholic and labor vote. James Q. Wilson, "The Negro in Politics," *Daedalus*, XCIV, No. 4 (Fall, 1965), 958.

Jersey--hold almost three-quarters (202) of the electoral vote needed for victory in a presidential election. Because of this factor, the political President or presidential hopefuls cannot avoid forceful leadership in civil rights.<sup>14</sup> To do otherwise, places the incumbent President or a presidential aspirant in a precarious position that he can ill afford. Theodore H. White, in *The Making of the President, 1960*, related the impact of the aid furnished by the Kennedy brothers in having Martin Luther King released from a Georgia jail during the height of the 1960 presidential campaign. According to White, their interest in the case proved to be crucial in John F. Kennedy's election. White reported:

One cannot identify in the narrowness of American voting of 1960 any one particular episode or decision as being more important than any other in the final tallies: yet when one reflects that Illinois was carried by only 9,000 votes and that 250,000 Negroes are estimated to have voted for Kennedy; that Michigan was carried by only 67,000 and that an estimated 250,000 Negroes voted for Kennedy; that South Carolina was carried by 10,000 votes and that an estimated 40,000 Negroes there voted for Kennedy, the candidate's instinctive decision must be ranked among the most crucial of the last few weeks.<sup>15</sup>

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<sup>14</sup>Longaker, *The Presidency and Individual Liberties*, p. 10.

<sup>15</sup>Theodore H. White, *The Making of the President, 1960* (New York: Pocket Books, Inc., 1961), p. 387. On the basis of the 1964 election, there were definite indications that southern Negroes could deny a state's electoral vote to a presidential candidate they completely opposed. Election returns showed that in every southern state where at least 45% of the age-eligible Negroes were registered, their votes made the difference in President Johnson's successful margin. The estimated size of the Negro vote, 95% of which voted for President Johnson, in Arkansas, Virginia, Tennessee and Florida, helped him eke out narrow state victories. *Minneapolis Sunday Tribune*, November 29, 1964, p. 2B.

## Civil rights and foreign policy

Foreign policy considerations have produced an unavoidable presidential responsibility toward Negro rights. For civil rights problems not only have domestic political implications but complicate the President's role in foreign relations. Racial incidents, the intensification of the "freedom now" movement by Negro groups and Little Rock, Birmingham, Harlem or Watts riots have hurt the American image abroad. In directing foreign policy, Presidents have found themselves continually involved in "counteracting the damaging effects of racial prejudice."<sup>16</sup> Racial incidents in the United States have reverberations throughout the colored nations of the world. The callous handling of the nation's race relations would damage the image of America in these nations' eyes and thus undermine the President's power as a leader abroad. For example, African people, throwing off the badge of second-class citizenship from their former colonial masters, have found American constitutional guarantees of liberty not uniformly applied to ten per cent of the United States' population, the American Negro.

Particularly galling to African diplomats has been their inability to find decent nondiscriminatory housing near the United Nations headquarters and in Washington, D. C. Housing segregation has threatened to provide a rich source

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<sup>16</sup>Longaker, *American Government Annual, 1962-1963*, p. 55.

of anti-American propoganda and deep embarrassment to the United States.<sup>17</sup> Presidents Eisenhower and Kennedy met with offended diplomats on more than one occasion to express the nation's apologies after indignities had been suffered.<sup>18</sup> In 1962, President Kennedy was informed by the Commission on Civil Rights of the acute housing problem faced by African diplomats in Washington, D. C. The Commission reported that a study made in 1961 of luxury apartments in the northwest section of the city showed only eight of two hundred and eleven apartment houses and apartment-hotels would accept diplomats as tenants.<sup>19</sup> To deal with this housing "shortage" and other forms of racial discrimination, the State Department formed a Special Protocol Service Section. Attempts were made to induce Washington realtors to make more apartments available to African diplomats. However, opening up more housing for foreign diplomats was not a panacea for more overriding problems. When asked, "Can the problem be resolved for foreign diplomats only?" then Assistant Secre-

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<sup>17</sup>Not only has segregated housing been a source of embarrassment for officials of the Department of State in seeking accommodations for African diplomats, but oftentimes service had been refused them along the highways between Washington, D. C. and New York. A series of incidents along Highway 40 was publicized in 1961 and 1962 when African diplomats were denied service in restaurants and motels after mistakenly being taken for American Negroes.

<sup>18</sup>Longaker, *American Government Annual, 1962-1963*, p. 55.

<sup>19</sup>U. S. Commission on Civil Rights, *Hearings, Housing in Washington, D. C., April 12-13* (Washington: U. S. Government Printing Office, 1962), pp. 165-168.

tary of State for African Affairs, G. Mennen Williams, answered:

No. . . . First of all, the foreign diplomats would feel this sort of special discrimination almost as much as they do the kind of discrimination they now receive; and the second thing is you can't put a badge on every diplomat and tell him he has to wear it and, as a consequence, our American citizens and the foreign diplomats would be mistaken one for the other.<sup>20</sup>

The efforts of the State Department met with some limited success. But the continuing effort of presidential aides marked the problem as an issue of foreign and domestic relations that could not be escaped. Calling in 1962 for the end of housing discrimination in the District of Columbia, Angier Biddle Duke, then State Department Chief of Protocol, concluded:

. . . only with the ending of it can we counter the belief of many key and important foreign diplomats that in questions of equal opportunity the United States professes one policy but lives by another--and more important, only by eliminating such inequity can we live up to the promises we made to ourselves 180 years ago.<sup>21</sup>

#### President's administrative role

Civil rights problems in the United States and international considerations are intertwined and have caused vexations in the nation's foreign policy. Yet, even though their relationship might not be compelling enough for presidential action in the field of civil rights, a President would still

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<sup>20</sup>*Ibid.*, p. 128.

<sup>21</sup>*Ibid.*, pp. 140-141.

find himself involved under the ample pressure from the Constitution and the necessities of law enforcement.<sup>22</sup> The growth of federal expenditures, national programs and power now penetrates into areas which were once largely a state or local function. The greater their significance, the more it has necessitated presidential exercise of discretion in their administration. For civil rights advocates, however, the expansion of governmental functions has meant the power of government be widened to rid national programs of any vestige of racial discrimination. They felt that the President could no longer play a passive role in avoiding involvement with segregation in education or in the national housing program. Concerted and articulate demands have been made by civil rights groups to enforce his oath of office, in that he is duty bound to "take care that the laws be faithfully executed."<sup>23</sup>

The question of whether federal funds would be spent for activities where racial discrimination existed had to be faced by the President. This dilemma posed for the Chief Executive was particularly evident in the federal housing programs. In housing programs made possible by federal funds from taxes imposed on all Americans alike, segregation policies reflected sanction by the federal government itself.

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<sup>22</sup>Longaker, *American Government Annual, 1962-1963*, p. 55.

<sup>23</sup>U. S., *Constitution*, Art. 2, sect. 3.

The evidence of segregation in the national housing programs was interpreted by civil rights groups to mean that the "federal government has become the architect and enforcer of segregated communities."<sup>24</sup> Despite the deep involvement of the federal government in the housing picture, the NCDH declared:

Housing . . . is the one commodity where the race, religion or national origin of the purchaser determines what he may buy and where he may buy it, regardless of his ability to pay. In this aspect of our economy, the free enterprise system has broken down and private prejudice has determined public policy.<sup>25</sup>

In the administration of the various housing programs civil rights advocates argued persuasively that the dispensation of federal funds be administered in a constitutional manner. Failure to ensure federal housing programs bereft of racial discrimination would mean noncompliance with the requirement of equality in the distribution of governmental benefits imposed by the Fifth and Fourteenth Amendments.<sup>26</sup> Furthermore, civil rights organizations concluded, the President and federal housing agencies had ample power in absence of sanctions by the Congress of the United States to prohibit discrimination in order to achieve the purposes of the national housing legislation. The National Housing Act of 1949 stated that its purpose was "the realiza-

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<sup>24</sup>*A Call On The President of the United States For The Issuance of an Executive Order*, p. 3.

<sup>25</sup>*Ibid.*

<sup>26</sup>*Ibid.*, p. 23.

tion as soon as feasible of the goal of a decent home and a suitable environment for every American family."<sup>27</sup> To "faithfully execute" the goals of the legislation meant that the federal government had an obligation to see that discrimination in the various housing programs be effectively eliminated.

For the success of the national effort to achieve a decent home for every American family, the Chief Executive was prevailed upon by civil rights proponents. Executive action was deemed of inestimable value if the President gave a declaration of national intent to end all discrimination in the federal housing programs. After efforts had failed in the other agencies and levels of government, only the President through resourceful leadership could commit the federal government to make housing benefits available to all Americans. The Chief Executive alone had the opportunity to see that housing laws were administered to curb segregation. Summing up the attitude of organizations working for a ban on segregated housing through presidential action, the Southern Regional Council said:

A declaration by the President that federal housing programs will be guided by a belief in the values of integration would be the soundest basis for an executive order prohibiting discrimination. Because the federal government has been a principal architect of housing segregation, there is special reason . . . in reversing the process.<sup>28</sup>

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<sup>27</sup>*Housing Act of 1949*, Public Law 171, 81st Congress, 1st Session, 1949.

<sup>28</sup>Southern Regional Council, *The Federal Executive and Civil Rights* (Atlanta: Southern Regional Council, January, 1961), pp. 46-47.

Executive Orders: A Recourse for  
Decisive Executive Action

Given the willingness to lead in establishing a climate favorable to civil rights, there are several instruments available to a President. Specific actions entail directives from the White House or department heads, guidelines drawn up by presidential commissions, or executive orders. Whatever means taken by the President, the process for civil rights groups are the same, that is, the introduction of "a higher standard of performance by means of official command or authoritative suggestion."<sup>29</sup> Recourse to these devices by Presidents have ushered in the acceptance of official responsibility for enhancing the rights of minorities by the application of executive power. The instruments chosen by the Chief Executive have provided dramatic evidence in encouraging social change.

Presidential commissions

Creation of presidential commissions by administrative means has enabled the President "to bring together publicity, consultation, and expertise"<sup>30</sup> to inform the nation of the problems encountered by American Negroes. President Truman created by executive order in 1946 the President's Committee on Civil Rights to investigate the incipient

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<sup>29</sup>Longaker, *The Presidency and Individual Liberties*, p. 111.

<sup>30</sup>*Ibid.*, p. 206.

crisis in race relations.<sup>31</sup> (The United States Commission on Civil Rights was established by Congress with the passage of the Civil Rights Act of 1957. Unlike its predecessor, the Commission on Civil Rights did not have a close relationship with President Eisenhower. Not only did he delay the appointment of members to the Commission, but he also showed aloofness to the Commission's first report in 1959.)<sup>32</sup> Although the Committee's report, *To Secure These Rights*, failed to produce any immediate legislation by Congress, its statement of principles provided standards for a public policy in civil rights.<sup>33</sup> Both President Truman's Committee and the United States Commission on Civil Rights have served to inform the President and the public of the shortcomings of the nation in civil rights. Their fact-finding, opinions and recommendations have prodded a nation that had long been remiss in forming a constructive approach to a serious national dilemma.<sup>34</sup>

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<sup>31</sup>*Ibid.*, p. 207.

<sup>32</sup>*Ibid.*, p. 208.

<sup>33</sup>By 1965, it should be noted, most of the recommendations of *To Secure These Rights* had become the law of the land.

<sup>34</sup>Reports of such bodies, of course, can be perturbing to the Chief Executive. An example on these lines would be the recommendations made by the U. S. Commission on Civil Rights in 1963 after hearings were held in the State of Mississippi. U. S. Attorney General, Robert Kennedy, asked the Commission to refrain from holding the hearings because he feared they might hamper the Justice Department's own actions in Mississippi. When the Commission issued its report urging the President to cut off federal funds to the state, President Kennedy remarked that he did not have the power to cut off

Desirability of executive orders

Although presidential commissions have played a prominent role in awakening the President and the public to racial problems, proponents of civil rights have preferred action that is more pervasive and that directly coped with the barriers of segregation. The type of executive action envisaged by supporters having immediate and cogent effect upon racial injustice, particularly in areas where federal monies are involved, has been the issuance of executive or administrative orders. Housing-civil rights advocates have felt that although legislation passed by Congress failed specifically to bar segregated facilities in governmental programs, the President could still aid their cause. As administrator and interpreter of laws passed by Congress, the President had the power to give construction to specified acts of Congress or he could exercise his constitutional prerogatives faithfully in executing the laws. In supplementing the general law, the President has acquired authority "from silences of Congress as well as from its positive enactments, provided only the silences were sufficiently prolonged."<sup>35</sup> Therefore, the President's duty to the law often has placed him in the position of interpreting it, which in turn has led to a

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federal aid to Mississippi nor did he think it wise to give the President that kind of power. For an account of this provocation see: Barbara Carter, "The Role of the Civil Rights Commission," *The Reporter*, XXIX, No. 1 (July 4, 1963), 10-14.

<sup>35</sup>Edward S. Corwin, *The President: Office and Powers* (New York: New York University Press, 1957), p. 119.

species of subordinate legislation.<sup>36</sup>

Since World War II, the use of executive orders to encourage social change has provided evidence of the significance of the executive instrument.<sup>37</sup> An executive order as Edward H. Hobbs has defined it, ". . . is nothing more than a rule or regulation of the President which is generally based on some statutory authority but sometimes on constitutional prerogatives."<sup>38</sup> Executive orders have given effect to legislation and have obviated conflicts. They have ranged from adoption of a complicated volume of rules governing the operation of an act to exemption of a single individual from civil service regulation.<sup>39</sup> Concerning their intricacies, Hobbs has said:

Executive orders emanate from the agency level and are customarily forwarded to the President for his approval. Considering the unrelenting flow of such documents intermediary action (consisting of a complicated network of channels) is absolutely essential before the President is called upon for an actual decision as to the propriety of the order.<sup>40</sup>

Although there are basic limitations to the scope of

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<sup>36</sup>*Ibid.*

<sup>37</sup>Longaker, *The Presidency and Individual Liberties*, p. 114.

<sup>38</sup>Edward H. Hobbs, *Behind the President: A Study of Executive Office Agencies* (Washington: Public Affairs Press, 1954), p. 52.

<sup>39</sup>*Ibid.*

<sup>40</sup>*Ibid.* The utilization of executive orders has increased with the rise of the modern Presidency. Hobbs has pointed out that the federal government first began numbering them in 1823. Up to 1932 less than 6,000 had been issued. From 1932 to 1947, over 4,000 had been enacted with President Franklin D. Roosevelt issuing 2,570 executive orders alone.

executive action, its range is, nevertheless, great. World War II and its aftermath saw the acceptance of presidential responsibility for the reduction of violations of minority rights by means of application of the executive power.<sup>41</sup> Beginning with labor leader A. Phillip Randolph's threatened march on Washington in 1941, Presidents have issued executive orders barring racial discrimination in the employment of workers in defense industries or government.<sup>42</sup> From this time, free of the encumbrance of congressional involvement, executive action brought about desegregation of the armed forces, and discrimination by firms having contracts with the federal government was mitigated.<sup>43</sup> These developments were due to the determinations of Presidents Truman and Eisenhower. President Kennedy, in the early months of his administration, broadened the powers of the executive branch in investigating discrimination in federally connected employment with the formation of the President's Committee on Equal Employment.<sup>44</sup>

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<sup>41</sup>Longaker, *The Presidency and Individual Liberties*, p. 114.

<sup>42</sup>After Randolph's threatened march on Washington, President Roosevelt issued executive orders creating two Fair Employment Practice Committees to receive and investigate complaints. See Executive Order No. 8802, Fed. Reg. 3109 (1941); Executive Order No. 9346, 8 Fed. Reg. 7183 (1943).

<sup>43</sup>Executive Order No. 9981, 13 Fed. Reg. 4313 (1948); Executive Order No. 9980, 13 Fed. Reg. 4311 (1948); Executive Order No. 10479, 18 Fed. Reg. 4899 (1953).

<sup>44</sup>Executive Order No. 10925, 26 Fed. Reg. 1977 (1961).

The term "executive action" is to some extent a misnomer. Much of what is done by the Chief Executive is derived from powers conferred by statute. Without legislation under which he could act, there would be little the President could do in some areas. In other areas, such as the armed forces or federally contracted employment, he operates more freely. When the President acts under statutory authority, however, there are opportunities for creative policies. Statutes may be interpreted broadly and they may be culled for implied delegation of power to the Chief Executive. For the supporters of civil rights, executive action has immediate positive value as it usually goes into effect at once. Between an act of Congress or a court decision and its enforcement, there is always an interval of time, sometimes a lengthy period. For executive actions, however, from the time of their decisions to their application, there is supposedly little time available for disputation and the mobilization of resistance to them. As pointed out by the Southern Regional Council:

These are qualities of executive action, which, in the case of a responsible administration, permit the strengthening of the rights of the people without heated and divisive controversy and without harm to the Constitutional processes.<sup>45</sup>

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<sup>45</sup>Southern Regional Council, *Executive Support of Civil Rights* (Atlanta: Southern Regional Council, March 13, 1962), p. 2.

## Presidential inhibitions to executive action

Granted the wide areas of presidential responsibility, there are burdensome restrictions on executive action on any President closely aligned with the protection of civil rights. Many obstructions, political and administrative, built into the American system of government tend to modify or diminish presidential action even though the President be thoroughly committed to the cause. There are many obstacles for direct action by the President that are overlooked by supporters of civil rights. These barriers may make the White House reluctant to act in the first place or they may hinder the effective use of presidential authority once it has been committed.<sup>46</sup> Their endurance can and has curbed and reshaped presidential initiative.

The most significant limitation imposed is the political environment that takes precedence or priority over ventures in social justice.<sup>47</sup> Because of political necessity, the President has to view pressing civil rights problems as only one of many urgent and sometimes conflicting policy problems.<sup>48</sup> Political survival has caused the inhibiting of more direct presidential action because of basic prior concerns faced by the President. Civil rights problems

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<sup>46</sup>Longaker, *American Government Annual*, 1962-1963, p. 56.

<sup>47</sup>Louis Koenig, *op. cit.*, p. 306.

<sup>48</sup>Longaker, *American Government Annual*, 1962-1963, pp. 56-57.

are only one of the many policy problems that confront the President. Often, full energy is devoted to the topic only after it has become so urgent that systematic treatment has to be afforded. Competing policy priorities not only reduce the time spent on problems which have not reached emergency proportions but will also lead to the purchase of support for some programs by abandoning others.<sup>49</sup> Until the Civil Rights Act of 1964 was passed, comprehensive civil rights legislation had not been actively pursued by Presidents who feared the resultant damage that might be done to other legislative proposals.

In addition to legislative priorities, executive action encounters the dualisms of the American governmental system--President and Congress, President and Administration, federal and state, public and private--as well as the multiplicity of power centers in the same system.<sup>50</sup> Presidential initiative is limited by a Congress jealous to preserve its own independence and an unmanageable party majority in either House. Furthermore, executive action can be retarded as Richard P. Longaker has indicated by

. . . a wide chasm between the White House and a bureaucracy which . . . has the professional skill, not to say professional pride, in its ability to thwart the President's wishes. The federal system effectively limits the reach of the national executive arm, making it necessary to deal with multiple governmental authorities, both state and local, which are not always amenable to national

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<sup>49</sup>*Ibid.*, p. 57.

<sup>50</sup>*Ibid.*

direction. Finally, there is an inconclusively defined realm of private choice which is free from direct intervention by the national government and the national executive.<sup>51</sup>

In seeking executive action to bar segregation in the federal housing programs, civil rights advocates turned to an area where the Chief Executive had moved more cautiously than his attack on other aspects of discrimination. Aside from the modest directives to end discrimination where mortgage guarantee through the FHA were involved when state law bans existed,<sup>52</sup> the executive branch had until 1962 placed major emphasis on persuasion and education. For civil rights organizations, this approach was timid in that the housing programs involved vast expenditures of federal monies. Because of the expenditures, they felt that there was "no constitutional limit on the power of the executive branch to demand that the money be untainted by discrimination."<sup>53</sup> To do otherwise, the President would be in the unusual position of barring racial discrimination in the disbursement of some government benefits while condoning racial discrimination in the disbursement of others. Calling for an executive order forbidding discrimination in federally assisted housing, the NCDH cited the contradictory situation that had arisen. The NCDH stated that

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<sup>51</sup>*Ibid.*

<sup>52</sup>*Supra*, Chapter II, pp. 41-42.

<sup>53</sup>Longaker, *The Presidency and Individual Liberties*, p. 121.

. . . by Presidential Order, the developer of an urban renewal project, in his role as *builder* of Government-assisted housing, must sign a contract which includes a non-discriminatory hiring provision. This same developer, in his role as *seller* of Government-assisted housing, is free to follow a pattern of rigid racial discrimination. By Presidential Order, the Negro soldier is guaranteed service in an integrated Army. If he seeks living quarters in Federal public housing, the chances are better than eight out of ten that he must accept housing in a segregated project.

Housing remains the major Federal aid program unprotected by any requirements of equal opportunity. A standard of racial equality, in one Government operation, but not in all, is contrary to good morals, logic and constitutional principles.<sup>54</sup>

The Drive for an Executive Order:  
A Brief History<sup>55</sup>

Although efforts to desegregate housing patterns had proved inconclusive with an unwilling Congress and piecemeal judicial decisions, the efforts made by civil rights groups had not entirely been fruitless. Desegregated housing, once given a low priority by these groups, was now placed in the forefront of their national activities. With the experience gained in lobbying and related educational campaigns that

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<sup>54</sup>*A Call On The President of the United States For The Issuance of an Executive Order*, pp. 7-8.

<sup>55</sup>Between 1945 and 1962, a number of proposed executive orders were submitted by civil rights groups. Because the quest for an executive order barring discrimination in the federal housing program is ancillary to the overall study of the group process, only the major pronouncements are here recorded. Finally, excluding the delineated propositions of the United States Commission on Civil Rights in reports submitted in 1959 and 1961 and the NCDH in 1961, earlier requests by organizations merely cited the need of an executive order or action by the Chief Executive. Major stress, therefore, is given in this section to these specific proposals.

were conducted, public comprehension of the problem grew. The response brought forth from previously quiescent civil rights organizations a groundswell of concern and action which aided old-line groups who had been in the forefront of the fight against segregated housing. The rallying point of the concerned groups was the issuance of an executive order banning discrimination in federally assisted housing. A convergence of their drive was brought to bear upon newly elected President Kennedy in 1961.

Changes in public policy affecting civil rights has been attributed to the determined efforts of a small minority of citizens who recognized a need to bring it to public attention.<sup>56</sup> In the case of residential segregation, the publicized requests for an executive order spreading over almost a decade and a half, served to express a mounting public concern. The failure of a meaningful public policy on the Negro housing supply caused civil rights groups to focus on the Presidency to initiate action so as to alleviate the growing segregated residential patterns.

#### Early declarations

The campaign for an executive order crystallized after Congress and the housing agencies failed to demonstrate that the national government was providing equal opportunity

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<sup>56</sup>*Where Shall We Live?*, pp. 53-56. See also Eunice and George Grier, "Equality and Beyond: Housing Segregation in the Great Society," *Daedalus*, XCV, No. 1 (Winter, 1966), 93-97.

for minority groups to the existing housing programs. Practices of the federal housing agencies continued to put a premium on segregated and discriminatory housing even while general policy statements in favor of equal opportunity were issued.<sup>57</sup> The first outright declaration against these practices came with the writing of *The Negro Ghetto* by Robert C. Weaver in 1948. Weaver proposed a firm edict by the national government against discrimination in federally assisted housing.<sup>58</sup> Weaver's call for executive action came, it should be noted, the same year that President Truman began to issue executive orders banning discrimination under government contracts and the armed forces. For civil rights groups it seemed logical that similar presidential action would result in the issuance of an executive order barring discrimination in the federal housing program.<sup>59</sup>

As federal activities were broadened with the passage of the Housing Acts of 1949 and 1954, civil rights organiza-

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<sup>57</sup>*Supra*, Chapter II, *passim*.

<sup>58</sup>Weaver, *op. cit.*, p. 312.

<sup>59</sup>According to the extensive survey made by William Brink and Louis Harris, Negroes have more faith in the President and the federal courts than in Congress when they look to white institutions for help. However, there is a sharp split between the Negro rank and file and the leadership over the trustworthiness of the President and the courts. Forty-four per cent of the rank and file favor the executive branch, while 59% of the leaders look to the courts. The disparity is explained by the fact that Negro leaders place more trust in judicial decisions, while the rank and file, because of their unfamiliarity with the courts or for emotional reasons, look to the President for the fulfillment of their hopes. William Brink and Louis Harris, *The Negro Revolution In America* (New York: Simon and Schuster, 1964), p. 76.

tions such as the NCDH, the NAACP, the National Urban League, the Congress of Industrial Organizations (CIO), and many religious groups were united in the conviction that the President should adopt a firm stand to end racial discrimination in the policies of the federal housing agencies. The year 1955 witnessed the first specific request for a comprehensive executive order banning discriminatory practices of the FHA and VA. Congress, in 1955, investigating the existing housing programs, heard a detailed plan by civil rights advocates recommending the issuance of an executive order.<sup>60</sup> In a proposal offered by the American Friends Service Committee and co-sponsored by several human relations groups, their executive order envisaged:

- (a) An affirmation of the policy . . . to provide equal accesses to government housing benefits without discrimination or segregation because of race, creed, color, or national origin.
- (b) A requirement . . . in FHA and VA insured or guaranteed mortgages . . . to include a statement that there will not be discrimination in sales or rentals against any person who is otherwise qualified, on grounds of race, creed, color, or national origin.
- (c) The establishment of an advisory committee made up of representatives of the federal mortgage insuring agencies, the building, mortgage financing, and real estate industries and the public. . . . This committee . . . would carry on an educational program aimed at securing general understanding and acceptance of the policy enunciated by the President and it would receive from the concerned federal agencies reports on progress toward the goal of removing racial and other restrictions in FHA and VA housing and on the extent of compliance with the pledge . . .<sup>61</sup>

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<sup>60</sup>*Investigation of Housing, 1955*, p. 549.

<sup>61</sup>*Ibid.*, pp. 549-550.

The Eisenhower Administration failed to show any enthusiasm for this type of presidential action. Although President Eisenhower had used the power of his office to create a new Committee on Government Contracts early in his Administration, no executive order came forth related to the federal housing program.<sup>62</sup> This was not surprising since President Eisenhower showed significant reluctance in meeting other problems of the Negro minority in the nation. For the NAACP, he had "consistently refused to urge civil rights action by Congress."<sup>63</sup> He neglected as late as 1958 to voice an official opinion on the United States Supreme Court decision which touched at the heart of equal protection of the law, the *Brown v. Board of Education* case. President Eisenhower refused to take the lead in persuading the public of the correctness of the decision when in a press conference he said:

I have always declined . . . for the single reason that here was something that the Supreme Court says this is the direction of the Constitution, this is the instruction of the Constitution. That is, they say this is the meaning of the Constitution.

. . . . .  
Now, I am sworn . . . to defend the Constitution . . . .  
and execute its laws. Therefore, for me to weaken public opinion by discussion . . . where I might agree or disagree, seems to me to be completely unwise and not a good

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<sup>62</sup>The housing administrators of the Eisenhower administration apparently spoke for the President regarding their inability to act on the problem. The constrained views of HHFA Administrators Albert Cole and Norman Mason on executive action are cited in Chapter IV, pp. 132-133.

<sup>63</sup>NAACP, *Annual Report, Forty-sixth Year* (New York: NAACP, 1954), p. 45.

thing to do.<sup>64</sup>

Even when civil rights legislation became a front-ranking measure for his Administration, President Eisenhower failed to furnish presidential leadership. When asked to comment in 1957 about particulars in the civil rights legislation drawn up by his Justice Department and then before the Congress, he stated:

Well, I would not want to answer . . . in detail because I was reading part of that bill this morning, and there were certain phrases I didn't completely understand. So, before I made more remarks on that, I would want to talk to the Attorney General and see exactly what they do mean. . . . Naturally, I'm not a lawyer and I don't participate in drawing up the exact language of proposals. . . .<sup>65</sup>

With the reluctance and indecision shown by President Eisenhower in the policy area of civil rights, it was apparent that the executive order drawn up by the American Friends Service Committee was not to be issued during his terms in office.

#### Role of the NCDH

Although President Eisenhower showed no predilection for the issuance of such an executive order, pressures began to build up for that form of presidential action in housing. Led by the NCDH, religious, civil rights, civic and labor groups spearheaded a drive for equal opportunity in housing

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<sup>64</sup>President's Press Conference, *New York Times*, August 21, 1958, p. 14.

<sup>65</sup>Quoted in Richard E. Neustadt, *Presidential Power* (New York: The New American Library, 1964), p. 80.

throughout the nation. The NCDH was formed in 1950 as an aftermath of the legal battle against the Metropolitan Life Insurance Company's plans for an all-white housing development in New York City.<sup>66</sup> It soon was responsible for passage of legislation in New York City and New York State prohibiting discrimination in both government-aided and private housing.<sup>67</sup> Serving as liaison for thirty-seven organizations affiliated with the NCDH and committed to the elimination of racial and religious barriers to housing, the NCDH is an "agency of agencies."<sup>68</sup>

The NCDH has operated with a small staff of professionals, drawing heavily upon the staff talents and broad experience of its member agencies.<sup>69</sup> In turn, the NCDH staff has undertaken to provide its affiliates with the type of information and assistance they need to enhance their housing activities. With this arrangement, the NCDH has stated:

The housing-civil rights movement is given added strength by this reciprocal relationship, and the united effort of 37 national organizations plays a central role in the struggle for equal opportunity in housing.<sup>70</sup>

The legislative success the NCDH realized in New

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<sup>66</sup>*Supra*, Chapter V, p. 189. For a list of organizations affiliated with the NCDH see Appendix A.

<sup>67</sup>See Appendices C and D.

<sup>68</sup>*Trends in Housing*, VIII, No. 2 (September-October, 1964), p. 4.

<sup>69</sup>Meagerly financed, the NCDH, expanding its activities in 1964, called for a minimum operating budget of \$120,000 and a goal of \$250,000 per year to make possible a sustained operation with a nationwide focus. *Ibid.*, p. 1.

<sup>70</sup>*Ibid.*, p. 4.

York City and New York State carried over into several other states and cities. But as the victories on these governmental levels mounted, the NCDH recognized the limitations of state and local action. An apparent obstacle to these laws having a real impact was the operation of the federal housing agencies. The URA, the FHA and the VA agreed not to do business with builders found to have violated state laws and who refused to take appropriate remedial action. In practice, proceedings before state enforcement agencies and the courts took so long that the builder could finish the project with federal aid before a final decision was reached. Thus, the NCDH began pressing as early as 1953 for executive action to end discrimination in housing aided by federal agencies.<sup>71</sup>

The broader goal of the NCDH, beyond serving as a clearing house for organizations working to end residential segregation, was the type of comprehensive program first enunciated in 1958 in the recommendations of the Commission on Race and Housing.<sup>72</sup> The Commission, composed of eminent Americans from business and the professions, conducted a three-year study of racial discrimination in housing. At the conclusion of its investigation, the Commission issued a report, entitled *Where Shall We Live?* In the final chapter of this report, the Commission recommended a broad program to

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<sup>71</sup>J. Anthony Lukas, "Integrated Housing: A Matter of Timing," *The Reporter*, XXVI, No. 4 (February 5, 1962), 30.

<sup>72</sup>*Trends in Housing*, VIII, No. 2 (September-October, 1964), p. 4.

achieve equal opportunity in housing. Urging voluntary associations working for racial equality in housing to conduct programs of action, the Commission requested:

To carry on the suggested activities effectively requires technical knowledge and skill in such fields as real estate, mortgage financing, public relations, law, social and economic research, and community organization.<sup>73</sup>

In seeking the issuance of an executive order the NCDH demonstrated a competency in all of these areas.

Seeking to end housing bias, the NCDH stressed the role of the federal government as the most powerful force in the national housing picture. Yet, in its housing policies, the NCDH indicated the federal government was "both the architect and enforcer of residential segregation."<sup>74</sup> The charges of the NCDH were sustained by an agency of the government itself, the United States Commission on Civil Rights.

#### 1959 and 1961 Reports of United States Commission on Civil Rights

Established by Congress with the passage of the Civil Rights Act of 1957, the Commission was to serve as an independent agency within the Executive Branch and was empowered to investigate, study, appraise, and to make findings and recommendations in regard to the laws and policies of "the Federal Government with respect to equal protection of the laws under the Constitution."<sup>75</sup> Regarding housing, the

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<sup>73</sup>*Where Shall We Live?*, p. 70.

<sup>74</sup>NCDH, *News Release*, October 6, 1961.

<sup>75</sup>*1959 Report*, p. x.

Commission in its investigations had to determine whether the housing laws and policies of "Federal, State and Local Governments are operating to deny the equal protection of the laws to any Americans."<sup>76</sup>

The Commission, in its 1959 and 1961 reports relating to housing, noted the absence of a federal policy banning housing bias. In 1959, the Commission stated:

While the fundamental legal principle is clear, Federal housing policies need to be better directed toward fulfilling the constitutional and congressional objective of equal opportunity.<sup>77</sup>

The Commission, two years later, emphasized the extensive role of the federal contribution to the nation's housing. Noting governmental housing assistance to the private housing and home finance industries, the Commission said:

They profit from the benefits that the Federal Government offers--and on racial grounds deny large numbers of Americans equal housing opportunity. At all levels of the housing and home finance industries--from the builder and the lender to the real estate broker, and often the local housing authority--Federal resources are utilized to accentuate this denial. This is the central finding of the Commission's present study.

Denial of equal housing opportunity means essentially the deliberate exclusion of many minority group members from a large part of the housing market and to a large extent confinement in deteriorating ghettos. It involves more than poverty and slums, for it extends to the denial of a fundamental part of freedom: choice in an open, competitive market. . . . For in housing, as elsewhere, the essence of freedom is choice. Nevertheless Federal programs, Federal benefits, Federal resources have been widely, if indirectly, used in a discriminatory manner--and the Federal Government has done virtually

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<sup>76</sup>*Ibid.*, p. 331.

<sup>77</sup>*Ibid.*, p. 537.

nothing to prevent it.<sup>78</sup>

The 1959 and 1961 reports both called for direct action by the President in the form of an executive order so that equality of opportunity in housing might be realized. Essential to both reports was the executive order applying to all federally assisted housing, including housing constructed with the assistance of federal mortgage insurance on loan guaranty as well as federally aided public housing and urban renewal projects. The 1959 report, with all six members concurring, drew up six recommendations to alleviate minority housing discrimination. Recommendation number two asked that

. . . The President issue an executive order stating the constitutional objective of equal opportunity in housing, directing all Federal agencies to shape their policies and practices to make the maximum contribution to the achievement of the goal. . . .<sup>79</sup>

In addition to the issuance of an executive order, the Commission recommended: that the FHA strengthen their present agreements with states and cities having laws against discrimination in housing by requiring builders subject to these laws who desired the benefits of federal mortgage insurance and loan guaranty programs to agree in writing that they would abide by such laws;<sup>80</sup> the PHA take affirmative action to encourage the selection of sites on open land in good areas outside the present centers of racial concentra-

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<sup>78</sup>*Housing Report*, p. 140.

<sup>79</sup>1959 *Report*, p. 538.

<sup>80</sup>*Ibid.*

tions;<sup>81</sup> and that the URA take positive steps to assure that in the preparation of overall community "workable programs" for urban renewal, spokesmen for minority groups were included among the citizens whose participation was required.<sup>82</sup>

After further investigations and findings, the United States Commission on Civil Rights urged broader action by the federal government in its 1961 report. Not only did the Commission repeat the call for the President to issue an executive order but it also recommended more stringent measures to be followed by the FHA, the VA and the URA in dealing with housing discrimination.<sup>83</sup> However, the major departure from the earlier housing report was the recommendation of federal action encompassing the mortgage-lending institutions. Any action to be effective, the Commission felt, had to cover the nation's financial institutions who were recipients of aids and benefits from the federal government. Since the federal government exercised numerous supervisory controls over their activities, these controls must be extended to ensure equal housing opportunities for all citizens.<sup>84</sup> Upon the evidence received in its hearings throughout

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<sup>81</sup>*Ibid.*, p. 539.

<sup>82</sup>*Ibid.*, p. 540.

<sup>83</sup>*Housing Report*, pp. 150-153.

<sup>84</sup>The extent of the financial community as it is involved in the nation's housing market can be briefly described. As of 1960, approximately 90% of the home mortgages throughout the country were affected by some government activity. About 30% were insured or guaranteed by the FHA or VA. More than 60% of the nonfarm home mortgage debt was held by financial

the country, the Commission recommended:

That the Federal Government, either by executive or by congressional action, take appropriate measures to require all financial institutions engaged in a mortgage loan business that are supervised by a Federal agency to conduct such business on a nondiscriminatory basis, and to direct all relevant agencies to devise reasonable and effective complementary procedures.<sup>85</sup>

### Proposal of the NCDH

After President Kennedy assumed office in 1961, the NCDH drew up a model executive order as a guide for the new President. Entitled *Proposed Executive Order to Bar Discrimination in Receiving Federal Assistance*,<sup>86</sup> this contemplated presidential directive was drawn up in September, 1961, during the NCDH's "stroke of the pen" campaign.<sup>87</sup> The campaign sought the fulfillment of candidate Kennedy's promise to end segregation in the federal housing program. Generally encompassing similar areas covered by the two United States Commission on Civil Rights reports on housing, the proposed directive was milder in scope. This was true particularly when compared to the Commission's 1961 housing report. (The Commission issued its housing report in October, 1961, while

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institutions that gain benefits from the federal government and are supervised by one or more federal regulatory agencies--the FHLBB, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the FDIC. *Housing Report*, pp. 28-53.

<sup>85</sup>*Ibid.*, p. 151.

<sup>86</sup>*A Call On The President Of The United States For The Issuance Of An Executive Order*, p. 20.

<sup>87</sup>*Infra*, pp. 287-288.

the NCDH's proposed order was released in September, 1961.)

The proposed executive order suggested by the National Committee required that all federal statutes providing for assistance to housing of any type be administered in such a way as to ensure equal opportunity for all to enjoy the benefits of these statutes. Essentially, the directive sought to prevent discrimination by agencies of the federal government, and by private persons, corporations and other agencies in the housing industry that received assistance from the federal government.<sup>88</sup> Assistance could be direct or indirect, whether in the form of subsidy, loan, mortgage insurance, commitment for mortgage insurance, advice and approval on the selection of sites and methods of construction, or otherwise.<sup>89</sup> To achieve this result the order would instruct the various agencies in the national administration dealing with housing to adopt appropriate regulations. Among such regulations would be one requiring every federal, state and local agency to include anti-discrimination clauses in all agreements by which public assistance or credit was granted to developers and builders.<sup>90</sup>

To enforce the order, violations of such agreements could be referred to the Attorney General of the United States for appropriate action if the head of the federal

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<sup>88</sup>*A Call On The President of the United States For The Issuance of an Executive Order*, pp. 19-22.

<sup>89</sup>*Ibid.*

<sup>90</sup>*Ibid.*, pp. 20-21.

agency involved failed to gain compliance. Referral of a complaint to the Attorney General by the head of an agency would occur only after informal methods of conference, conciliation and persuasion had failed.<sup>91</sup> Finally, the proposed executive order called for the creation of a President's Committee on Discrimination in Housing to evaluate the degree of compliance by the federal agencies with the executive order. In addition, the Committee could make recommendations to the federal agencies for more effective implementation and report their findings annually to the President.<sup>92</sup> (Neither the United States Commission on Civil Rights reports in 1959 or 1961 called for a similar Committee. The 1959 report recommended that the Commission itself study and appraise the policies of the federal housing agencies under their proposed executive order. However, the 1961 report did not include the same feature.)

The NCDH's proposed order, as stated earlier, was milder in its approach regarding the pervasiveness of presidential action. This was true concerning the executive order's coverage of the nation's financial institutions. Where the United States Commission on Civil Rights in 1961 had called for a requirement that all financial institutions supervised by a federal agency conduct their business on a nondiscriminatory basis, the NCDH's proposed order avoided

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<sup>91</sup>*Ibid.*, p. 21.

<sup>92</sup>*Ibid.*, p. 24.

specific provisions dealing with banks. The National Committee felt that the existing informal regulation of financial institutions by federal agencies could lead to administrative procedures remedying the question. Rather than the setting up of tight restrictive regulations, the National Committee recommended:

. . . that all of the Federal agencies which supervise the banking community enjoy high prestige among the institutions they supervise, and much of their authority is exerted effectively through essentially informal means. Given a clear-cut policy, and a determination to carry it out, the Federal supervisory agencies could quickly and quietly end the racially discriminatory practices of lending institutions. The NCDH (National Committee Against Discrimination in Housing) order, therefore, would give responsibility to the President's Committee on Discrimination in Housing, set up . . . to work with the Federal agencies involved to develop effective procedures to bring financial institutions into line.<sup>93</sup>

Armed with a series of proposed recommendations, both by civil rights organizations and an agency of the federal government itself, pressure began building up for the issuance of an executive order soon after John F. Kennedy assumed the Presidency.

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<sup>93</sup>From a letter to President Kennedy by Charles Abrams, former President of the NCDH, dated November 1, 1961. A copy of the letter is included in *A Call On the President of the United States for the Issuance of an Executive Order*, p. 3.

## CHAPTER VIII

### PRESIDENT JOHN F. KENNEDY ISSUES AN EXECUTIVE ORDER

I run for the Presidency of the United States because it is the center of action, and, in a free society, the chief responsibility of the President is to set before the American people the unfinished public business of our country.<sup>1</sup>

Senator John F. Kennedy  
November 7, 1960

#### Presidential Power: The Kennedy View and Choices

During the presidential campaign of 1960, John F. Kennedy stressed his concept of an activist Presidency, that is, the Office as the "center of action." In the area of civil rights, he had pointed out that only a President willing to use all the resources of his Office could provide the leadership and the direction to eliminate racial discrimination in the nation. On September 9, 1960, Kennedy had expressed:

If the President does not himself wage the struggle for equal rights--if he stands above the battle--then the battle will inevitably be lost. . . . He cannot wait for others to act; he must draft the platforms, transmit them to Congress and fight for their enactment, taking

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<sup>1</sup>Quoted in Theodore H. White, *The Making of the President, 1964* (New York: Atheneum Publishers, 1965), p. 22.

his case to the people if the Congress is slow.<sup>2</sup> Viewed from the vantage point of civil rights groups, Kennedy's "stroke of the pen" statements,<sup>3</sup> linked with his commitments of presidential involvement in equal rights, meant the rapid signing of an executive order once he assumed the Presidency.<sup>4</sup>

It has been pointed out by political observers that a strong influence upon the late President Kennedy in his shaping of presidential power was Richard E. Neustadt's *Presidential Power*.<sup>5</sup> Arthur M. Schlesinger, Jr., has related that Kennedy, prior to his election, read Neustadt's book and found "an abundance of evidence and analysis to support his

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<sup>2</sup>Quoted in an editorial, *New York Times*, January 17, 1962, p. 32.

<sup>3</sup>*Supra*, p. 239.

<sup>4</sup>Both major parties had declared in their 1960 platforms that they would act to prevent discrimination in the federal housing program. *Democratic Party Platform*: ". . . the Democratic administration will use its full executive powers to assure equal employment opportunities and to terminate racial segregation throughout federal services and institutions, and on all government contracts. . . . Similarly the new Democratic administration will take action to end discrimination in federal housing programs, including federally-assisted housing." *Congressional Quarterly Almanac*, XVI (Washington: Congressional Quarterly, Inc., 1960), 788. *Republican Party Platform*: "We pledge: Action to prohibit discrimination in housing constructed with the aid of Federal subsidies." Cited in *A Call On The President Of The United States For The Issuance Of An Executive Order*, p. 7.

<sup>5</sup>See Douglass Cater, *Power in Washington* (New York: Random House, 1964), p. 80; Wilfred E. Binkley, *The Man in the White House* (New York: Harper and Row, Publishers, 1964), p. 158.

predilection toward a fluid Presidency."<sup>6</sup> So impressed was Kennedy with the book that he brought Professor Neustadt from his classroom at Columbia University on a day-to-day basis and placed him in the Bureau of the Budget where he aided in the transition from the Eisenhower Administration to his own. Here, among other duties, Neustadt was available for consultation.<sup>7</sup> Features of Neustadt's thesis proved attractive to the President even though Schlesinger has remarked:

As a natural President, he ran his presidential office with notable ease and informality. He did this by instinct, not by theory. He was fond of Richard Neustadt but a little annoyed by the notion that he was modeling his Presidency on the doctrines of *Presidential Power*. He once remarked that Neustadt "makes everything a President does seem too premeditated."<sup>8</sup>

The thesis of *Presidential Power* is that a President increases or diminishes his power by the type of choices he makes. A President's own choices are the only means available whereby he guards his own prospects for effective influence. By building power through his choices, the President finds a viable approach in making his position operative. This is the contribution he must offer to policy-

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<sup>6</sup>Arthur M. Schlesinger, Jr., *A Thousand Days* (Boston: Houghton Mifflin Company, 1965), p. 126.

<sup>7</sup>Binkley, *op. cit.*, p. 158.

<sup>8</sup>Schlesinger, *op. cit.*, pp. 678-679. The writer does not wish to give the impression that Kennedy was guided solely by the "power-conscious President" of the Neustadt analysis. Certainly, Kennedy had other conditioning about the presidential office before his election and many circumstances helped shape his decisions. However, aspects of Neustadt's thesis, the writer feels, had immediate impact, for President Kennedy's long delay in issuing the executive order on housing.

making after his advisors have presented him with their options and alternatives. The artful political President will build power as he protects himself through his own choices. In this manner, the President can best assure a workable public policy.<sup>9</sup> The question of issuing an executive order to end discrimination in the federal housing program was a choice that awaited President Kennedy when he took office.

When John F. Kennedy assumed the Presidency, civil rights advocates had high expectations of immediate positive action. After campaigning on themes attractive to their cause, vigorous innovations and prospects seemed imminent. The lack of moral leadership decried by civil rights spokesmen during the Eisenhower administration was now supplanted. Kennedy's campaign had won great support among Negro leaders and their civil rights allies and their support had been indispensable in his election. To reinforce his position and to guide him, proposals were drawn up pointing out how presidential action could aid the fight for equality. He was not in office more than a few days when the Southern Regional Council released a report, *The Federal Executive and Civil Rights*,<sup>10</sup> which described the immediate steps that could be taken. In its report to President Kennedy, the Council maintained: "The President holds power under the

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<sup>9</sup>Neustadt, *op. cit.*, pp. 61-63.

<sup>10</sup>Southern Regional Council, *The Federal Executive and Civil Rights* (Atlanta: Southern Regional Council, January, 1961), pp. 1-47.

Constitution and existing statutes which . . . could carry the country far toward racial relations that are sane and honorable."<sup>11</sup>

However, there were counteracting pressures in any sweeping approach to civil rights by President Kennedy. Not only had he received something less than a national mandate in his election, but the Democratic Party had lost twenty seats in 1960 in the House of Representatives. Here, President Kennedy enjoyed only a nominal majority.<sup>12</sup> He was left with a thin margin of potential support for his legislative program. Critical international problems that confronted him demanded lasting and enduring attention. As President Kennedy's approach to major problems evolved, prudence dictated a course that would yield as much progress in civil rights without alienating essential congressional leaders who might frustrate his hopes for a broader national consensus. Being channeled to civil rights would detract from the amount of time, attention and prestige needed to cope with vital problems of foreign affairs and urgent domestic questions.<sup>13</sup>

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<sup>11</sup>*Ibid.*, p. 3.

<sup>12</sup>Theodore H. White, *The Making of the President, 1964*, p. 25.

<sup>13</sup>Harold C. Fleming, "The Federal Executive and Civil Rights: 1961-1965," *Daedalus*, XCIV, No. 4 (Fall, 1965), 922.

Kennedy's Civil Rights Program:  
The Deliberate Approach

When President Kennedy entered the White House in 1961, he had inherited no comprehensive program in civil rights. From his predecessors, there was a legacy of piecemeal legislation, the Civil Rights Acts of 1957 and 1960 and the executive actions of Presidents Franklin D. Roosevelt, Harry S. Truman and Dwight D. Eisenhower. President Kennedy had no great knowledge about the problems of Negroes and this weakness led him to call upon the services of Harris Wofford, a law professor at Notre Dame with extensive experience in civil rights problems. Wofford had served as Commissioner Theodore Hesburgh's counsel on the United States Commission on Civil Rights and had conducted the Commission's inquiry into discrimination in housing. President Kennedy, creating the administrative machinery to cope with rising civil rights problems, appointed Wofford as special assistant for civil rights on the White House staff. The experience Wofford had gained on the Commission led him to the belief that the untapped resources of executive action offered the best immediate hope for new initiatives in civil rights. President Kennedy liked this approach as it fit in with his concept of an activist Presidency and because the 1957 and 1960 civil rights debates had left him pessimistic about further progress in Congress.<sup>14</sup>

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<sup>14</sup>Schlesinger, *op. cit.*, pp. 928-929.

The Kennedy civil rights program as it was formulated saw no new legislative requests in the first two years of his Administration. The civil rights problem, initially, was regarded as only one among many domestic problems. (After the Birmingham demonstrations in 1963, however, civil rights became his major domestic concern.) Instead of new legislation, executive action was emphasized. President Kennedy stressed this approach at a press conference when he stated:

When I believe that we can usefully move ahead in the field of legislation, I will recommend it to the Congress. I do believe that there is a good deal . . . we can do now in administering laws previously passed by the Congress, . . . and also by using the power which the Constitution gives to the President through executive orders. When I feel that there is necessity for a congressional action with a chance of getting that congressional action then I will recommend it to the Congress.<sup>15</sup>

The executive action taken at the outset was to be in the areas where federal authority was most complete and undisputed, as in federally connected employment. In April, 1961, Executive Order No. 10925 was issued creating the President's Committee on Equal Employment Opportunity to provide equal opportunity in federal and federally connected employment. The Order greatly strengthened standards of compliance and methods of enforcement applying to contractors and federal agencies. Under the chairmanship of Vice President Lyndon B. Johnson, a committee of public and private members with broad powers of regulation and review of agencies' programs was established.<sup>16</sup> In areas of sensitive federal-state relation-

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<sup>15</sup>*New York Times*, March 9, 1961, p. 16.

<sup>16</sup>Harold C. Fleming, *op. cit.*, p. 932.

ships, as in federal assistance programs, no action was taken. National guard units in the South remained segregated. Where executive action had been direct in barring discrimination in hiring by the federal government and its contractors, the matter of discrimination in housing was left unattended. Fearful of upsetting his legislative program, President Kennedy prolonged the delay of his campaign "stroke of the pen" pledge. A significant number of presidential appointments to high executive and judicial positions were drawn from Negro ranks.<sup>17</sup> The Justice Department instituted a number of cases in the South in implementing the Civil Rights Acts of 1957 and 1960, but the housing question remained unanswered.

Although President Kennedy's campaign pledge was not redeemed in the first few months of his Administration, civil rights groups showed forbearance with regard to the proposed executive order. Initially, Robert C. Weaver's appointment as Administrator of the HHFA, which supervised all federal housing programs, served to reinforce Kennedy's campaign pledge. Weaver had been a leader of the NCDH from its inception and was the organization's president at the time of his appointment. His appointment bought time as the only

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<sup>17</sup>Among the major Negro appointments to high governmental posts were: Thurgood Marshall, nominated to the highest judicial post ever held by a Negro, the Second Circuit Court of Appeals; the appointment of Robert C. Weaver as head of the HHFA; Carl T. Rowan was named Deputy Assistant Secretary of State and Ambassador to Finland; and James B. Parsons was nominated to a federal judgeship in Illinois. Longaker, *American Government Annual, 1962-1963*, p. 57.

pressure during the Administration's first few months came from two leaders of the Leadership Conference on Civil Rights, Chairman Roy Wilkins and Secretary Arnold Aronson.<sup>18</sup> They presented to President Kennedy a memorandum calling for an executive order banning discrimination in all federal programs and institutions. The NCDH abstained from pressure tactics since it was convinced that an order was on the way with the Weaver appointment. Therefore, the NCDH did not make its usual presentation before congressional hearings for an anti-discrimination amendment to the 1961 Housing Act.<sup>19</sup>

It soon became evident to civil rights groups that comprehensive executive action envisaged in barring discrimination in the federal housing program had been curbed by political judgments. President Kennedy's major concern was the reaction of powerful southern Congressmen. He felt the need of their support for his 1961 legislative proposals such as federal aid to education and extending the minimum-wage law. His 1962 program that included the creation of an Urban Affairs Department, Medicare and tariff liberalization would need their votes if passage of the legislation was to

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<sup>18</sup>J. Anthony Lukas, *op. cit.*, p. 30. The Leadership Conference on Civil Rights has served as a co-ordinating agency for civil rights groups affiliated with it. During the action leading to the Civil Rights Act of 1964, the Leadership Conference performed a vital role in its ultimate passage. See Congressional Quarterly Service, *Revolution In Civil Rights* (Washington: Congressional Quarterly Service, 1965), pp. 44-45.

<sup>19</sup>NCDH, *A Chronology of Events in the "Stroke of the Pen" Campaign for an Executive Order* (November 16, 1962).

occur. Strong pressure was brought on the President to delay the issuance of the executive order.<sup>20</sup> The question of priorities now caused the President to waver on his campaign pledge. Presidential Assistant Harris Wofford related the problem before civil rights leaders in the spring of 1961 when he said:

I do not mean that the new avenue of executive action will be easy. This course has plenty of contradictions. . . . The need for the enactment of vital measures for the general welfare . . . may still at any given moment have to be weighted against other actions to advance civil rights. Since these social measures have the most direct impact on our racial minorities . . . the weighing process is sometimes painful. You may . . . disagree with the result of the weighing of priorities. But for your disagreement to be effective you will need to look at the process through a political lens that takes into account the major contradictions shaping this problem.<sup>21</sup>

Pressure Generated for the  
Executive Order, 1961

The results of the "weighing of priorities" were disappointing to the organizations supporting an executive order on housing. For now the issue had become embroiled in the pull and tug of legislative politics. Supporting passage of the 1961 Housing Act, they held back their fire until that was accomplished. Once the Congress had adjourned in June, 1961, there was no indication that President Kennedy would issue the housing order. His inaction soon brought forth a continuous campaign by civil rights groups led by the NCDH to fulfill his campaign promise. On September 22, 1961, the

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<sup>20</sup>*Ibid.*

<sup>21</sup>Quoted in Harold C. Fleming, *op. cit.*, p. 929.

NCDH and its affiliated organizations submitted to President Kennedy a proposed executive order, with a supporting brief and memorandum of law on the authority of the Chief Executive to act.<sup>22</sup> Thereafter, a nationwide "Stroke of the Pen" campaign was launched when the NCDH released its proposal at a press conference held in Washington, D. C., September 27, 1961.<sup>23</sup>

The proposed executive order submitted to President Kennedy enunciated a national ethic for the housing industry. In allaying any fears the President had concerning the curtailing of building starts as a result of signing an executive order, the NCDH stressed the feasibility and practicability of existing fair and open occupancy laws in the nation. Where tried in states and localities, claimed the NCDH, they have worked. The NCDH said that experience proved:

In no instance has the real estate industry been adversely affected. Real estate values have not dropped in areas where laws are operating, building construction has not declined--in some instances it has increased, and mortgage money is no more difficult to obtain.

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<sup>22</sup>*Supra*, pp. 273-276.

<sup>23</sup>NCDH, *News Release* (September 27, 1961). Individual initiative preceded the NCDH's campaign. Arthur M. Schlesinger, Jr., has described that in the summer of 1961 "Recalling Kennedy's campaign assurances about 'a stroke of the pen', people began sending pens to the White House in a sarcastic effort to ease the President's task." Schlesinger, *op. cit.*, p. 939. The American Veterans Committee at its annual convention in June, 1962, initiated a "send-a-pen-to-the-White-House" campaign. A giant size pen bearing the inscription: "Mr. President - 'One stroke of the pen' to work wonders for millions of Negroes" was to be sent to President Kennedy. See *Trends in Housing*, VI, No. 2 (March-April, 1962), 1, 7.

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 Overt opposition from the real estate industry is less than had been expected. Revolutionary change has not taken place. Neighborhoods have not been inundated, intergroup tensions have not increased, and there has been no accelerated flight of white families.<sup>24</sup>

To enhance the issuance of the executive order, members and affiliated organizations were urged to: write or wire the President; get favorable editorial comment; use whatever contracts you have with television, radio and press to get coverage of the issue; have your organization officially take action with communications to the President and the press; use whatever contacts you have with public officials and political and business leaders to have them communicate with the President.<sup>25</sup>

Expectations that the executive order would be signed came after a delegation from the NCDH and sympathetic members of the housing and real estate industry consulted with Attorney General Robert F. Kennedy on November 8, 1961. At the conference, the industry group, comprised of important housing development leaders: Robert W. Dowling, President of City Investing Company; Frank Luchs, Vice President of Shannon and Luchs Company and President of the Washington (D. C.) Real Estate Board; and James H. Scheuer, President, Renewal and Development Corporation, supported the NCDH's recommendations. In addition, they urged that an overall policy should

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<sup>24</sup>*A Call On The President Of The United States For The Issuance Of An Executive Order*, p. 10.

<sup>25</sup>NCDH, *Needed - A Stroke Of The Pen* (October, 1961).

be established by the President in setting standards for all builders and developers who made use of federal aids.<sup>26</sup> While the Attorney General made no commitments, he indicated that an order was being worked on at the highest levels at the White House. The delegation leaving the conference felt only the scope of the order was in doubt. Charles Abrams, successor to Robert C. Weaver as president of the NCDH, told colleagues as he left the Attorney General's office, "We're going to get either a Thanksgiving or a Christmas present."<sup>27</sup>

The NCDH did not receive its "Thanksgiving or a Christmas present" as expected by Mr. Abrams--at least not that year. As Attorney General Kennedy had related, an executive order was being prepared at the highest levels at the White House. In October, after the housing report of the United States Commission on Civil Rights had been released, the matter was referred to a high-ranking inter-departmental group. The group included Robert C. Weaver; Assistant Attorney General Burke Marshall; Harris Wofford, Special Assistant to the President on civil rights; and Neil J. Hardy, Director of the FHA. After a month, the group submitted its recommendation to the White House. Reporting that the text of an executive order was on the President's desk awaiting his signature, the *New York Times* described it as broader than the NCDH's original proposal but not as strong

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<sup>26</sup>*Trends in Housing*, V, No. 5 (September-October, 1961), 6-7.

<sup>27</sup>J. Anthony Lukas, *op. cit.*, p. 31.

as the United States Commission on Civil Rights 1961 housing report.<sup>28</sup> According to the *Times*, the executive order barred discrimination in all federally assisted housing operations, including public housing, urban renewal and homes financed by federally insured or guaranteed loans. The order also covered federally supervised mortgage lending institutions such as federal savings and loan associations, but not member banks of the Federal Reserve System or the Federal Deposit Insurance Corporation.<sup>29</sup>

As the year came to an end the promised executive order still was left unsigned by President Kennedy. The civil rights campaign pressed harder for his signature and editorial comment asked the President to redeem his pledge.<sup>30</sup> The White House, however, maintained its silence. In explaining President Kennedy's inaction, Schlesinger said:

Kennedy had . . . intended to put out the order when Congress adjourned in the fall of 1961. But he decided to postpone it because he needed Congressional support for a Department of Urban Affairs with Robert Weaver as Secretary, because he sought southern votes for the trade expansion bill in 1962 and perhaps because he feared that the order might slow up business recovery by holding back building starts.<sup>31</sup>

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<sup>28</sup>*New York Times*, November 27, 1961, p. 1.

<sup>29</sup>*Ibid.*

<sup>30</sup>See *New York Times*, October 11, 1961, December 25, 1961; *New York Post*, October 10, 1961, December 27, 1961; *New York Herald Tribune*, December 27, 1961.

<sup>31</sup>Schlesinger, *op. cit.*, p. 939.

Impediment to Issuance of the Order

When narrowed down to any one factor, however, the decision to postpone the order was based not on its economic effects but what it would do to the President's legislative program. As for the fear of economic dislocations, a study made by the HHFA in the fall of 1961 concluded that the effect of an executive order on building starts would be minimal.<sup>32</sup> Among the group of people who would be affected most directly, home builders, financiers of home construction and real estate brokers, there was little active campaigning against the proposed order.

At the 1961 conventions of the National Association of Home Builders and the National Association of Real Estate Boards, mild resolutions were passed concerning the anti-bias order in housing. The National Association of Home Builders urged that the order be withheld pending a study of the economic effects that might result from its issuance.<sup>33</sup> While the National Association of Real Estate Boards came out strongly against public housing and opposed any federal control over "private transactions," that is, the sale or rental of property, the organization did not adopt any specific resolution against an executive order. Mortgage-lenders were even more silent than the other members of the industry. If bankers resented being included in the

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<sup>32</sup>J. Anthony Lukas, *op. cit.*, p. 32.

<sup>33</sup>*New York Times*, December 17, 1961, p. 45.

anti-bias order, their national organizations had not raised much protest.<sup>34</sup> A full-fledged campaign against the executive order, it was felt, would be considered as a support for housing discrimination; apparently, a move that would not be considered good public relations.

Clearly, what had emerged in the extended delay of the order's issuance was the political effect upon President Kennedy's legislative program. Strong pressure had been brought on the President to delay the issuance of the executive order so as not to jeopardize his 1962 legislative proposals, particularly the creation of a Department of Urban Affairs. Within the political realities that President Kennedy operated, he was aware of the scant majority of support for his program in Congress. Reliance on southern Congressmen for their support was essential. Senator John Sparkman and Representative Albert Rains, who were chairmen of the housing subcommittees in their respective houses and were progressive on most domestic and foreign policy issues, reflected the segregationist views of their state of Alabama. They professed to Kennedy that the executive order would endanger not only the federal housing program both had fought for in 1961 but the President's overall legislative program. Senator Sparkman posed the problem in a telegram to President Kennedy on October 6, 1961 when he warned:

As one who has had practical experience in legislating, you know that we could never have put through Congress

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<sup>34</sup>*Ibid.*

this year's great housing measure if such an order had been in effect.<sup>35</sup>

Representative Albert Rains was more blunt when he declared:

I've reminded the President that I pushed his 1961 housing bill through the House for him. He gave me the pen he signed the bill with. I've got a lot of those pens. But I also told the President that I couldn't have got that bill through if the order had been out. I would have missed by fifty votes--including my own. The President's a practical man. He's been up here. He knows there aren't enough votes from New York and Massachusetts to pass a housing bill--or any bill, for that matter.<sup>36</sup>

After their warnings and subsequent visitations at the White House early in December, word leaked out that the order had been postponed until after a Department of Urban Affairs and Housing, with Cabinet rank headed by Robert C. Weaver and other high-priority legislation could be pushed through Congress.<sup>37</sup> The failure of the President to sign the order immediately after Congress adjourned had been upsetting to the civil rights groups. But with an executive order on the President's desk, hopes had arisen for its issuance before Congress reconvened. With word circulating of a further delay, the postponement aroused resentment among civil rights proponents. Calling for the President's signature before the beginning of the next session of Congress, Charles Abrams, President of the NCDH, said:

Signing of the order, moreover, would remove the issue from Congress and many Southern legislators would take

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<sup>35</sup>Quoted in J. Anthony Lukas, *op. cit.*, p. 32.

<sup>36</sup>*Ibid.*

<sup>37</sup>*Trends in Housing*, V, No. 6 (November-December, 1961), 1.

it as an accepted fact, something on which they are not being called upon to take an embarrassing stand. But if the order is not signed, the issue will be bound to erupt in Southern quarters and in Congress. The lines will harden and it will be extremely difficult for the President then to sign the order.<sup>38</sup>

Once the second session of the Eighty-seventh Congress opened, any rumor of an early issuance of the housing order was quashed. Tom Wicker, *New York Times* correspondent, reported that President Kennedy had told friends he would not issue the housing order at this time because he feared it might hinder the "accelerating pace of civil rights victories."<sup>39</sup> The President's attitude, said Wicker, was that the housing order would be issued when he thought it would be helpful in pushing ahead his whole civil rights program. Otherwise, the order might be divisive enough to slow down any civil rights progress.

President Kennedy's cautiousness was borne out in his State of the Union Message. He did not push for civil rights by offering a comprehensive legislative plan. (Kennedy did ask Congress in January, 1962, for a supplementary voting rights law making six years of schooling *prima facie* evidence of literacy. Neither this measure, nor the Administration's 1963 proposal for the placing of federal voting referees in counties where fewer than fifteen per cent of the eligible Negroes were registered got by

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<sup>38</sup>NCDH, *Excerpts From Statement of Charles Abrams, President, NCDH - December 13, 1961.*

<sup>39</sup>*New York Times*, January 2, 1962, p. 18.

Congress.)<sup>40</sup> The State of the Union Message did not mention the housing order. Again the pressure of priorities made it politically wise to issue the order at some other time. When asked at a press conference why he had not honored his campaign pledge, the President said:

. . . I stated I would issue that order when I considered it to be in the public interest, and when I considered it to make an important contribution to advancing the rights of our citizens. . . . We are proceeding ahead in a way which will maintain a consensus, and which will advance this cause. . . . I am fully conscious of the pledge and campaign statements and plan to meet my responsibilities in regard to this matter.<sup>41</sup>

As events evolved, the warning of Charles Abrams was well justified. The planned executive order had been linked with the battle over the creation of the Urban Affairs Department. On January 26, 1962, the proposed Department was killed in the House Rules Committee. Reacting to the defeat, President Kennedy said he would push for it by executive order through his power of reorganizing the Executive Branch.<sup>42</sup> The maneuver was overwhelmingly killed by a coalition of Republican and southern Democrats in the House on February 21, 1962. Factors in the defeat were the proposed housing order and President Kennedy's assertion that Robert C. Weaver would be named the first Negro Cabinet member when the Department was created. Charles Abrams, recapitulating

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<sup>40</sup>Harold C. Fleming, *op. cit.*, p. 939.

<sup>41</sup>*New York Times*, January 16, 1962, p. 14.

<sup>42</sup>*New York Times*, January 26, 1962, p. 1.

upon his earlier warning, declared:

If President Kennedy had issued the executive order in December or earlier, it would have been a one-day story, over and done with before Congress convened. It is ironic that in many cases failure to move brings with it more repercussions than does bold and daring action.<sup>43</sup>

Repercussions for the housing order after President Kennedy's defeat by the conservative coalition meant more wariness in taking any action of this nature while the priority of Administration bills remained before Congress.

#### Pressure Group Activities Renewed

Civil rights groups did not doubt that the executive order would be issued if pressure was maintained. The big question, however, was when was it to be signed. Therefore, the NCDH continued its campaign calling once again on organizations and individual citizens to urge the President to fulfill his pledge and sign an executive order barring discrimination in federally aided housing. Declaring the vital issue should not be made on political basis, the NCDH said: "This is a matter of moral rightness. . . . Further delay will only serve to strengthen and encourage the opposition . . ."44

Pressure tactics served to embarrass the Kennedy Administration as it tried to mollify the delay of the housing order. When URA Commissioner, William L. Slayton,

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<sup>43</sup>*Trends in Housing*, V, No. 6 (November-December, 1961), 8.

<sup>44</sup>*Ibid.*

announced on April 8, 1962, that developers of urban renewal projects must obey state and local laws prohibiting discrimination, the NCDH indicated that this only proved the need of broader executive action. Slayton had notified all public agencies involved in urban renewal that contracts with private developers must include the following clause: "The redevelopers will comply with all state and local laws . . . prohibiting discrimination or segregation by reason of race . . ."45 His action bolstered only northern states having such laws and in no way constituted broad action to ban discrimination in federally aided housing. Since only thirteen states at the time barred discrimination in urban renewal projects, Charles Abrams retorted that "this policy is the first official sanction of federally aided discrimination in the Kennedy Administration." Such a doctrine, Abrams said, would give thirty-seven states, including all of the South, "a free hand to discriminate against Negroes."46 Commenting on Commissioner Slayton's directive, *The Boston Herald*, in an editorial, declared:

The order is one more instance of temporizing, actually, outright stalling, by the Kennedy Administration on the President's campaign promise to end, "by the stroke of a pen," segregation in federally-assisted housing.47

President Kennedy's statement that he would issue

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45 *New York Times*, April 8, 1962, p. 1.

46 *Trends in Housing*, VI, No. 1 (January-February, 1962), 1.

47 *The Boston Herald*, April 10, 1962, p. 8.

the order when "I considered it to be in the public interest," however, accelerated the plans of the NCDH for a nationwide drive to mobilize support for the signing of the order.<sup>48</sup> A telegram campaign to deluge the White House with requests for the presidential signature was conducted. Groups affiliated with the NCDH renewed their call on the President to sign the order without further delay. Successively, from May through July, 1962, high officials of the Protestant Episcopal Church, the American Jewish Committee, the American Jewish Congress and the national conventions and annual meetings of the B'nai B'rith, Unitarian Universalist Association, NAACP, American Veterans Committee and the United Steelworkers of America drew up resolutions urging President Kennedy to sign. The groups generally stated they recognized important considerations had prompted the Administration to delay action. Underlying their statements, however, lay sterner tones. Officials of the United Steelworkers of America warned that a point had been reached when further delay "might promote serious questions about the integrity of the Administration in this matter."<sup>49</sup> President Kennedy's answer to these pronouncements was again noncommittal when he stated that the housing order would be issued "at the appropriate time."<sup>50</sup>

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<sup>48</sup>*Trends in Housing*, VI, No. 2 (March-April, 1962), 7.

<sup>49</sup>*Trends in Housing*, VI, No. 3 (May-June, 1962), 2.

<sup>50</sup>President's Press Conference, *New York Times*, July 6, 1962, p. 8.

The only challenge from a contending interest group to civil rights organizations exerting pressure for the executive order came in July, 1962. A survey conducted by the National Association of Home Builders was submitted to the President and the press, purporting to show that building starts would be adversely affected by the contemplated ban on discrimination in federally assisted housing.<sup>51</sup> Authorized at the Home Builders 1961 convention, the study claimed that the executive order would cause a one-third decline of new home construction. From the responses of the 6,000 builders polled, the National Association of Home Builders stated that the diminished construction would mean both an indirect and a direct loss of three to six billion dollars to the national housing output. To prevent the anticipated harm to the nation's economy, the National Association said the order should not be issued. Instead of the order, the National Association of Home Builders urged a "major educational campaign to lessen misunderstanding and tension . . . to foster community acceptance of changing living patterns."<sup>52</sup> Viewed from the conclusion drawn by the Home Builders, education would be the preferred means to suppress the executive order rather than a device to supplement it once issued.

In response to their opponent's survey, the NCDH urged President Kennedy to recognize it as "misleading in

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<sup>51</sup>*New York Times*, July 9, 1962, p. 31.

<sup>52</sup>*Ibid.*

its statements and unfounded in its conclusions."<sup>53</sup> The NCDH labeled the Home Builder study as having a number of glaring weaknesses. Among the discrepancies, there was cited the fact that "59.3 per cent of those who responded said their building plans would not be affected, would be increased, or had no opinion."<sup>54</sup> Furthermore, there was a southern bias in the responses in that a third of the replies came from southern builders who said their plans would be adversely affected by the issuance of an executive order. Also, builders who answered from states and cities having fair housing laws, areas with broader coverage than the proposed executive order, indicated they would cut back production if and when the order came. Contrary to the builders' predictions, the NCDH said that in areas having anti-bias laws, there had been no decline in building starts or general real estate activity following their enactment.<sup>55</sup>

After the Home Builders survey had been attacked, the NCDH gained unexpected support from the Henry Luce publications representing the building industry, *House and Home* and *Architectural Forum*. The National Association of Home Builders study was called only an opinion survey by *House and Home*, one whose chief finding was "many--about half--of the builders were scared, and the bigger the builder, the more

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<sup>53</sup>*Trends in Housing*, VI, No. 3 (May-June, 1962), 1.

<sup>54</sup>*Ibid.*

<sup>55</sup>*Ibid.*, p. 2.

scared."<sup>56</sup> *Architectural Forum* (August, 1962) said the survey should not be taken seriously since other studies suggested strongly that "There would be no long term decline in home building if the Administration issued an anti-bias edict."<sup>57</sup> The publication, predicting that the order would probably be issued before the 1962 congressional elections, listed these reasons for its need:

First, it would be good politics; second, Southern Congressmen have failed, . . . to respond to appeasement, hence may find themselves treated with less consideration; and third--and most important--discrimination in any activities financed by white and Negro taxes alike has become increasingly . . . indefensible in this country.<sup>58</sup>

Aside from the attempt by the Home Builders to persuade President Kennedy to delay issuance of the executive order, many builders had accepted the order as inevitable.<sup>59</sup> The economic impact of such an order, it was felt, might be far less severe than was imagined. With the issuance of the order, uncertainty for the housing industry would be ended. According to *House and Home*, the sooner the order was issued, the sooner the industry and public alike would adapt to it and work out solutions that might be necessary.<sup>60</sup> As far as

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<sup>56</sup>"The Challenge of Open Occupancy," *House and Home Editorial Reprint* (November, 1962), p. 91.

<sup>57</sup>Quoted in *Trends in Housing*, VI, No. 3 (May-June, 1962), 2.

<sup>58</sup>*Ibid.*, p. 3.

<sup>59</sup>See *House and Home Editorial Reprint* (November, 1962), pp. 91-93; J. Anthony Lukas, *op. cit.*, p. 32.

<sup>60</sup>*House and Home Editorial Reprint* (November, 1962), p. 92.

the South was concerned, the prediction that the order would mean the end of all federally aided construction was also questioned. Here, several factors had to be taken into consideration. Southern cities had already built and were building increasing numbers of all-Negro public housing projects. This practice, it was expected, would become more prevalent when the order was issued. Observers looked for more southern cities to copy Atlanta, Austin, Winston-Salem, and Greensboro, which had built housing solely for Negro occupancy.<sup>61</sup> As for FHA and VA benefits, few southern Negroes could yet afford new housing under these programs. Even where they could afford it, social pressure would limit attempts to enter all-white neighborhoods.

Depending upon the scope of the order, the major impact would therefore be felt in the North and West, particularly in the new suburban developments built with FHA and VA commitments. Unsure of the order's coverage, leading spokesmen of the banking industry even urged the issuance of a sweeping executive order. Earl Schwulst, Chairman of the Bowery Savings Bank (the nation's largest mutual savings bank) and former Chairman of the Commission on Race and Housing, asked President Kennedy to issue a broad anti-bias order. Schwulst said it would be unfair to limit an executive order to a small part of the housing market. When

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<sup>61</sup>J. Anthony Lukas, *op. cit.*, p. 32.

issued, he said, it should apply to "all lender groups, especially those whose deposits or share accounts are insured by agencies of the federal government."<sup>62</sup> Grover Ensley, Executive Vice President of the National Association of Mutual Savings Banks, said: "I support a sweeping order, and I am confident saving bankers generally feel, that if an order is issued, it should be broad."<sup>63</sup> With no major opposition, once again the order became a matter of the Administration's timing.

#### The Order is Finally Issued

The congressional session went on until the middle of October, 1962, even though it was an election year. Reassurances to civil rights groups were given by high government officials that the issuance of the executive order was all but certain. Theodore C. Sorenson, Counsel to President Kennedy, told Democratic congressional candidates that the President would sign the long-delayed executive order soon. He said the President had considered it necessary to wait until the right time, which involved the status of the Administration's legislative program.<sup>64</sup> Attorney General Robert F. Kennedy forecast that "it is very possible that it

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<sup>62</sup>Quoted in *Trends in Housing*, VI, No. 4 (July-August, 1962), 8.

<sup>63</sup>*House and Home Editorial Reprint* (November, 1962), p. 92.

<sup>64</sup>*New York Times*, July 21, 1962, p. 11.

will come before the first of the year."<sup>65</sup> The question of its issuance narrowed down to before or after the election.

After the congressional session had ended, Anthony Lewis, *New York Times* correspondent, reported that President Kennedy had definitely decided to sign the long-awaited executive order after the November elections. Lewis said: "It can be stopped now only by some drastic change in circumstances, which is not expected."<sup>66</sup> His report indicated that its coverage had been extended and that it would be much more sweeping than was originally anticipated by many observers. If the federally insured financial institutions were included, Lewis said, more than ninety per cent of housing construction would be covered.

The executive order was not issued immediately after Congress adjourned because it was believed that its issuance a few weeks before the election would make an important governmental decision look like a political gesture. Presidential Adviser Arthur Schlesinger, Jr., who strongly supported the order, suggested to President Kennedy that it be postponed until after the election, lest it appear to be a "purely political maneuver."<sup>67</sup> Another practical consideration was the opposition being faced by some southern Demo-

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<sup>65</sup>Quoted in *Trends in Housing*, VI, No. 4 (July-August, 1962), 8.

<sup>66</sup>*New York Times*, October 22, 1962, p. 1.

<sup>67</sup>Don Oberdorfer and Milton McKaye, "Will Negroes Crack the Suburbs?" *Saturday Evening Post*, CCXXXV, No. 46 (December 22-29, 1962), 73.

cratic candidates, among them Senator Lester Hill of Alabama. Southern candidates pressed for a delay in issuing the executive order or taking any strong civil rights action.<sup>68</sup> Also, the use of troops to enforce James Meredith's entrance into the University of Mississippi that fall ended the possibility of it being issued before the November elections.

A few weeks after the November elections, President Kennedy announced the signing of the long-delayed anti-bias housing order. After twenty-two months in office, he had finally determined that such action was now in the public interest. At a presidential press conference Kennedy announced:

. . . I have today signed an executive order directing federal departments and agencies to take every proper and legal action to prevent discrimination in the sale or lease of housing facilities owned or operated by the federal government, housing constructed or sold as a result of loans or grants to be made by the federal government and housing to be made available through the development or redevelopment of property under federal slum clearance or urban renewal programs. With regard to existing housing facilities constructed or purchased as a result of direct loans or grants from the federal government, or under federal guarantees, or as a result of the Urban Renewal Program, I have directed the Housing Agency and other appropriate agencies to use their good offices to promote and encourage the abandonment of discriminatory practices that may now exist. In order to assist the departments and agencies in implementing the policy, and to coordinate their efforts, I have established the President's Committee on Equal Opportunity in Housing. It is neither proper nor equitable that Americans should be denied the benefits of housing owned by the federal government or financed through federal assistance on the basis of their race, color, creed or national origin.<sup>69</sup>

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<sup>68</sup>NCDH, *A Chronology of Events in the "Stroke of the Pen" Campaign for an Executive Order* (November 16, 1962).

<sup>69</sup>*New York Times*, November 21, 1962, p. 10.

## CHAPTER IX

### ANALYSIS OF PRESIDENT KENNEDY'S EXECUTIVE ORDER ON EQUAL OPPORTUNITY IN HOUSING: POSTSCRIPT TO ACTION

. . . it has become painfully clear that Executive Order 11063 in its present form is too limited in coverage to have any significant impact on the prevailing pattern of residential segregation.<sup>1</sup>

Harold C. Fleming

Executive Order 11063 issued on November 20, 1962, was "something of an anti-climax."<sup>2</sup> What had been a contentious issue in 1960 and a major political issue until its signing ended as a compromise. President Kennedy's Order sought to placate the civil rights groups on one hand, the homebuilding industry and the South on the other. The Order, once issued, did not live up to the expectations of its proponents, such as Martin Luther King, who said, upon its issuance: "The Order strikes at the very heart of the segregated system."<sup>3</sup> Nor has its results led to the ominous portents voiced by opponents of its issuance such as former

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<sup>1</sup>Fleming, *op. cit.*, pp. 931-932. Harold C. Fleming, now Executive Vice President of the Potomac Institute in Washington, D. C., formerly was the Executive Director of the Southern Regional Council, Atlanta, Georgia.

<sup>2</sup>*Ibid.*, p. 931.

<sup>3</sup>*New York Times*, November 21, 1962, p. 19.

Senator A. Willis Robertson, Chairman of the Senate Banking Committee, who claimed the Order would curtail housing construction "by anywhere from 25 to 50 per cent."<sup>4</sup> Since its issuance, there has been no adverse effect on the housing industry, no revolt broke out against the Kennedy Administration in Congress and no measurable salutary inroad was made in reversing segregated housing patterns. The compromised Order only partly resolved the issue of discrimination in housing where federal aid was involved. After analyzing the Executive Order, the NCDH stated reservedly that it was "a vital first step, an important gain in principle,"<sup>5</sup> but an advance that was far from complete.

#### Order's Coverage and Related Weaknesses

The basic drawback in President Kennedy's Executive Order was its narrow and limited coverage. In addition to its minimal coverage, construction of the Order by the affected departments and agencies was also very cautious. The anti-discriminatory ban on federally assisted housing brought only about twenty-three per cent of all new housing construction built since November 20, 1962, under its requirements and only thirteen per cent of the housing not already covered by state or local anti-bias housing laws.<sup>6</sup>

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<sup>4</sup>*Ibid.*

<sup>5</sup>*New York Times*, November 22, 1962, p. 32.

<sup>6</sup>Charles Abrams, "The Housing Problem and the Negro," *Daedalus*, XCV, No. 1 (Winter, 1966), 64.

In analyzing Executive Order 11063, a description and discussion will indicate what it aimed to do and what it could not do.

Broadly, the Order's mildness and weakness stemmed from the two truncated directions that it has encompassed. First, the main concern of the Order related almost entirely to housing provided through federal aid agreements executed after the effective date of November 20, 1962. The second basic shortcoming curtailed the types of federal assistance subjected to its provisions. While the Order was addressed to "all departments and agencies in the executive branch of the federal government,"<sup>7</sup> only a fraction of the home financing in which governmental agencies played a part was affected. Housing bought through conventional financing under federally supervised mortgage-lenders was excluded from coverage. Mortgage-lenders were affected only to the extent that they engaged in FHA and VA programs. A brief analysis of the working arrangements of the Order indicates why it has had no significant impact on the pattern of residential segregation.

#### Extent of housing coverage

Under the stipulations of the Executive Order the

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<sup>7</sup>Housing and Home Finance Agency, *President's Executive Order 11063, Equal Opportunity in Housing* (Washington: U. S. Government Printing Office, November 24, 1962). Hereafter cited as *Executive Order 11063*.

federal agencies involved in housing programs were directed to prevent discrimination in the sale or rental of "residential property and related facilities,"<sup>8</sup> including vacant land. This provision applied to four classes of property: property owned or operated by the federal government; property maintained by loans or contributions which the federal government agreed to make after November 20, 1962, the effective date; property that was provided by loans guaranteed or insured by the federal government after November 20, 1962; and property provided by the development or the redevelopment of real property purchased or leased from a state or local public agency receiving federal aid for slum clearance or urban renewal under a contract made after the effective date.<sup>9</sup> Housing provided under federal aid agreements prior to the Executive Order's issuance were to be covered by a "good offices" section. The HHFA and all other executive departments were directed "to use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation"<sup>10</sup> to end discrimination in property which had been provided with the kind of federal aid described above.

Primary responsibility for obtaining compliance with the Order was placed on the agencies for that portion of the

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<sup>8</sup>*Executive Order 11063*, Sect. 101 (a).

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*, Sect. 102.

housing program they administered. Within thirty days after the Order went into effect, each agency was to adopt rules and regulations and "make such exemptions and exceptions"<sup>11</sup> consistent with law and necessary to carry out the Order.

A President's Committee on Equal Opportunity in Housing was created to coordinate the activities of the housing agencies so as to achieve the overall objective of the Executive Order.<sup>12</sup> In enforcing the Order, the President's Committee and any of the housing agencies could hold public or private hearings. If an agency concluded that any person, firm or state or local public agency violated any rule or regulation adopted under the Order, it would try to correct the violation by informal means, including persuasion or conciliation. Failing to curb the violation, the agency could take action to correct the perpetration by cancelling the contract for federal aid, barring the violator from further aid until compliance was assured and refusing to approve a lending institution as a beneficiary under any program affected by the Order.<sup>13</sup> Finally, the housing agencies were directed in appropriate cases to refer violations to the Attorney General "for such civil or criminal action as he may deem appropriate."<sup>14</sup>

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<sup>11</sup>*Ibid.*, Sect. 203.

<sup>12</sup>*Ibid.*, Sect. 401.

<sup>13</sup>*Ibid.*, Sect. 302 (a), (b), (c).

<sup>14</sup>*Ibid.*, Sect. 303.

Effect upon programs receiving direct federal supports

Existing public housing and urban renewal projects, under the Order, were left in an ambiguous way. Public housing, owned and operated by local housing authorities and whose construction was made possible by federal money in the first place, was not covered by the Order. Projects contracted after November 20, 1962, of course, came under the purview of the Order. The "good offices" provision and the use of appropriate litigation with respect to existing housing, was intended to apply to this area. As to future urban renewal projects, little was added to the protection of Negroes aside from the "good offices" provisions of the Order as it related to redevelopment housing. Since the actual discrimination against Negroes has taken place in evictions and the selection of discriminatory relocation sites to perpetuate segregation, a serious weakness of the Order was evident.<sup>15</sup> Here, the Order provided little help, for it failed to bar discrimination in the private housing market in which most families displaced by federally aided urban renewal projects were to be relocated.<sup>16</sup>

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<sup>15</sup>Joseph B. Robison, *Analysis of Executive Order on Discrimination in the Federal Housing Program* (NCDH, December 3, 1962), p. 7. Hereafter cited as Robison, *Analysis of Executive Order*.

<sup>16</sup>Title VI of the Civil Rights Act of 1964, with its relevance to denial of benefits under any program receiving federal financial assistance where discrimination is practiced, has virtually eliminated problems of the "good offices" provision in connection with the urban renewal and public housing programs. HHFA regulations and the URA

Relevance to FHA and VA housing

The greatest impact of the Order was upon builders who sold housing under FHA and VA guarantees. Primarily designed to open the northern suburban areas to Negroes, developers of new suburbs would no longer be able to restrict these enclaves to whites alone. The Order, however, did not apply to the sale or rental of the millions of pre-Order homes then subject to FHA- or VA-guaranteed mortgages. Individuals buying homes under these agencies' financing programs after November 20, 1962, would not be covered by the Order when they resold or rented even though, technically, such sales and rentals came within the anti-bias ban.

The first FHA regulations implementing the Order provided that the ban on discrimination would not apply to "transactions involving any one- or two-family dwelling which has been occupied by the seller."<sup>17</sup> Exemption of the sale or rental of one- or two-family houses occupied by the owner was made on the basis of the experience of states having

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requirements implementing these regulations meant that urban renewal projects not yet reaching the disposition stage by January 4, 1965, were subject to the nondiscrimination requirements of Title VI. This applied whether the loan and grant contracted had been executed prior to November 20, 1962. In public housing, all low-rent projects still receiving annual contributions from the PHA on January 4, 1965, were subject to the requirements of Title VI, regardless of the date on which the annual contributions contract was executed. Because of Title VI, the "good offices" provision of the Executive Order as it might concern public housing and urban renewal, was virtually a dead letter. Martin E. Sloane, *The Executive Order on Housing and Conventional Financing* (NCDH, April, 1965), pp. 3-4.

<sup>17</sup>Robison, *Analysis of Executive Order*, p. 8.

nondiscriminatory housing laws. According to Neal J. Hardy, FHA Administrator, the small amount of government control over the individual home owner and the burden of proving discrimination in individual resales made it difficult to enforce such a provision.<sup>18</sup> Owner-occupied houses were covered in one minor respect. If the owner agreed to sell to a Negro but the buyer was denied a loan on racial grounds, the bank or lending institution would have violated the regulations and would be denied approval as a lender for such housing.

FHA and VA regulations made the Order applicable to builders from the earliest point at which they received the agencies' assistance. Builders were to comply with the non-discrimination regulations from the time that they were informed their homes or projects were eligible for FHA or VA benefits. Once again, pre-Order housing was covered only by the "good offices" provisions of Section 102.<sup>19</sup>

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<sup>18</sup>*New York Times*, December 1, 1962, p. 1.

<sup>19</sup>*Supra*, p. 309. Title VI of the Civil Rights Act of 1964 exempted FHA and VA housing. Although Title VI prohibited discrimination under any program or activity receiving federal financial assistance, Sect. 602 of the Act excluded "a contract of insurance or guaranty." *Civil Rights Act of 1964*, P. L. 88-352, 78 Stat. 252, Sect. 602. A few civil rights advocates felt that this section gutted President Kennedy's Executive Order 11063, at least as it applied to FHA and VA housing. See Alexander M. Bickel, "Sleepers in the Civil Rights Bill," *The New Republic*, CL, No. 9 (February 29, 1964), 14-15. Joseph B. Robison, Chairman of the NCDH Legal Committee put this fear to rest by stating: "As originally written, Title VI would have barred discrimination in all federally-assisted housing, even including existing FHA and VA housing not covered by the Order. . . . However, the Executive Order was issued under authority of other statutes and the Constitution and would not be affected by the bill, even as amended." Quoted in *Trends in Housing*,

### The Executive Order and financial institutions

Another omission of the Order was an absence of its extension to lending institutions, particularly savings and loan associations. The United States Civil Rights Commission's 1961 housing report had recommended that the President prohibit discrimination in lending by all institutions supervised by the federal government.<sup>20</sup> If the Commission's recommendation had been included in Executive Order 11063, all federal and virtually all state savings and loan associations, all national banks, state-chartered banks that are in the Federal Reserve System and all banks under the Federal Deposit Insurance Corporation would have been covered. Since the Executive Order did not touch upon discrimination in the lending activities of these banking institutions, then only about twenty per cent of the total amount of new housing was affected by its stipulations.<sup>21</sup>

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VII, No. 1 (January-February, 1964), 8. Robison said this was made clear in the debate in the House of Representatives. Rep. Emmanuel Celler, sponsor of the amendment (Sect. 602), stated it had nothing to do with Executive Order 11063 and it would not be affected.

<sup>20</sup>*Supra*, pp. 272-273. Civil rights groups complained that President Kennedy had not honored his "stroke of the pen" campaign pledge by virtue of his signing a weak Order, that is, the failure to include conventional financing by lending institutions supervised by the federal government. Berl I. Bernhard, former Staff Director of the U. S. Commission on Civil Rights, stated that the President had gone beyond the Commission's 1959 housing recommendations. He said President Kennedy had honored his campaign pledge since the Commission's 1961 report had asked for an Executive Order covering conventional financing. Letter to the Editor, *New York Times*, January 12, 1963, p. 36.

<sup>21</sup>Robison, *Analysis of Executive Order*, p. 10.

The failure to bring savings and loan associations under the scope of the Executive Order, paradoxically, appeared to undercut a previous resolution adopted by the Federal Home Loan Bank Board. On June 1, 1961, Joseph P. McMurray, Chairman of the Board, had announced a policy of opposition to discriminatory practices by financial institutions over which he had supervisory authority. The resolution stated:

. . . the Federal Home Loan Bank Board, as a matter of policy, opposes discrimination, by financial institutions over which it has supervisory authority, against borrowers solely because of race, color, or creed.<sup>22</sup>

However, the resolution was not implemented in any way. Failure to implement the stated policy was due to the Board's staff who interpreted that savings and loan associations must consider only economic factors in making loans. The Board was uncertain whether race could be considered an economic factor. Moreover, there was doubt of the Board's legal authority to bar discrimination by its associations. According to Charles Abrams:

Had the President's Order embraced these savings and loan associations, the doubt would have been dispelled. As it now stands, however, by being excluded from the Order, the principal mortgage lenders in the country feel themselves free to discriminate. In fact, some home builders who had been using FHA loans are already switching their mortgage applications from FHA to these associations so as to avoid the Order's prohibition.<sup>23</sup>

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<sup>22</sup>Quoted in *Housing Report*, p. 36.

<sup>23</sup>Charles Abrams, "The Housing Order and Its Limits," *Commentary*, XXXV, No. 1 (January, 1963), 13.

An additional inadequacy was the power given agencies to grant exemptions from under the scope of the Order. Joseph B. Robison considered this power to be "an unusual and potentially dangerous provision."<sup>24</sup> In fact, the first regulation of the FHA excluded the resale or rental of one- or two-family houses occupied by the owner. Since the Order gave no standard on which to base such exemptions, the housing agencies apparently could also exclude other forms of housing.

#### The Order as a positive step

While the housing order was not all the civil rights groups had sought, spokesmen felt it could achieve some positive gains. Now a step had been taken to initiate an end to the long standing practice of discrimination and segregation in federally assisted housing programs. Although it had many shortcomings, the Order established a "new ethic for federal housing that should have a profound effect on the housing industry and ultimately on the structure of America."<sup>25</sup> A basic recognition, however, was the limited scope of the Executive Order since it touched only a fraction of the housing market. As Charles Abrams stated:

If any real gains are to be made its coverage must be widened or more individual state laws laboriously sought. The President's Order is no more than a small first federal step toward breaking the bottleneck in housing

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<sup>24</sup>Robison, *Analysis of Executive Order*, p. 11.

<sup>25</sup>*Ibid.*, p. 15.

discrimination.<sup>26</sup>

Advocates of open housing as in other areas of civil rights found their quests and campaigns operate on a continuum. Their job is never completely accomplished. Not discounting the importance of Executive Order 11063, they still looked ahead to still further positive enactments of government. Noting the possibilities of the Order, Charles Abrams said: "First steps in civil rights legislation have often led to the second steps when the will to move ahead has been present."<sup>27</sup> Since the Order's issuance, "the will to move ahead" saw further attempts by civil rights groups to broaden its range.

The Campaign to Expand Executive Order 11063:  
A "Broader Stroke of the Pen"

Executive Order 11063 had not been in effect very long before it became evident that the broad problems of housing discrimination and segregation were too interwoven to be solved by this piecemeal change in federal policy. The first year under the Executive Order ended with relatively little change in segregated housing areas. Few minority group families directly benefited by the anti-bias directive. During 1963, civil rights groups prodded, to no avail, the Kennedy Administration for a more liberal interpretation of the Order's provisions. In 1964 and 1965, a

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<sup>26</sup>Abrams, *Commentary*, XXXV, No. 1, 14.

<sup>27</sup>*Ibid.*

drive once again led by the NCDH sought expansion of the Order to cover more of the housing market. The drive was heightened by the fact that in 1965 sixty-five per cent of American Negroes lived in urban areas and eight out of every ten Negroes were jammed into the slum areas of the central cities.<sup>28</sup>

#### New proposals tendered

The NCDH began in July, 1963, a three-pronged campaign for more meaningful action ending racial restrictions in federally assisted housing. Specifically, the NCDH pressed for the following: 1) more liberal interpretation and vigorous enforcement of Executive Order 11063; 2) an educational program by the federal government and private agencies to inform the public on how to make the most effective use of the Order; and 3) a broader "stroke of the pen" by President Kennedy, expanding the Order to cover all mortgage-lending institutions which were supervised by the federal government, and all pre-Order-aided housing.<sup>29</sup>

The prompting of the new drive came after consultations with Administration officials responsible for implementing the Order. Upon completion of a two-day Washington conference in April with housing officials, the NCDH felt that execution of the anti-bias ban was moving at a sluggish

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<sup>28</sup>*St. Louis Post-Dispatch*, January 16, 1966, p. 3B.

<sup>29</sup>*Trends in Housing*, VII, No. 4 (July-August, 1963), 1.

pace. Chairman Algernon D. Black of the NCDH, in a joint statement with James Farmer, National Director of the Congress of Racial Equality; Roy Wilkins, Executive Secretary of the NAACP; and Whitney Young, Jr., Executive Director of the National Urban League, declared: "On the record to date we are forced to conclude that neither the broad spirit nor the limited letter of the Order is being made a reality."<sup>30</sup>

The kind of action envisaged by the NCDH at the Washington conference was the use of the "good offices" provisions by the PHA to influence site selection in order to overcome segregated projects. Also, it was proposed that the FHA and VA should disqualify for future commitments builders who were discriminating in pre-Order federally aided housing. Finally, there was urged a course of litigation to bar discrimination in existing federally aided housing to fulfill the constitutional mandate of nondiscrimination.<sup>31</sup> In addition to existing housing, the NCDH pressed for litigation in several cases where there had been no clear cut violation of the Executive Order but where the existence of actual discrimination was conceded by the federal government. Deputy Attorney Nicholas Katzenbach warned the conference that precipitant legal suits might be dangerous in that their loss might set back the progress of the anti-discrimination

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<sup>30</sup>*Ibid.*, p. 4.

<sup>31</sup>*Ibid.*, p. 5.

drive several years.<sup>32</sup>

### Proposals as a result of implementation of Order

Civil rights groups were also discouraged by the cumbersome and limited use of the Order's enforcement procedures. One year after the Order had been issued, only twenty-seven complaints under both the mandatory and the "good offices" provisions were filed. Less than a third of these had been satisfactorily settled during that period.<sup>33</sup> A few builders were suspended or disciplined for violation of FHA and VA nondiscrimination rules. In a publicized case in July, 1963, an Orlando, Florida, building firm, Housing and Home, Ltd., was disciplined by both agencies for refusing to sell a home to a Negro veteran in its Merritt Island development near Cocoa, Florida. The VA then declined assessing the firm's properties which resulted in the company's inability to get guarantees on mortgages. FHA commitments were also withheld. However, the Florida building firm had the suspension lifted by both agencies before the year ended after assurances were given that there would be no discrimination in the future.<sup>34</sup>

Under the "good offices" provision of the Order only fifteen complaints were filed with the FHA. In only two cases were the federal agencies successful in using their "good offices" to persuade builders to comply with the intent

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<sup>32</sup>*New York Times*, April 26, 1963, p. 16.

<sup>33</sup>*Trends in Housing*, VII, No. 6 (November-December, 1963), 1.

<sup>34</sup>*Ibid.*, p. 7.

of the Order.<sup>35</sup> Obviously, this approach to desegregation of existing housing did not enjoy any great success. As for litigation, after the Order had been in existence for three years, not a single law suit had been filed under its provisions.<sup>36</sup>

The timorous approach taken by government officials in utilizing their "good offices" was borne out by the FHA's first major test. William J. Levitt had refused to sell a home to a Negro in his huge Belair project in Bowie, Maryland. When the complaint was taken to the Agency, the "good offices" section of the Order was discussed with Levitt. Levitt, beneficiary of 3,126 commitments for mortgage insurance contracted before the effective date of the Executive Order, was not dissuaded from employing discriminatory practices. After unsuccessful negotiations with Levitt, Phillip N. Brownstein, new FHA Administrator, finally told the Negro complainant that "there is nothing further we can do to assist you in this matter."<sup>37</sup> Had the Belair project been open to Negroes, the "good offices" section would have buttressed a sagging Executive Order. A favorable transaction with Levitt, one of the nation's largest home builders, might have set an example for other builders.

One of the few imaginative approaches in putting the

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<sup>35</sup>*Ibid.*

<sup>36</sup>Fleming, *op. cit.*, p. 931.

<sup>37</sup>*Minneapolis Morning Tribune*, March 28, 1963, p. 1.

Executive Order to work was linking it to states having anti-discrimination housing laws. In January, 1964, HHFA Administrator Robert C. Weaver announced that the federal housing agencies had completed a model agreement with the Minnesota Commission Against Discrimination which would serve as a guide for similar agreements with other states having anti-bias housing legislation.<sup>38</sup> Under the terms of the agreement, if violation of the state housing laws involved any federally aided housing (whether covered by the mandatory section of the Order or not), the full sanctions of the Order would be invoked. For example, if an FHA builder violated the Minnesota law, he would be suspended from further participation in the agency's program.<sup>39</sup>

The remonstrations of civil rights groups concerning the Order's failure to include conventional mortgage activities of federally assisted lenders was given additional strength by criticism within the industry itself. Mortgage bankers claimed that the Order gave savings and loan associations an unfair competitive advantage. They felt that the Executive Order itself was discriminatory because it was "limited only to FHA and VA insured financing."<sup>40</sup> Savings and loan associations made lower-downpayment and longer-term mortgages but other lending institutions required FHA and VA

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<sup>38</sup>*Minneapolis Morning Tribune*, January 16, 1964, p. 16.

<sup>39</sup>*Ibid.*

<sup>40</sup>*Civil Rights '63*, p. 102.

insurance to give these benefits. Urging the Order to be broadened to cover all mortgage lending by federally chartered and insured institutions, Dale M. Thompson, President of the Mortgage Bankers Association of America, said: "If all forms of mortgage lending cannot be reached, then the result will be the withdrawal from those forms that are reached."<sup>41</sup> Thompson's sentiments were echoed by the President's Committee on Equal Opportunity in Housing headed by former Governor David Lawrence of Pennsylvania. The Committee repeatedly recommended that the President extend the coverage of the Executive Order.<sup>42</sup> Even William J. Levitt, long-time foe of Negro occupants in his Levittowns, asked for universal coverage of the Order. Stating that he did not oppose open occupancy when universally applied, Levitt said:

To make the Order effective it should be extended to cover all home mortgages written by all banks, all savings and loan associations, and all lending agencies wherever the Federal Government has a legal right to do so.<sup>43</sup>

#### Subsequent Actions Taken to Desegregate Housing

After pointing to the federal government's commitment to bar discrimination in federal housing programs in light of Executive Order 11063, civil rights groups once

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<sup>41</sup>*New York Times*, December 8, 1962, p. 29.

<sup>42</sup>Fleming, *op. cit.*, p. 932.

<sup>43</sup>Quoted in *Trends in Housing*, VII, No. 4 (July-August, 1963), 6.

again pressed for action. Studies began to appear stating that the federal housing agencies had the authority and responsibility to go beyond a mere prohibition of discrimination and for them to actively promote open occupancy in all types of housing built with governmental assistance. In January, 1964, The Potomac Institute, a private research and consulting agency in the field of race relations, called for a more liberal interpretation and vigorous enforcement of Executive Order 11063.<sup>44</sup> The study said that the federal agencies were empowered under the Executive Order to assure that housing was actually opened to Negroes wherever federal funds were involved. It also urged that the Order be broadened to reach all federally regulated lending institutions. In addition to the Potomac Institute study, articles were written to argue the ample authority that existed for

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<sup>44</sup>The Potomac Institute, *The Federal Role in Equal Housing Opportunity* (Washington: The Potomac Institute, January, 1964), pp. 1-28. Incorporated in 1958, the Institute was established with funds provided by the Taconic Foundation. In February, 1966, the Potomac Institute recommended a drastic plan to exert tremendous pressure on cities to desegregate housing or else forfeit federal funds in a variety of fields. The Institute's proposal called for a new concept for the use of Title VI of the 1964 Civil Rights Act. Title VI power would be used against any area or neighborhood where there was housing discrimination. Not only would federal assistance for housing be cut off, but funds would be withdrawn from all federally aided programs that benefited residential areas, such as roads, sewer and water systems, education, health and recreation services. Finally, the study required the adoption of a fair housing law before a community could receive federal funds for programs affecting housing. See *St. Louis Post-Dispatch*, February 13, 1966, p. 3B.

expanding the Executive Order.<sup>45</sup>

With the passage of the Voting Rights Act of 1965, a new sense of urgency arose among civil rights groups involved in the housing field. After passage of the legislation, they felt that the federal government now had taken an affirmative stand on equal rights for all, except in housing. Executive Order 11063 had scarcely made a dent on housing segregation. Equal rights would never be a reality as long as the racial ghetto remained unassailed. The NCDH again called on its affiliates to appeal to President Johnson for an extension of Executive Order 11063.

The 1965 campaign sought executive action that would remedy the Order's small effect on housing barriers. To correct the weaknesses of Executive Order 11063, the NCDH called for: 1) the Order to be extended to cover all banks and savings and loan associations chartered, regulated and insured by the federal government (with their inclusion more than eighty per cent of all new housing would be brought under the Order's requirement of nondiscrimination; 2) its expansion to cover the supply of federally aided housing built before November 20, 1962, that had been exempted from

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<sup>45</sup>See Monroe H. Freedman and Martin E. Sloane, "The Executive Order on Housing: The Constitutional Basis For What It Fails To Do," *Howard Law Journal*, IX, No. 1 (Winter, 1963), 1-19; Martin E. Sloane, *op. cit.* The tone of these studies set forth the need and legal justification for making Executive Order 11063 applicable to all financial institutions regulated by the federal government and to the sale and rental of all housing financed by such institutions.

from coverage; 3) the withdrawal of the procedural power provided federal housing agencies to grant exemptions from the scope of the Order, and 4) the President's Committee on Equal Opportunity in Housing be directed to assume broader responsibility for the implementation of the Order and should be provided with sufficient staff and an increased budget to administer an effective national program.<sup>46</sup> Only then could the racial barriers to housing be struck down and a major goal of the civil rights movement be achieved.

Constitutional and legal doubts had restrained President Johnson from extending the Order to cover more of the housing market. He had been reported to have been advised that such action might be of doubtful legality.<sup>47</sup> To preclude any doubts he had about this form of executive action, President Johnson asked for congressional enactment of a fair housing law.

Circumstances at the outset of 1966 seemed very favorable for the passage of anti-discrimination legislation in housing. Public opinion gave no indication that it had lost its "civil rights consciousness." Large Democratic majorities still existed in both houses of Congress as an aftermath of the Goldwater defeat in the 1964 presidential election and could provide the margin of votes for its

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<sup>46</sup>*Trends in Housing*, IX, No. 2 (March-April, 1965), 3.

<sup>47</sup>*St. Louis Post-Dispatch*, January 16, 1966, p. 3B.

enactment. Finally, the coalition of civil rights groups, spurred on by legislative successes in 1964 and 1965, remained intact. President Johnson's legislative request, for fair housing advocates, would overcome the basic weaknesses in the existing Executive Order 11063. (Not to be overlooked was their great concern with a trend in 1964 and 1965 that saw state and local governments repeal by referenda open housing laws. In addition to California's adoption of "Proposition 14" in 1964, nullifying the state's existing open occupancy law, the cities of Berkeley, California; Seattle and Tacoma, Washington; Detroit, Michigan, and Akron, Ohio, either rejected fair housing laws or repealed existing ones.)<sup>48</sup>

President Johnson, in his 1966 State of the Union Message, called for ". . . legislation, resting on the fullest Constitutional authority of the Federal Government, to prohibit racial discrimination in the sale or rental of housing."<sup>49</sup> Details of the President's request were spelled out in his Civil Rights Message to the Congress in April, 1966. Even ardent fair housing advocates were taken by surprise when he asked for the passage of "the first effective Federal law against discrimination in the sale and rental of housing."<sup>50</sup> Housing discrimination covered by the

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<sup>48</sup>*Trends in Housing*, IX, No. 1 (January-February, 1965), 1.

<sup>49</sup>*Congressional Quarterly Weekly Report*, XXIV, No. 2 (Washington: Congressional Quarterly, Inc., 1966), 48.

<sup>50</sup>*New York Times*, April 29, 1966, p. 22.

legislative proposal included: the sale, rental and financing of all dwelling units; making illegal false statements by realtors concerning the availability of housing; a ban on discrimination by owners, brokers and lending corporations in their housing commitments; permitting private individuals to sue in state or federal courts to block discrimination.<sup>51</sup>

A weakened version of President Johnson's legislative request passed the House of Representatives. However, the Senate balked at the House's watered-down open housing provision. Proponents of the measure, failing to gain enough votes to shut off a filibuster, saw the open housing legislation go down to defeat in September, 1966. Many factors accounted for its legislative defeat. Among them were the "white backlash," the 1966 summer riots in northern cities, the concept of "black power" and the resultant lack of direction and cleavage in the coalition of civil rights groups. The course of events tarnished the possibility of public support for the legislation. As a result, the proposed federal fair housing law became a victim of the occurrences in 1966 that brought a pause in civil rights progress.

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<sup>51</sup>*Ibid.*

## CHAPTER X

### SUMMARY AND CONCLUSION

Because the federal government has given great direct and indirect assistance to the nation's housing, housing is no longer strictly a private undertaking. From the 1930's when mortgage credit was extended to a faltering housing industry, to the 1950's when the renewal of American cities began, the federal government brought about changes and controls in the private housing sector. Private housing has been extensively underwritten by the pervasiveness of federal programs, among them are the following: the extension of government credit to aid people in buying their homes; insurance of home mortgages; and grants of federal funds to communities to tear down slums and relocate their tenants. As civil rights groups have seen, the recipients of governmental aid, monies and resources have not always been prevented from utilizing discriminatory practices in determining where Negroes could live.

Indeed, the actions of the real estate and home building industry have been buttressed by the fostering of housing segregation by the federal government itself. Federal funds and powers have been used to exclude or segre-

gate Negroes in the housing programs. The ethic of government, as an arbiter between interests and the guardian of a higher moral conduct, was superceded by the business ethic in the housing program. By inadvertence, irresoluteness and design, this resulted when the federal government first put its power and credit behind the mortgage and home building industries. As long as home building had been a private undertaking, the real estate community could look upon discrimination as an element of sound business practices. Such practices could continue while housing transactions remained private. When the national government undertook the role of underwriting the housing industry, federal housing officials did not abide by the higher ethic of nondiscrimination which applied to government. Instead, they followed the same business practices.

When civil rights groups began to chip away at federally sponsored housing segregation, initial gains were established. The Supreme Court's decisions in the racial covenant cases stimulated the ending of this practice by federal housing agencies in 1950. However, the climate and spirit of these institutions did not drastically change. Civil rights groups continually had to challenge thereafter other vestiges of discrimination by these agencies. Moreover, by the time the federal housing agencies began to observe their obligations, the result of their past delinquencies were enormous. Between 1935 and 1950 alone, eleven million homes were built under a federal policy that "did

more to entrench housing bias in American neighborhoods than the courts, subsequent executive action or actions of civil rights groups could undo."<sup>1</sup>

Equal housing opportunity has become an absolutely fundamental part of the civil rights revolution. The legal foundations and forms of racism have been undermined in the moves to attain voting rights, fair employment, public accommodations and desegregation of the schools in the last decade. Engaged largely in tearing down these barriers to Negro opportunity, civil rights organizations have now moved to the next stage--seeking active measures positively to foster development of a fully integrated society. Positive form can be given to successful civil rights goals and gains, the organizations have felt, only if hard core segregated housing patterns are overcome. But segregation in housing has never manifested itself before on such a giant scale.

The lack of a governmental policy has spawned sprawling all-white suburban developments surrounding central cities, the only place where most Negroes are allowed to live. Growing segregation has split the nation's metropolitan areas into two enclaves, each the distinct tract of a single race. The magnitude of the problem has been suggested by statistics compiled for the Philadelphia metropolitan area. In order that the area's Negro concentration be prevented from further ex-

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<sup>1</sup>Abrams, *Daedalus*, XCV, No. 1, 69.

panding, an annual outgo of 6,000 Negro families would be required. To reverse the trend, so that the Negro population would be evenly distributed throughout Philadelphia by the turn of the century, it would require the annual entry of 9,700 Negro families into white districts and an entry of 3,700 white families into current Negro areas. No comparable shift of populations is occurring in Philadelphia or in any other major city and surrounding communities.<sup>2</sup>

For civil rights groups, the failure to implement positive prohibitions against discrimination in housing has not been due to the insufficiency of constitutional authority. A clear national policy, they believe, existed even before President Kennedy's issuance of Executive Order 11063. Sources for this authority are found both in policies enunciated by Congress and the Supreme Court insofar as equal opportunity to housing was concerned. Discrimination in housing has been held by the Court to be "contrary to the public policy of the United States."<sup>3</sup> Congress, in addition, enacted a hundred years ago a provision of the Civil Rights Act of 1866, still in effect, that prohibited discrimination based on race in the sale or rental of real

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<sup>2</sup>Grier and Grier, *Daedalus*, XCV, No. 1, 87. Statistics for the Philadelphia study were compiled by George Schermer, former Executive Director of the Philadelphia Commission of Human Rights.

<sup>3</sup>*Hurd v. Hodge*, 334 U. S. 24 (1948).

property.<sup>4</sup> Furthermore, the Housing Act of 1949 proclaimed as a national objective "a decent home and a suitable living environment for every American family."<sup>5</sup> The statute provided that

The Housing and Home Finance Agency and its constituent agencies . . . shall exercise their powers, functions, and duties . . . consistently with the national housing policy declared by the Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established . . .<sup>6</sup>

Executive action has also strengthened the objective of the national housing policy. President Kennedy's Executive Order banning discrimination in a portion of the federal program fell short of the "national ethic" sought by civil

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<sup>4</sup>*Supra*, Chapter VI, p. 200. The NCDH in December, 1966, seeking to show that a national fair housing law has existed in the statute books for 100 years, submitted an *amicus curiae* brief before the U. S. Circuit of Appeals for the Eighth Circuit. The brief argues that the provision of the Civil Rights Act of 1866 prohibiting housing discrimination is still valid although it has been unused. *Trends in Housing*, X, No. 9 (December, 1966), 1.

It is arguable, of course, whether the Civil Rights Act of 1866 did establish national fair housing legislation. The implications of the NCDH's brief would bring private housing under the purview of the law. But in the *Hurd v. Hodge* case, *supra*, the Supreme Court held that the 1866 statute was directed toward governmental action. The statute could be invoked only if there was proof of sufficient state action so as to bring the 14th Amendment into operation. Since the Civil Rights Cases (1883) held the 14th Amendment applicable only to state and not private action, the NCDH brief would have to be persuasive enough to overturn this decision that still stands on this point as the law of the land.

<sup>5</sup>63 Stat. 413 (1949), 42 U. S. C. 1441 (1958).

<sup>6</sup>*Ibid.* The Housing Act of 1949 authorizes, but does not require, that measures be taken assuring equal access "for every American family" for benefits of the housing program. Without appropriate measures, the national housing objective could hardly be achieved in any other way.

rights groups. Yet, it conveyed the goal that federal assistance in the operation of housing from which Negroes were excluded was "inconsistent with the public policy of the United States as manifested in its Constitution and laws."<sup>7</sup>

In the long struggle to gain equal opportunities within the national housing program, Negro groups and their allies have been made well aware that a statement of policy is one thing, the fulfillment of the policy is another matter. Therefore, as they approached the problem, from its outset to the present day, it has necessitated a strategy whereby the principles set down by these policies may be concretized. The sensitivity of the housing-civil rights question has meant that a tactic of extended probing had to be used so that substantial access to an agency of government might be realized.

Anti-discrimination in housing has been called the last frontier in the fight for civil rights. As an unfulfilled aim, failure of the goal can be accounted for by the inability of civil rights groups to realize a firm and constant accommodation to the potential accesses available within the governmental system. Unable to gain singular commitments from either the Congress, the courts, state governments or the President, civil rights groups have resorted to a strategy of continuing accommodation in all branches of government as shifts in their personnel or

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<sup>7</sup>*Executive Order No. 11063.*

philosophies have occurred. It has meant that major emphasis may be placed upon Congress as a potential access point, later the President, or pressure has been generated simultaneously throughout the governmental system, federal and state. Heavy stress, of course, has been placed upon the President in recent times as he has served as an innovator of social change.

The quest for a governmental decision by interest groups seeking a ban in the discriminatory practices followed by the federal housing agencies saw them pass through legislative, judicial, state government and administrative stages. Each stage has been fraught with obstacles. Beginning with Congress, where a decisive national policy might have been obtained, proposed amendments to ban housing discrimination became entangled in legislative subterfuges. These amendments almost served as sources for the defeat of public housing, a program beneficial to members of minority groups.

Failure by the civil rights groups to add proscriptions to national housing programs allowed administrators to take a safe path--implementation of regulations that would not upset Congress. A course was not charted that might alter the growing racial imbalance in residential areas throughout the nation. Reluctant housing officials became the source of aid to middle-class whites moving and owning homes in the suburbs while restricting Negroes to public housing in the cities.

With the vast expansion of federal aid in housing,

a clear statement of principle for equal opportunity to the programs was needed. But a definitive decision, similar to the ending of "separate but equal" education was not forthcoming from the United States Supreme Court when civil rights advocates employed litigation as an extension of interest groups activity. Aside from undermining racial restrictive covenants and posing the concept of "state action" in the housing area, no sweeping decision has unraveled the complexities of discrimination carried on by beneficiaries of federal aid. Lower federal court decisions have curbed the most flagrant forms of housing discrimination, but that is all.

Civil rights groups have seen that court decisions left no marked impression in denting residential segregation. The racial covenant cases and the victories gained through federal court decisions meant winning cases in law but not in fact. Evasions of the courts' decisions have followed since the courts have been unable to act against unwritten exclusion. Basically, in the confrontations of residential segregation, the favorable rulings set down by the courts have advanced constitutional principles, which are important first steps. They have not resulted, however, in federal housing officials being placed under judicial scrutiny as they failed to uphold the objectives of the national housing policy. Rather than affording the ultimate governmental power for equal access to the federal housing programs, the courts have been one source among the nation's political

agencies providing limited protection for minority rights.

Since Congress had shown an unwillingness and the federal courts an inability for sustained initiative in the housing-civil rights area, interest groups sought positive action through presidential assistance. Activating their allies, the civil rights groups called on the President to use the powers of his Office to fulfill the national housing objectives. The realization of their fondest hopes seemed imminent when President Kennedy, who had promised to eliminate discrimination in the nation's housing program by executive action, took office. However, the advantages of executive action in the housing field proved to be desultory as far as civil rights groups were concerned. As noted in Chapter VIII, whatever the advantages envisaged by the supporters of an executive order, the circumstances of its issuance clearly indicated that executive action can be subjected to the same kind of pressures as the legislative process.

The quest for an executive order to bar discrimination in federally aided housing revealed the basic limitation of presidential power as a means to attain social change. Although President Kennedy had committed himself to bring this about by a "stroke of the pen," his ample authority to do so was inhibited by administrative and political realities, particularly the latter. Here, the use of executive action was minimal because of the fear that its inopportune issuance could bring the defeat of important legislative proposals.

The Order's lack of comprehensiveness was explained away partly in terms of the difficulty of administrative enforcement, the dubiousness of the constitutionality of bringing coverage to the home mortgage industry and the fear of congressional reprisals in subsequent legislative actions. When issued, the qualified Executive Order 11063 covered only a fraction of the nation's total housing supply.

Since Executive Order 11063 has been in effect, it has had a negligible impact on residential segregation. Housing administrators have been reluctant to implement the scope of the Order broadly. As Louis W. Koenig has stated:

It is one thing for the President to issue executive orders and proclaim high policy; it is quite another to transmute policy into action and orders into compliance. In the acid test of performance, the President depends upon a vast federal bureaucracy and far-flung field organizations staffed heavily with local personnel.<sup>8</sup>

The long-sought housing Order, a minimum counter-force to the problems of residential segregation, was further softened by administrative interpretations with extensive exemptions and stress upon "persuasion" rather than enforcement.

On the state and local levels of government, housing-civil rights advocates have gained moderate victories through legislative reform. But even among the states and cities enacting fair housing laws, segregated residential housing patterns have not been upset. The extent of housing covered, the exemptions and the effective enforcement of the legislation have undercut the availability of more housing for Negroes. Negroes living in states and cities having comprehen-

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<sup>8</sup>Koenig, *op. cit.*, p. 328.

sive laws have found intricate complaint procedures a deterrent to badly needed housing. Each negotiated enforcement of the law has remained an isolated event having no carry over effect for the overall Negro population.<sup>9</sup>

The inability to gain a sweeping decision to end housing discrimination has not been the result of the choice of tactics employed by the groups involved. Some criticism, however, can be directed to the belated attention given to housing segregation. It was after World War II before civil rights groups fully became aware of the implications of the situation. By that time, housing restrictions upon the Negro had proliferated to serious proportions. Another criticism would be the failure to create a proper climate of opinion to gain wider citizen support to influence official action.<sup>10</sup> Here, the difficulty relates to the failure in changing the conventional thinking of the traditional rights

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<sup>9</sup>In states and localities having fair housing laws in operation for some length of time, members of minority groups have registered little confidence in the efficacy of registering complaints. Philadelphia's Commission on Human Relations, enforcement agency of the city's fair housing ordinance, has received only 466 complaints in the three years the ordinance has been in existence. Frances F. Piven and Richard A. Cloward, "Desegregated Housing: Who Pays for the Reformer's Ideal?" *The New Republic*, CLV, No. 25 (December 17, 1966), 19.

<sup>10</sup>In 1963, 50% of the nation's whites objected to the idea of a Negro living next door to them. Brink and Harris, *op. cit.*, p. 150. In 1965, the figure had diminished to 37%. "The Harris Survey," *Chicago Daily News*, September 20, 1965, p. 2. Resistance has increased, of course, since then as a result of racial flareups and demonstrations in urban areas. By mid-1967, 63% of the white population opposed a federal open housing law. "The Harris Survey," *Chicago Daily News*, June 5, 1967, p. 3.

of property owners--to dispose of their properties as they saw fit. Linked with this viewpoint has been the information disseminated by the real estate industry that associates the drop in property values to the upsetting of homogeneous neighborhoods. Personal prejudice then may be compounded by the anxious concern of the economic consequences that brings many persons engaged in the housing industry to practice discrimination.

In opposition to civil rights groups who seek the advancement of fair housing laws, the catchphrase then becomes discrimination in reverse, that is, trampling on the rights of one group in order to secure rights for others. Proponents of fair housing legislation have responded that the opportunity to buy or rent housing is also a legitimate property right; a conflict which government must decide in terms of the priority of rights. The lack of a comprehensive governmental anti-discrimination housing policy has indicated to civil rights groups that half-hearted official sanctions have only served to promote the right to sell on a discriminatory basis. Ironically, the situation prevails even though the federal government has been the single most important factor in the housing market.

Executive Order 11063 has not served to undermine residential housing segregation. However, it did permit at the very least a beginning in an area where segregation has its deepest roots. To have greater significance, the scope of the existing Order must be broadened either by further

executive action or by legislation. The realization of this task has posed once again for civil rights groups the problem of an access route for a favorable decision. As a potential access point, the Presidency has extended the greatest receptivity to the civil rights cause. Housing-civil rights groups recognize this potential and place greater stock on broadening existing Executive Order 11063 than on congressional action. Spokesmen for the NCDH, in fact, have stated that "Executive action is essential now--whether or not a federal fair housing law is passed."<sup>11</sup> They stress that the constitutional basis for reaching federal financing and support in housing by executive action is the same as in the case of the existing Order. Congressional action is desirable but recognizing the obstacles faced in the legislative subsystem, presidential initiative is preferred because of its directness and decisiveness.

The victories in the civil rights revolution of the 1960's, the Civil Rights Act of 1964 and the Voting Rights Act of 1965, came as a response to a national emergency. As far as civil rights questions are concerned, the Chief Executive and Congress have responded only after a sense of national urgency became manifest. Passage of the federal acts was due to the recognition that the civil rights forces had assembled a coalition of groups that could not be ignored by the political agencies of government. A similar and continu-

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<sup>11</sup>*Trends in Housing*, X, No. 2 (March-April, 1966), 3.

ing coalition will have to be maintained to insure the implementation of either a broadened executive order or federal fair housing legislation to ameliorate the urgency of Negro housing.

The solution of remedial governmental action to the housing problem has been admittedly aggravated with the ruptures in the civil rights movement itself. As the demonstrations, riots and "black power" slogans appeared, the coalition became divided. Not only did the movement begin to weaken because of these actions, but it lost momentum with the lack of commitment and agreement among the group participants. Daniel P. Moynihan has pointed out that after the 1964 presidential election the nation had the resources, the leadership and the will to make a total commitment to the cause of Negro equality. Yet, he has said:

. . . opposition emanated from the supposed proponents of such a commitment: from Negro leaders unable to comprehend their opportunity; from civil-rights militants, Negro and white, . . .; and from white liberals unwilling to expend a jot of prestige to do a difficult but dangerous job that had to be done . . .<sup>12</sup>

Moynihan's description of the lack of consensus among civil rights supporters relates to their failure to back a national policy for the Negro family. But it has overtones for the housing question also. For the successes garnished in the residential segregation battle, the courts

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<sup>12</sup>Daniel P. Moynihan, "The President and the Negro: The Moment Lost," *Commentary*, XLIII, No. 1 (February, 1967), 32.

or the Presidency, have come about through the civil rights coalition. In the long run, Negroes must hold the support of their allies and achieve a common strategy. Reassembling the coalition is vital for the application of pressure on the President or Congress to effectuate a fair housing measure. It will be essential for the fulfillment of the policy and necessary to scrutinize the administration of that policy. Since the victims of housing discrimination will have to cope with a complex complaint structure, civil rights groups must oversee the processes that the law provides. The past activities of the federal housing agencies suggest that without outside prodding, enforcement proceedings against housing discrimination will be seriously weakened.

A wholesale remedy for the Negro housing problem will not come about by the broadening of the housing Order or the passage of a federal fair housing law. Neither would be enough to ease the plight of the central city or give its Negroes better housing and a better environment.<sup>13</sup> The principle result would be to put real estate practices on a consistent basis. Either action would signify a committal to the principle of an open society and remove the "elements of compulsion which keep its members in place when they are ready, willing, and able to live elsewhere."<sup>14</sup>

Anti-discrimination measures alone cannot meet the

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<sup>13</sup>Charles Abrams, *The City Is the Frontier* (New York: Harper and Row, Publishers, 1965), p. 67.

<sup>14</sup>*Ibid.*, p. 64.

problems of the growing city slums. Such measures have to be coupled with the way government resources are used in the planning and execution of housing programs which are supposed to expand housing opportunities. Even if suburbia were opened to the Negroes, most could not afford the housing offered them. A basic failure of the federal housing program has been the dearth of housing provided for low-income groups other than public housing. Even in public housing, shortcomings are heightened with the clearing of slum sites through urban renewal projects and the federal highway program during periods of housing shortages for the poor.<sup>15</sup> A meaningful program dealing with the Negro housing problem is one that provides shelter for low-income families at costs they can afford. But public housing today is eighty per cent segregated and local authorities cannot build them beyond their legal boundaries. Even with additional public housing, segregation would be extended.

A positive approach for improved housing opportunities lies in larger outlays of federal aid and action to meet the needs of the urban poor. The Housing Act of 1965 with its provisions for rent subsidies represented a step in the

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<sup>15</sup>The Housing Act of 1949 set a goal of 810,000 low-income dwelling units to be built through 1955. The goal was still far distant in units to be built through 1965 when only 575,000 had been constructed under the provisions of the Act. Elizabeth Brenner Drew, "The Long Trial of Public Housing," *The Reporter*, XXXII, No. 12 (June 17, 1965), 15. In the last 15 years, 700,000 low-rental units have been demolished because of federal urban renewal or highway programs. Piven and Cloward, *op. cit.*, p. 18.

right direction. However, its success depended upon the willingness of Congress to provide the necessary appropriations to fulfill the aims of the Act and on the supervising federal housing agencies and nonprofit corporations building the housing units under the rent subsidy program to venture outside the central city.<sup>16</sup> Given the scope of the Negro housing problem, it will be necessary, as Charles Abrams, housing-civil rights scholar, has stated, that

The federal government should not only insist that equal access to housing be provided in all federally assisted private subdivisions, but it should also combine direct building with rent supplements in order to bring the dwellings in suburbs as well as in cities within the means of lower-income families.<sup>17</sup>

The decay of the nation's central cities now constitutes a major problem for the national government. Recognition of the problem was seen by the creation of a new Department of Housing and Urban Development in 1965. New legislation like the model-cities program seeks to set goals for the reshaping of American communities. Admittedly, the decay of our central cities is far more complex than just the racial problem, important as that problem is. Revitalization will have to be based on overall comprehensive planning that will cope with questions of transportation, air pollution, water shortages, recreation, schools and the salvage of the

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<sup>16</sup>Congress at this writing, however, has in effect emasculated the rent subsidies program, providing few funds for its first year's operation and in 1967 denied it any funds.

<sup>17</sup>Abrams, XCV, No. 1, 74.

central business districts. However, proposed remedies will be meaningful to the extent that racial difficulties are given consideration in that planning and major emphasis will have to be devoted to the persistent Negro housing problem.

In his 1966 Civil Rights Message to Congress, President Lyndon B. Johnson said:

The ghettos of our major cities--North and South, from coast to coast--represent fully as severe a denial of freedom and the fruits of American citizenship as more obvious injustices. . . . When we restrict the Negro's freedom, unescapably we restrict a part of our own.<sup>18</sup>

Linking the sanctions and the direct aid of government together enhances the goal of equal opportunities in housing. Only when this utilization of governmental power is evinced will the opportunity be at hand when "Government can give no higher service than the creation of environments in which the nation's individuals can live with each other in trust and good will."<sup>19</sup>

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<sup>18</sup>*New York Times*, April 29, 1966, p. 22.

<sup>19</sup>Southern Regional Council, *Executive Support of Civil Rights* (Atlanta: Southern Regional Council, March 13, 1962), p. 46.

## APPENDICES

APPENDIX A

ORGANIZATIONS AFFILIATED WITH THE NATIONAL  
COMMITTEE AGAINST DISCRIMINATION IN  
HOUSING AS OF JULY, 1962

Amalgamated Clothing Workers of America, AFL-CIO  
American Baptist Convention, Council on Christian Social  
Progress  
American Civil Liberties Union  
American Council on Human Rights  
American Ethical Union  
American Friends Service Committee  
American Jewish Committee  
American Jewish Congress  
American Newspaper Guild, AFL-CIO  
American Veterans Committee  
Americans for Democratic Action  
Anti-Defamation League of B'nai B'rith  
Brotherhood of Sleeping Car Porters, AFL-CIO/CLC  
Commonwealth of Puerto Rico, Department of Labor, Migration  
Division  
Congregational Christian Churches, Council on Social Action,  
and Race Relations Department, Board of Home Missions  
Congress of Racial Equality  
Cooperative League of the USA  
Friendship Houses, USA  
Industrial Union Department, AFL-CIO  
International Ladies' Garment Workers' Union, AFL-CIO  
International Union of Electrical, Radio and Machine Workers,  
AFL-CIO  
Jewish Labor Committee  
League for Industrial Democracy  
The Methodist Church, Women's Division of Christian Service  
National Association for the Advancement of Colored People  
National Association of Negro Business and Professional  
Women's Clubs  
National Catholic Conference for Interracial Justice  
National Council of Churches of Christ, Department of Racial  
and Cultural Relations  
National Council of Jewish Women  
National Council of Negro Women  
National Urban League  
Protestant Episcopal Church, Department of Christian Social  
Relations

Union of American Hebrew Congregations  
Unitarian Fellowship for Social Justice  
United Auto Workers of America, AFL-CIO  
United Presbyterian Church, Office of Church and Society  
United Steel Workers of America, AFL-CIO

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Source: National Committee Against Discrimination  
in Housing, *News Release*, July 18, 1962.

APPENDIX B

ORGANIZATIONS AS *AMICI CURIAE* IN  
RACIAL COVENANT CASES

American Association for the United Nations  
American Civil Liberties Union  
American Federation of Labor  
American Indian Citizens League of California  
American Jewish Committee  
American Jewish Congress  
American Unitarian Association  
American Veterans Committee  
California *Amici Curiae*  
Congregational Christian Church  
Congress of Industrial Organizations  
Human Relations Commission of the Protestant Council of New  
York City  
Independent, Benevolent, Protective Order of Elks of the  
World  
Japanese American Citizen League  
National Bar Association  
National Lawyers Guild  
Non-Sectarian Anti-Nazi League to Champion Human Rights  
St. Louis Civil Liberties Committee  
United States Government

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Source: Clement E. Vose, *Caucasians Only* (Berkeley and Los Angeles: University of California Press, 1959), pp. 191-197.

APPENDIX C  
SCOREBOARD

Laws Affecting Discrimination in Housing  
As of September 30, 1963

STATE	COVERAGE									
	Public Housing	Urban Renewal	FHA & VA	Private Housing	Real Estate Agents	Mortgage Lenders	Advertising	Official Enforcement Agency		
1 Alaska	X	X	X	X	X		X	X		
2 California	X	X	X	X	X	X	X	X		
3 Colorado	X	X	X	X	X	X	X	X		
4 Connecticut	X	X	X	X	X	X	X	X		
5 Indiana	X	X	X	X	X	X	X	X		
6 Massachusetts	X	X	X	X	X	X	X	X		
7 Michigan	X	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>		
8 Minnesota	X	X	X	X	X	X	X	X		
9 Montana	X	X	X	X	X	X	X	X		
10 New Hampshire	X	X	X	X	X	X	X	X		
11 New Jersey	X	X	X	X	X	X	X	X		
12 New York	X	X	X	X	X	X	X	X		
13 Oregon	X	X	X	X	X	X	X	X		
14 Pennsylvania	X	X	X	X	X	X	X	X		
15 Rhode Island	X	X	X	X	X	X	X	X		
16 Washington	X	X	X	X	X <sup>2</sup>	X <sup>2</sup>	X	X		
17 Wisconsin	X	X	X	X	X	X	X	X		
Virgin Islands	X	X	X	X	X	X	X	X		

<sup>1</sup>The State Attorney General has ruled that the State Civil Rights Commission, created under Michigan's Revised Constitution to take office Jan. 1, 1964, will have authority "to enforce civil rights to purchase, mortgage, lease or rent private housing."

<sup>2</sup>A ruling that Washington State's law barring discrimination in places of public accommodation applies to the operations of real estate brokers and salesmen is now in the courts. Illinois prohibits restrictive covenants on urban redevelopment land. Kansas and Alabama prohibit racial zoning.

Source: *Trends in Housing*, VII, No. 5 (September-October, 1963), 7.

APPENDIX D

CHART 2

SCOPE OF STATE FAIR HOUSING LAWS COVERING DISCRIMINATION IN PRIVATE HOUSING\*

STATE	Coverage Provisions			Voiding of Restrictive Covenants	Enforcement Agency	Administrative Provisions			Penalty for Violation
	Real Estate Brokers	Financial Institutions**	Who May Issue Complaints <sup>a</sup>			Agency	Attorney General	Temporary Injunctions	
1 Alaska	...	...	...	...	...	...	...	...	YES
2 California	YES	YES	YES	YES	...	...	...	...	YES
3 Colorado	YES <sup>b</sup>	YES <sup>b</sup>	YES <sup>b,c</sup>	YES	...	...	...	...	YES <sup>b</sup>
4 Connecticut	YES <sup>d</sup>	YES <sup>d</sup>	...	...	...	...	...	...	YES
5 Massachusetts	YES	YES	...	...	...	...	...	...	YES
6 Michigan	...	YES <sup>e</sup>	...	...	...	...	...	...	YES <sup>e</sup>
7 Minnesota	YES	YES	...	...	...	...	...	...	YES
8 New Hampshire	YES <sup>f</sup>	...	...	...	...	...	...	...	YES
9 New Jersey	YES	...	...	...	...	...	...	...	YES
10 New York	YES	YES	...	...	...	...	...	...	YES
11 Oregon	YES	...	...	...	...	...	...	...	YES
12 Pennsylvania	YES	YES	...	...	...	...	...	...	YES
District of Columbia	...	...	...	...	...	...	...	...	YES
Puerto Rico	YES	YES	YES <sup>k</sup>	...	...	...	...	...	YES
Virgin Islands	YES	...	...	...	...	...	...	...	YES

Footnotes to "Scope of State Fair Housing Laws  
Covering Discrimination in Private Housing"  
(Chart 2, Appendix D)

\*The jurisdictions listed in this chart include only those in which the fair housing laws cover private housing as well as public housing, urban renewal housing, and other publicly assisted housing. . . .

\*\*Sec. 101(b) of Executive Order 11063 on Equal Opportunity in Housing directs Federal departments and agencies to take all action necessary and appropriate to prevent discrimination in the lending practices of financial institutions insofar as such practices relate to loans insured or guaranteed by the Federal Government after Nov. 20, 1962.

<sup>a</sup>Persons aggrieved by an alleged unfair practice may file complaints in every jurisdiction which has an enforcement agency.

<sup>b</sup>The scope of the orders which may be issued by the Colorado Antidiscrimination Commission has been limited by the Colorado Supreme Court in *Case v. Colorado Anti-Discrimination Comm'n*, \_\_\_\_\_ Colo. \_\_\_\_\_, 380 P. 2d 34 (1962).

<sup>c</sup>It is unlawful for any person to "include in any transfer, rental, or lease of housing any restrictive covenants; or for any person to honor or exercise, or attempt to honor or exercise any restrictive covenants pertaining to housing."

<sup>d</sup>The State Commission on Civil Rights has ruled that real estate agents and lending institutions fall within the scope of the public accommodations statute.

<sup>e</sup>Michigan's new Constitution, which became effective Jan. 1, 1964, has been interpreted by the Michigan attorney general to grant the right to obtain mortgage financing without discrimination. . . .

<sup>f</sup>Although the statute does not specifically mention real estate brokers, it forbids "any person" to discriminate.

<sup>g</sup>Complaints may also be filed by the Commissioner of Labor and Industry, and the Commissioner of Education.

<sup>h</sup>Complaints may also be filed by the Industrial Commissioner.

<sup>i</sup>Although the temporary injunctive power is not specifically granted in New York's fair housing laws, the New York attorney general has indicated his intention to seek

injunctions relying on sec. 63(9) of the New York Executive Law which provides that the attorney general may, upon request of the Commission for Human Rights, bring "any civil action or proceeding . . . which in his judgment is necessary for the effective enforcement of the laws . . . against discrimination." . . .

JWhen a complaint is filed in Oregon, notice of the filing is sent to the person named in the complaint who is forbidden to take any action which would make the property in question unavailable to the complainant upon disposition of the complaint. If the respondent should take such action, he is liable in compensatory and reasonable exemplary damages in a civil action brought by the complainant.

kIt is unlawful to "include in the terms or conditions of a transfer of an interest in real property any clause, condition, or restriction" because of the race, color, religion, or national origin of an individual.

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Source: U. S. Housing and Home Finance Agency, *Fair Housing Laws* (Washington: U. S. Government Printing Office, September, 1964), pp. 12-13.

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## BIOGRAPHICAL SKETCH

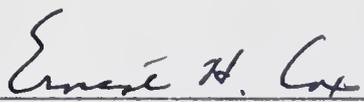
Irving Berg was born December 4, 1926, in Chelsea, Massachusetts. After graduating from Chelsea High School in 1944, he spent two years in the United States Navy. Resuming his education after his discharge, he received his A. B. from the University of Massachusetts in 1950 and M. A. degree from Boston University in 1951. From 1953 to 1955 he was employed by the Democratic National Committee, Washington, D. C., as a research assistant. Leaving this position, he spent a year working in the Executive Office of the Governor, Albany, New York, and in the summer of 1956 joined the staff of the Harriman for President Committee. He entered the graduate school of the University of Florida in 1956 to begin work toward a doctorate with a major in political science. While at the University of Florida, he served as a graduate assistant; was granted a graduate fellowship in 1959; and upon completion of his course work and examinations was named a teaching assistant and interim instructor in the Division of Social Sciences. He began teaching full time, teaching at Bemidji State College in 1962 and subsequently joined the faculty of Western Illinois University in 1965 where he is presently employed.

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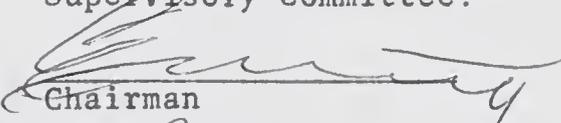
This dissertation was prepared under the direction of the chairman of the candidate's supervisory committee and has been approved by all members of that committee. It was submitted to the Dean of the College of Arts and Sciences and to the Graduate Council, and was approved as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

August, 1967

  
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Dean, College of Arts and Sciences

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