[ca. March 26, 1964]

THE CIVIL RIGHTS BILL

Some observations by
Senator Everett McKinley Dirksen

I. MORSE MOTION SHOULD BE ADOPTED -- OPEN AND EXECUTIVE SESSIONS -- EQUAL TIME -- WITNESSES ARE IMPORTANT.

II. AN INTERESTING ARTICLE BY JOSEPH W. SULLIVAN OF THE WALL STREET JOURNAL.

III. NOT SALVAGE OR GARBAGE BUT CAN BE IMPROVED. HOUSE -- 155 AMENDMENTS;ADOPTED -- 34 SHOWS NEED FOR SCRUTINY.

IV. IS JUDICIARY A BURIAL GROUND? NINE MEMBERS FROM STATES WITH ANTI-DISCRIMINATION LAWS. SEVERE PENALTIES.

V. & VI. SUGGESTIONS ON THE BILL, WHICH FOLLOW.

TITLE I

The principal item which I feel should receive some attention in this Title is that section which states "The Attorney General or any defendant in the proceedings may file with the Clerk of such court a request that a court of three judges be convened to hear and determine the case." The words "or any defendant in the proceedings" were added to this section in the House of Representatives. The purpose of this section appears to provide for an acceleration of the appeal procedure. I have some grave doubts as to the ultimate wisdom of by-passing traditional legal procedures with respect to cases brought under this section. From the reports of the Civil Rights Commission it appears that the number of actions brought under this Title will be considerable and I am concerned about the impact of the already heavy case load on our federal courts of litigation brought under this section.

Each case requires a panel of three judges for its disposition. In all fairness, decent consideration must also be given to the litigants in other fields many of whom are required by reason of existing busy court calendars to wait, years in some instances, for compensation for personal injuries.

TITLE II

I have been and still am studying each and every aspect of Title II of this bill and I will have a substitute for this Title which I will present later.

TITLE III

This Title provides a basis for law suits by the Attorney General to remedy denial of "access to or full and complete utilization of any public facility" *** operated by any state or subdivision thereof. I apprehend some very real

TITLE III (Cont.)

and practical problems with respect to the determination of "full and complete utilization of any public facility" and I feel the public interest would be better served for example by substituting words such as equal utilization of any public facilities.

Complaints under this section, I think, ought to be filed by the complainant who should set out under oath the particulars of the alleged violation so that any one defending an action brought against him under this Title would be informed of the nature of the charge against him and the identity of his accuser.

Section 302 of this Title is not limited to public facilities but authorizes the Attorney General for or in the name of the United States to intervene in an action "commenced in any court of the United States seeking relief from the denial of equal protection of laws on account of race, color, religion, or national origin." It seems to me that the parties to the suit should have a chance to be heard with respect to such intervention before it takes place.

TITLE IV

I now turn to Title IV - school desegregation. Again I find difficulty in reconciling the language of the bill with what I assume the intent to be. Let me illustrate. I had understood that this Title was not applicable to private schools in the grade and secondary level. Look at the definition on page 14, line 3,

> (c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary level, operated by a State, subdivision of a State, or governmental agency----"

Does this language encompass private schools through the twelfth grade? I find it extremely difficult to reach any other construction, although I am not certain that that was the intent. It seems clear and unambiguous. Would the use of federal funds and property by a private military academy in their R.O.T.C. program bring them with the broad language in lines 9 and 10 on page 14?

Consider the training institutes, inservice training, employment of specialists to advise in problems incident to desegregation, all provided for in this Title. Who is to determine the cost and extent of such programs? The Commissioner. But what is the criteria, where are the guidelines? I find none. Neither is there any estimate of the cost.

Individuals who attend such institutes may be paid stipends for their attendance in amounts determined by the Commissioner, including allowance for travel. It is possible that this authority should be further defined. I would not like to see a repetition of the present practice of establishing an institute on one of the more popular summer campus towns and then transporting teachers and their dependants from other campus towns, acation all paid for by the United States taxpayers.

What must the complaint, to be filed with the Attorney General, set forth in the way of particulars? I find only a general allegation as a requirement. Isn't the school board or other agency entitled to some opportunity to correct the situation complained of before the Attorney General institutes suit? I would expect so. Certainly needless litigation would be avoided. The complaint could do far towards relieving this potential if it were under oath and contained a detailed description of the act or acts complained of.

One further matter is unclear. Could the Attorney General, through the exercise of the authority conferred upon him by this Title, achieve desegregation "through the assignment of students to public schools in order to overcome racial imbalance"? Notwithstanding the definition that "desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance", I find no such limitation upon the authority of the Attorney General to take such action in order to "materially further the public policy of the United States favoring the orderly achievement of desegregation in public education---"

And should not consideration also be given to the idea which was recently developed by the columnist Joseph Alsop when he said in a recent column:

> "Besides less of the old discrimination, in truth, a quite new kind of discrimination is also needed. Invest twice as much per pupil in schools in deprived neighborhoods. Discriminate in favor of the slums and then the slum school will become a social lever and the lever will pry open the ghetto doors in the end. It is right to ask for justice but it is also necessary to ask for useful justice."

TITLE V

E. Now that the Civil Rights Commission is achieving somewhat the permanent "temporary" status of the wartime buildings along the Mall and the reflecting pool, some built as far back as the World War I and only now being slowly removed, and now that we are adding more duties and functions to the activities of the Commission, should not that Commission be subject to the same rules of procedure which have been carefully developed for all of the other departments and agencies of this federal government excluding only military or naval functions, court martial and the like. The Administrative Procedure Act is not perfect and I have sponsored and co-sponsored legislation to improve it. But it does set out the basic essentials of fair proceedings.

It provides for adequate notice of a hearing instead of an announcement "in an opening statement" of the subject of the hearing.

It requires that the rules of government agencies and commissions be published in the Federal Register.

It provides more completely for the right to counsel instead of the limited right to counsel "for the purpose of advising witnesses concerning their constitutional rights."

It provides for the conduct of hearings in which a record is to be made and the decision based on record.

Certainly we should consider carefully whether the provisions and the safeguards of the Administrative Procedure Act should not be made clearly applicable to the proceedings of the Civil Rights Commission.

TITLE VI

F. Problems exist as well with respect to the meaning of language used in

Title VI relating to non-discrimination in federally assisted programs. Does the phrase "notwithstanding any inconsistent provision of any law" deny possible defenses under existing law? It is always a broad phrase - "notwithstanding any inconsistent provision of any other law." What will we be doing if we adopt that phrase?

Then too, does this title give to the federal government the power to invalidate existing contracts if it determines to discontinue assistance? What if these contracts were entered into without any thought that such a provision would be applicable to them?

The difficulties of drafting legislation on the floor instead of in committee where careful attention which can be given to details and an explanation of language can be provided by way of a carefully thought-out committee report are indicated also by the addition by the House in Sec. 602 of the phrase "other than a contract of insurance or guarantee." Just how far does that extend? And does it extend far enough? We really know very little about such a significant phrase. It may be as big as the whole outdoors or it may be as small as the point of a pencil in relation to the vast government assistance programs.

Then too, in Sec. 603 we have an apparent intention to provide for judicial review of agency action. It states that "any person aggrieved" may obtain judicial review in accordance with Sec. 10 of the Administrative Procedure Act. I assume that what is referred to are the procedures set forth in some detail in Sections 10(b), (c), (d), and (e) of that Act because the provision in Section 10(a) could well be interpreted to limit the right of review of "persons aggrieved" to those particular persons covered by Section 10(a). So we should be more craftsmenlike in our reference to Section 10 of the Administrative Procedure Act.

Again this is the type of careful work which can be best done in committee and should be done there.

TITLE VIII

G. I do not find Title VIII relating to the gathering of registration and voting statistics objectionable except that we should protect the privacy of those who do not wish to give information as to race, color, and national origin and the like to survey groups or investigators. So, I would suggest that we provide that it shall not be an offense not to give such information to the Commission.

TITLE IX

Title IX of this bill provides that "Title 28 of the United States Code, Section 1447(d), is amended to read as follows: 'An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to Section 1443 of this Title shall be reviewable by appeal or otherwise.'" This seeming innocuous amendment is a radical departure from traditional legal procedures which reserved this right to the federal district court on a remand motion rather than to a party to the law suit.

Section 1447 of Title 28 proposed to be amended by this section authorizes a federal court to send back a case brought to it in which a party alleges he has been denied or cannot enforce his civil rights in a state court.

In the interest of orderly conduct of law enforcement and the business of the courts, I feel that allowing for an appeal to a higher court before a case comes to trial on the merits in the first instance would unnecessarily handicap state and local courts and would add immeasurably to existing delay in the enforcement of legal rights. The public, victims of crime and witnesses would be adversely affected by dilatory tactics made available under this section.

TITLE X

Title X establishes a community relations service which I expect to discuss more fully in connection with my proposals by way of a substitute for Title II.

TITLE XI

This section indicates a lack of intention to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States

or any agency or official thereby under existing law to intervene in any action or proceeding.

It further states the intent of the Congress not to pre-emt state law on the same subject matter. In view of differing opinions among lawyers on this, a clearer statement as to its effect should be given. Section 1103 provides for an open end authority of such sums as are necessary to carry out the provisions of this act. Certainly ordinary prudence, particularly at this time should indicate some limit to the amount of funds which can be authorized to be appropriated under this section.

Section 1104 of this Title is similar to Section 716 of Title VII. It states "If any provision of this Title or the application of such provision to any person or circumstance shall be held invalid, the remainder of this Title or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." In my opinion limiting the decision of invalidity to a particular person or circumstance would only result in a multiplicity of suits. If the court should determine any provision or section of this act to be invalid their decision of invalidity ought not to be limited by Congress to a particular person or circumstance.

A. What records are employers required to keep by Title VII? Employers voluntarily participating in the program of the President's Commission on Equal Opportunity are apprised in detail of the records which they must keep -- and the records are, I believe, more comprehensive than are those that would be required by Title VII. Are we to superimpose another set of records on the employer in addition to a third set that he may be keeping for a State F.E.P.C.?

What of the conflict between State and Federal record requirements? Illinois prohibits any reference to color or religion in employers' records. Title VII would require this information to be kept. Are we now to force an employer to violate a state law in order to comply with a federal statute, each of which has the same purpose?

Every employer is required to make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed and shall preserve such records for such periods as the Commission shall require.

In the wage and hour laws we clearly set forth the records to be kept and prescribed the periods for which they should be preserved. Why not do the same in this legislation? Is there any compelling reason why this cannot be done? I know of no such restriction on the Senate or on the Judiciary Committee, where in fact it should be done.

Who is to determine what are essential and what are non-essential records? Without adequate statutory direction an employer may well risk severe penalties if he destroys records relevant to the determination of whether unlawful employment practices have been or are being

committed. Who is to determine what is relevant, certainly not the employer unless he is willing to risk prosecution.

What protection is afforded to an employer from fishing expeditions by investigators in their zeal to enforce Title VII? Examine Section 709(a) on page 44. The Commission or its designated representative shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Can there be a greater grant of investigatory authority? I can recall none. Should the Commission be permitted to copy evidence? Should an employer be permitted to request a detailed list of the records to be examined by the Commission? Should the employer be permitted to go before a competent court in order to determine what records relate to any matter under investigation or in question? Or are we to allow the Commission carte blanche authority in its examination, in its copying of evidence, in its inquiry? Should this examination be limited to specified documents? How broad can such inquiry be? It will be limited only by determination of the Commission. No private rights will remain.

TITLE VII

B. On Page 41 section 707(d) provides for relieving the Commission of any obligation to bring a civil action where the Commission has determined that the bringing of such action would not serve the public interest. I feel the public interest should be more clearly defined for the purposes of this bill and that the language should be changed to read "which would serve the interest of this Title."

C. Section 708 of this Title vests in this Commission the authority to determine the effectiveness of state or local action in the field of fair-employment . I do not feel such language is appropriate. The people of the state should have the right to determine the effectiveness of their agencies consistent with the expressed purpose of this section.

D. Now let's take the case of the operator of an establishment who has been determined to be in violation of one or another of the provisions of Title VII and who has been so ungracious as to refuse the gentle persuasive efforts of the Commission or perhaps the not-too-gentle armtwisting of the Commission, toward conciliation.

The bill provides that within 90 days the Commission shall, and I emphasize the mandatory nature of the verb, bring a civil action to prevent the respondent from engaging in such unlawful employment practice unless by affirmative vote the Commission shall determine that the bringing of such an action would not serve the public interest. So he finds himself in the Federal District Court.

Now, if he operates in a state which has a fair employment practice statute, such as my state of Illinois does, he is likely to have been the respondent in an administrative proceeding by the state Commission and the subject of an order requiring him to cease and desist from the unemployment practice complained of and to take such further affirmative or other actions as will eliminate the effect of

the practice complained of. And, if he does not comply, the Commission shall, that is the word, commence an action in the name of the People of the State of Illinois for the issuance of an order directing such person to comply with the Commission's order. For violation of that order he may be punished as in the case of civil contempt.

What a layering upon layer of enforcement. What if the court orders differ in their terms or requirements? There is no assurance that they will be identical. Shall we have the federal forces of justice pulling on the one arm and the state forces of justice tugging on the other? Shall we draw and quarter the victim?

If he has violated a valid law, he must be brought into line, but should we not give consideration to the overlapping of jurisdiction and multiple suits against the same defendant arising out of the same discrimination? I know there is a provision, as I have mentioned, for the federal agency, at its discretion, to enter into agreements with a state or local agency to refrain from bringing a civil action in classes of cases to which they can agree. But, if that agreement does not come to pass, where are we under the provisions of overlapping federal and state statutes?

E.

Who is an employer within the meaning of Title VII? I am not sure, the bill is indefinite, we have no committee hearings, no report. Can an employer readily ascertain from the language of the bill whether or not he is included? Employers with a large number of employees will have no difficulty, but what of the small businessman?

Most statutes in defining an employer in relation to the number of employees he has are rather specific. Contrast the language on page 28 of this bill:

> "The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees"

With the language from the Illinois F.E.P. Act:

> (d) "Employer" includes and means all persons, including any labor organization, labor unions, or labor association employing more than 100 persons within the State within each of twenty or more calendar weeks, within either the current or preceeding calendar year prior to January 1, 1963; ---"

Assume if you will the operation of a medium size orchard. For eleven and one-half months of the year the employer has no employees. But during two weeks of the year he employs 100 pickers. Is he to be subjected to the provisions of this Title? What of summer or winter resort operations where employment is only for two or three months at the most. Are they to be covered by this Title? Certainly we have no clear statement by which an employer can be guided. Is this the way to legislate?

If an employer obtains his employees from a union hiring hall through operation of his labor contract is he in fact the true employer from the standpoint of discrimination because of race,

color, religion or national origin when he exercises no choice in their selection? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this Title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this Title.

Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally labor contracts call for "last hired, first fired." If the last hired are negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white? If an employer is directed to abolish his employment list because of discrimination what happens to seniority? Does an unfair labor practice arise as a result of the operation of this discrimination provision in Title VII?

These are questions that cannot be answered here, they properly belong before the Committee. Witnesses should be called to clarify these issues. Testimony should be taken, views obtained, a record made.

F.

Now I turn to discrimination on account of sex. Frankly, I always like to discriminate in favor of the fairer sex. I hope that the might of the Federal Government will not enjoin me from such discrimination.

But let us look further at this provision. Historically discrimination because of sex has been a protective discrimination because we do not believe that women should do heavy manual labor of the sort which falls to the lot of some men. This is not true, of course, in some other countries where we see pictures of women working on the roads and in the mines. Then too, we discriminate in favor of women because of nimble abilities in many fields, such as the assembly of radios and delicate instruments and machines.

Where the discrimination is not in the best interest of the fairer sex we have approached the problem by specific prohibitions such as the requirement of equal pay for women doing the same work as men.

I suggest, therefore, that we look at this problem with compassion and care. We do not want women to be discriminated against, but we do not want, through inadvertance, to remove the protection which is appropriate. It occurs to me that in the Department of Labor there is a Women's Bureau and I offer for consideration the thought that since discrimination on account of sex is a vastly different problem than discrimination because of race, color, or national origin, we should give further attention to the best manner to deal with that problem.

G.

Section 704 provides that it shall be unlawful employment practices for an employer....to fail or refuse to hire....any individual....because of such individuals....national origin. This as well as other restrictions on employers under this title would tend to create difficulties for the defense contractors, for example, who are required by reason of security clearance regulations to practice what amounts to discrimination because such discrimination in security matters is both vital and necessary.

H.

Section 704 describes the employment practices which are made unlawful by this bill. SubSection (e) of that section provides certain exceptions - namely "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" or where a religious educational institution wishes to hire only employees of its particular religion.

But what of other reasonable occupational qualifications. The Harlem Globe Trotters may well wish to preserve their racial identity. A movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible. A religious institution which operates a hospital may have as great a desire to employ people of its own religious persuasion in the hospital as it would in its educational institution.

Again we need careful consideration and study.

I. Section 707 of this Title provides for action to be taken by the Commission "on behalf of a person" when it has received information on behalf of a person who is claiming to be aggrieved. I feel that action taken under this Title should be by complaint of an individual and not initiated on his behalf by others.

J. Section 704(f) of this Title reads as follows: Notwithstanding any other provision of this Title, it shall not be an unlawful employment practice for an employer to refuse to hire and employ any person because of said person's atheistic practices and beliefs.

This language was added to the bill in the House of Representatives and would, if passed, be in my opinion, the subject of review by the Supreme Court. I have some doubt, in view of recent decisions of the Supreme Court, that this section would be sustained.

VII. IMPATIENCE. IF THIS MEASURE IS MOST IMPORTANT IN SEVERAL GENERATIONS IS IT NOT TIME TO SHOW PATIENCE AND DO WORKMANLIKE JOB?

VIII. THREATS. HOW UNWORTHY CAN WE BE AS A DELIBERATIVE BODY IF THREATS OF DEMONSTRATIONS AND TAKING TO THE STREETS MOVES US TO HURRIED AND CARELESS CRAFTSMANSHIP.

IX. ARGUMENT THAT AMENDMENTS CAN BE PRESENTED ON SENATE FLOOR.
A. TO EMPTY SENATE.

B. BURDEN ON AUTHOR OF THE AMENDMENT

C. COMMITTEE CAN HOLD BOTH OPEN AND CLOSED SESSIONS.

X. THE INTERPRETATION TO FOLLOW
A. THERE MUST BE GUIDELINES

B. MOTOROLA CASE, AS EXAMPLE

C. EXAMINERS REPORT -- THEREFORE ORDERED.
1. THAT RESPONDENT CEASE AND DESIST FROM UNFAIR EMPLOYMENT PRACTICES.

2. RESPONDENT CEASE AND DESIST FROM USE OF TEST NUMBER 10 IN THIRTY DAYS.

3. IF RESPONDENT REPLACES TEST NUMBER 10 THAT IT ADOPT A TEST "WHICH SHALL REFLECT AND EQUATE INEQUALITIES, AND ENVIRONMENTAL FACTORS AMONG THE DISADVANTAGED AND CULTURALLY DEPRIVED GROUPS."

4. THAT RESPONDENT REVISE EMPLOYMENT APPLICATION FORM AND SUBMIT COPY TO COMMISSION

5. THAT RESPONDENT OFFER IMMEDIATE EMPLOYMENT TO COMPLAINANT AT CURRENT PAY RAISE.

6. THAT RESPONDENT SHOW GOOD FAITH IN INTENTIONS TO EXECUTE COMMISSION ORDER.

7. THAT RESPONDENT REPORT DATE OF ITS OFFER TO COMPLAINANT WITHIN SEVEN DAYS.

8. SIGNED BY HEARING EXAMINER AND DATED FEBRUARY 26, 1964.

XI. ALL THESE ARE ITEMS WHICH MERIT SOME TESTIMONY AS GUIDELINES FOR COURTS BECAUSE THERE WILL BE PLENTY OF LITIGATION.