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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

VS.

ALLAN BAKKE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR PETITIONER

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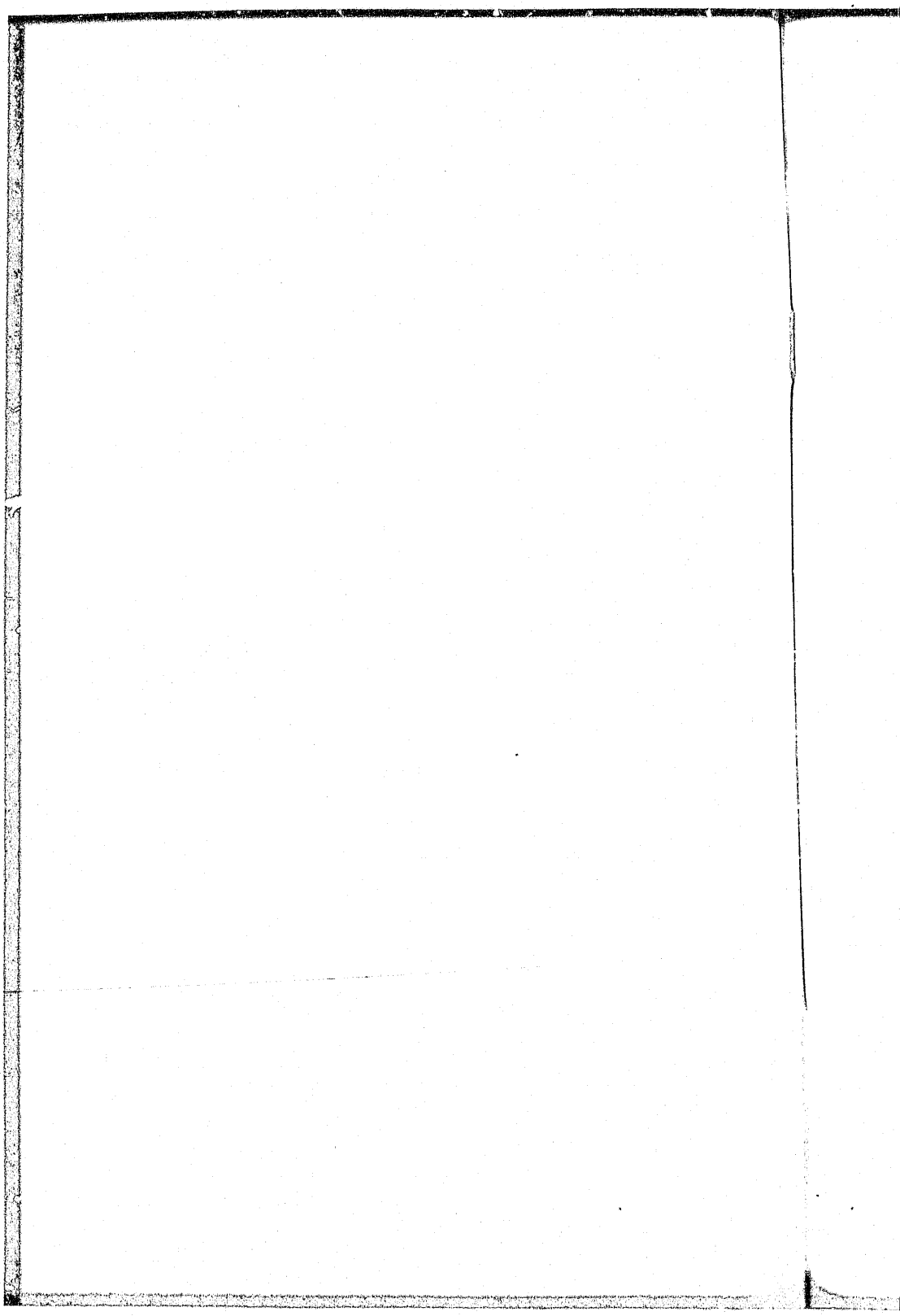

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SUPPLEMENTAL BRIEF FOR PETITIONER

This brief is submitted by the petitioner pursuant to the order of the Court entered on October 17, 1977, directing each party "to file within 30 days a supplemental brief discussing Title VI of the Civil Rights Act of 1964 as it applies to this case."

STATUTE INVOLVED

Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d-2000d-6, is reprinted in Appendix A, *infra*.

The Department of Health, Education and Welfare has issued regulations pursuant to section 602 of Title VI, 42 U.S.C. § 2000d-1. The regulations are reproduced as Appendix B, *infra*.

QUESTIONS PRESENTED

1. Whether Title VI of the Civil Rights Act of 1964, like the Equal Protection Clause, permits professional schools receiving federal funds to take race into account in admissions in order to provide minority groups with more nearly equal educational opportunities, thereby reducing racial injustice and achieving other compelling educational, professional and social purposes.

2. Whether respondent is barred from pressing a new independent claim under Title VI by his prior conduct of the action.

STATEMENT

In his complaint filed in California Superior Court respondent attempted to state a cause of action under the Equal Protection Clause, the California Constitution and Title VI of the Civil Rights Act of 1964. All three contentions were lumped together in a single cause of action as if there were only one legal theory (R. 3):

> . . . plaintiff has been invidiously discriminated against on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Art. 1, sec. 21), and the Federal Civil Rights Act (42 U.S.C. sec. 2000(d).).

The only allegation of fact specially relevant to Title VI was that the Medical School at Davis "is supported by public funds and tax monies and receives federal financial assistance." (R. 2). There was no allegation that the plaintiff had exhausted administrative remedies or that the effort would be futile.

The answer and cross-complaint filed by the University, both in its original form and as amended, admits that the school "is supported by public funds and tax monies and receives federal financial assistance" (R. 11, 14, 24, 29). Neither party submitted evidence to particularize these averments.

Several letters contained in a bundle of assorted correspondence attached to a deposition indicate that the plaintiff filed a complaint with the Department of Health, Education and Welfare. (R. 191, 277-281.) No evidence was offered to show whether the complaint was still pending or what had been its disposition.

The plaintiff's legal memorandum in support of the application for immediate relief did not refer to Title VI (R. 97-111).

The opinion of the trial court (Notice of Intended Decision) noted the mention of the Civil Rights Act in the complaint but discussed the issues exclusively in federal constitutional terms (R. 286-308). In an addendum to the Notice of Intended Decision, the court observed (R. 384):

> . . . in the original opinion, no reference was made as to whether the special admissions program in question violates Article 1, Section 21, of the California Constitution or 42 U.S.C. § 2000(d), a part of the Federal Civil Rights Act, as alleged by the plaintiff, and as requested by defendants. This was because *all of plaintiff's oral argument and written memoranda were directed to a consideration of the Fourteenth Amendment to the U.S. Constitution.* The Court concludes that the same reasoning as set forth in the original opinion applies equally to the California constitutional provision above mentioned and to the Federal Civil Rights Act. (Emphasis supplied)

Upon the basis of the averments in the complaint, answer and cross-complaint, the trial court found (R. 387) that the University has

> full powers of organization and government over the University of California, a public trust, including the Medical School of the University of California at Davis, which is supported by public funds and tax monies and receives Federal financial assistance.

And the court ruled (R. 391) that the Task Force program "does violate the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act (42 U.S.C. § 2000(d))."

No separate significance was attached to the Civil Rights Act in the Supreme Court of California. Plaintiff's initial brief (p. 14) before that court explicitly stated that he viewed the state and Title VI claims as presenting no issue independent of the Equal Protection Clause. Plaintiff's reply brief (p. 2) reiterated this position:

> This case also involves the application of the privileges and immunities clause of the California Constitution (Art. 1, § 21) and the Federal Civil Rights Act of 1964 (42 U.S.C. § 2000 [d]). Because those provisions parallel the fourteenth amendment, we do not separately discuss them. We confine our discussion herein to the scope of the equal protection clause.

In this Court neither petitioner nor respondent placed the slightest reliance upon Title VI until its potential application was suggested by questions during oral argument. Counsel for petitioner took the position that Title VI was not properly before the Court as a separate issue (Transcript of Oral Argument pp. 21-25). Counsel for

respondent on the spur of the moment apparently attempted for the first time to place independent reliance on Title VI (*id.* at 68-72), a position he had disclaimed in the courts below. Because the parties are now filing simultaneous briefs, the University is unaware of the position that respondent will now take as to Title VI.

Thereafter the Court entered the order quoted above.

SUMMARY OF ARGUMENT

I

Title VI was a product of the conditions confronting the nation in 1964. Generations of hostile discrimination, de jure as well as de facto, had condemned black people and other racial minorities to the stigma of inferiority; isolated them in barrios and ghettos and on Indian reservations; denied them equal education and access to the more rewarding occupations and thus withheld from succeeding generations the examples which stimulate self-advancement through education to the learned professions. The Civil Rights Act of 1964, of which Title VI is an integral part, sought to remove such barriers—to provide the minorities victimized by racial discrimination with equality of access to the ballot, to public education, to places of public accommodation, to employment and membership in labor organizations, and to higher education and the benefit of other programs supported by federal funds.

The Equal Protection Clause leaves State universities and professional schools free, like private institutions, to adopt remedial race-conscious admissions policies affording minorities more nearly equal access to higher education and the learned professions. Title VI is no different. Such policies do not discriminate "on the ground of race [or] color" in violation of Title VI, because neither the policies

nor the selections for admission rely upon race or color per se out of hostility, prejudice or a racially selfish or arbitrary preference. The ground of the decision is not race or color but the educational, professional and remedial objectives. To read Title VI to deprive minorities of the increased access to higher education and the professions which the universities might otherwise voluntarily afford would not only stand the Civil Rights Act of 1964 on its head; it would turn a charter of liberty into an instrument of exclusion from opportunities central to American life.

The structure and legislative history of Title VI reveal particular purposes consonant with the basic policy of the Civil Rights Act. The aim was to tie federal funding to compliance with Equal Protection standards proscribing racial discrimination against historically oppressed and alienated minorities. Section 601 was consistently described as a general declaration of policy paraphrasing constitutional obligations. Section 602, which was perceived as the only operative section and a limitation upon section 601, directed the withdrawal of funds by the funding agency, subject to the judicial review authorized by section 603, if the agency were unable to induce voluntary compliance.

Title VI contains no explicit grant of a private right of action such as Congress created in other titles. The sponsors were explicit in describing this omission. No new authority to sue was conferred upon any government agency. These omissions confirm the independent evidence of a general congressional understanding that Title VI would simply gear the administrative machinery to ensure that federally financed activities are conducted in accordance with constitutional standards of Equal Protection.

The words of section 601, read in the context of the purpose and the legislative history, aptly paraphrase the

antidiscrimination principle of the Fourteenth Amendment. They proscribe any use of race which carries a racial slur or stigma or which treats an individual as better or worse or more deserving or less deserving because of his race as such. Not race but the educational, professional and remedial objectives served by giving the minority groups more nearly equal access to higher education are "the ground" of the medical school's Task Force program.

The Court proceeded on this understanding of the congruence between Title VI and the antidiscrimination principle of the Equal Protection Clause in *Jefferson v. Hackney,* 406 U.S. 535 (1972). Lower federal courts have uniformly proceeded on the same basis. Any interpretation of Title VI which barred affirmative action consistent with the Fourteenth Amendment would invalidate the very judicial decrees requiring the elimination of dual school systems which Title VI was intended to support.

The HEW regulations issued under Title VI, 45 C.F.R. pt. 80 (1976), Appendix B, *infra,* explicitly permit affirmative action to increase the educational opportunities available to minority groups not only to correct the consequences of an institution's past racial discrimination but to "overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 45 C.F.R. § 80.3(b)(6)(ii). The regulations, being expressly authorized and reasonably related to the purposes of the legislation, are entitled to great weight.

Judicial and administrative interpretation of the parallel provisions of Title VII further confirms our interpretation of Title VI. A long line of authority construes Title VII to permit orders setting targets and requiring preferential hiring as a remedy for unlawful discrimination. A second long line of authority holds that requiring federal con-

tractors to recruit and employ racial minorities, even in the absence of a determination that the particular employer had previously engaged in racial discrimination, is not inconsistent with the prohibition against discrimination in employment "because of such individual's race, color . . ." 42 U.S.C. § 2000e-2(a)(1). In 1972 Congress reviewed and revised Title VII, but rejected amendments to overturn these interpretations.

A series of executive and congressional measures detailed in our Argument implements the national policy of drawing the disadvantaged and isolated minority groups into the mainstream of American life by race-conscious measures designed to offset the inequality of opportunity resulting from previous discrimination. Plainly, Congress saw no inconsistency between a general condemnation of racial discrimination and specific affirmative action programs designed to afford minorities greater access to opportunities which they would otherwise lack because of the isolation and disadvantage long imposed by invidious discrimination.

The Task Force program at Davis is fully in keeping with the policy of Congress.

II

The cause should not be remanded to take additional evidence concerning the status of the Task Force program under Title VI.

Throughout this litigation respondent has presented a single contention: that his legal rights were violated because the minority status of some qualified applicants was taken into account in selecting students for admission. The limited preference is admitted. No other information about the Task Force program is required to adjudicate

the only claim presented, whether it be based upon Title VI or the Fourteenth Amendment.

For the Court to read subordinate requirements relating to the details of admissions programs into Title VI would impair the autonomy of educational institutions and of the States in dealing with matters properly within their provinces and thereby eliminate one of the great virtues of federalism as a source of creativity in dealing with complex and subtle problems.

III

Respondent's previous conduct of this action bars him from now pressing a new independent claim under Title VI. Although respondent's papers in the courts below mentioned Title VI, the substance of his presentation, which was uniformly devoted to the Fourteenth Amendment, consistently drained the formal recitals of any significance. Respondent invariably asserted that Title VI required no separate treatment because it parallels the Equal Protection Clause. Because of this disclaimer, it cannot be said that "any title, right, privilege or immunity . . . under" Title VI was "specially set up or claimed" in any meaningful sense within 28 U.S.C. § 1257(3).

Even if there is jurisdiction, the claim is barred by rules of practice and sound judicial administration. *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940); *Wiener v. United States,* 357 U.S. 349, 351 n. 1 (1958).

Respondent is also barred by failure to plead and prove exhaustion of administrative remedies. Assuming arguendo that a private right of action arises under Title VI, it must be subject to the administrative process upon which Congress explicitly relied.

ARGUMENT

I

Title VI of the Civil Rights Act of 1964 Leaves State Universities Receiving Federal Funds Free to Provide More Nearly Equal Educational Opportunities to Minority Groups for Purposes and In a Manner Consistent With the Equal Protection Clause.

Introductory

The Civil Rights Act of 1964 is one of the great charters of human dignity. The Act seeks to provide black people and other victims of racial prejudice with equality of access to the ballot, to public education, to places of public accommodation, to employment and membership in labor organizations, and to the benefit of programs supported by federal funds, including higher education.

The function of Title VI was and is to ensure that federal monies are not used to support invidious discrimination inconsistent with the constitutional standards of equality established by the Fourteenth Amendment. Title VI, like the Fourteenth Amendment, seeks to achieve equality of opportunity regardless of race, not as a philosophical abstraction but as a vital human condition. To read Title VI as barring efforts to make equality of opportunity a reality would be to allow blind allegiance to a formalistic abstraction of equality to preclude any chance at real equality. "In the field of moral action truth is judged by the actual facts of life, for it is in them that the decisive element lies. So we must examine the conclusions we have reached so far by applying them to the actual facts of life; if they are in harmony with the facts, we must accept them, and if they clash, we must assume

that they are mere words." Aristotle, *Nicomachean Ethics* (bk. X, ch. 8).[1]

Members of Congress are too pragmatic to permit us to suppose that they ignored the conditions confronting the nation in 1964. Individuals belonging to minorities long victimized by racial discrimination did not have real equality of opportunity in 1964, and all too often they do not have it today. Generations of hostile discrimination, de jure as well as de facto, condemned them to the stigma of inferiority; subjected them to inferior education; isolated them in barrios and ghettos and on Indian reservations; denied them access to the more rewarding occupations and thus withheld from succeeding generations the examples which stimulate self-advancement through education to the learned professions. Those barriers must be eliminated if reality is ever to approach the philosophical ideal. Because the barriers were imposed by race, their consequences are associated with race; and race must be used to define the scope of the effective remedies.

The framers of the Civil Rights Act cannot have been blind to these facts. They cannot rationally be supposed to have required the recipients of federal funds to ignore reality and to refrain from any voluntary remedial measures consistent with Equal Protection which the recipients might otherwise be willing to undertake. The words in section 601 prohibiting exclusion, denial of benefits or

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1. Compare the observation of Justice Brennan, joined by Justice Marshall, in *General Electric Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (dissenting opinion):

> [In *Lau v. Nichols*] a unanimous Court recognized that discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end-products of the relevant legislative enactment, end-products that may demand due consideration to the uniqueness of "disadvantaged" individuals.

other discrimination "on the ground of race [or] color" pick up the antidiscrimination principle of the Fourteenth Amendment, *i.e.* they condemn discrimination which imparts a racial slur or stigma or which treats an individual as better or worse or as more deserving or less deserving than another solely by reason of his race or color as such. Under the Task Force program there is no reliance upon race or color per se out of hostility, prejudice, or a racially selfish or arbitrary preference. Race is used only to define the scope of a program for correcting ills caused by, and in the first instance measured by, distinctions of race. Not only minority students but all students benefit from the inclusion of minorities in the student body. The entire medical profession and the entire legal profession benefit, as does the whole community, when the profession is truly open to the whole community. Whether the judgment required by section 601 be based upon inquiry into the subjective motivation of the faculty and admissions committee, or upon inferences drawn solely from objective conduct, or upon a weighing of the relative significance of the dangers of race-conscious choices and the benefits of equalizing opportunities, the ground of the admissions policy at Davis and of the selections made thereunder was not racial prejudice or preference but the educational, professional and social benefit of all whom the school could reach.

The Equal Protection Clause leaves state universities and professional schools free to adopt race-conscious admissions policies affording minorities more nearly equal access to higher education and the professions, where necessary to achieve such objectives, bringing an increased measure of racial justice to a society still marred by the consequences of racial injustice. To read Title VI as operating to take away this freedom not only from state

but also from private universities as the price of accepting federal funds—and thus to deprive minorities of the increased access to higher education and the professions which universities might otherwise voluntarily afford—would not only stand the Civil Rights Act of 1964 upon its head; it would turn a charter of liberty into an instrument of exclusion from opportunities central to American life.

The structure and legislative history of Title VI reveal particular purposes more consonant with the basic policy of the Civil Rights Act.

A. The evolution of Title VI reveals the core congressional purpose to tie federal funding to compliance with Equal Protection standards and not to create new standards or new causes of action.

In the early 1960's racial segregation and discrimination violating the Fourteenth Amendment were common in thousands of school systems, hospitals and welfare programs supported by federal financial assistance. School desegregation was slow and painful. The only remedy, suits by parents and children, imposed heavy burdens on the federal courts. Many of the most recalcitrant school districts were operating with heavy federal financial support received as construction grants or as compensation for the "impact" of the families of soldiers, sailors and other federal personnel. There was much criticism of the continued payment of federal monies to districts resisting the plain constitutional mandate of *Brown v. Board of Education,* 347 U.S. 483 (1954). Then HEW Secretary Ribicoff answered congressional critics with the explanation that he had no power under then-existing law to withhold funds appropriated for the school districts by the Congress. *Hearings on H.R. 6890, 87th Cong., 2d Sess. before the Subcommittee on Integration in Federally Assisted Public Education*

Programs of the House Committee on Education and Labor, 14-15, 18, 20-21, 32, 37-38. The Secretary urged Congress to exercise its responsibility by enacting legislation (*Id.* at 21, 32):

> Secretary Ribicoff. Congressman, you people control the purse strings. You vote the impacted money in Congress. You vote us the money and say, "Give it out." As far as I am concerned, our Department listens to the voice and the instructions of the Congress of the United States.
>
> You control the purse strings and you can determine how the money is spent. And this is a congressional problem and not an administrative problem. You can determine under what conditions the money is paid out.
>
> I say to you that if you give me the authority, if Congress gives me the authority, we will act under that authority. But if you do not give me the authority, I cannot act and I must obey the law of the land and the law of the land is as Congress gives it to me.

Segregation and other forms of discrimination against black people were frequent in other activities wholly or partly financed by the federal government. Discrimination was rife, for example, in hospitals built with federal aid. Food stamp programs suffered from similar abuse. In some instances—for example, in the Hill-Burton Act, former 42 U.S.C. § 291e(f) (1958)—an administrative cut-off of funds was implicitly barred by a provision approving payments to build separate but equal facilities. Under other acts the agency's power to withhold funds was doubtful at best, for the legislative history showed that antidiscrimination amendments had been rejected.

On June 19, 1963, President Kennedy addressed the problem by a message proposing the legislation which, after amendment and revision, became the Civil Rights Act of

1964. The message proposed that Congress grant executive departments and agencies authority to cut off federal funds used in programs violating constitutional rights of blacks (109 Cong. Rec. 11161):

> v. Federal Programs
>
> Simple justice requires that public funds to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also . . . .
>
> * * *
>
> Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance —by way of grant, loan, contract, guaranty, insurance, or otherwise—to any program or activity in which racial discrimination occurs.

The message plainly equates the discrimination at which the legislation would be aimed with violations of the Equal Protection Clause.

The administration bill introduced in Congress on the day following the message became, after amendment and revision, the Civil Rights Act of 1964. Three strands of thought run through the legislative history of Title VI, and are clearly reflected in the title's substance and structure:

(1) The policy declared in section 601 is a paraphrase of

the constitutional antidiscrimination principle embodied in the guaranty of Equal Protection.

(2) Section 601 is a declaration of policy whose sole function is to guide executive departments and agencies in implementing the operative provisions of Title VI, which call for the issuance of regulations, efforts to obtain voluntary compliance and, if necessary, the use of the government's legal remedies and the cutoff of federal funds.

(3) Section 601, standing alone, is to create no private right of action.

At the outset Title VI was a single paragraph containing two authorizations: (1) it gave discretion to federal agencies to withhold financial assistance when individuals actually or potentially under a federally-assisted program are subjected to discrimination "on the ground of race, color, religion or national origin;" (2) it empowered the President to prescribe conditions to be included in contracts for federal aid barring discrimination in employment.[2]

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2. Title VI of H.R. 7152 as introduced in the Eighty-eighth Congress, 1st Session, read:

> Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefitting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, religion, or national origin. The bill is reprinted in *Hearings before Subcommittee No. 5 of the House Committee on the Judiciary,* 88th Cong., 1st Sess. p. 659.

There were no other provisions. At this stage, therefore, Title VI dealt only with stopping the expenditure of federal funds to support denials of racial equality. It proposed no legal rights or duties beyond those already existing under the Constitution and 42 U.S.C. § 1983.

The House Judiciary Committee revised Title VI but did not change the essence of the plan. It directed the agencies to enforce section 601 but (1) left the cut-off provisions discretionary; (2) directed the issuance of implementing regulations by the agency, with Presidential approval; and (3) subjected any agency termination of assistance to judicial review. H. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2391, 2400-01. Thus, Title VI of the Committee bill was the same in structure and material substance as Title VI of the enacted statute. Section 601 now as then "states the general principle" of nondiscrimination. *Id.* at 2401. Section 602 now as then "directs each Federal agency administering a program of Federal financial assistance . . . to effectuate the principle of Section 601. . . ." The agency is to seek to effect compliance by voluntary means, but if a recipient of funds refuses, it is to cut off funds or employ other means of obtaining compliance authorized by law. Section 603 provided for judicial review of agency action under section 602. In essence, Title VI

> "declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance and directs and authorizes the appropriate Federal departments and agencies to take action to carry out this policy." *Id.* at 2400.

Both the obvious interrelationship between sections 601 and 602 and the Committee's description make it plain that

the general principle of section 601 is stated solely to inform administrative action. If section 601 had been intended by itself and without agency action to create new legal rights and duties, the committee would hardly have described it only as a "declaration of policy." Section 601 was treated as wholly dependent upon section 602 in other phases of the debate. When critics of the bill expressed concern that Title VI would reach the actions of all banks whose deposits were insured by the Federal Deposit Insurance Corporation, and even the actions of all homeowners and land developers who had received loans as the result of a repayment guarantee by the Veterans' Administration or the Federal Housing Administration, Representative Celler, who was the Chairman of the House Judiciary Committee which had reported the bill, offered an amendment whereby the words "contract, or loan" in section 602 would be changed to "loan, or contract other than a contract of insurance or guaranty." He explained (110 Cong. Rec. 2500):

> In order to make crystal clear that guarantees and insurance are not in title VI we are offering this amendment, and only contracts not connected with insurance, not connected with guarantees are included.

The limitation could be "crystal clear" only if section 602, where the amendment was put, was the only operative section with section 601 simply a predicate for administrative action. Senator Gore raised a question about this in the Senate debate (110 Cong. Rec. 13132):

> There still remains the question of whether the broad language of section 601 is fully limited by the language of section 602. If the provisions of 601 are not so limited, as I believe to be the case, then section 601 might well be interpreted as conferring statutory authority which might be implemented by means other than those prescribed by section 602.

Senator Humphrey, the floor manager, replied (110 Cong. Rec. 13378):

> First of all, section 601 states general policy. Section 602 states the means of effectuating that general policy, the implementation and the exclusion. The exclusion relates to, as the language says, other than a contract of insurance or guarantee. So FDIC—Federal Deposit Insurance Corporation—and all activities pertaining thereto are eliminated. The Federal Housing Administration is eliminated. So let us not have any more talk about that.

When the opposition continued to press the point, Senator Pastore, a sponsor of the Act with special responsibility for Title VI, replied (110 Cong. Rec. 13435):

> Mr. President, frankly, I think what we are beginning to do is kick a dead horse. The trouble with the sponsors of the present amendment is that they are not reading title VI as a whole. . . .
>
> Section 602 is just as much a part of title VI as is section 601. Section 601 is a statement of policy. Section 602 is the section that gives authority to the agencies. . . .
>
> * * *
>
> I am saying to Members of the Senate that what the Senator from Louisiana has pointed out to us as a possibility under section 601, can never happen because of what is stated in section 602.

Later, any possibility of the perverse interpretation which worried opponents was shut off by the addition of section 605, 42 U.S.C. § 2000d-4, which explicitly excepts federal assistance by insurance or guaranty. The previous debate reveals, however, a clear understanding that the sole function of section 601 would be to lay a predicate for administrative action under section 602.

The interrelation between sections 601 and 602 becomes even plainer as one notes what Title VI says and what it omits with respect to enforcement. Section 602 directs the funding agencies "to effectuate" the policy declared in section 601. Section 602 further provides that compliance "may be effected" by cutting off funds or by "any other means authorized by law." The compliance to be effected, however, is not compliance with section 601; it is "Compliance with any requirement adopted pursuant to this section . . .," *i.e.*, pursuant to section 602. The quoted phrase is repeated in the penultimate sentence of section 602.

Title VI makes no new provision for actions by either individuals or the government to enforce section 601. The omission cannot be explained away as inadvertence. Those titles of the Civil Rights Act of 1964 which create new legal obligations contain provisions conferring private rights of action. Title II, section 204, 42 U.S.C. § 2000a-3(a) (discrimination in places of public accommodation); Title III, section 303, 42 U.S.C. § 2000b-2 (public facilities); Title IV, section 409, 42 U.S.C. § 2000c-8 (discrimination in public education); Title VII, section 706, 42 U.S.C. § 2000e-5(f) (equal employment opportunity).[3] No one could miss the contrasting omission from Title VI.

The omission was pointed out by sponsors of the measure during the Senate debate. After describing the role which Senator Ribicoff and he had in revising Title VI of the original bill in consultation with the Department of Justice, Senator Keating said (110 Cong. Rec. 7065):

> Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or

3. In Titles III and IV, private suits are expressly authorized even though no new substantive obligations may have been created.

> the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill.[4]

Representative Gill, in emphasizing the restraint with which Title VI had been drafted, had previously explained to the House of Representatives (110 Cong. Rec. 2467):

> Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim.[5]

The deliberate omission, the contrast with other titles and the legislative history show that Title VI does not give rise to legal rights enforceable by private action.[6]

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4. Later Senator Keating gave a similar but somewhat less explicit description. 110 Cong. Rec. 9112.

5. By defeating the Meador amendment the House rejected a proposal authorizing private actions but the inference to be drawn is not very strong because the Meador amendment would not have allowed the cut-off of financial assistance after the recipient had signed a contractual undertaking to refrain from racial discrimination. 110 Cong. Rec. 2494, 2497.

6. The omission of an express right of action, the explicit legislative history, the provision of administrative machinery and the explained relationship between sections 601 and 602 would seem to bring the case within such recent decisions as *Cort v. Ash*, 422 U.S. 66 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974).

Lau v. Nichols, 414 U.S. 563 (1974), is not to the contrary. Although some lower courts have misinterpreted the decision, plaintiffs' standing in *Lau* was not disputed. Insofar as the claim of standing was related in any way to Title VI, the claim was made as beneficiaries of the federal funding contract. See *id.* at 571, n. 2 (concurring opinion).

There are lower court decisions citing *Lau v. Nichols* as authority for a private right of action. *E.g.*, *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974), *Rios v. Read*, 73 F.R.D. 589 (E.D. N.Y. 1977). The issue has been thoroughly considered upon full briefing only in the Seventh Circuit, where it was held

Both the omission of any express private right of action and the treatment of section 601 as a general declaration of policy laying the foundation for administrative action

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that there is no private right of action under the parallel act, Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, §§ 901-905, prohibiting discrimination on the ground of sex. *Cannon v. University of Chicago,* 559 F.2d 1063 (7th Cir. 1977). Title IX of the Education Amendments of 1972 is based on Title VI; it contains identical nondiscrimination language and its structure and enforcement mechanisms parallel those of Title VI. *Flanagan v. President and Director of Georgetown College,* 417 F. Supp. 377 (D.D.C. 1976) sustained an action based upon section 601 without discussion of this point. The Eighth Circuit has assumed a private right of action arguendo but noted the uncertainty in dismissing actions on other grounds. *Chambers v. Omaha Public School District,* 536 F.2d 222 (8th Cir. 1976); *Gilliam v. City of Omaha,* 524 F.2d 1013 (8th Cir. 1975).

Other courts have stated without analysis that section 601 gives a private right of action in situations in which the point was unimportant because the action was also grounded on the Equal Protection Clause and 42 U.S.C. § 1983. *E.g., Uzzell v. Friday,* 547 F.2d 801 (4th Cir. 1977), *Alvarado v. El Paso Independent School District,* 445 F.2d 1011 (5th Cir. 1971); *Bossier Parish School Board v. Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 388 U.S. 911 (1967). *Player v. State of Alabama,* 400 F.Supp. 249 (M.D.Ala. 1975).

In *Johnson v. County of Chester,* 413 F.Supp. 1299 (E.D.Pa. 1976) and *Santiago v. City of Philadelphia,* 435 F.Supp. 136, 157-158 (E.D.Pa. 1977) the claims alleging violations of section 601 were dismissed upon the ground that the plaintiff failed to allege or prove exhaustion of administrative remedies.

In the present case respondent is barred from asserting a claim under Title VI by his failure to allege or prove exhaustion of administrative remedies. See Part III B, *infra.*

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988, throws no light upon the question whether a private action may be maintained to enforce Section 601 against a recipient of federal grants. The discussion in the House of Representatives makes it entirely clear that the 1976 Act was intended not to affect the question. Representative Railsbach said:

> It has been brought to my attention that by granting attorneys' fees to prevailing parties other than the United States, Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress.

The relevant colloquy is quoted in *Cannon v. University of Chicago, supra,* 559 F.2d at 1079-80.

under section 602 but carrying no independent legal bite confirm the general understanding that the antidiscrimination principle declared by section 601 is the same guaranty of racial equality found in the Fourteenth Amendment. On this understanding there was no need for new rights of action.

The exclusions, denials of benefits and discrimination declared to be against the policy of the United States in section 601 were uniformly treated as discrimination against blacks and other racial minorities (although the latter were less often mentioned). *E.g.*, 110 Cong. Rec. 2469 (Representative Libonati), 2720-21 (Representative Green), 2766 (Representative Matsunaga), 7058 (Senator Pastore), 7382 (Senator Young). On numerous occasions sponsors explained that the function of Title VI was to give effect to the mandate of the Constitution. This was the thrust of President Kennedy's message to Congress. In laying the measure before the House, Representative Celler, the chairman of the Judiciary Committee, which reported the bill, explained that Title VI "would, in short, assure *the existing right to equal treatment* in the enjoyment of federal funds." 110 Cong. Rec. 1519 (emphasis supplied).[7]

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7. Representative Celler returned to the theme on a later occasion (110 Cong. Rec. 2467):

> In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.
>
> It is for these reasons that we bring forth title VI. The enactment of title VI will serve to overide specific provisions of law which contemplate Federal assistance to racially segregated institutions.

Congressman Celler also filed a legal memorandum describing the constitutional bases for congressional enactment of Title VI. The memorandum states (110 Cong. Rec. 1527-1528):

> [*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)] and the general trend of authorities it cites, indicates that, as to many of the Federal assistance programs to which title VI would apply, the Constitution may impose on the United States an affirmative duty to preclude racial segregation or discrimination by the recipient of Federal aid. In exercising its authority to fix the terms on which Federal funds will be disbursed . . ., Congress clearly has power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution.

Representative Lindsay, a member of the Judiciary Committee and strong supporter of the measure, also observed (110 Cong. Rec. 2467):

> Both the Federal Government and the States are under constitutional mandates not to discriminate. Many have raised the question as to whether legislation is required at all. Does not the Executive already have the power in the distribution of Federal funds to apply those conditions which will enable the Federal Government itself to live up to the mandate of the Constitution and to require States and local government entities to live up to the Constitution, most especially the 5th and 14th amendments?

He then explained that the legislation was required because of the explicit "separate but equal" provisions of some statutes and the defeat of antidiscrimination riders proposed for other legislation. *Ibid.* See also 110 Cong. Rec. 2732 (Representative Dawson); 2766 (Representative Matsunaga).

When the bill first came to the Senate floor, its principal manager, Senator Humphrey, explained that Title VI was linked to existing constitutional obligations (110 Cong. Rec. 6544):

> The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins v. Moses H. Cone Memorial Hospital,* 323 F.2d 959 (C.A. 4, 1963), cert. denied, March 2, 1964. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.

Nowhere in the debates have we found an assertion that section 601 declares an antidiscrimination policy going beyond the Fourteenth Amendment.[8] The general under-

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8. Our search did turn up one or two occasions in which opponents of the bill raised the charge that Title VI would be used to *compel* preferential action in favor of minorities. 110 Cong. Rec. 1611, 1619 (1964). The proponents of the legislation denied that such action could be compelled. 110 *id.* at 1540. The legislative history apparently contains no discussion of voluntary programs by recipients of federal funds to extend increased opportunities to minorities. Evidently Congress had no concern about such programs and no thought that Title VI should be taken to bar them. This case deals, of course, with a voluntary rather than a federally-compelled special admissions program.

An opponent of desegregation made the only even remotely relevant reference to the possibility of minority preference in the expenditure of federal funds when he inquired about approval of a federal loan to an "all-Negro city." Chairman Celler replied that he would "call that discrimination against the white folks if there

standing that section 601 would be used to effectuate existing constitutional obligations was repeatedly affirmed. For example, at the close of a major speech by Senator Pastore explaining Title VI, Senator Pell asked (110 Cong. Rec. 7064):

> Mr. PELL . . . Is it not true that the philosophy of Title VI is already in the law? The authority is permissive. Title VI would merely extend it, but would not bring in a new concept. Is that correct.
> Mr. PASTORE. That is correct.[9]

To interpret Title VI as incorporating the antidiscrimination principles developed under the Fifth and Fourteenth Amendments gives it the only meaning consistent with the legislative history. More important, perhaps, to interpret Title VI to allow voluntary, remedial action permitted under the Fourteenth Amendment is essential to avoid defeating the central thrust of the Civil Rights Act of 1964. The aim was to remove the obstacles barring blacks and other minorities from full participation in American life. Perhaps the greatest single handicap blacks and other minorities face is their underrepresentation in higher education and the learned professions. *Cf.* The

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is *undue* favoritism to the colored folks." 110 *id.* at 2494 (1964) (emphasis supplied).
The charge that preferential action could be compelled was raised and denied more often in relation to Title VII (see e.g., 110 Cong. Rec. 1518, 2560, 6549, 6553, 6563, 7382, 7420, 7711, 7738, 7800) (1964). For the special development in the employment area, see 42 U.S.C. § 2000e-2(j) and the analysis of the statute's history and meaning in the cases cited in Part I D of this brief and at 67 n.67 of our opening brief. As noted in those places, Title VII has repeatedly been read by the federal courts to permit race-conscious remedies.

9. For additional expressions of intent to ensure that federal funds would be spent only in accordance with the Constitution, see 110 Cong. Rec. 7057, 7062, 13333.

Carnegie Commission on Higher Education, A Chance to Learn 12-13 (1970). It would be unfaithful to the spirit of the Act to read Title VI to prohibit reducing the handicap by voluntary and constitutional measures.

B. Title VI permits educational institutions receiving federal funds to provide minority groups more nearly equal educational opportunities.

Section 601 of Title VI provides:

> No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

These words, read in context, conform closely to the purposes revealed by the legislative history and policy of Title VI: (1) to stop federal funding of State agencies, especially of public schools and institutions of higher education, which were engaging in invidious discrimination against black people and other minorities in violation of the Fourteenth Amendment; (2) to give minorities equal access to the benefits of other federally-funded programs in accordance with the standards of equality established by the Fourteenth Amendment.

The prohibition against various forms of discrimination "on the ground of race [or] color," read in context, refers to a use of race or color which carries a racial slur or stigma or which treats an individual as better or worse or as more deserving or less deserving than another by reason of his race or color. It is hard to think of more apt legislative language in which to state the constitutional anti-discrimination principle. Thus, the public policy declared by section 601 to govern the recipients of federal funds

and inform the administration of section 602 and section 603, does not by its own force go beyond standards established by the Equal Protection Clause and expounded in such decisions as *Washington v. Davis,* 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan District Housing Authority,* 429 U.S. 252 (1977); *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144 (1977); and *Dayton Board of Education v. Brinkman,* 97 S.Ct. 2766, 2772 (1977).

The point is readily illustrated. Knowingly to exclude a black applicant from a federally financed program in favor of a white with no reason other than race or color gives rise to an irrebuttable or virtually irrebuttable inference of an "invidious" use of race. In those circumstances it is impossible or almost impossible to find a reason for the racial choice sufficient to overbalance the racial injury. Compare the opinion of the Court with the concurring opinion of Justice Stewart in *McLaughlin v. Florida,* 379 U.S. 184, 191-192, 198 (1964).

Evidence that a white applicant was knowingly excluded in favor of a black may give rise to a similar inference of invidious (including irrelevant) use of race in the absence of other evidence[10] because of the risks inherent in any drawing of racial lines (Brief for Petitioner at 57-60); but the inference is easier to overcome, partly because the deci-

10. See *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976) (Title VII). The Court in *McDonald* specifically noted (n. 8, p. 281) that:

> Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, see Brief for Respondent Santa Fe, at 19 n. 5, and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted. Cf. Brief for the United States as *Amicus Curiae,* at 7 n. 5.

sion carries no racial slur or stigma in a predominantly white society and partly because race-conscious action preserving or opening opportunities for minority racial groups may be indispensable to "effective social policies promoting racial justice in a society beset by deep-rooted racial inequities," *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 175 (1977) (Brennan, J., concurring).

The preference given to 15 or 16 disadvantaged minority applicants, even standing unexplained, could hardly imply a racial slur but perhaps one could infer an arbitrary or irrelevant preference inconsistent with the ideal of racial equality. The full facts belie the possibility. Giving a degree of preference to disadvantaged minority applicants "is not . . . the equivalent of discriminatory intent," nor does it imply "insult or injury to those whites who are affected by the [action]." *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 180 (Stewart, J., concurring in judgment), 178 (Brennan, J., concurring in part) (1977). The Task Force program applicants were fully qualified when admitted; they formed only a fraction of the class. The program favored educationally or economically disadvantaged members of four minority groups and thus ran against all others; but the others were wholly undifferentiated on grounds of race. The general pool of applicants and the class selected from the pool were both made up, actually or potentially, of young men and women of every race and color, including non-disadvantaged individuals from the same four minority groups. The limited preference does not flow from the notion that being black, Chicano, Asian or American Indian is inherently better or worse, or makes one more deserving or less deserving, than anyone else. Nor was an increase in the number of minority

students desired because of any notion that opportunities should be apportioned to racial groups. The increase was sought:

> (1) to improve medical education and the medical professional through the participation of men and women drawn from all segments of society;
>
> (2) to reduce the separation of blacks, Chicanos, Asians and American Indians from the mainstream of American life by drawing them into higher education and the professions;
>
> (3) to demonstrate to boys and girls in still isolated minority groups that the historic barriers to their entering the medical profession raised by racial discrimination have now been eliminated; and
>
> (4) to improve medical care in the minority communities now so seriously underserved.

Thus, the Task Force program is entirely consistent with the words of section 601 whether the phrase "on ground of race [or] color" be read to require proof of an intent to make invidious comparisons or to require only proof of such use of race or color as would lead a fair-minded observer with full knowledge of all relevant circumstances to say that a preference for one race or color over another *as such* was the ground of the decision. The educational, professional and social goals are so predominant in significance that they—not a racial preference—form "the ground" upon which both the program and the individual decisions stand.

The judicial decisions sustain our view that section 601 is a paraphrase of the antidiscrimination principle of the Equal Protection Clause. The Court proceeded upon this

understanding in *Jefferson v. Hackney,* 406 U.S. 535 (1972).[11] The opinions expressed by other federal courts also treat the statutory and constitutional duties as the same. *Taylor v. Cohen,* 405 F.2d 277, 281 (4th Cir. 1968); *Bossier Parrish School Board v. Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 388 U.S. 911 (1967); *Ward v. Winstead,* 314 F.Supp. 1225, 1235 (N.D.Miss. 1970); *United States v. Tatum Ind. School District,* 306 F.Supp. 285, 288 (E.D. Tex. 1969); *United States v. State of Texas,* 321 F.Supp. 1043, 1056-57 (E.D. Tex. 1970); *Goodwin v. Wyman,* 330 F.Supp. 1038, 1040 n.3 (S.D.N.Y. 1971), *aff'd,* 406 U.S. 964 (1972);

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11. *Lau v. Nichols,* 414 U.S. 563 (1974), is not to the contrary. There the complaint alleged that some 2,000 students of Chinese ancestry in the San Francisco schools were being denied equal education because they were given instruction only in English, a language which they did not understand and which the school district did nothing to teach them. The suit was based upon the Equal Protection Clause and upon the school district's promise to "comply with title VI and all requirements imposed by or pursuant to the Regulation," a promise given in return for federal funds. Pursuant to section 602, HEW had issued regulations and a clarifying guideline requiring school districts to take "affirmative steps to rectify the language deficiency" wherever inability to speak English excluded national-origin minority group children from effective participation in a federally supported program of education.

The Court apparently ruled that the complaint stated a cause of action under Title VI, the HEW regulation, and the contractual agreement of the school district. Mr. Justice Stewart, with whom the Chief Justice and Mr. Justice Blackmun concurred, was more explicit. After observing that "it is not entirely clear that § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), standing alone, would render illegal the expenditure of federal funds on these schools," he stated that the regulation requiring affirmative action to correct language deficiencies was binding because it was "reasonably related to the purposes of the enabling legislation." *Id.* at 570-571. There is nothing in *Lau* to suggest that section 601, standing alone, proscribes or compels HEW to proscribe action for the benefit of minorities which is permissible under the Fourteenth Amendment because it serves compelling public purposes.

N.A.A.C.P., Western Region v. Brennan, 360 F.Supp. 1006 (D.D.C. 1973); *Gilliam v. City of Omaha,* 388 F.Supp. 842 (D.Neb. 1975), *aff'd,* 524 F.2d 1013 (8th Cir. 1975); *Uzzell v. Friday,* 547 F.2d 801 (4th Cir. 1977) (*semble*); *Associated General Contractors of California v. Secretary of Commerce,* No. 77-3738 AAH (C.D. Cal. filed Nov. 2, 1977).

The single most important aim of Title VI was to withdraw federal funds from school districts refusing to comply with desegregation decrees. See Part IA, *supra.* Those decrees often required race-conscious action. *E.g. Green v. County School Board,* 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971); *Davis v. Board of School Commissioners,* 402 U.S. 33, 35 (1971); *Porcelli v. Titus,* 431 F.2d 1254 (3rd Cir. 1970), *cert. denied,* 402 U.S. 944 (1971); *Kelley v. Altheimer Arkansas Public School District,* 378 F.2d 483 (8th Cir. 1967); *Carr v. Montgomery County Board of Education,* 289 F. Supp. 647 (M.D. Ala. 1968), *aff'd,* 395 U.S. 225 (1969). To interpret section 601 to declare a mandate of color-blindness would bar these race-conscious remedies to correct the effects of prior discrimination.[12] The words of section 601 make no exception for color-conscious action under a judicial decree or to correct one's own previous racial discrimination. On the other hand, the words of section 601 in their most natural sense condemn only the "invidious" use of race or color and thus permit remedial action not only to correct one's own misconduct but to

12. Even if the cases of race-conscious pupil assignment could be taken out from a mandate of color-blindness by a forced interpretation holding that pupils assigned by race are not "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under" an educational program, that escape is not available where the order requires desegregation of the faculty by established specified ratios by hiring, assignment and promotion as in the last three cases cited in the text above.

alleviate the consequences of pervasive societal discrimination. Congress has used language essentially indistinguishable from that in section 601 in other statutes, such as the Voting Rights Act of 1965, 42 U.S.C. § 1973, *et seq.*, which prohibits voting practices that deny or abridge the right of any citizen to vote "on account of race or color." This Court has recognized that the use of such language does not prohibit race-conscious action designed to remedy the effects of prior societal discrimination that impaired minority participation. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).

C. The applicable administrative regulations permit educational institutions receiving federal funds to provide more nearly equal educational opportunities to minority groups.

Title VI, Section 602, 42 U.S.C. § 2000d-1, directs each funding agency "to effectuate the provisions of Section 601 . . . by issuing rules, regulations, or orders of general applicability. . . ."

The HEW regulations, 45 C.F.R. pt. 80, Appendix B, *infra*, explicitly permit affirmative action to increase the educational opportunities available to minority groups not only to correct the consequences of an institution's past racial discrimination but to "overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 45 C.F.R. § 80.3(b)(6)(ii).

The regulations, expressly authorized and reasonably related to the purposes of the legislation, are entitled to great weight. *Lau v. Nichols*, 414 U.S. 563 (1974); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

1. Section 80.3(a) of the HEW regulations repeats the language of section 601. Section 80.3(b)(1) prohibits cer-

tain specific actions "on ground of race, color or national origin." Manifestly the quoted phrase is taken from section 601 and has the same meaning. An example in section 80.5(c) shows the regulations to apply to the admission of students to a graduate school which, like the Davis Medical School, receives federal grants for its general purposes.

2. New subdivisions added in 1973, 38 Fed.Reg. 17978-84, reflect the growing awareness that ending the legacy of racial repression requires affirmative race-conscious measures. A common theme—the assurance of racial equality not as a theory but as a fact—runs through the Equal Protection Clause, the Civil Rights Act of 1964, the new provisions of the HEW regulations, and also a wealth of executive and legislative action from 1964 to the present day (pp. 44-56 *infra.*) The unity of purpose is further evidence that the antidiscrimination principle of the Equal Protection Clause and Title VI is not violated by remedial race-conscious measures.

One subdivision new in 1973, Section 80.3(b)(6)(i), provides that a recipient which has previously engaged in racial discrimination

> must take affirmative action to overcome the effects of prior discrimination.

Section 80.5(i) specifies that in some circumstances the required affirmative action may be

> making selections which will insure that groups previously subjected to discrimination are adequately served.

These provisions are utterly inconsistent with any interpretation of Title VI requiring a recipient of federal financial aid to refrain from race-conscious admissions practices designed to provide more nearly equal educational

opportunities to minority groups still suffering the consequences of prior discrimination.

But there is no need to rely upon inference. Section 80.3(b)(6)(ii) gives express permission for such voluntary race-conscious action even though the recipient has never engaged in racial discrimination:

> Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

Section 80.5(j) adds by way of example:

> Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient *may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available* to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and *take other steps to provide that group with more adequate service.* (Emphasis supplied)

Sections 80.3(b)(6)(ii) and 80.5(j) describe precisely the condition facing the nation's medical schools, including Davis, when in 1968 the Association of American Medical Colleges established a special Task Force to expand the educational opportunities of "Blacks and Other Minorities," and resolved that "Medical Schools must admit increased numbers of students from geographic areas, economic

backgrounds and ethnic groups that are now inadequately represented." The only way for a medical school "to make the benefits of its program more widely available to such groups," 45 C.F.R. § 80.3(b)(6), was and still is to take minority status into account in selecting among qualified applicants for admissions (Brief for Petitioner at 26-35). Such action must therefore be one of the "other steps to provide that group with more adequate service" contemplated by section 80.5(j).[13]

It is important to observe that although sections 80.3(b)(6)(i) and 80.5(i) require racial awareness in admission to an institution which has itself engaged in racial discrimination, nothing in the HEW regulations mandates

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13. The interpretation is confirmed by the dilemma with which the HEW regulations would otherwise confront educational institutions. Section 80.3(b)(2) provides:

> A recipient in determining . . . the class of individuals to be afforded an opportunity to participate in any such program, may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

The exclusive use of traditional admissions criteria placing heavy weight upon aptitude test scores and undergraduate grade point averages "have the effect of" excluding a disproportionate number of minority applicants. The more selective the institution, the harsher the disproportion. See Brief for Petitioner at 21-32; Brief for Association of American Law Schools at 27-38; Brief for Association of American Medical Colleges at 10-15. Whether the exclusive use of conventional criteria with these effects violates section 80.3(b)(2) may depend upon the respondent's ability to show that the tests are not racially biased and that the tests and grades sufficiently correlate with performance in professional school. There is debate upon both points, as the voluminous briefs in this case indicate. The Davis Task Force program may fairly be described as a measure avoiding the disproportionate impact upon minorities while retaining the use of the criteria which the faculties deem to be fairest and most workable in other respects. Brief for Petitioner at 51-54.

affirmative action by an institution which has not engaged in racial discrimination. *A fortiori* nothing sets "quotas" or "targets." Sections 80.3(b)(6)(ii) and 80.5(j) speak only of purely voluntary action. Consequently, this case raises no question about the validity under Title VI of a race-conscious program imposed by HEW, much less of a quota so imposed.

The distinction has critical importance. To hold that Title VI allows States and private universities to adopt their own voluntary remedial admissions policies consistent with the mandate of the Equal Protection Clause does not mean reading the title to compel or authorize HEW to compel the mandatory establishment of preferential admissions. Nothing in the language of Title VI permits, much less suggests, the latter interpretation; and the Court could appropriately disclaim it. Any such reading would cut wide and deep into the freedom of States to manage the affairs of their institutions, and also into the academic freedom of all colleges and universities whether privately endowed or State supported. The very same concerns which caution against reading into Title VI a monolithic national barrier against voluntary efforts to find fair and workable means of providing equal educational opportunities to minorities also caution against interpreting Title VI to authorize HEW to establish a monolithic national rule requiring quotas, targets or like affirmative action.

Special recruitment and admissions programs designed specifically to enhance minority access to medical schools were instituted by public and private medical schools across the country beginning in the late 1960s. These race-conscious programs have been supported and encouraged by national associations such as the Association of American Medical Colleges (AAMC). Such programs have been

widely publicized.[14] The standard application form prescribed by the American Medical Colleges Application

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14. For the early years of these programs, descriptions of them were collected in the AAMC booklet MINORITY STUDENT OPPORTUNITIES IN UNITED STATES MEDICAL SCHOOLS 1969-70 and subsequent annual editions through 1971-72. Since that time such descriptions of the programs of individual medical schools have been incorporated into the annual publication of the AAMC MEDICAL SCHOOL ADMISSION REQUIREMENTS U.S.A. AND CANADA. See *id.* (23d ed., 1973-74) at 52. Examples of minority admissions programs of medical schools referred to in that publication (current as of the time of respondent's applications to several medical schools) are the following:

Stanford University School of Medicine:

> In 1969 the faculty of the medical school instituted a special program for minority students from disadvantaged educational and social backgrounds. Under this program, 12 students [out of a class of 86] of American citizenship are admitted to the M.D. program annually.

Id. at 103

Harvard Medical School:

> Special consideration is given to minority group students who demonstrate the potential for successful completion of the medical school curriculum. Extra help is available for those who have difficulty in reading and math skills.

Id. at 165.

The University of Minnesota Medical School, Minneapolis:

> . . . The University of Minnesota has recently established a special program in medical education for minority students.

Id. at 181.

The recent annual editions of this standard reference contain, in addition to the summary descriptions of programs at individual schools, an entire chapter devoted to "Information for Minority Group Students," the current version being the 28th Edition, 1978-79, Chapter 7, at 45-58. Among other things, this chapter contains the AAMC Statement on Medical Education of Minority Group Students adopted December 16, 1970 and information about the Medical Minority Applicant Registry (Med-MAR), a service which

> . . . provides the opportunity for any medical school applicant belonging to a minority group to have basic biographical information circulated automatically at no cost to the admissions offices of all U.S. medical schools. . . .

Id. at 46.

Service (AMCAS) and used by most medical schools asks:

> 15. Do you wish to be considered as a minority group applicant? R. 236.

Certainly HEW, the major federal granting agency as to higher education in general and medical schools in particular has been aware of these minority admissions programs at schools across the nation.[15]

The fact that HEW has never taken action directed against race-conscious admissions programs designed to enhance minority access to medical education in the face of knowledge of the existence of such programs in schools across the nation, while being responsible for administering large sums of federal funds granted to these schools,[16] forcefully points up that the responsible enforcement agency deems such programs to be consistent with Title VI and its regulations thereunder.

The Congress has also legislated in terms which suggest the absence of any intention to outlaw minority admissions programs or disapprove the permissive aspects of 45 C.F.R. §§ 80.3(a)(6)(ii) and 80.5(j). In 1976 Congress amended Section 440 of the General Education Provisions, 20 U.S.C. § 1232i, by adding the following subsection:

> (c) It shall be unlawful for the Secretary to defer or limit any Federal financial assistance on the basis of any failure to comply with the imposition of quotas

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15. Respondent's November 9, 1973 complaint to HEW was directed against the Davis Medical School and another medical school, the name of which was deleted from the copy of the complaint furnished by HEW to Petitioner (R. 281). Petitioner is informed that the other school named in that complaint was the Stanford University School of Medicine. Respondent indicated, prior to bringing this action, that he was contemplating filing suit against Stanford. (R. 268-69).

16. As one example, HEW makes annual "capitation" grants based upon enrollments to schools of medicine and certain other health sciences "for the support of the education programs of such schools." 42 U.S.C. § 295f(a).

> (or any other numerical requirements which have the effect of imposing quotas) on the student admission practices of an institution of higher education or community college receiving Federal financial assistance.

Pub. L. No. 94-482, §§ 407, 408, 90 Stat. 2232, 2233 (1976).

Whatever may be the extent of the restriction upon the Secretary,[17] two points are clear. One is that Congress was well aware of race-conscious minority admissions programs. The second is that Congress legislated in the area and carefully restricted the measure to a prohibition against the imposition of sanctions for failure to comply with governmentally imposed quotas. The conclusion is inescapable that Congress did not intend to interfere with voluntary programs to increase minority access to professional education.

D. Judicial and administrative interpretation of the parallel provisions of Title VII further confirms the view that Title VI permits voluntary race-conscious affirmative action consistent with the Equal Protection Clause.

Title VII, section 703, of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 provides in part:

> (a) It shall be an unlawful employment practice for an employer—

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17. Section 440(c), 20 U.S.C. § 1232i (a), is much narrower than the so-called Eshleman Amendment, which would have barred "the imposition of quotas, goals or any other numerical requirements." 122 Cong. Rec. H 4316 (daily ed. May 12, 1976). The amendment was cut back to "quotas" in the Conference Committee with the caveat that

> The conferees wish to state that this language, by its adoption, does not imply, one way or the other, that the Secretary does or does not possess the authority to defer or limit Federal financial assistance to institutions of higher education or community colleges on other grounds.

H.R.Conf.Rep.No.94-1701, 94th Cong., 2d Sess. 177, 243, *reprinted in* [1976] U.S. Code Cong. & Ad. News 4877, 4944.

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

There are marked differences between Title VI and Title VII. Other subdivisions of Section 703 impose additional duties upon an employer not implicit in the language quoted and going beyond the obligations resting upon a government employer under the Fifth and Fourteenth Amendments. Section 703(a)(2) and (h), 42 U.S.C. § 2000e-2(a)(2) and (h). Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) with *Washington v. Davis,* 426 U.S. 229 (1976). Title VII also contains a proviso having no parallel in Title VI, which enacts that nothing in Title VII shall be interpreted to require any employer to grant preferential treatment because of race on account of an existing imbalance in its work force. Section 703(j), 42 U.S.C. § 2000e-2(j).

These differences limit the conclusions which can be drawn from Title VII with respect to Title VI. The words of section 601 and section 703(a)(1) taken by itself are so alike in their prohibition of racial discrimination, however, that the interpretation of section 703(a)(1) provides helpful guidance with respect to the extent of the prohibition imposed upon discrimination "because of . . . race" in section 601. Both courts and executive agencies have consistently interpreted section 703(a)(1) not to bar a variety of race-conscious employment practices designed to remedy the effects of previous discrimination. The consistent administrative and judicial interpretation of Section 703(a)(1) thus confirms our interpretation of similar language in Section 601.

One line of authority construes Title VII to permit orders setting targets and requiring preferential hiring as a remedy for unlawful discrimination. At least nine circuits have approved such decrees. In addition to the cases cited on pages 67-68 of our opening brief, see *Rios v. Enterprise Ass'n Steamfitters Local 638,* 501 F.2d 622 (2d Cir. 1974), collecting earlier cases. The decisions are consistent with the words of Section 703(a)(1) only when the words are read to prohibit selection involving "invidious" reliance upon race, or in other words, selection "because of . . . race" as such rather than because of the need to remedy previous discrimination.

A second line of authority grew out of Executive Order 11246, 30 Fed.Reg. 12319, *as amended,* 32 Fed.Reg. 14303, 34 Fed.Reg. 12985, requiring federal contractors to take affirmative action to recruit and employ racial minorities even in the absence of a determination that the employer had previously engaged in unlawful discrimination. The order led to the development of specific plans for local areas under the auspices of the Department of Labor setting percentage targets for the employment of minority journeymen and apprentices in the construction industry; the "Philadelphia Plan," for example. The executive order and ensuing administrative activity represent a nearly contemporary interpretation of both Title VI and VII because an appreciable part of the construction work would have been covered by Title VI. The lower federal courts have consistently upheld Executive Order 11246 and its implementation in local plans for the construction industry, despite the argument that they required race-conscious hiring in violation of Sections 601 and 703(a)(1). *Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971); *Southern Illinois Builders*

Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); *Joyce v. McCrane,* 320 F.Supp. 1284 (D.N.J. 1970); *Weiner v. Cuyahoga Community College District,* 19 Ohio St. 2d 35, 48 Ohio Ops.2d 48, 249 N.E. 2d 907, *cert. denied,* 396 U.S. 1004 (1970). See also *Associated General Contractors of Massachusetts v. Altshuler,* 409 F.2d 9 (1st Cir. 1973), cert. denied 416 U.S. 957 (1974). In *Contractor's Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d at 173, the court observed:

> To read § 703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Clearly the Philadelphia Plan is color-conscious. Indeed the only meaning which can be attributed to the "affirmative action" language in successive Executive Orders is that Government contractors must be color-conscious.
>
> * * *
>
> We reject the contention that Title VII prevents the President acting through the Executive Order program from attempting to remedy the absence from the Philadelphia construction labor [force] of minority tradesmen in key trades.
>
> What we have said about Title VII applies with equal force to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

In 1972 Congress reviewed Title VII and rejected amendments to invalidate Executive Order 11246 and the local plans for the construction industry. See Part IE, *infra.*

The decisions cited above require the conclusion that, to effectuate the basic statutory goals, Sections 601 and 703(a)(1) are not to be read as barriers to affirmative

action. Just as this case raises no question of HEW's power to *require* a minority preference in admissions—much less to set quotas—so we need not be concerned here with the further questions of statutory authority and constitutionality raised in Title VII cases by orders *requiring* employers to take affirmative action. The latter questions are so controversial and so different from questions concerning the permissibility of voluntary steps in the field of education, for reasons pointed out at pp. 13-15 of our reply brief, as to suggest that the Court should neither decide nor comment upon them here. For the Court to hold that voluntary remedial affirmative action is permissible when consistent with the Fourteenth Amendment would not endorse decisions upholding or imposing a requirement of affirmative action. The difference between voluntary and mandatory action and the presence of the Section 703(j) proviso in Title VII without analogue in Title VI provide two major points of distinction. On the other hand, to hold that Title VI forbids race-conscious remedial action even when voluntary would logically repudiate previous interpretation of Title VII.

E. Subsequent legislative and executive practice shows that the purpose and provisions of Title VI are advanced by race-conscious programs to counter the effects of generations of racial discrimination and increase minority participation in the opportunities of American life.

Title VI of the Civil Rights Act of 1964 was only one step in a continuing national effort not merely to halt racial discrimination but to relieve the isolation and disadvantage still suffered by minorities because of past discrimination even after the aggressive violations were ended. This Court lighted the first bright beacon of hope in *Brown v. Board of Education.* An important aim—in

shaping the Civil Rights Act of 1964 and later legislative and executive actions—was to draw the minority groups into the mainstream of American life by race-conscious measures designed to offset the inequality of opportunity resulting from previous discrimination. This national policy is reflected in a long series of executive and legislative measures extending from 1964 until the present day all designed to effectuate the ideal of Equal Protection. All, including Title VI, must be read together. So read, they further demonstrate that race conscious affirmative action such as the Task Force program is fully consistent with the antidiscrimination principle in Title VI.

1. The policy of using federal funds in education to reduce the isolation of minority groups and offset the resulting disadvantage is plainly stated in the Emergency School Aid Act of 1972, Pub. L. No. 92-318, 86 Stat. 354, 20 U.S.C. § 1601 *et seq.* Section 702, 20 U.S.C. § 1601(a), declares the purpose of providing financial assistance to "the process of eliminating or preventing minority group isolation and improving the quality of education for all children." Section 707, 20 U.S.C. § 1606(b), provides for expenditures for the specific purpose of "overcoming the adverse effects of minority group isolation, by improving the educational achievement of children in minority group isolated schools."

2. The national policy of encouraging race-conscious action to draw students from minority groups into higher education and give them special assistance is found in section 7 of the National Science Foundation Authorization Act, 1977, Pub. L. No. 94-471, 90 Stat. 2053 (1976). The Director of the National Science Foundation is required to "initiate an intensive search for qualified women, members of minority groups, and handicapped

individuals to fill executive-level positions" in the Foundation. The Director is also to make grants looking toward the establishment of Minority Centers for Graduate Education in Science and Engineering at educational institutions which, among other requirements, "demonstrate a commitment to encouraging and assisting minority students, researchers, faculty . . ." These race-conscious grants can be reconciled with Title VI of the Civil Rights Act of 1964 only upon the understanding that Title VI does not bar recipients of grants from race-conscious remedial action designed to effectuate the over-all policy of the Act.

3. Congress also gave evidence of its intent in creating the Program for Graduate and Professional Student Fellowships and Institutional Grants, 20 U.S.C. § 1134 *et seq.* Section 1134f(b) provides that in awarding fellowships the Commissioner of Education shall

> consider the need to prepare a larger number of teachers and other academic leaders from minority groups, especially from among such groups who have been traditionally underrepresented in colleges and universities. . . .

The subdivision then goes on to state that nothing in the quoted words shall "require" any educational institution to grant preferential treatment to members of a minority group because of an existing racial imbalance. Note that here, again, Congress proscribed compulsion upon educational institutions but did not forbid appropriate voluntary action.

The regulations proposed to govern the administration of the program were published on October 11, 1977, 42 Fed. Reg. 54926-930. Section 179.42(b)(1) provides for approval of a program if the college or university

> (1) Gives consideration, in accepting persons into the program, to meeting the need to prepare a larger number of individuals from minority groups, especially from among such groups who have been traditionally underrepresented in colleges and universities. . . .

In validating applications the Commission is to give weight to the extent to which the institution seeks "to prepare a larger number of individuals from minorities. . . ." 42 Fed. Reg. 54929 (1977), § 179.44(c)(6). This factor is one of ten listed in the proposed regulations and represents the maximum weight—15 points. *Id.* The effort to draw minorities into higher education is further underscored by one other factor receiving the maximum weight which refers back to the same goal.

4. Executive Order 11246, discussed at pp. 42-43, reflects the national policy of encouraging race-conscious affirmative action for the benefit of underrepresented minorities, especially in the detailed plans for the construction industry worked out by the Department of Labor. These activities and the decisions approving their legality demonstrate the extent of the executive and judicial understanding that race-conscious action to provide minorities with more nearly equal opportunities to participate in American life does not violate Title VI of the Civil Rights Act of 1964 or any other statute of the United States.

Congress demonstrated the same understanding when it amended Title VII in 1972 after thorough review of its administration and also of the Office of Federal Contract Compliance, which administered Executive Order 11246. The section-by-section analysis of the amendatory legislation in the House Committee Report stated that "it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of Equal Em-

ployment Opportunity Act of 1972 (G.P.O. 1972) 1844. While the bill was on the floor of the House, Congressman Dent offered an amendment which would have transferred all the functions of OFCC to the Equal Employment Opportunity Commission, and prohibited the Commission from imposing or requiring a quota or preferential treatment with respect to number of employees or percentages of employees of any race, color, religion, sex, or national origin. 117 Cong. Rec. 31981, 31984 (1971). The amendment was defeated. *Id.* at 32111-12.

In the upper chamber Senator Ervin offered a series of four amendments attacking the executive order program and also the Philadelphia Plan and its counterparts. Three of the amendments combined this and other issues but the fourth was limited to proscribing the OFCC affirmative action programs. All four amendments were defeated. Congress thereby "unequivocally approved the affirmative action program of the executive." Comment: *The Philadelphia Plan,* 39 U.Chi.L.Rev. 723, 757 (1972).[18] The action also demonstrates that Congress understood there to be no inconsistency between the thrust of the OFCC affirmative action programs and the policy of the United States declared in the Civil Rights Act of 1964. *United States v. Local Union No. 212, etc.,* 472 F.2d 634, 636 (6th Cir. 1973); *Patterson v. American Tobacco Co.,* 535 F.2d 257, 267 n.5 (4th Cir. 1976).

5. Many federal programs are specially designed to assist minority groups to escape from the isolation and disadvantage still resulting from past discrimination. Some programs avoid the explicit language of race; others are explicitly limited to members of racial groups. A repre-

18. The article cited in the text contains a useful history of congressional debates concerning the Philadelphia Plan at 747-757.

sentative number are listed in Appendix A to the Brief for the United States on the merits. As the Solicitor General pointed out (p. 33), many have been funded by Congress. Here again one finds a clear indication that properly targeted remedial programs consistent with the Equal Protection Clause do not violate the policy of the United States merely because their scope is defined in terms of race or color.

6. The administration and amendment of the Small Business Act, 15 U.S.C. § 631 *et seq.*, give further evidence that conscious assistance to members of minority groups in order to open opportunities denied by the consequences of earlier discrimination is entirely consistent with the policy declared in Title VI of the Civil Rights Act of 1964. Section 8(a) of the Small Business Act, 15 U.S.C. § 637, as enacted in 1958, authorizes the Administration to enter into contracts with other departments or agencies for the furnishing of supplies or materials, and then to let subcontracts to small-business concerns for the furnishing of such supplies or materials, or some part thereof. In 1973 SBA issued regulations making the program chiefly one for enabling minority-owned businesses to participate in government contracts without competitive bidding. 13 C.F.R. 124.8-1(c) (1) (1976) defines the firms eligible for section 8(a) subcontracts:

> (c) Eligibility. To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts.

Although the words are broader, the primary criterion for the program, as signaled by the regulation, apparently became race. See *Ray Baillie Trash Hauling, Inc. v. Kleppe,*

477 F.2d 696, 700 (5th Cir. 1973). Congress has continued to fund the programs.

On October 13, 1971, the President issued Executive Order 11625, 36 Fed. Reg. 19967-970 establishing a National Program for Minority Business Enterprise. Section 6(a) defined "minority business enterprise" to mean

> a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts.

In 1974, after full oversight hearings, Congress amended the Small Business Act, Pub. L. No. 93-386, 93 Cong., 2d Sess., 88 Stat. 742 (1974). There was no criticism of the administration of Section 8(a) for racial or ethnic preference. No legislative action was taken to force a change in the regulations. Nor can one suppose that Congress was not sufficiently informed. In a separate statement accompanying House Report 93-1178, Congressman Mitchell said:

> . . . I am grateful for the Committee's action because it is meaningful for many minority businessmen whose survival depends on the Small Business Administration. The structure, policies and program delivery of the Small Business Administration are deficient in many respects, but deficient though they may be, SBA is still the backbone support for minority business enterprise.

Reprinted in [1974] U.S. Code Cong. & Ad. News 4500, 4512-13.

7. The Railroad Revitalization Act of 1976, Pub. L. No. 94-210, 90 Stat. 33 (1976), 45 U.S.C. § 801 *et seq.*, 49

U.S.C. § 1657a, also contains evidence of the compatibility of affirmative, race-conscious assistance to minorities and a general prohibition against exclusion or discrimination "on the ground of race or color." Section 905 of that Act, 45 U.S.C. § 803, prohibits such discrimination in terms identical for present purposes to Section 601 of Title VI. Section 906 of the Revitalization Act, 49 U.S.C. § 1657a, directs the Secretary of Transportation to establish a Minority Resource Center with authority to assist "minority entrepreneurs and businesses" in various ways, including to:

> (2) assist minority entrepreneurs and businesses in obtaining investment capital and debt financing;
>
> * * *
>
> (4) design and conduct programs to encourage, promote, and assist minority entrepreneurs and businesses to secure contracts, subcontracts, and projects related to . . . revitalization of the Nation's railroads;
>
> * * *
>
> (7) participate in, and cooperate with, all Federal programs and other programs designed to provide financial, management and other forms of support and assistance to minority entrepreneurs and businesses.

Such preferential assistance to minority businessmen is consistent with the constitutional guarantees of equality and the general statutory policy against discrimination "on the ground of race [or] color" for the same reasons that minority status may be made a factor in selecting applicants for admission. Neither is invidious in purpose or effect. Neither excludes nor gives a preference based upon race or color as such. Both serve a larger and more general public interest by drawing minorities into opportunities and activities in the mainstream of American life, thus helping to

eliminate the isolation and inequality flowing from earlier societal discrimination.

8. The 1977 amendments to the Public Works Employment Act of 1976 [the 1977-PWE Act], Pub.L. No. 95-28, 91 Stat. 116 (1977), 42 U.S.C. § 6701 *et seq.*, provide an explicit recent confirmation of the congressional view that opening opportunities to racial minorities previously victimized by hostile discrimination is not inconsistent with Title VI.

The Public Works Employment Act of 1976, Pub.L. No. 94-369, 90 Stat. 999 (1976), 42 U.S.C. § 6701, established federal grants for local public works which clearly are subject to Title VI of the Civil Rights Act of 1964. Section 110, 42 U.S.C. § 6709, providing that no person should be excluded from participation in, or subjected to discrimination under, any project receiving federal assistance under the Act "on the ground of sex," and explicitly refers to Title VI of the Civil Rights Act of 1964 for its enforcement.[19] Obviously, Congress understood that exclusion or discrimination on the ground of race or color was already prohibited by Title VI.

When it increased the authorization by the 1977 PWE Act, Congress added a new section 103(f)(2), 42 U.S.C. § 6705(f)(2), setting aside at least 10 percent of each grant for "minority business enterprises." It specifies:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority busi-

19. In addition, section 207, 42 U.S.C. 6726, prohibited discrimination "on the grounds of race, religion, color, national origin, or sex" in any program funded under Title II of the Public Works Employment Act, and also made reference to Title VI of the Civil Rights Act of 1964 for enforcement.

> ness enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

This provision came into the bill by amendment on the House floor. 123 Cong.Rec. H1436-441 (daily ed. Feb. 24, 1977). Congressman Mitchell, who offered the amendment, explained its policy and constitutional justification in words equally applicable to minority admissions:

> We are targeting for various groups of people. We are targeting for the Indians, that is a set-aside. All that I am asking is that we set aside also for minority contractors.
>
> I would point out also that this concept of a set-aside is becoming increasingly popular. Many States and many local subdivisions have moved into the process of setting aside contracts for minorities. That is because that is the only way we are going to get the minority enterprises into our system.
>
> * * *
>
> The other objection that will be raised is the objection that everybody else is going to go on a competitive bid basis; why should not the minority enterprise people go on a competitive bid basis? The answer is very simple: we cannot. We are so new on the scene, we are so relatively small that every time we go out for a competitive bid, the larger, older, more established companies are always going to be successful in underbidding us. That is an absolute truism.

Id. at H1437.

Plainly, Congress saw no inconsistency between the general condemnation of racial discrimination in Title VI and

specific affirmative action programs designed to afford minorities greater access to opportunities which they would otherwise lack because of the isolation and disadvantage long imposed by invidious discrimination. In upholding the constitutionality of section 103(f)(2) of the 1977 PWE Act, the minority set-aside provision, in *Constructors Ass'n of Western Pa. v. Kreps*, No. 77-1035 (W.D.Pa. decided Oct. 13, 1977), Judge Snyder observed:

> * * * there is no inherent inconsistency between a requirement that contracting be done without discriminatory consideration of race and a requirement that every good faith effort be used to achieve minority participation pursuant to Legislative mandate in grant funds.[20] (Slip op. p. 26.)

The executive orders and acts of Congress from 1964 to the present reveal continual understanding that affirmative action designed to provide better opportunities for minority participation is not inconsistent with, but constructively supplements the policy of prohibiting discrimination on the ground of race. "It is clear that 'all acts are to be taken together, as if they were one law.' *United States v. Freeman*, 3 How. 556, 564." *United States v. Stewart*, 311 U.S. 60, 64 (1940).

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20. District Judge Hauk of the Central District of California in *Associated General Contractors of Cal. v. Secretary of Commerce*, No. 77-3738-AAH (C.D. Cal. 1977) on November 2, 1977 issued a summary judgment declaring section 103(f)(2) and the regulations issued thereunder unconstitutional and invalid under Title VI. The permanent injunction accompanying the declaratory judgment by its own terms does not apply to any pending projects although it expressly recognizes that all authorized funds have been allocated. Thus, this decision is in the nature of an expression of views not binding on the parties as to any current projects. Of greater immediate significance is Judge Hauk's determination that Title VI, and in particular sections 601 and 602, "codify into statutory formula the equal protection and non-discrimination guarantees of the Federal Constitution." (Slip. Op. p. 23.)

A later act is helpful as a legislative interpretation of the earlier in the sense that it aids in understanding the meaning of the words used in their earlier setting because a "legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States,* 409 U.S. 239, 243 (1972). See also *Kokoszka v. Belford,* 417 U.S. 642, 650 (1974).

The weakness of any claim that Title VI forbids voluntary remedial measures permitted by the Equal Protection Clause is overwhelmingly demonstrated by the basic policy of the Civil Rights Act of 1964, its legislative history, the choice of words, the administrative regulations and the further development of national policy in related fields. We see no room for doubt that Title VI states the antidiscrimination principle of the Equal Protection Clause, and that the Task Force program is therefore fully consistent with Title VI.

But if there could be room for doubt—if the evidence showing that Title VI sets forth only the antidiscrimination principle could be swept aside—still the title should not be construed to prohibit race-conscious remedial action. It is clear beyond a peradventure of a doubt that Congress did not resolve to prohibit voluntary affirmative action programs in 1964. The subtlety and difficulty of the problems of affirmative action are exceeded only by its importance. To read a restriction into Title VI would be a judicial innovation unsupported by evidence of legislative intent. Yet both wisdom and inherited tradition caution against substituting a nationwide judge-made rule for pluralistic decision-making through the educational self-government of both State and private institutions, subject to revision by the political process if the people deem their interest to require such revision.

II

The Cause Should Not be Remanded to Take Additional Evidence Under Title VI.

Throughout this litigation respondent has presented a single contention: that petitioner violated his legal rights, in selecting students for admissions, by taking the minority status of some qualified applicants into account to his disadvantage as a non-minority applicant. Respondent made no claim based upon other details of the Task Force program. In this Court, for example, counsel for respondent asserted that he placed no reliance upon the fact that the faculty looked to the admission of a stated number of disadvantaged minority students, provided that they are qualified to matriculate.

The ability of the Solicitor General or another amicus to imagine facts of which they might have offered proof in the trial court under legal theories which they might then have presented should not be used to present new questions, requiring new evidence, never litigated between petitioner and respondent and never decided by the California courts. We cannot think of alternative theories under Title VI or the Fourteenth Amendment which might be submitted, but if any are plausible, they can be adjudicated when a party in interest chooses to present them. Respondent has had his day in the trial court. Nothing he offered was rejected. Having staked his claim, he is bound by it. To invite him to prove different facts in support of a different legal theory which his counsel has never asserted would unfairly protract the litigation in this case and set a bad precedent for others.

No additional evidence or findings of fact are necessary to adjudicate the only claim which the plaintiff-respondent

has presented.[21] The background facts determining the constitutionality of programs whose validity depends upon their functions and effects in a social, economic or political context are properly presented by the briefs of counsel referring to data disclosed by investigations and the writings of informed persons. This material has been fully developed.

Nor is the issue presented feigned or otherwise artificial. It is raised by the Task Force program. It affects countless law schools, medical schools and other institutions of higher education. To delay a decision would require universities to reappraise their minority admissions programs in a climate of legal hostility, facing a virtual certainty of litigation. The consequence could only delay the elimination of racial injustice.

In our reply brief we stated other, substantive reasons why the Court, upon upholding the constitutionality of race-conscious affirmative action programs for the admission of reasonable numbers of qualified minority students, should not go further and lay down subordinate rules "constitutionalizing" and thus "judicializing" the details of the admission practices of State colleges and universities.[22] To pursue that course would not merely invite

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21. It is immaterial that Dean Lowrey's testimony was partly hearsay. The testimony was admitted without objection and therefore should be accorded its material probative effect. *Cf. Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 155 (1941). The facts with respect to the merits have never been disputed in this case.

22. There is an additional reason for not "judicializing" subsidiary questions under Title VI of the Civil Rights Act of 1964. Section 602 makes plain that Congress intended any subordinate rules to be developed through regulations by the administrative agency empowered to extend the federal financial assistance—in this instance, by the Department of Health, Education and Welfare—subject to judicial review. Section 602 directs each agency "to effectuate the provisions of section 601 . . . by issuing rules,

litigation burdening the federal courts; it would curtail the freedom of States to manage their local institutions and also impair the autonomy of both public and privately-endowed institutions of higher education, thereby eliminating one of the great virtues of federalism and sources of creativity in dealing with a complex and subtle problem to which no perfect answer has been found.

III

Respondent Is Barred From Pressing An Independent Claim Under Title VI By His Previous Conduct of This Action.

A. Respondent should not be heard to press a new, independent claim under Title VI for the first time in oral argument in this Court.

The course pursued by the respondent in the California courts leaves him no right to press this Court to decide now whether Title VI imposes more severe statutory restrictions upon the educational freedom of State and privately endowed universities than the standards developed under the Equal Protection Clause.[23] Although respondent's papers below made formal reference to Title VI, along with the Fourteenth Amendment, the substance of his

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regulations, or orders of general applicability." 42 U.S.C. 2000d-1. HEW has issued no rules or regulations governing the details of admission to professional schools which receive federal financial assistance. For the Court to read subordinate requirements relating to the details of admissions programs into section 601 would usurp the administrative function plainly reserved by section 602.

23. We do not know even now whether respondent is actually taking this position. Since he never addressed any argument to Title VI as such throughout the proceedings in the courts below or in any previous briefs in this Court, there has been no adversary development of issues under that statute. Since the present supplemental briefs are being filed simultaneously, we do not know what contentions respondent will now press. This posture reflects the soundness of the Court's jurisdictional rules and practices against considering as present here novel claims not pressed or decided below.

presentation consistently drained the recitals of significance. In the trial court, as that court pointed out, "all of plaintiff's oral argument and written memoranda were directed to a consideration of the Fourteenth Amendment to the U.S. Constitution" (R. 384). In the California Supreme Court, respondent disclaimed any reliance upon the view that Title VI might have independent significance over and above the Equal Protection Clause:

> Because those provisions [Title VI] parallel the fourteenth amendment, we do not separately discuss them. We confine our discussion herein to the scope of the equal protection clause. (Resp. Rep. Brief at p. 2)

Respondent's passing references to the statute in the courts below may have been initially sufficient technically to "raise" the issue. But when he thereafter proceeded not only to focus attention exclusively upon the constitutional question but affirmatively to deny any claim of independent significance for Title VI, he effectively nullified his statutory reference. On these facts, it cannot be said that "any title, right, privilege or immunity . . . under" Title VI was "specially set up or claimed" as required by this Court's jurisdictional statute, 28 U.S.C. § 1257(3), unless that requirement is to be robbed of meaning.

To hold otherwise would disserve the considerations of judicial administration and of sound relations between this Court and state courts which underlie the basic requirement that no federal question may be presented here which was not pressed or passed upon below.[24] To allow a party

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24. *See, e.g., Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927):

> This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here.

to lead State courts not to address an issue, thus bypassing them, and then present it here for the first time as a viable ground for decision would undermine the role and status of those courts and deprive this Court of the benefit of insights gained by successive adversary presentations and decisions upon complex questions.

Even if there is jurisdiction, the question is not properly presented for decision by this Court.[25] The Court confronted a closely similar situation in *McGoldrick v. Compagnie General Transatlantique*, 309 U.S. 430 (1940). In that case, also, the respondent sought to support the judgment below by new contentions in this Court which might technically have been raised below but which respondent had not argued in the highest State court and which were not passed upon by that court. Respondent had stated in its brief to the intermediate appellate court that "The court need give no attention to them." Its brief in the highest State court explicitly limited its presentation to the issue on which that court ruled. This Court refused to entertain the newly urged contentions and passed upon the constitutional question decided below, although its mandate allowed for the possibility that the tardily-adopted claim might still thereafter be passed upon by the state courts on remand. The Court said:

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25. Respondent continued the effect of the course he pursued in the California courts when he failed to present the Title VI issue to this Court, as required by this Court's rules and practices. The petition for certiorari and petitioner's brief on the merits set forth one question presented, that under the Fourteenth Amendment. Respondent set forth in his briefs in opposition to certiorari and on the merits a restatement of the same question, again only under the Constitution, and did not in any way urge the statutory contention. See *Revised Rules of the Supreme Court of the United States* 23(1)(c), 24(1) and (4), 40(1)(d)(2) and 40(3); *Wiener v. United States*, 357 U.S. 349, 351 n. 1 (1958). Respondent also failed to file any cross-petition for certiorari. *Strunk v. United States*, 412 U.S. 434, 437 (1973); *NLRB v. International Van Lines*, 409 U.S. 48, 52 & n.4 (1972).

> . . . In the exercise of our appellate jurisdiction to review the action of state courts we should hold our selves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned. *Id.,* at 435.

Respondent's belatedly-embraced claim in *McGoldrick* was constitutional while in this case it is statutory, but the source of a claim makes no significant difference as to whether it is properly present. See, *e.g., Branzburg v. Hayes,* 408 U.S. 665, 708 (1972); *Wiener v. United States,* 357 U.S. 349, 351 n.1 (1958).

The only argument for a last minute conversion of this case into a dispute over the requirements of Title VI would have to be based upon the general principle, given classic formulation by Justice Brandeis, that "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936). The general validity of the *Ashwander* principle is unquestioned. By its very terms, however, the principle is not applicable in this case, since the alternative nonconstitutional ground is not "also present." See *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 629 (1974) (Equal Protection issue decided; issue of state law "abandoned by the parties" and held not present); see also *McGoldrick, supra.*

In any event, as this Court has pointed out, the *Ashwander* standard is "susceptible of misuse." *Mayor of Philadelphia v. Educational Equality League, supra,* at

629. Its proper force does not foreclose other considerations of sound judicial administration. And for the reasons noted above with regard to appropriate relations between this Court and lower courts, particularly state courts, it would be a misuse of the *Ashwander* principle to consider it governing in this case. That principle has never been a rigid rule universally adhered to. See, *e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964); *Staub v. Baxley,* 355 U.S. 313 (1958).

By his disclaimer of reliance upon Title VI as having any independent significance, respondent has brought about a situation in which none of the complex and ramifying aspects of the statutory issues have been developed in the courts below or even in this Court, prior to the order of October 17, 1977. The result is to deprive this Court not merely of the successive adversary presentations which sharpen analysis but also of the insights and wisdom which might be contributed by the lower courts.

At the same time, the constitutional issues have been fully litigated, not only in this case but once before in this Court. *De Funis v. Odegaard,* 416 U.S. 312 (1974).

B. Respondent's failure to exhaust administrative remedies bars the separate presentation of a Title VI claim in this action.

Consistent with his position that his rights under Title VI were not larger or different in any respect from his rights under the Fourteenth Amendment, respondent neither pleaded nor proved exhaustion of his administrative remedies under Title VI. The record casually reveals that a complaint was made to HEW but there is no record of its disposition (Statement, *supra*).

The failure to exhaust administrative remedies furnishes a short and simple ground for dismissing any new and independent claim which respondent may now seek to press. Even if Title VI gives rise to an implied private right of action, a duty to exhaust administrative remedies before judicial action must also be implied. *North Philadelphia Community Board v. Temple University,* 330 F. Supp. 1107 (E.D. Pa. 1971); *Dupree v. City of Chattanooga,* 362 F. Supp. 1136 (E.D. Tenn. 1973); *Mendoza v. Lavine,* 412 F. Supp. 1105 (S.D. N.Y. 1976); *Johnson v. County of Chester,* 413 F. Supp. 1299 (E.D. Pa. 1976); *NAACP v. Wilmington Medical Center, Inc.,* 426 F. Supp. 919 (D. Del. 1977).

Section 80.7 of the HEW regulations promulgated under section 602 provides such a remedy (45 C.F.R. § 80.7):

> § 80.7 Conduct of investigations.
>
> * * *
>
> (b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint.
>
> * * *
>
> (d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.
>
> (2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

The record does not show the completion of the steps required by this section of the regulations.[26]

The regulations conform to the congressional intention to put primary reliance upon administrative action and voluntary compliance. Section 602 authorizes enforcement by termination of funding or "by any other means authorized by law," but it specifically limits the use of sanctions:

> *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

The legislative history demonstrates the great importance which sponsors of the measure attached to negotiations and voluntary compliance. H. Rep. 914, 88th Cong., 2d Sess., reprinted [1964] U.S. Code, Cong. & Ad. News, 2391, 2401; 110 Cong. Rec. 6546, 13, 700.

The scheme of Title VI and the legislative history thus plainly require that any private right of action assumed to flow from Title VI be conditioned upon the complainant's exhaustion of administrative remedies.

We raise this point for the first time now. Respondent may seek to respond that, having failed to present it below, we should be tarred with our own brush and foreclosed from belated presentation. But the omission was induced by respondent. So long as respondent presented his case upon the theory that Title VI and the Equal Protection Clause have the same meaning, a plea to the Title VI claim alone would serve no purpose because the failure to exhaust

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26. Petitioner has received no later notice of disposition. It seems quite possible that administrative proceedings were halted by the prosecution of this action.

administrative remedies would not affect the Equal Protection aspect. Respondent should not be heard to argue a "new" legal theory yet to shut off the "new" defenses.

CONCLUSION

The heart of our submission is that the kinds of racial discrimination forbidden by Title VI are those condemned by the Fourteenth Amendment. This is the only reading which gives effect to the words, the legislative history, the administrative regulations, and above all the spirit of the Civil Rights Act of 1964.

The Fourteenth Amendment dedicated the Nation to the ideal of equality of opportunity regardless of race, not as a philosophical abstraction but as a vital human condition. Individuals belonging to minorities long victimized by racial discrimination did not have this kind of equality in 1964, and in many phases of American life they do not have it today. The Civil Rights Act of 1964 sought to lower the barriers—to give minorities true equality of access—to voting, to public accommodations, to employment, to federally-assisted programs, and to education. The purpose and effect of the Task Force program at Davis and of minority admissions programs at other universities likewise is to lower the still-existing barriers to full participation.

By taking minority status into account as one factor in filling the limited number of places available—not for the sake of race but to achieve educational, professional and social purposes—universities have begun to demonstrate that the doors to higher education and the professions are in fact open to members of minorities previously denied equality of opportunity because of racial discrimination. The competition for places is so great that a return to once-

conventional standards of selection would severely limit the access of qualified minority students to higher education and virtually bar them from the most highly regarded professional schools. The Fourteenth Amendment permitted—and permits—such voluntary affirmative action. It would indeed "turn the blade inward" to read Title VI of an act designed to give practical effect to the ideal of equal opportunity to require universities to close and lock those once-opened doors.

Respectfully submitted,

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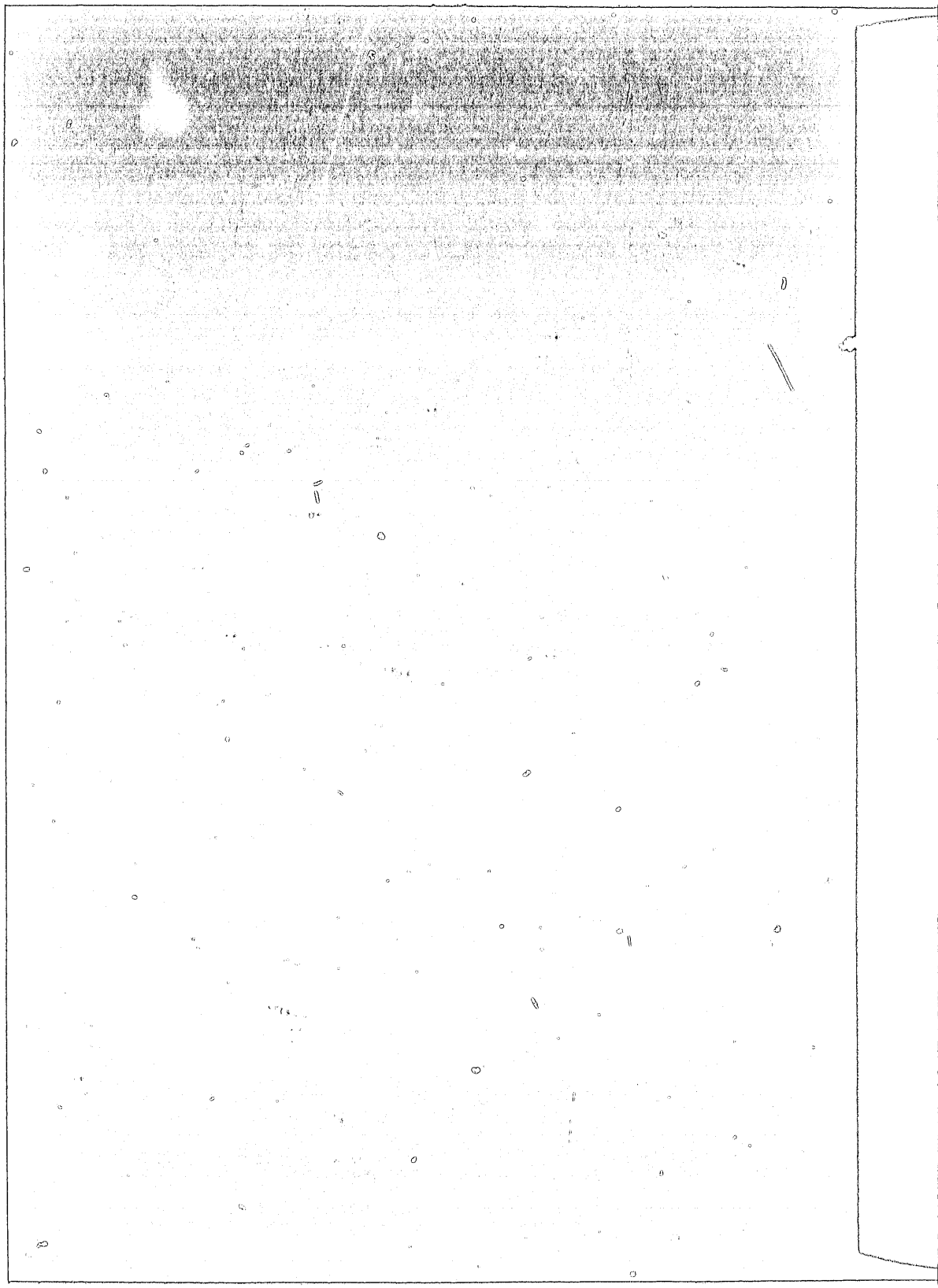
November 1977



Appendix A

Title VI of the Civil Rights Act of 1964, as Amended (42 U.S.C. §§ 2000d-2000d-6)

§ 2000d. *Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin*

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000d-1. *Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action*

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1)

by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 2000d-2. *Judicial review; Administrative Procedure Act*

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to com-

ply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

§ 2000d-3. *Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment*

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

§ 2000d-4. *Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty*

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

§ 2000d-5. *Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged noncompliance with Civil Rights Act*

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated

by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: *Provided,* That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

§ 2000d-6. *Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies—Declaration of uniform policy*

(a) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of

any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

Nature of uniformity

(b) Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements

(c) Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally-assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

Additional funds

(d) It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States.

Appendix B

Regulations of Department of Health, Education and Welfare Pursuant to Title VI of the Civil Rights Act of 1964 (45 C.F.R., Part 80, §§ 80.1-80.13)

§ 80.1 *Purpose.*

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall: on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education, and Welfare.

§ 80.2 *Application of this regulation.*

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, or any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if

Title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

§ 80.3 *Discrimination prohibited.*

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate

in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Fed-

eral financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commence-

ment or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(*a*) Projects under the Public Works Acceleration Act, Public Law 87-658, 42 U.S.C. 2641-2643.

(*b*) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374.

(*c*) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(*d*) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or

other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian Health and Cuban Refugee Services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraphs (a) of this section.

§ 80.4. *Assurances required.*

(a) *General.* (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property

or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of

reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing State programs.* Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United

States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the

satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

§ 80.5 *Illustrative application.*

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by Title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance).

(a) In Federally assisted programs for the provision of health or welfare services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited. This prohibition extends to all facilities and services provided by the grantee under the program or, if the grantee is a State, by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 80.3(e).

(b) In federally-affected area assistance (P.L. 815 and P.L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more

limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

(d) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(e) In grants to assist in the construction of facilities for the provision of health, educational or welfare services,

assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In case of hospital construction grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professionally qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

(f) Upon transfers of real or personal surplus property for health or educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(g) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(h) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not

base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance as respects individuals of a particular race, color or national origin.

(i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

§ 80.6 *Compliance information.*

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set

forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaulating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation. (Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.7 *Conduct of investigations.*

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged

discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidenial except

to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§ 80.8 *Procedure for effecting compliance.*

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this pe[illegible]f at least 10 days additional efforts shall be mad[illegible]suade the recipient or other person to comply witl[illegible]ulation and to take such corrective action as may be appropriate.

§ 80.9 *Hearings.*

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the

record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

§ 80.10. *Decisions and notices.*

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period pro-

vided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in

default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (1) of this paragraph. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record,

in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of subparagraph (1) of this paragraph. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

§ 80.11 *Judicial review.*

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

§ 80.12 *Effect on other regulations, forms and instructions.*

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of De-

fense, of Health, Education and Welfare, and of Labor, 45 CFR Part 70; (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (3) requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 45 CFR Part 181.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this regulation (other than responsibility for review as provided in § 80.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the responsible official of this Department.

§ 80.13 *Definitions.*

As used in this part—

(a) The term "Department" means the Department of Health, Education, and Welfare, and includes each of its operating agencies and other organizational units.

(b) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(c) The term "responsible Department official" means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term "reviewing authority" means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 80.10(a)-(d).

(e) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

(f) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to

be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(h) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(j) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) The term "applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or plan.*

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*Appendix A to the foregoing regulations, "Federal Financial Assistance to Which These Regulations Apply," omitted in printing. See 45 C.F.R. following § 80.13.