October 4, 1967

To: Mr. Norman

From: Mr. Fiss

Attached you will find the papers in Jones v. Alfred Mayer Company case involving the 8th Circuit's limited construction of Section 1982. This memorandum is to merely summarize my reaction to this problem, which I gave to you earlier this morning.

1. Philosophically, I have great difficulty with the resurrection of antiquated reconstruction statutes for the purpose of dealing with the problems for which Congress today refuses to enact necessary legislation. The courts are too far away in time from the enactment of the statute to begin a useful construction of the statute afresh, which would become necessary if the limitations previously imposed on the statute are now removed. I think this is part of the explanation of the majority opinions of the Supreme Court in the removal cases, and U.S. v. Guest — a difficulty that Louis Claiborne does not seem to share. I do recognize that in certain situations social needs are so great and the congressional impass so inexcusable that there is no recourse other than to resurrect one of these statutes. This is perhaps the meaning of U.S. v. Price. Richard Posner, in his memorandum, quite eloquently argues that we are faced with the same need with regard to a fair housing law, and that Section 1982 should be dusted off and made to serve this purpose, at least with regard to residential sub-division (which we should realize is at the heart and substance of the fair housing controversy.) I have no basis for disagreeing with his judgment as to the need for a law

cc: Mr. Landsberg

of this type and of the unlikelihood of Congress enacting such a law in the near future; however, I have some reservations with his belief that this new construction of 1982 will make that statute an effective legal instrument for dealing with the problem.

2. The entry in this case of the United States will be so important -- from the viewpoint of Congress, the public and the Supreme Court -- that we must be absolutely sure we are right in the position that we take, and although I believe strong arguments can be mustered in support of petitioner's position I have not convinced myself -- with the certainty I believe is necessary -- that petitioner is right. Maybe 1982 is nothing more than a law invalidating all the statutes preventing Negroes from holding property and that Hurd v. Hodge is at the very periphery of this statute. Of course, March v. Alabama is a powerful precedent for relying on a state action theory based on the equal protection clause of the 14th Amendment.

3. It is conceivable to me that the Solicitor General-elect might want to be consulted about this, although this is a decision for Ralph Spritzer to make.