C. Civil Rights Act of 1964

1. General

ASSIGNMENT OF TITLES

All extensions are Department of Justice personnel -- RE 7-8200 plus extension or Code 187

I -- Mr. Burke Marshall, Assistant Attorney General, Civil Rights Division -- Ext. 2151

Mr. Harold Greene, Section Chief of Appeals and Research, Civil Rights Division -- Ext. 2175

II -- Mr. Sol Lindenbaum, Office of Legal Counsel -- Ext. 2043

III, IV -- Mr. Norbert Schlei, Assistant Attorney General, Office of Legal Counsel -- Ext. 2041

VI -- Mr. Harold Reis, First Assistant, Office of Legal Counsel -- Ext. 2051

VII -- Mr. Richard Berg, Office of Legal Counsel -- Ext. 2060

V, VIII IX & X -- Mr. Alan Marer, Civil Rights Division -- Ext. 2176

All Titles - Mr. Burke Marshall, Assistant Attorney General, Civil Rights Division - Ext. 2151

Mr. David Filvaroff, Assistant to the Deputy Attorney General - Ext. 2101

ASSIGNMENT OF TITLES

CApitol 4-3121
Code 180

I	Chairman Celler, Mr. Rogers, Mr. Libonati
II	Chairman Celler, Mr. Kastenmeier, Mr. Senner
III	Mr. Rogers, Mr. Gilbert, Mr. Edwards
IV	Mr. Rogers, Mr. Libonati, Mr. Gilbert, Mr. Edwards
V	Mr. Corman, Mr. St. Onge
VI	Chairman Celler, Mr. Rodino, Mr. Libonati, Mr. Corman
VII	Chairman Celler, Mr. Rodino, Mr. Libonati
VIII	Mr. St. Onge, Mr. Sennor
IX	Mr. Kastenmeier, Mr. Gilbert, Mr. Edwards

Chairman Emanuel Celler, New York, Room 347, Ext. 3531

Mr. Byron G. Rogers, Colorado, Room 343, Ext. 3331

Mr. Roland V. Libonati, Illinois, Room 408, Ext. 4931

Mr. Robert W. Kastenmeier, Wisconsin, Room 1725, Ext. 2906

Mr. George F. Senner, Jr., Arizona, Room 444, Ext. 4576

Mr. Jacob H. Gilbert, New York, Room 1723, Ext. 4361

Mr. Don Edwards, California, Room 136, Ext. 3072

Mr. James C. Corman, California, Room 230, Ext. 5311

Mr. William L. St. Onge, Connecticut, Room 1415, Ext. 2076

Mr. Peter W. Rodino, Jr., New Jersey, Room 1607, Ext. 3436

Senate Debate on Treaty 1964

REPUBLICAN CIVIL RIGHTS ASSIGNMENTS (Am. 656)

I. Senator Kenneth B. Keating — Flor Manager, also Hart (D)

Nick II. Senator Roman L. Hruska — Magnuson (D) Flor Manager

III. Senator Jacob K. Javits — Flor. Manager; also Morse (D)

IV. Senator John Sherman Cooper — F-M-also Douglas (D), Flor Manager

Nick V. Senator Hugh Scott — F-M-also Long (D) " "

VI. Senator Norris Cotton — Pastore (D) Flor Manager

Nick VII. Senator Clifford P. Case — F-M-also Church (D) Flor Manager

VIII. — Dodd (D) " "

REPORT OF GERSON B. KRAMER CIVIL DIV. ROOM 3333 & 3402

Congressman James Corman, 22d Dist. California Rm 332 Old HOB (X 5311)

WAGER Spoke to Congressman Corman together with his legislative assistant, Bob Wheeler. Congressman is a member of the Judiciary Committee and at a recent meeting he had titles V and VI assigned to him. He is apparently a floor leader on these titles or on one of them. The congressman and his legislative assistant gave me a long list of information which they want furnished and questions which they desire to be answered. The congressman indicated that he expected assistance from the department and when I arrived he had expected someone from the Department to have contacted him. Apparently someone else has been in touch with him since he expected someone from the Department to furnish him with a large batch of information of some sort. I gave the congressman my phone number as a contact if he wished further information but stated that I would try to get him a direct contact in the department who could answer his subsequent requests for information. The following lists the information desired by Congressman Corman:

Taylor should do

1. When the Civil Rights Commission made its original recommendation on the cut-off of federal funds, it was set forth in a report which contained a great deal of material annexed thereto. This material established various kinds of back-up information on the recommended cut-off. The congressman wants a copy of the report together with all of the extensive back-up material.

Taylor should do This

2. The congressman wants a copy of each annual Civil Rights Commission report since 1957.

3. The congressman wants a history of section V since 1957. In other words a history of the Civil Rights Commission and how many times Congress has taken action extending its life.

?

4. Regarding the subpoena power the congressman wants information and details concerning the subpoena power and the precedents for it. He also wants specific reasons as to why there was a change in the language concerning the subpoena power. He noted the power, while it would extend within a 50-mile area, could cross state lines. He was partly concerned to after learning the reasons for the change in the bill on this point.

Taylor should do

5. The congressman also wants back-up information on the advisory committees. He specifically requested guide lines to be used by the advisory committees. In this connection he mentioned something that did not have any meaning for me but may for someone else. He stated that recently an advisory committee or commission in Utah had taken certain action and now there was a question as to whether the actions taken were proper. He indicated this might become a problem of concern.

6. He further noted section 504 of the bill and section 104(a)(4). He wants to know why these provisions were added and what the reasons were for doing so.

7. On title VI he wants specific examples of how this would be implemented

In other words assuming there was a failure of negotiations for voluntary compliance how would the department take action. What are the various alternative ways of taking the action. How would the cut-off work. For example he stated suppose one county was administering a school milk program in a discriminatory manner. Would the entire state be cut off, just the county, a part of the county etc.

8. Again on title VI he wants some clarification of the extent of judiciary review. He thinks the review is a review of fact only and not a de novo review but is not certain.

Lastly, he asked for a list of the members of the Civil Rights Commission and the staff director together with some biographical information on them.

Congressman Corman is of course extremely well acquainted with the various provisions of the bill and his questions assumed a detailed knowledge of the bill. For this reason it is suggested that he should be contacted directly by someone who might be called an expert on the bill inasmuch as many of his suggestions concerned intricate details of the bill.

Jason B. Fraser

Department of Justice
Washington

March 12, 1964

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

From Burke Marshall

This afternoon I brief Senators Clark and Senator Case on Title VII. The following matters came up on it. I gave commitments to the Senators for memoranda dealing with each point:

(1) A memorandum on the constitutionality of the provisions regarding records inspections. For Senator Case' purposes this should include an analysis also of the provisions which afford protections against burdensomeness, and a comparison of the records keeping and records inspection provisions with those contained in existing laws, such as the Fair Labor Standards Act, the Food and Drug Act, the Income Tax Code and the like. If possible, we should give him statutes which are more stringent in this respect but which were supported by Southern Senators and other Senators opposed to Title VII. The memorandum should also include information on the experience of the President's Committee on Equal Employment Opportunities in regard to records keeping and their reporting requirements.

(2) Senator Case would like us to attempt to get the views of the state and municipal Fair Employment Agencies as to whether or not the enactment of Title VII will interfere with their functioning. Presumably it will not, and obviously the question should not be asked unless we can expect favorable answers.

3

(3) Senator Case would like consideration to be given to whether the Labor Management Relations Act should not be amended to take up appeals based on racial considerations and unlawful practice in union elections. He said he discussed this with Archie Cox in 1961. I understand that the NLRB has already taken some steps in this direction.

(4) A memorandum on the question of whether the provisions for judicial review in Section 603 meet the constitutional requirement of a case or controversy.

(5) A memorandum on why the limitations on Section 602 do not affect the President's Housing Order or his future ability to extend the Housing Order.

(6) A memorandum breaking down the responsibilities of the various agencies which will do civil rights work in the future - the Civil Rights Division, the Civil Rights Commission, Equal Employment Opportunity Commission, the President's Committee on Equal Employment Opportunity, and Community Relations Service. The purpose of the memorandum should be to show, if possible, that these agencies are all necessary, and do not overlap each other.

* * *

These memoranda should be ready by the middle of next week. Could you have them assigned out?

ATTACKS ON THE CIVIL RIGHTS BILL
MADE BY SENATOR THURMOND IN
DEBATE ON MARCH 17, 1964,
AND ANSWERS THERETO

1. Charge: The civil rights bill was railroaded through the House Judiciary Committee. Moreover, not one Senate Committee has had an opportunity to consider the measure.

Answer: A subcommittee of the House Judiciary Committee held 22 days of public hearings on civil rights bills between May 8, 1963 and August 2, 1963. During this period it heard 101 witnesses, including 2 Senators and 26 Congressmen. It received an additional 71 statements from interested parties. The hearings and statements run some 2649 pages of printed record. In addition to the public hearings, the subcommittee studied the bill for 17 days in executive session. The full Judiciary Committee considered the bill in executive session for 7 days. The House Rules Committee held 9 days of public hearings and took testimony from 39 witnesses, covering 518

pages of printed record. A subcommittee of the House Labor Committee heard 33 witnesses in 10 days of public hearings, covering 557 pages of the printed record on a bill to prevent discrimination in employment upon which Title VII of the present bill is in part based. The House of Representatives debated the bill from January 31, 1964 to February 10, 1964. Each title of the bill was debated separately and thoroughly. 155 amendments were submitted, of which 34 were adopted.

The Senate Committee on Commerce held 22 days of hearings on S. 1732, a bill dealing with discrimination in public accommodations. It heard the testimony of 47 witnesses, took 81 additional statements, and compiled a printed record of over 1500 pages. The Senate Labor and Education Committee held 7 days of hearings on S. 1937, a bill to prohibit discrimination in employment, heard 55 witnesses, and supplied a record of 578 pages.

Thus, there were a total of 70 days of public hearings, 275 witnesses were heard, and 152 statements filed. There are almost 6,000 pages of printed record discussing the provisions of the bill.

2. Charge: The bill does not define "discrimination." It would leave to the whim or caprice of a commission or some Attorney General the definition of "discrimination", for the commission of which a citizen could be both fined and imprisoned.

Answer: The word "discrimination" is well known in the law, where it has the meaning Webster gives it: "a distinction, as in treatment; esp., an unfair or injurious distinction." As applied to the Civil Rights Bill, this means that places of public accommodation, in dispensing their goods, services, facilities, advantages or accommodations, could not make distinctions in the treatment of persons on the grounds of their race or color. Institutions which receive financial aid from the government could not make any unfair distinction in the treatment of persons eligible for help under a particular program by denying them benefits because of race or color. Employers and unions covered by the Act could not make distinctions on

the basis of race or color in the treatment of employees, applicants for employment, union members or applicants for union membership.

The bill contains no criminal provisions. Of course, if a suit is brought to enjoin the discriminatory practice, an injunction is issued by a court of competent jurisdiction, and the injunction is violated, the violator can be fined or imprisoned for contempt, in accordance with the provisions of the Act, for violating the court order.

3. Charge: The bill would deprive property owners of their right to use their property as they see fit.

Answer: Most social advances have been opposed by some on the ground that they interfered with rights of private property. The institution of human slavery was defended for centuries on this very ground. More recently, it was charged that the laws abolishing child labor interfered with a property right, that is, the right to profit from the abuse of children. It seems to me that the private property argument is just as baseless here as it was in those cases. All this bill does is to tell an owner of a place which holds itself out as serving the public, that he must deal with all of the public. This does not invade a right of any consequence.

4. Charge: The civil rights bill is based upon a mythological preoccupation with equality. Neither the Constitution nor the Declaration of Independence was concerned with equality of people beyond equal justice under the law. Equality, rather than equal justice under the law, is what the civil rights bill attempts to attain.

Answer: The civil rights bill does not legislate equality. It does implement the principle of equality before the law -- a principle formally embedded in our Constitution with the adoption of the Fourteenth Amendment. The testimony and findings in hundreds of court cases demonstrate beyond the shadow of a doubt that Negroes are being deprived of equal voting rights and equal access to governmental facilities. The civil rights bill would provide a remedy against these abuses; it would rectify some of these injustices.

The bill also attempts to secure equality of opportunity, which long has been a principle underlying our democratic creed. Whatever may be the precise meaning of the statement of the Declaration of Independence that all men are created equal, we have constantly proclaimed our allegiance to the ideal of equal opportunity -- an ideal inconsistent with the refusal, on the basis of race, to hire a Negro, admit him to union membership, or serve him at a lunch counter.

5. Charge: In the case of Taylor v. Board of Education, etc. of New Rochelle, the Court of Appeals for the Second Circuit held that where the student body of a public school had over the years, because of neighborhood changes, evolved from predominantly white to predominantly -- 94 percent -- Negro, the Negro pupils could apply to the Federal court for transfer to a school whose racial makeup was more in accord with their preferences, irrespective of school boundaries or distances involved. The Department of Justice was amicus curiae in that case and no doubt will seek similar results in cases brought by it under Title IV; i.e., it will seek to redress "racial imbalance" in schools.

Answer: Section 401 of the bill specifically states that the term "desegregation" as used in Title IV shall not mean the assignment of students to public schools in order to overcome racial imbalance. Such plans -- if

they are to be considered at all -- are entirely a matter for local decision.

The Department of Justice was asked by the district court to participate as amicus curiae in the New Rochelle case to assist in formulating a decree. The Department's participation in that case is no determinant of its function under Title IV of this bill. Moreover, your characterization of the decision of the court of appeals is both misleading and inaccurate. The Court of Appeals for the Second Circuit did not hold that Negro pupils can come into federal court to get transferred out of a school whose student body had become predominantly Negro because of neighborhood changes. To the contrary, the court specifically held that the school authorities had deliberately gerrymandered the school boundaries so as to perpetuate racial segregation. To require a stop to that type of discrimination is affirmatively seeking to establish racial balance.

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6. Charge: It has been the tendency of commissions set up by various states to end bias in employment, housing, and public accommodations to become increasingly aggressive, seeking more powers and harsher punitive measures for alleged offenders. This undoubtedly will be our experience in setting up the so-called equal employment commission in Title VII of this bill.

Answer: If Congress is displeased by the manner in which a commission established by Congress carries out its responsibilities, or does not agree with a request made by the Commission in the future to expand its role, Congress would have ample opportunity to abolish the Commission, reduce its powers, or refuse its requests.

No
p. 11

7. Charge: Anti-bias commissions set up by various states have sometimes engaged in activities which border on the ridiculous. In one instance, the owner of a little barber shop on Long Island placed a sign in his window reading "Kinky Haircuts $5". The New York State Commission against discrimination took immediate steps to punish him.

Answer: Of course, for the sake of accuracy I feel I should point out that the public accommodations title of our bill would apply only to those barber shops which are part of a facility in interstate commerce, such as a hotel otherwise covered by the title. I do not agree that the commission's action in that instance was unnecessary or unreasonable. If a barber shop is forbidden to discriminate against its Negro customers on account of their race then it follows that it should likewise not be permitted to engage in practices which cause prospective Negro customers to feel embarrassed or to humiliate themselves if they avail themselves of the barbering services tendered by that shop.

Perhaps in this instance the implications of headlining a symbol of racial identification such as the texture of one's hair might have been of such a nature as to warrant the action the commission took. I can envision some Negroes who have been continually subjected to the epithet "kinky-head" as a term of derision would be offended by this sign. Moreover, the $5 charge for such a hair-cuts suggests that this barber is charging Negroes more than he charges whites and this may also have been another reason for the commission's action. In any event, whether one agrees with the decision of the commission or not, the solution can hardly be written off as bordering on the ridiculous or being an abuse of the power vested in the discrimination of the commission.

March 29, 1964

TO: Mr. Harold Greene
Civil Rights Division

FROM: Harold Reis
Office of Legal Counsel

RE: <u>Information for Senator Cooper</u>

Sent copy [illegible]

Morris Wolff of Senator Cooper's office called this morning and advised me that in the eleven States of the Deep South, 31 schools or school districts were desegregated in 1961; 46 were desegregated in 1962; and 161 were desegregated in 1963. He would like to know how many of these were desegregated voluntarily and how many were desegregated as a result of lawsuits.

The purpose of the request is to obtain information useful to counter a claim that sufficient progress is being made in desegregation at the present time and that, therefore, title IV is unnecessary. Any other information relating to the progress of desegregation which would be relevant to this general theme will also be appreciated -- e.g., statistical figures relating to the percentage of schools that actually have been desegregated, the percentage of Negroes attending desegregated schools, etc.

He also wants to know whether testimony [illegible] there is in the record [illegible] that title IV will accelerate desegregation.

Burke Marshall
Assistant Attorney General
Civil Rights Division

May 21, 1964

HHG:AGM:icb

Harold H. Greene, Chief
Appeals and Research Section

Further Desirable Amendments to H.R. 7152

All references are to the revised mimeographed version of the bill.

1. On page 7 of Title II, section 206(b), after the word "section," in the third line of 206(b), add a new clause so that 206(b) would read as follows:

> The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section [,] and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

At the end of the third line of 206(b) strike out the word "and" and capitalize "in," so that immediately following the above new language the sentence would begin as follows: "In any such proceeding the Attorney General . . .," etc.

It would also be desirable to clarify section 207(a) by adding a new clause so that the section would read as follows:

> Except as expressly provided in sections 204(c) and (d) of this title, [The] the district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

cc: Records
Chrono
Greene
Marer

6

The same problem arises in even more critical form in Title VII. Unlike Title II, Title VII does not contain a general no-exhaustion rule applicable to the entire Title. And section 707(b), dealing with suits by the Attorney General, merely declares that the district courts "shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. . . ." The same no-exhaustion language added to section 206(b) should be added to 707(b) (on page 17 of Title VII, after the word "section" in the third line of 707(b)).

A similar problem arises in Titles III and IV and can be cured by adding the same no-exhaustion language on page 1 of Title III, sixth line from the bottom of the page, section 301(a), after the word "section", and by adding the identical language in line 2 on page 5 of Title IV, again after the word "section."

In each case the comma appearing after the word "section" should be deleted and the sentence should end after the no-exhaustion rule is stated.

2. On pages 1 and 2 of Title III and page 5 of Title IV identical language is used to describe the circumstances in which the Attorney General may "deem" a person or persons "unable to initiate and maintain appropriate legal proceedings." This should be revised to read as follows:

> The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section [when] whenever he is satisfied that such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation [;], or [whenever he is satisfied] that the institution of such litigation would jeopardize the personal safety, employment or economic standing of such person or persons or their families, or would result in injury to their property.

3. On page 5 of Title I, section 101(d), dealing with expedition of voting suits, change the beginning of the second paragraph of the new subsection (h) to read as follows:

> In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or [In] in the event neither the Attorney General nor any defendant files a request for a three-judge court in any [such proceeding,] proceeding as authorized by this subsection, it shall be the duty of. . . .

4. On pages 4 and 5 of Title I, change the first sentence of the new subsection "(h)" to read as follows:

> (h) In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General or, within ten days, any defendant in the proceeding may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case.

5. On page 5 of Title I change the sentence "An appeal from the final judgment of such court will lie to the Supreme Court" so that it reads as follows:

> An appeal from any interlocutory or final judgment of such court will lie to the Supreme Court.

6. On page 8 of Title II, change the sentence "An appeal from the final judgment of such court will lie to the Supreme Court." so that it reads as follows:

> An appeal from any interlocutory or final judgment of such court will lie to the Supreme Court.

7. On page 4 of Title IV, insert the word "been" after the word "not" on line 10, so that Section 407(a)(2) would read as follows:

> (2) signed by an individual, or his parent, to the effect that he has been denied admission to or not been permitted to continue in attendance at a public college by reason of race, color, religion, or national origin.

8. On page 5 of Title IV, substitute the word "add" for the word "implead" on line 9, so that the last sentence of Section 407 reads as follows:

> The Attorney General may [implead] add as defendants such additional parties as are or become necessary to the grant of effective relief.

9. On page 18 of Title VII, change the words "An appeal from the final judgment of such court will lie to the Supreme Court" to read as follows:

An appeal from any interlocutory or final judgment of such court will lie to the Supreme Court.

Comments on Senator Dirksen's Observations — Pre-introduction 9 Jan 1964

Title I

1. The only objection made to the scope of Title I relates to the authorization for a district court of three judges in voting cases. It is suggested that this provision will have an adverse impact upon federal court case loads.

The history of enforcement of the 1957 and 1960 Civil Rights Acts shows that practically every voting suit brought by the government has been appealed to a court of appeals. The three-judge court provision will eliminate the intermediate appellate stage and simply shift some of the burden now carried by appellate judges sitting at the court of appeals level, to the same appellate judges and some trial judges sitting as a three-judge court at the trial level. Considered on an over-all basis it may be doubted that the three-judge provision will seriously increase the burden on federal judges as a whole.

In any event, the importance of voting cases to the public interest obviously transcends that of cases brought by private litigants in such matters as personal injury compensation cases. While these

private suits are of very great importance to the individual plaintiffs involved, surely the deprivation of the right to vote of hundreds of thousands of Negro citizens is more significant to our governmental system as such. Moreover, whatever may be said about relative importance, it can hardly be denied that voting cases should be entitled to speedier consideration than ordinary, private lawsuits. Voting rights which cannot be exercised while lawsuits wind their ways through the courts can never be regained. On the other hand, in almost all other instances, money damages will compensate for the loss sustained. While delay is regrettable in either situation, delay in obtaining a money judgment which eventually will be secured, perhaps with interest, is less serious than delay in the vindication of rights which, to the extent of the delay, are irretrievably lost.

2. The original bill required the convening of a three-judge court in voting cases only upon the application of the Attorney General. The House of Representatives granted the same authority to the defendant, on the theory that it would be inequitable to permit the Attorney General to demand such a court

while denying the defendant the same opportunity. While the House amendment is somewhat unusual, it does not appear objectionable either to the Administration or to Senator Dirksen.

Title II

Senator Dirksen did not comment upon this title but declared that he is still studying it and would have a substitute to be presented later.

Title III

1. Senator Dirksen's first observation is that problems may arise concerning the meaning of the right granted by section 301(a) of Title III to the "full and complete utilization of any public facility . . . ." It is suggested that the phrase "full and complete" be replaced by some word such as "equal." The object of the language of section 301(a) is to grant the Attorney General power to enforce the constitutional right of Negroes to use public facilities on precisely the same basis as anyone else. The word "equal", standing alone, may suggest that public parks, for example, must admit Negroes half the time and whites the other half the time but need not admit

both groups at the same time. In other words, such terminology may open the door to separate-but-equal treatment which, of course, is now unconstitutional. This provision in section 301(c) may be contrasted with section 301(a) of Title II, dealing with public accommodations, which provides that all persons shall be entitled to the "full and equal enjoyment" of such places. Perhaps the language used in Title II could also be used in Title III if the present wording is deemed objectionable as long as it is made clear that the bill does not validate the practice of maintaining separate-but-equal facilities.

2. Senator Dirksen's next observation about Title III is that "complaints" filed with the Attorney General pursuant to section 301(a) should be under oath and should set out "the particulars of the alleged violation so that anyone defending an action brought against him under this Title would be informed of the nature of the charge against him and the identity of his accuser." Such a requirement is probably unwise and unnecessary.

First, many persons denied access to public facilities will probably not be sufficiently well-educated to describe in great detail what happened to

them, and unless a very good reason exists for requiring such specificity it should be avoided for that reason. Second, no compelling reason for such a requirement would appear to exist. Before the Attorney General files a suit he will conduct an investigation to

determine whether the complainant was in fact and law deprived of a right under section 301. If the investigation does not reveal a violation the Attorney General will not institute a suit. If the Attorney General determines after investigation that a violation occurred and that all of the other requirements for instituting a suit set forth in section 301(a) have been met, he will then file a complaint in federal district court. This complaint will necessarily set forth a claim for relief, as required by the Federal Rules of Civil Procedure, sufficiently specific to permit the defendant to file an answer, as is done in every other civil action in the district court. This complaint will apprise the defendant of the particulars of the alleged violation and the nature of the charge. Indeed, this will be the first time that the defendant will have to meet any charge. The earlier stage will be merely informational to the Attorney General. There is no need to subject the complainant to possible reprisals at that stage of the matter, when, to repeat, there is as yet no real charge against anyone.

3. Senator Dirksen also suggests that the authority granted the Attorney General by section 302 to intervene in private lawsuits involving the "denial

of equal protection of the laws on account of race, color, religion, or national origin," should be limited so that the parties to the suit should have a chance to be heard with respect to such intervention before it takes place."

The object of section 302 is to permit the Attorney General to intervene as of right in such cases. Senator Dirksen's suggestion would appear to change that basic conception by permitting duplicate litigations once on the intervention question and then again on the lawsuit itself. Such a limitation would, of course, be difficult to enact without standards to guide the district courts in granting or refusing intervention. Moreover, the considerations governing the question whether the Attorney General ought to intervene are necessarily of such a nature that he--and not the courts--ought to decide that question, as the present section 302 provides. Surely there can be no valid objection to permitting the chief law enforcement officer of the United States Government to intervene as a litigant in a suit involving constitutional rights of this nature in a federal district court. Moreover, other statutes allowing the Attorney General

or other government agencies to intervene in district court cases do not circumscribe Executive officials in this way. See, for example, 28 U.S.C. 2403; 28 U.S.C. 2323. Such a restriction would be an unusual intervention of the Judiciary in determinations traditionally made by the Executive.

Title IV

1. One of the objections is that the definition of "public school" in section 401(c) encompasses private schools through the twelfth grade. This subsection provides that:

> 'Public school' means any elementary or secondary education institution, and 'public college' means any institution of higher education or any technical or vocational school above the secondary school level, operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or property derived from a governmental source.

Apparently the Senator reads the language following the comma after the word "level" to modify only the definition of "public college" and not the definition of "public school." The definition is not intended to have that result.

The comma appearing after the word "level", is intended to convey that the language "operated by a state, etc." modifies both preceding clauses which are separated by commas. If no comma appeared after the word "level" there would of course, be very good grounds for a contrary view. But as the sentence is now structured, it means that a public school is one "operated by a state, subdivision of a state, or governmental agency within a state, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source." An additional reason for this interpretation is that the Congress probably lacks power, under the Fourteenth Amendment, to require desegregation in primary and secondary schools having no governmental connections.

In any event, if any question remains on this matter, there certainly would be no objection to making it quite explicit, either by a principal spokesman for the bill on the Senate floor or by some other means that private schools shall not be affected.

2. Along the same lines, Senator Dirksen asks whether "the use of federal funds and property by a private military academy in their ROTC program

bring them with[in] the broad language in lines 9 and 10 on page 14?" Lines 3 through 10 on that page define a public school as one "operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source." The phrase "wholly or predominantly" modifies not only "from or through the use of governmental funds or property", but also the phrase "or funds or property derived from a governmental source." It would hardly be sensible to limit the application of desegregation requirements to schools operated wholly or predominantly with support from governmental funds or property, while reaching all schools which operate with funds or property derived from governmental sources, no matter how limited such support might be. The intent of the bill is to treat both categories alike, as they should be.

3. The Senator also suggests that the provisions authorizing technical assistance and training institutes (sections 403 and 404), do not spell out the costs and expense of such programs.

First, Congress will, of course, have to appropriate funds to finance the bill. At that time,

it may be as specific as it chooses in describing how such funds should be employed.

Second, the bill does, in fact, set forth certain guide lines for the Commissioner. For example, section 403 dealing with technical assistance provides that:

> Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

Furthermore, in section 404, dealing with training institutes, the Commissioner is authorized to arrange "for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation." This language is considerably more specific than guide lines set down for federal agencies in many other federal statutes.

These provisions are as specific as the nature of the situation to be dealt with permits. Obviously, any determination under these provisions

will require experience. Congress will always retain the ultimate authority when it disagrees as to the extent of federal involvement in these matters.

4. Senator Dirksen also suggests that perhaps the stipends for persons attending training institutes referred to in section 404 should be more carefully controlled. The Senator is concerned with the possible abuse of such payments by turning these institutes into a summer holiday at the taxpayers' expense. Certainly no such use of tax money is contemplated by section 404 or should be allowed. While there is no reason to assume that such abuses will occur, if there is any question about it at all, the matter could be spelled out in legislative history or otherwise.

5. Senator Dirksen's next objection is that "the complaint" to be filed with the Attorney General alleging a denial of equal protection in school assignments requires only a "general allegation" of discrimination.

It is suggested that the complaint should be made under oath and should contain a "detailed description of the act or actions complained of." Apparently it is thought that this will give the school board "some opportunity to correct the situation complained of before the Attorney General institutes suit."

For reasons already given with respect to a similar suggestion dealing with Title III, we do not believe that great specificity should be required of complaints filed with the Attorney General. Beyond that, however, the specificity of the complaint has no relation to whether the school board charged with malfeasance should be given an opportunity to cease discriminating before the Attorney General sues. It has been the invariable policy and practice of the Administration, in its enforcement of the voting statutes, to advise voting registrars that their conduct is deemed illegal and to given them an opportunity to correct their practices before suit is filed. Needless to say this practice will undoubtedly be followed under Title IV.

6. The Senator also suggests that the Attorney General might have the power under section 407 to sue to eliminate "racial imbalance" in public schools, indicating

that the explicit disclaimer of any such power in section 401(b) does not limit the power to sue granted in section 407(a).

Section 401(b), in defining "desegregation," declares that desegregation "shall not mean the assignment of students to public schools in order to overcome racial imbalance." Under section 407 the Attorney General may sue when a school board has failed "to achieve desegregation" and when "the institution of an action will materially further the public policy of the United States favoring the orderly achievement of desegregation . . . ." In other words, the Attorney General's authority to institute a suit is limited to relief achieving "desegregation" which is specifically declared in the bill to exclude achieving "racial balance."

7. The Senator states that consideration should be given to a suggestion by columnist Joseph Alsop that the school problem should be tackled by investing much more money in schools in deprived neighborhoods. Full support should be given for any effort to improve such schools and to raise them to the level of our best educational institutions. But

MEMORANDUM DESCRIBING CHANGES IN
H.R. 7152 EMBODIED IN AMENDMENT
No. 656 OFFERED BY SENATORS DIRKSEN,
MANSFIELD, HUMPHREY, AND KUCHEL

The purpose of this memorandum is to summarize the more important changes that have been made in the House bill and which are now embodied in amendment No. 656, in the form of a substitute bill, offered on May 26 by Senators Dirksen, Mansfield, Humphrey, and Kuchel.

While many changes have been made in the bill most of them are designed simply to clarify what was already understood to be the meaning of the text. These are the changes that Senator Saltonstall referred to as "purifying" amendments.

The principal substantive changes occur in Titles II and VII -- dealing with public accommodations and equal employment opportunity. There is no change in the coverage of Title II, and only minor revisions in the coverage of Title VII. The principal changes have to do with how the rights guaranteed by these two titles are to be enforced.

In both titles, provisions have been inserted to give states which have public accommodations or fair employment practices laws a reasonable opportunity to act under state law before activating any federal

conciliation machinery or authorizing the filing of lawsuits in federal courts by individuals who allege discrimination.

The revised public accommodations title would provide that, in states or localities which have their own public accommodations laws, no private civil action for injunctive relief may be brought in federal court until thirty days after the individual aggrieved has notified state authorities of the alleged discriminatory act. After expiration of the thirty-day period a suit may be filed without further delay, but the court may stay the proceedings pending the termination of state or local enforcement proceedings.

Under the equal employment opportunity title the state has 60 days to act, or 120 days during the first year the state law is in effect. After expiration of the 60 or 120 day period the Commission will have thirty more days (which may be extended to 60 days) to seek voluntary compliance. If that fails a suit may be filed in the district court by the person aggrieved. The court may appoint counsel in a proper case and may also permit the Attorney General to intervene. Upon request the court may stay proceedings, for not more than sixty days, pending termination

of state or local proceedings or further Commission efforts to seek voluntary compliance.

In states which do not have fair employment practices laws the federal commission would take jurisdiction immediately and if voluntary compliance cannot be obtained within thirty days (which may be extended to 60 days) a private suit may be instituted, subject to the same rules already noted. In states which do not have public accommodations laws a private civil action may be filed without any delay but the court may refer the matter to the Community Relations Service (to be established by Title X of the bill) for not more than sixty days, or if there is a reasonable possibility of securing voluntary compliance after the expiration of the sixty-day period, for an additional sixty days.

Ordinary lawsuits under both Title II and Title VII are required to be initiated by the individual who alleges discrimination, rather than by the Attorney General or the Commission. However, power is given to the Attorney General in both Titles II and VII to sue, without delay or without reference to state authorities, wherever he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights" secured by those titles.

The power of the Attorney General is designed, as the language indicates, to confine his authority to sue to cases where something more than an isolated instance of denial of rights is involved. Thus, the Attorney General could sue, for example, in cases where a single business repeatedly refuses service to Negroes, where a number of establishments in the same line of business refuse to obey the law, or where a number of stores in a chain are recalcitrant. It is essential that the Attorney General have such power if this law is to be effectively enforced throughout the United States.

The other principal changes are discussed below on a title by title basis.

TITLE I: The requirement that literacy tests be in writing unless an individual requests an oral test is changed to eliminate the oral test exception, but the Attorney General is authorized to agree with state and local authorities that their practice pursuant to state or local law is consistent with the purpose of this provision. This change is designed to avoid an undue burden upon states or localities where there is no discrimination in the use of such tests.

A second change has been made with respect to the three-judge court provision. A three-judge court can be demanded by the Attorney General or by any

defendant only in cases in which the Attorney General alleges a pattern or practice of discrimination.

TITLE II: The principal changes in Title II have already been discussed. The Attorney General's power to bring suit is set out in section 206 and he is permitted to ask for a three-judge court in any such proceedings whenever he also certifies that the case is of general public importance. The same is true under section 707 of Title VII.

TITLE III: The changes in Title III are "purifying" only. Section 302 has been deleted in this title but reappears as Section 902.

TITLE IV: The changes in Title IV are all designed to clarify the original intention. None of these seem controversial, although they do help to meet some criticisms by clarifying the language in a number of places so as to make doubly clear that the Attorney General is not empowered to sue to remedy alleged racial imbalance in public schools. Another change specifies that he should give school authorities a reasonable time to adjust the complaint of discrimination.

TITLE V: Title V has been extensively re-written and the rules of procedure of the Commission hearings set out in more detail. These clarifications

have been designed to meet criticism which some have expressed as to the need for fair procedures. All are consistent with the way in which the Commission has in fact conducted its operations.

In addition, the duties of the Commission have been changed to make its functions more precise.

TITLE VI: The changes in Title VI are designed to clarify what has always been the intention of the bill; that is, to insure that only the part of a program or activity in which discrimination is found is curtailed and that discrimination in one program or part of a program cannot result in funds being withheld from other programs or from other parts of the same program within a state.

TITLE VII: A large number of technical amendments have been made in Title VII, and reference has already been made to the principal changes in this title. The other changes of substance are as follows:

1. Section 701(b) changes the definition of an employer of 25 or more persons to "a person . . . who has 25 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

2. Another change insures that union hiring halls are prohibited from discriminating.

3. Section 702, which exempts religious corporations, has been clarified to insure that such corporations are only exempt with respect to positions which are related to the religious activity.

4. Educational institutions are similarly exempted with respect to positions which are related to educational activity. This is the principal change in the coverage of Title VII.

5. The title is changed to insure that certain traditional prerogatives of tribal Indians are not affected.

6. The provision with respect to atheism has been deleted, and a new provision, paralleling that regarding membership in the Communist Party, has been inserted to insure that it is not an unlawful employment practice to fail to employ or discharge persons on security grounds wherever required by statute or executive order. There is nothing in the Act which would have made this an unlawful employment practice, but some persons wished to see it stated explicitly.

7. Section 703(g) adds the word "intentionally" to make it clear that it is not an unlawful employment practice to discriminate inadvertently or without knowledge of the pertinent facts.

8. The record-keeping provisions of section 709 have been considerably modified to insure that in states which have fair employment practice laws duplicate records will not have to be kept and that compliance with state record keeping requirements will by and large satisfy the federal requirements.

9. The investigation powers of the Commission have been rewritten in their entirety. Section 710 now provides that the Commission, if it seeks to enforce a failure to comply with its demands for documents or the testimony of witnesses, must first go to court and secure a court subpoena. The Commission may, however, formally demand certain documents of any respondent and if the respondent has objections to the demand he is required to go to court within 20 days or else waive his objections to a subsequent court order.

This is similar to the powers possessed by the Department of Justice with respect to civil investigative demands but is more limited than the powers originally given to the Commission and already possessed by the Federal Trade Commission and the Federal Power Commission

10. Another change makes clear that differences in compensation or conditions of employment resulting from a bona fide seniority or merit system, or piece work system, or from differing locations of places of employment, do not amount to unfair employment practices if they are not the result of an intention to discriminate on account of race, color, religion, or national origin.

11. Another revision makes clear the original intention that nothing in Title VII requires any action by employers, unions, employment agencies, or joint labor-management committees to overcome racial imbalance.

TITLE VIII. An addition has been made to Title VIII to apply the compulsory disclosure and confidentiality provisions of the census law to the voting survey to be conducted by the census bureau. A further change provides that no person shall be required to disclose his race, color, national origin, party affiliation, or how or why he voted.

TITLE IX. Section 902, which grants to the Attorney General the right to intervene in racial equal protection cases, replaces the original section 302 and is without substantive amendment. But the Attorney General may intervene only if he certifies that the case is of general public importance.

TITLE X. Title X has been amended to eliminate the restriction on the Community Relations Service to a total personnel of six, plus the Director.

TITLE XI. The Dirksen-Mansfield jury trial amendment has been incorporated as a new section 1101(a). It provides that in any case arising under the provisions of the bill charging an individual with criminal contempt which is tried without a jury the maximum aggregate fine shall be $300 and the maximum cumulative term of imprisonment shall be 30 days.

C. Civil Rights Act of 1964

2. Title VI: Nondiscrimination in Federally Assisted Programs

NAS:JLM:agg December 2, 1963

Congressman Emanuel Celler
Chairman, Committee on the Judiciary
House of Representatives
Washington 25, D. C.

Dear Mr. Celler:

This is in response to your request for a list of programs and activities which involve federal financial assistance within the scope of Title VI of the proposed Civil Rights Bill, H.R. 7152.

For the reasons outlined below, it has been found to be impossible to compile any list which is accurately responsive to your request or satisfactorily representative of the amounts of Federal financial assistance which potentially could be affected by the provisions of Title VI. The list attached should not, therefore, be taken at face value or used without an understanding of its limitations.

Title VI, as set forth in Committee Print No. 2, dated October 30, 1963, provides in part:

"SEC. 601. Notwithstanding any inconsistent provision of any other law, 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."

"SEC. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, contract, or loan, shall take action to effectuate the provisions of Section 601 with respect to such program or activity. . . ."

Title VI would apply to programs and activities which receive federal financial assistance, by way of grant, contract or loan. I attach a list of appropriations, revolving funds, and trust funds, part or all of which may involve such federal financial assistance. The list is keyed to

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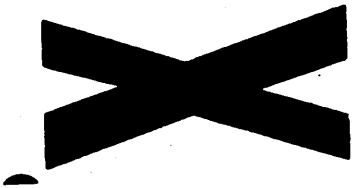
to line items in the 1964 Budget, and is based on financial data furnished by the Bureau of the Budget. The following, however, were omitted: (1) new programs which, although listed in the budget, are not yet authorized and are the subject of proposed legislation and (2) programs which were in liquidation after fiscal year 1962. A program description for each item can be found in the Appendix to the 1964 Budget on the page indicated after the program title on the attached list.

The dollar figures in the table are the preliminary actual expenditures for the fiscal year 1963 as reported by the Treasury Department. In the case of revolving and trust funds, the expenditures shown are on a net basis except in the case of two trust funds indicated by footnotes in the attached table, which are shown on a gross expenditure basis in the budget and Treasury reports. Minus figures indicate net revenues.

The following comments and observations are applicable to the attached table.

1. Activities wholly carried out by the United States with federal funds, such as rivers and harbor improvements and other public works, defense installations, veterans hospitals, mail service, etc. are not included in the list. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving federal assistance. While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of Title VI. 1/

1/ Reclamation projects have, however, been included because they may include construction under contract of some facilities which will be operated and ultimately owned by non-federal entities, and may to that extent be considered to involve a form of financial assistance to such entities.



THE REPRODUCTION OF THE FOLLOWING DOCUMENTS CAN NOT BE IMPROVED DUE TO THE CONDITION OF THE ORIGINAL.

For similar reasons, ordinary procurement is not considered to be subject to Title VI. All such direct activities of the federal government are, of course, subject to the Constitutional requirement of nondiscrimination embodied in the Fifth Amendment; in addition contracting related to them is subject to the nondiscrimination requirements of Executive Order 10925 and would be subject to the authority conferred by Section 711(b) of H.R. 7152.

2. [A number of programs administered by federal agencies involve direct payments to individuals possessing a certain status. Some such programs may involve compensation for services rendered, or for injuries sustained, such as military retirement pay and veterans' compensation for service-connected disability, and perhaps should not be described as assistance programs; others, such as veterans' pensions and old age, survivors and disability benefits under Title II of the Social Security Act, might be considered to involve financial assistance by way of grant. Due to the extent that there is financial assistance in either type of program, the assistance is to an individual and not to a "program or activity" as required by Title VI. In any event, Title VI would not substantially affect such benefits, since these payments are presently made on a nondiscriminatory basis, and since discrimination in connection with them is precluded by the Fifth Amendment to the Constitution, even in the relatively few instances in which they are not wholly federally administered.] Accordingly, such programs are omitted from the list. For similar reasons, programs involving direct federal furnishing of services, such as medical care at federally owned hospitals, are omitted.

3. Programs of assistance to foreign countries, to persons abroad, and to unincorporated territories and possessions of the United States, are omitted, since the application of Title VI is limited to persons in the United States. Programs of assistance to Indians are also omitted. Indians have a special status under the Constitution and treaties. Nothing in Title VI is intended to change that status or to preclude special assistance to Indians. Programs which involve federal payments to regular school districts which

provide education to Indians as well as non-Indians have, however, been included since such programs can be regarded as a form of assistance to the school district.

4. The dollar amounts shown do not in each case afford a reliable indication of the magnitude of the assisted program or activity. In a number of cases, the total federal expenditures for a given line item in the Budget have been shown even though only a small portion or aspect of the program covered by that line item might involve financial assistance within the scope of Title VI. 2/ On the other hand, certain very large items which may involve relatively very small amounts of federal financial assistance, have been omitted to avoid undue distortion. Examples include: AEC, a small part of whose expenditures may have been spent on assistance payments to states, localities, and private entities; research and development activities related to national defense and other direct governmental functions, a small part of which involve grants, fellowships and other assistance payments; and procurement, some part of which may conceivably be considered to involve special assistance to contractors. Similarly, while programs involving donation of commodities in kind would appear to be within the scope of Title VI, and such programs have been included in the attached list where clearly identifiable, no attempt has been made to identify, or place a dollar figure on, all programs involving donation of property, or disposition at less than fair value.

5. It should not be assumed that each program shown on the attached list will be significantly affected by the enactment of Title VI. Title VI expresses a general, across-the-board government policy, which has potential impact on a

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2/ For example, the item listed as "forest protection and utilization" under the Department of Agriculture is shown at its total 1963 expenditure of $197,342,982 although only a small amount of that total is to be spent for state and local grants which come within the scope of Title VI.

Costs of administration have also been included except where they appear as a separate line item in the Budget.

great number and variety of programs. The attached list attempts to identify those programs which might potentially be affected, although some may have been overlooked. In fact, however, Title VI is expected to have little practical impact on many of the programs listed, for the reason that they are now being administered in a manner which conforms with the policy declared by Title VI. Indeed, explicit nondiscrimination policies have been adopted by executive action in recent years in many areas, including housing, airports, and employment on federally assisted construction, while other programs either do not present practical possibilities for discrimination, or have long been administered in ways which preclude discrimination.

The impact of Title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, Title VI will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by Title VI would apply. For example, the purpose of benefit payments to producers of agricultural commodities, under 7 U.S.C. 608, is to "establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602. The Act is not concerned with farm employment. As applied to this federal assistance program, Title VI would preclude discrimination in connection with the eligibility of farmers to obtain benefit payments, but it would not affect the employment policies of a farmer receiving such payments.

The effect of Title VI, on most of the programs shown on the attached list, will be to provide statutory support for action already being taken to preclude discrimination, to make certain that such action is continued in future years as a permanent part of our national policy, and to require each department and agency administering a program which may involve federal financial assistance to review its administration to make sure that adequate action has been taken to preclude discrimination and to take any action which may be shown to be necessary by such review.

In addition, Title VI will override those provisions of existing federal law which contemplate financial assistance to "separate but equal" facilities. Assistance to such facilities appears to be contemplated under the Hill-Burton Act (42 U.S.C. 291e(f) - hospital construction), the second Morrill Act (7 U.S.C. 323 - land grant colleges) and Public Law 815 (20 U.S.C. 636(b)(3) - school construction). The United States Court of Appeals of the Fourth Circuit has recently held the "separate but equal" provision of the Hill-Burton Act unconstitutional. Simkins v. Moses Cone Memorial Hospital, decided Nov. 1, 1963. Title VI would override all such "separate but equal" provisions without the need for further litigation, and would give, to the federal agencies administering laws which contain such provisions, a clear directive to take action to effectuate the provisions of Title VI.

I regret that it is impossible to supply more meaningful dollar figures with respect to programs of assistance potentially affected by Title VI. As indicated, the amounts set out in the accompanying chart are almost all total expenditure figures, rather than the considerably smaller portions thereof which could be affected by Title VI. Of course, most of the programs of Federal assistance included on the list are already administered on a non-discriminatory basis, and, thus, though within the literal scope of Title VI and included on the list, would not be affected by enactment of the Title. I particularly stress the regrettable, though unavoidable, difficulties inherent in the attached list in order to forestall any misunderstanding or distortion of its significance or meaning by either proponents or opponents of the legislation.

Sincerely yours,

Nicholas deB. Katzenbach
Deputy Attorney General

PROGRAMS WHICH MAY INVOLVE FEDERAL FINANCIAL ASSISTANCE

EXECUTIVE OFFICE OF THE PRESIDENT

	1963 expenditures
Office of Emergency Planning	
State and local preparedness (p. 52)	-0-

FUNDS APPROPRIATED TO THE PRESIDENT

Disaster Relief	
Disaster relief (p. 59)	$30,802,990
Expansion of Defense Production	
Revolving fund, Defense Production Act (p. 60)	-56,513,274
Public Works Acceleration	
Public works acceleration (p. 86)	61,843,808
Transitional Grants to Alaska	
Transitional grants to Alaska (p. 87)	3,110,295

DEPARTMENT OF AGRICULTURE

Cooperative State Experiment Station Service	
Payments and expenses (p. 95)	37,992,460
Extension Service	
Cooperative extension work, payments and expenses (p. 96)	74,687,584
Soil Conservation Service	
Watershed protection (p. 100)	53,092,516
Flood prevention (p. 103)	26,488,410
Great Plains conservation program (p. 104)	9,747,075
Resource conservation and development (p. 105)	-0-

DEPARTMENT OF AGRICULTURE (Continued)

	1963 expenditures
Agricultural Marketing Service	
Payments to States and possessions (p. 113)	$ 1,432,763
Special milk program (p. 113)	95,369,634
School lunch program (p. 114)	169,597,189
Removal of surplus agricultural commodities (p. 116)	131,805,115
Agricultural Stabilization and Conservation Service	
Expenses, Agricultural Stabilization and Conservation Service (p. 122)	87,415,517
Sugar Act program (p. 125)	76,929,888
Agricultural conservation program (p. 125)	211,194,214
Land-use adjustment program (p. 127)	2,000,000
Emergency conservation measures (p. 127)	2,701,427
Conservation reserve program (p. 127)	304,342,305
Commodity Credit Corporation	
Price support and related programs and special milk (p. 132)	3,486,356,042
National Wool Act (p. 137)	69,164,861
Rural Electrification Administration	
Loan authorizations (p. 148)	331,656,082
Farmers Home Administration	
Rural housing grants and loans (p. 151)	184,203,524
Rural renewal (p. 153)	-0-
Direct loan account (p. 153)	58,948,965
Emergency credit revolving fund (p. 156)	7,888,613
Rural housing for the elderly revolving fund (p. 155)	-0-
Forest Service	
Forest protection and utilization (p. 170)	197,242,562
Assistance to States for tree planting (p. 176)	1,203,697
Payments to Minnesota (Cook, Lake and St. Louis Counties) from the national forests fund (p. 177)	125,366
Payments to counties, national grasslands (p. 177)	393,674
Payments to school funds, Arizona and New Mexico, Act of June 10, 1910 (p. 177)	80,462
Payments to States, national forests fund (p. 177)	27,235,140

DEPARTMENT OF COMMERCE

	1963 expenditures
Area Redevelopment Administration	
Grants for public facilities (p. 188)	476,848
Area redevelopment fund (p. 188)	-499,532
Office of Trade Adjustment	
Trade adjustment assistance (p. 202)	2,820
Maritime Administration	
Ship construction (p. 223)	107,483,152
Operating-differential subsidies (p. 224)	220,676,686
Maritime training (p. 227)	3,297,777
State marine schools (p. 227)	1,420,724
Bureau of Public Roads	
Forest highways (p. 237)	38,525,999
Public lands highways (p. 239)	2,128,990
Control of outdoor advertising (p. 239)	-0-
Highway Trust Fund (p. 241)	3,017,268,879 1/

DEPARTMENT OF DEFENSE

Military personnel	
National Guard personnel, Army (p. 253)	212,109,751
National Guard personnel, Air Force (p. 254)	45,366,036
Operation and maintenance	
Operation and maintenance, Army National Guard (p. 267)	174,059,283
Operation and maintenance, Air National Guard (p. 268)	193,258,395
National Board for Promotion of Rifle Practice, Army (p. 269)	650,368
Military construction	
Military construction, Army National Guard (p. 306)	18,383,216
Military construction, Air National Guard (p. 306)	21,912,946

1/ This amount is on a checks-issued (gross) basis. Receipts (collections deposited) totaled $3,292,965,983 in fiscal year 1963.

DEPARTMENT OF DEFENSE (Continued)

	1963 expenditures
Civil Defense	
Operation and maintenance, civil defense (p. 313)	34,457,221
Research and development, shelter, and construction, civil defense (p. 314)	11,810,129
Civil Functions	
Payments to States, Flood Control Act of 1954 (p. 378)	1,613,757

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education	
Promotion and further development of vocational education (p. 402)	34,330,192
Further endowment of colleges of agriculture and mechanic arts (p. 402)	11,950,000
Grants for library services (p. 402)	7,256,890
Payments to school districts (p. 402)	276,910,035
Assistance for school construction (p. 403)	66,241,942
Defense educational activities (p. 404)	198,335,518
Expansion of teaching in education of the mentally retarded (p. 406)	959,631
Expansion of teaching in the education of the deaf (p. 406)	1,382,635
Cooperative research (p. 406)	5,015,385
Foreign language training and area studies (p. 407)	-0-
Colleges of agriculture and mechanic arts (p. 408)	2,550,000
Promotion of vocational education, Act of Feb. 23, 1917 (p. 409)	7,144,113
Office of Vocational Rehabilitation	
Grants to States (p. 409)	70,651,560
Research and training (p. 410)	24,145,307
Public Health Service	
Accident prevention (p. 415)	3,679,047
Chronic diseases and health of the aged (p. 416)	16,303,114
Communicable disease activities (p. 417)	10,749,235
Community health practice and research (p. 419)	23,946,767
Control of tuberculosis (p. 420)	6,813,635
Control of venereal diseases (p. 420)	7,843,535

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (Continued)

	1963 expenditures
Public Health Service (Continued)	
Dental services and resources (p. 421)	2,603,482
Nursing services and resources (p. 422)	8,373,620
Hospital construction activities (p. 423)	187,432,190
George Washington University Hospital construction (p. 424)	-0-
Aid to medical education (p. 424)	-0-
Environmental health sciences (p. 425)	-0-
Air pollution (p. 425)	10,100,876
Milk, food, interstate and community sanitation (p. 426)	8,723,615
Occupational health (p. 427)	4,059,384
Radiological health (p. 428)	13,466,288
Water supply and water pollution control (p. 429)	22,554,121
Grants for waste treatment works construction (p. 430)	51,738,090
National Institutes of Health (p. 435-444)	723,597,285
Social Security Administration	
Grants to States for public assistance (p. 460)	2,723,677,540
Training of public welfare personnel (p. 463)	-0-
Assistance for repatriated U. S. nationals (p. 464)	412,044
Grants for maternal and child welfare (p. 465)	76,057,662
Cooperative research or demonstration projects in social security (p. 468)	952,654
Assistance to refugees in the U. S. (p. 469)	52,902,237
American Printing House for the Blind	
Education of the blind (p. 472)	718,707
Gallaudet College	
Salaries and expenses (p. 474)	1,458,615
Howard University	
Salaries and expenses (p. 475)	8,362,261
Construction (p. 476)	2,687,024
Office of the Secretary	
Juvenile delinquency and youth offenses (p. 480)	4,473,623
Educational television facilities	1,818

DEPARTMENT OF THE INTERIOR

	1963 expenditures
Bureau of Land Management	
Payments to Oklahoma (royalties) (p. 491)	6,214
Payments to Coos and Douglas Counties, Oregon, from receipts, Coos Bay Wagon Road grant lands (p. 491)	697,449
Payments to counties, Oregon and California grant lands (p. 491)	15,400,136
Payments to States (grazing fees) (p. 492)	917
Payments to States (proceeds of sales) (p. 492)	249,328
Payments to States from grazing receipts, etc., public lands outside grazing districts (p. 492)	183,632
Payments to States from grazing receipts, etc., public lands within grazing districts (p. 492)	200,446
Payments to States from grazing receipts, etc., public lands within grazing districts, misc. (p. 492)	3,902
Payments to States from receipts under Mineral Leasing Act (p. 492)	47,147,555
Payments to counties, national grasslands (p. 492)	92,255
Bureau of Indian Affairs	
Education and welfare services (p. 493)	77,723,737
Menominee educational grants (p. 499)	396,000
National Park Service	
Payment for tax losses on land acquired for Grand Teton National Park (p. 511)	27,287
Bureau of Mines	
Drainage of anthracite mines (p. 524)	39,801
Office of Minerals Exploration	
Salaries and expenses (p. 528)	569,202
Lead and zinc stabilization programs (p. 528)	1,457,023
Bureau of Commercial Fisheries	
Construction of fishing vessels (p. 533)	543,459
Payment to Alaska from Pribilof Islands fund (p. 536)	702,852
Fisheries loan fund (p. 536)	-1,387,010
Bureau of Sport Fisheries and Wildlife	
Federal aid in fish restoration and management (p. 542)	5,768,736
Federal aid in wildlife restoration (p. 542)	15,530,052
Payments to counties, national grasslands (p. 543)	-1,970
Payments to counties from receipts under Migratory Bird Conservation Act (p. 543)	582,467

DEPARTMENT OF THE INTERIOR (Continued)

Bureau of Reclamation	1963 expenditures
Construction and rehabilitation (p. 546)	168,185,561
Loan program (p. 551)	14,486,977
Payments to States of Arizona and Nevada (p. 556)	600,000
Upper Colorado River storage project (p. 557)	106,298,150

DEPARTMENT OF LABOR

Office of Manpower, Automation and Training	
Manpower development and training activities (p. 600)	51,783,662
Area redevelopment activities: salaries and expenses (p. 601)	6,676,622

Bureau of Employment Security	
Unemployment compensation for Federal employees and ex-servicemen (p. 606)	152,858,563
Salaries and expenses, Mexican farm labor program (p. 607)	1,814,958
Farm labor supply revolving fund (p. 608)	1,179,036
Unemployment trust fund (p. 946)	3,815,629,499 1/

Office of the Secretary	
Trade adjustment activities (p. 619)	640

DEPARTMENT OF STATE

Educational exchange	
Mutual educational and cultural exchange activities (p. 649)	26,207,202
Center for cultural and technical interchange between East and West (p. 651)	7,344,731

FEDERAL AVIATION AGENCY

Grants-in-aid for airports (p. 700)	51,493,441

1/ This amount is on a check-issued (gross) basis. Receipts (collections deposited) totaled $4,256,052,867 in fiscal year 1963.

GENERAL SERVICES ADMINISTRATION

	1963 expenditures
Real Property Activities	
Hospital facilities in the District of Columbia (p. 714)	74,877

HOUSING AND HOME FINANCE AGENCY

Office of the Administrator	
Urban planning grants (p. 742)	12,388,967
Open-space land grants (p. 743)	265,014
Low income housing demonstration programs (p. 744)	145,976
College housing loans (p. 745)	283,573,515
Public facility loans (p. 747)	30,047,779
Public works planning (p. 749)	5,864,028
Urban renewal fund (p. 752)	173,208,174
Housing for the elderly fund (p. 757)	18,856,257
Federal National Mortgage Association	
Special assistance functions fund (p. 761)	-262,295,979
Federal National Mortgage Association secondary market operations (p. 956)	-720,621,211
Public Housing Administration	
Low rent public housing program fund (p. 773)	178,867,436

VETERANS ADMINISTRATION

Direct loans to veterans and reserves (p. 803)	-86,178,301

CIVIL AERONAUTICS BOARD

Payments to air carriers (p. 818)	81,856,762

FARM CREDIT ADMINISTRATION

Short-term credit investment fund (p. 835)	13,310,000
Banks for cooperatives investment fund (p. 836)	-11,979,500

FEDERAL HOME LOAN BANK BOARD

Federal Home Loan Bank Board revolving fund (p. 840)	-119,413

	1963 expenditures
FEDERAL POWER COMMISSION	
Payments to States under Federal Power Act (p. 850)	58,453
NATIONAL CAPITAL HOUSING AUTHORITY	
National Capital Housing Authority trust fund (p. 968)	-2,354,674
NATIONAL CAPITAL PLANNING COMMISSION	
Land acquisition, National Capital park, parkway, and playground system (p. 860)	1,295,588
NATIONAL SCIENCE FOUNDATION	
Salaries and expenses (p. 864)	206,859,160
SMALL BUSINESS ADMINISTRATION	
Trade adjustment loan assistance (p. 875)	-0-
Revolving fund (p. 876)	134,320,156
DISTRICT OF COLUMBIA	
Federal payment to District of Columbia (p. 913)	32,899,000
Loans to District of Columbia for capital outlay, general fund (p. 913)	-0-
Loans to District of Columbia for capital outlay, highway fund (p. 914)	7,500,000
Loans to District of Columbia for capital outlay, water fund (p. 914)	850,000
Loans to District of Columbia for capital outlay, sanitary sewage works fund (p. 914)	2,400,000
Federal contributions and loans to the Metropolitan Area sanitary sewage works fund (p. 915)	14,200,000
Repayable Advances to District of Columbia general fund (p. 915)	7,000,000
Advances to stadium sinking fund, Armory Board (p. 915)	415,800

Title VI - Nondiscrimination in Federally Assisted Programs

1. Need

In general, Title VI would confirm and clarify power already possessed by the Executive Branch. (See items 2 and 3 below). Its enactment would serve the following purposes:

a. To override specific provisions of law which contemplate federal assistance to racially segregated institutions. Such provisions are contained in the Hill-Burton Act (grants for hospital construction), 42 U.S.C. 291e(f); the second Morrill Act (annual grants to land-grant colleges), 7 U.S.C. 323; and (by implication) Public Law 815 (grants for school construction in federally impacted areas), 20 U.S.C. 636 (b) (f), see H. Rep. No. 2810, 81st Cong. 2d Sess. (1950) p. 15. 1/ The validity of such

1/ For texts of these provisions see list of Provisions of Existing Federal Assistance Statutes Relating to Racial Discrimination, item 10, infra.

provisions is in litigation, and is the subject of conflicting judicial decisions. 2/ Enactment of Title VI would override all such "separate but equal" provisions for the future regardless of the ultimate outcome of the pending litigation.

b. To provide express statutory support for action being taken by the Executive Branch. As a matter of simple justice, public funds, to which taxpayers of all races contribute, ought not be expended to support or foster discriminatory practices. While the Executive Branch is believed in most cases to have adequate authority to preclude discrimination or segregation by recipients of federal assistance,

2/ The Court of Appeals for the Fourth Circuit has held the "separate but equal" provision of the Hill-Burton Act unconstitutional and has enjoined non-profit hospitals which received Hill-Burton funds from excluding Negro patients and doctors. Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A. 4, 1963). The Court of Appeals for the Fifth Circuit has dismissed suits by the United States to enjoin pupil segregation at schools which received Public Law 815 funds. United States v. Madison County Board of Education, No. 20668, decided Jan. 7, 1964. A petition for certiorari has been filed in the Moses H. Cone case, and a petition for rehearing en banc has been filed in the Madison County case.

enactment of Title VI would clarify and confirm that authority. It would require agencies to act to eliminate racial discrimination, rather than leave the matter, as now, to individual agency discretion. It would give the non-discrimination policy express statutory sanction, and thus would tend to ensure that that policy would be continued in future years as a permanent part of our national policy.

c. To avoid legislative debate over the so-called "Powell amendment." Repeatedly, in recent years, amendments have been proposed in Congress to bills providing for, or extending, federal assistance to education, housing and other matters, which would preclude assistance to segregated institutions. Such amendments have consistently been opposed by members of Congress who favored the principle of non-discrimination, but feared that to raise the issue of discrimination in the particular legislative context would result in the defeat of the pending federal assistance legislation. Title VI enables the Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of particular federal assistance programs. Its enactment would avoid for the future the occasion for further legislative maneuvers of the type described above. It would also avoid any basis for argument that failure to adopt a "Powell amendment" in connection with a particular program implied a Congressional approval of racial discrimination in that program.

2. History

A large number of statutes provide for federal financial assistance to states, counties, municipalities and other governmental bodies, and in some cases to private individuals or organizations. For a partial listing of federal programs which may involve federal financial assistance by way of grant, contract or loan, see letter from Deputy Attorney General Katzenbach to Congressman Celler, dated December 2, 1963, item 11, infra.

A number of federal assistance statutes, enacted at various times from 1890 to the present, contain provisions which expressly preclude racial discrimination, or which generally prohibit unfair or unjust discrimination. See list of Provisions of Existing Federal Assistance Statutes Relating to Racial Discrimination, Item 10, infra. Some of these, in reliance on constitutional doctrines current at the time of their enactment, provided that the furnishing of separate facilities which make equitable provisions for whites and Negroes would be a compliance with their non-discrimination requirement.

In recent years, several actions have been taken by the President to preclude discrimination in connection with federal assistance programs. Executive Order 11063 (Nov. 20, 1962, 27 Fed. Reg. 11527) requires the appropriate federal agencies "to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin" in the sale, lease, rental, disposition, use or occupancy of residential property and related facilities which are provided in whole or in part with the aid of federal loans, grants, contributions, guaranties, or insurance. Discrimination in lending practices relating to such property is also to be prevented. (Sec. 101) It authorizes issuance of appropriate rule and regulations (Sec. 203) and their enforcement by informal means, by termination or refusal of assistance, or by other appropriate action. (Sec. 302).

Racial discrimination in employment on construction under programs supported by federal financial assistance is prohibited by Executive Order 11114 (June 25, 1963, 28 F.R. 6485). Prior to issuance of that order a number of agencies

had acted to prohibit such discrimination. 3/

Individual agencies have also taken action to preclude racial discrimination in connection with assistance programs administered by them. For example, the regulations of the Department of Agriculture prohibit schools or other institutions receiving donated agricultural commodities from discriminating against any person receiving food because of his race, creed or color. 6 C.F.R. § 503.8(a) and (b).

Repeatedly, in Congress, amendments have been offered, but not adopted, to proposed legislation to extend existing federal programs, or to establish new programs, for assistance to education, housing, and other matters, which would specifically prohibit assistance to institutions or persons engaging in racial discrimination or segregation. Such amendments, sometimes referred to familiarly as the "Powell amendment",

3/ See e.g., Federal Emergency Administration of Public Works, Terms and Conditions (Sept. 15, 1937) Part IV, § 7; 14 C.F.R. § 550.7(a)(14)(airport construction); and relevant contract forms of the Bureau of Public Roads, the Public Housing Administration, and the Rural Electrification Administrations.

have often been opposed by members of Congress who disapproved of racial segregation or discrimination, but who feared that in the particular legislative context adoption of the amendment would jeopardize passage of the bill to which it was proposed.

As introduced, both H.R. 7152 and S. 1731 contained a Title VI which would have provided simply that no federal assistance law should be interpreted as requiring assistance to be furnished in circumstances involving denial of participation or benefits, or discrimination against participants or beneficiaries, on the ground of race, color, religion or national origin. On August 23, 1963, the Attorney General, testifying before the Senate Committee on the Judiciary on S. 1731, presented a revised draft of Title VI. Title VI of H.R. 7152 is based on that draft, with certain amendments made by the House Judiciary Committee and by the House.

The effect of these various drafting changes, and the principal objections they were designed to meet, can be summarized as follows:

1. The orginal draft left it entirely to the discretion of federal agencies whether to take any action to eliminate racial discrimination in connection with their programs. A number of members of Congress, and witnesses before Congressional committees, expressed the view that federal agencies should be required to eliminate such discrimination. In its present form, Sec. 602 requires each agency to take action to end racial discrimination against participants and beneficiaries of its federal aid program, but leaves the agency some discretion as to what action it will take.

2. The original draft gave rise to objections that it would permit a blanket cutoff of all federal aid to a particular State because of a single act of discrimination or of resistance to federal court orders. It also gave rise to objections that it permitted arbitrary and non-uniform actions. Concern was expressed as to the procedure by which the fact as to whether discrimination had occurred would be determined. These various objections have been met by inclusion in Secs. 602 and 603 of a number of carefully drawn procedural safeguards.

a. Sec. 602 authorizes a particular federal agency to take action only with respect to discrimination "with respect to such program or activity," i.e., the particular program or activity which it is authorized to assist.

b. Any nondiscrimination requirements are to be imposed by "rule, regulation or order of general applicability." Hence actions taken must be uniform.

c. Each such general rule, regulation or order must be approved by the President.

d. Compliance action can be taken only after efforts have been made to secure voluntary compliance with the agency's nondiscrimination requirement.

e. Compliance action can be taken only after a hearing.

f. Federal aid can be refused or terminated only upon an express finding that the particular aid recipient whose grant, loan or contract is refused or terminated has violated the agency's nondiscrimination requirement.

g. In every case of refusal or termination of federal aid under Title VI, a full written report must be filed with the committees of Congress having legislative jurisdiction over the particular program or activity, and thirty days must elapse before the cutoff becomes effective.

h. Any refusal or termination of aid is subject to judicial review.

3. Several clarifications were made in the scope of Title VI:

a. The first sentence of Sec. 602 was amended to make it explicit that Title VI will not apply to insurance or guranty programs such as F.D.I.C., FHA mortgage insurance and guaranties, and the like. Action has been taken pursuant to Executive Order 11063 to end racial discrimination in connection with federally assisted housing, and that action will not be affected by Title VI.

b. Reference to "religion" was deleted. Discrimination on religious grounds does not appear to have been a significant problem in connection with federal aid programs. On the other hand, inclusion of the reference to religion could have caused unnecessary concern on the part of religiously-affiliated schools receiving aid under the school lunch program, religiously-affiliated organizations participating in the administration of State welfare programs receiving aid under the Social Security Act, and the like.

c. Programs whose participants and beneficiaries are outside the United States were excluded. It would be clearly

inappropriate, in legislation dealing with a domestic problem, to require action which could affect the governmental policies of other countries receiving foreign aid, and our international relations with those countries.

3. Legality

Title VI is not an exercise of regulatory authority over activities within the states. Its application is confined to programs and activities which receive federal financial assistance, by way of grant, loan or contract and its validity rests on the power of Congress to fix the terms on which federal funds will be made available.

In extending financial assistance, Congress unquestionably has power to impose such reasonable conditions on the use of the granted funds or other assistance as it deems in the public interest. E.g., United States v. San Francisco, 310 U.S.16 (1940); Oklahoma v. Civil Service Commission, 330 U.S. 127, 142-4 (1942). Since the recipients of assistance are under no legal obligation to accept federal assistance on the terms prescribed by Congress, there is no invasion of powers reserved to the states by the Tenth Amendment. ". . . [T]he powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject." Massachusetts v. Mellon, 262 U.S. 447,

480 (1923). Accord: Steward Machine Co. v. Davis, 301 U.S. 548, 593-8 (1937); United States v. Bekins, 304 U.S. 27, 51-54 (1938); Oklahoma v. Civil Service Commission, 330 U.S. 127, 142-6 (1947). 4/

In the last-mentioned case the Court sustained the constitutionality of provisions of the Hatch Act requiring dismissal, for political activities, of state officials administering programs supported by federal funds. The Court stated, "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." 330 U.S. at 143.

Congress' power to attach reasonable conditions to its grant of financial assistance may be exercised by general, across-the-board legislation. Examples of such

4/ Grants-in-aid given on condition, are essentially contractual in nature. McGee v. Mathis, 4 Wall, 143, 155 (1866); Burke v. Southern Pacific R.R. Co., 243 U.S. 669, 679-80 (1914). Loans and contracts are also clearly contractual. Congress has plenary authority to prescribe the terms on which the United States will contract, and the exercise of that authority involves no invasion of rights reserved to the States by the 10th Amendment. E.g., Perkins v. Lukens Steel Co., 310 U.S. 113, 127-9 (1940).

legislation are the Work Hours Act of 1962 (Public Law 87-581, 76 Stat. 357) and the Anti-Kickback Act of 1934 (18 U.S.C. 874, 41 U.S.C. 276c) both applicable generally to contracts for work financed by federal loans or grants, and the Hatch At (5 U.S.C. 118k, 18 U.S.C. 595) applicable generally to activities financed by federal loans or grants. The constitutionality of the Hatch Act, as applied to state programs supported with federal funds, was sustained in Oklahoma v. Civil Service Commission, supra.

The effect of Title VI would be prospective only. Sec. 602 authorizes each agency to adopt nondiscrimination requirements, by rule, regulation or order of general applicability, and to terminate assistance or take other appropriate action to secure compliance with such requirements. Such requirements would be applicable only to assistance given after their effective date. Hence no question would arise as to the authority of Congress to attach new conditions to grants already made or other assistance already given.

There can be no doubt of the power of Congress to prohibit racial discrimination in connection with programs

authorized by it. Congress has prohibited racial discrimination in connection with certain federal assistance programs. See annexed list of Provisions of Existing Federal Assistance Statutes which Relate to Racial Discrimination. Similarly, in the exercise of its power to regulate commerce, Congress has prohibited unjust discrimination by railroads, bus lines and airlines; those prohibitions have been construed to prohibit racial discrimination or segregation, and, as so construed, have been sustained by the courts. Mitchell v. United States, 313 U.S. 80 (1941) (railroads); Henderson v. United States, 339 U.S. 816 (1950) (railroads); Boynton v. United States, 364 U.S. 454 (1961) (bus lines); Fitzgerald v. Pan American World Airways, 229 F.2d 499 (C.A. 2, 1956) (airlines); United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala., 1962) (airlines).

As noted in point 2, the Executive Branch has taken a number of actions to preclude racial discrimination or segregation in connection with federal assistance programs. The validity of these actions has not been judicially challenged. It is well-settled that, except to the extent

Congress may have required or prohibited certain action, the Executive Branch has discretion to impose such conditions and requirements as it deems appropriate in entering into contracts and agreements. E.g., United States v. Tingey, 5 Peters 115, 127 (1831); United States v. Linn, 15 Peters 290, 315-6 (1841); United States v. Hodson, 10 Wall. 395, 406-8 (1870); Jessup v. United States, 106 U.S. 147, 151-2 (1882); Muschany v. United States, 324 U.S. 49, 63 (1945); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 116 (1954); Arizona v. California, 373 U.S. 546, 580 (1963). 5/ By enacting Title VI, Congress would thus confirm an authority which the Executive Branch is now exercising in many areas, and is believed to have ample power to exercise.

Indeed, a strong argument can be made that the Constitution requires that programs and activities receiving significant financial assistance from the United States refrain from racial segregation or discrimination. The

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5/ As to the contractual nature of grants, loans and other financial assistance, see note 4, supra.

Fifth Amendment prohibits racial discrimination or segregation by the United States, at least in the absence of a compelling justification. Bolling v. Sharpe, 347 U.S. 497 (1954); cf. Hirabayashi v. United States, 320 U.S. 81, 100 (1943); and see Steele v. Louisville and Nashville R. Co., 323 U.S. 192, 198-9 (1944). The prohibitions of the Fourteenth Amendment against racial discrimination by the states extend to governmental action "designed to perpetuate discrimination." Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945). They may extend to actions of private persons and organizations if the government participates in those actions. Cooper v. Aaron, 350 U.S. 1, 4 (1958). If the government, through such an arrangement, can be said to have "elected to place its power, prestige, and property behind the admitted discrimination," the courts may deem it a "joint participant" and hold the segregation or discrimination unlawful, Burton v. Wilmington Parking Authority, 365 U.S. 715, 724, 725 (1961). In such circumstances, the government may be under a duty to take affirmative action to preclude racial segregation or discrimination by private entities in whose activities

it is a participant; Burton v. Wilmington Parking Authority, supra.

In Simkins v. Moses Cone Hospital, 323 F.2d 959, decided Nov. 1, 1963, the U.S. Court of Appeals for the Fourth Circuit applied these principles to hold that the Fifth Amendment prohibited racial discrimination by non-profit hospitals which had received federal construction grants. One factor relied on by the court was the "massive use of federal funds." 323 F.2d at 967. The court emphasized that the application of these constitutional requirements to particular federal assistance programs will depend on the particular circumstances. 323 F.2d at 967.

Nevertheless, the decision, and the general trend of the authorities which 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 (see Oklahoma v. Civil Service Commission, supra), Congress clearly has power to legislate so as to ensure that the federal government does not become involved in a violation of the Constitution.

There is no Constitutional right to notice and hearing, or to judicial review, in connection with actions terminating or refusing to grant or continue financial assistance. The power of the United States to fix the terms and conditions on which federal funds will be made available includes the power to establish such procedures for passing on applications for assistance, and for terminating or withholding assistance, as appear to it appropriate. Except where Congress has provided by statute for judicial review, courts have not undertaken to review actions of federal officials refusing or terminating grants, or otherwise relating thereto. State of Arizona v. Hobby, 221 F. 2d 498 (C.A.D.C. 1954); see City of Dallas v. Rentzel, 172 F. 2d 122 (C.A. 5, 1949); Clement Martin v. Dick Corp., 97 F. Supp. 961 (W.D. Pa., 1959); cf. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). Nor have the courts required the executive department or agency to hold hearings. Thus, the provisions of Secs. 602 and 603 with respect to findings, hearings and judicial review, go beyond anything required by the Constitution.

4. Operation

Sec. 601 declares a basic rule of nondiscrimination. Secs. 602 and 603 set forth the procedures for implementing that rule. Each federal department or agency administering a program subject to Title VI is required to take action to effectuate the provisions of Sec. 601. The department or agency would have some discretion as to the nature of the action it takes.

a. Non-Discrimination Requirements. Sec. 602 authorizes agencies to impose nondiscrimination requirements by or pursuant to rule, regulation or order of general applicability. Such rule, regulation or order must be approved by the President and will be published in the Federal Register. The form and content of such a general requirement would vary, depending on the nature and method of administration of the particular assistance program. It could, for example, take the form of a rule or regulation governing the conduct of recipients of assistance, or an order specifying a standard form of written assurance or undertaking required to be given by each applicant for assistance, or a standard provision of assistance contracts.

Any such requirement must be one which will effectuate the provisions of section 601 with respect to such program or activity. Thus it must relate to the particular program or

activity in connection with which it is imposed. Moreover, it must relate to participation in, or receipt of the benefits of, such program or activity, since the policy declared in Sec. 601 is related to such participation and benefits. Title VI would not confer authority to impose any requirement, or take any action, which was not related to participation in, or receipt of the benefits of, or discrimination under, the particular program or activity with respect to which the requirement was imposed.

For example, the purpose of the Agricultural Adjustment Act in authorizing benefit payments to producers of agricultural commodities, under 7 U.S.C. 608, is to "establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602. It does not appear that Congress was concerned, in this Act, with extending assistance to farm labor. As applied to this program, Title VI would authorize the imposition of a requirement, or the taking of other action, to preclude racial discrimination affecting the receipt of benefit payments by farmers, but would not authorize any requirement or action with respect to the employment policies of such farmers.

b. Compliance. The procedures for obtaining compliance with the agency's nondiscrimination requirement are spelled out in some detail in Sec. 602.

Before any formal compliance action is taken, the agency must advise the offending party of his failure to comply, and must seek to obtain compliance with voluntary means.

If compliance cannot be obtained by voluntary means, then the agency has a choice. It can terminate the grant, loan, or contract, or refuse further payments under it, or refuse to make a new grant or loan or enter into a new contract. Alternatively, the agency may use any other means authorized by law. This phrase does not confer any new authority. It simply makes it clear that federal departments and agencies, in effectuating the purposes of Title VI, may use whatever powers are conferred on them by the laws creating them or authorizing particular assistance programs.

The importance of flexibility in obtaining compliance is emphasized by the provisions of Sec. 602 that any action an agency takes to effectuate Sec. 601 "shall be consistent with achievement of the objectives of the statute authorizing the financial

assistance in connection with which the action is taken." The object of Title VI is to end discrimination, not to cut off federal assistance. Hence, to the extent agencies can find effective means of ending racial discrimination relating to their programs without cutting off needed assistance, they will be encouraged to do so. Possible techniques may include the entering into contractual agreements by which the recipient of assistance agrees not to discriminate and the enforcement of such agreements by judicial action if necessary, the establishing of informal or formal procedures for dealing with complaints of discrimination, the disapproval of particular expenses incident to segregation or other discrimination, etc.

c. Hearings. Sec. 602 specifies that formal compliance action can be taken only "after a hearing." The nature, and formality, of the hearing will depend both on the nature of the particular program and the nature of the proposed compliance action. For example, if the proposed action is to refer the matter to the Attorney General for institution of a suit, the requirement of a hearing would be satisfied by an informal conference at which the noncomplying party was advised of the proposed referral, and given a further opportunity to avoid litigation by voluntary agreement to comply. On the other hand, if the proposed compliance action is to terminate or withhold payments under

an approved grant, the hearing would be of such a nature as would enable the allegedly noncomplying party to challenge the agency's evidence, and present his own evidence, on the issue of compliance, and to create a written record which would serve as an adequate basis for judicial review.

The provision for hearing was added by amendment from the floor of the House. The House debate makes it clear that the primary purpose of adding such a provision was to ensure that a complete written record would be made for purposes of judicial review in those cases which would be subject to judicial review under Sec. 603.

d. Report to Congress. If the agency proposes to take compliance action under Sec. 602 terminating or refusing to grant or continue, a grant, loan or assistance contract, Sec. 602 requires that it file "a full written report of the circumstances and the grounds for such action", with the committees of the House and Senate having legislative jurisdiction over the program or activity involved. No cutoff of funds can become effective until thirty days have elapsed after the filing of such report.

e. Judicial Review. Any agency action taken pursuant to section 602 would be subject to judicial review to the extent, and in the manner, provided by any provision of existing law applicable to

similar actions taken by the agency on other grounds. Special statutory review procedures are available under a number of statutes, for example, Public Law 815 and the Hill-Burton Act (20 U.S.C. 641(b), 42 U.S.C. 291j) for denial of a grant and for withholding of funds thereunder. If no such review is provided by existing law, agency action terminating or refusing to grant or continue financial assistance upon a finding of failure to comply with a nondiscrimination requirement imposed pursuant to Sec. 602 would be subject to judicial review in "any applicable form of legal action" as authorized by the Administrative Procedure Act, 5 U.S.C. 1009. That Act would authorize the bringing of a suit for injunction or declaratory judgment in a U.S. district court. Under recent amendment to the Judicial Code, the suit could be brought in the District where the plaintiff resides or where the cause of action arose. 28 U.S.C. (Supp. 1963) 1391(e). Review would be on the record made before the department or agency. The agency action could be set aside if its finding was not supported by substantial evidence, or its action was otherwise arbitrary, capricious or contrary to law. The court could grant relief pending review to avoid irreparable injury.

f. Effect on Existing Non-Discrimination Actions. Many federal assistance programs are now being administered in a non-discriminatory fashion. In a number of cases express non-discrimination

requirements are currently in effect. Insofar as the action already being taken is adequate to effectuate the rule declared in Sec. 601, no new action would be required. In other cases Title VI may require additional action to be taken, or may result in the formalizing in express regulations or orders of policies now adhered to in practice.

5. Scope

Title VI applies to programs of federal financial assistance by way of grant, loan or contract. A partial listing of such programs is attached to the letter from Deputy Attorney General Katzenbach to Congressman Celler, dated December 2, 1963, item 11, below. It identifies approximately 170 line items in the budget that may be affected.

In fact, however, as Mr. Katzenbach's letter indicates, enactment of Title VI will have little or no effect on many of the federal assistance programs which come within its terms. This is so because the great majority of such programs either present no practical possibility for racial discrimination against participants in or beneficiaries of the program, or are presently being administered in ways which adequately guard against such discrimination. In addition, in those cases in which Title VI will have an effect, its effect may be much more limited than that which its opponents would attribute to it. Title VI will not prohibit all forms of racial discrimination by a recipient of federal funds. It only prohibits discrimination against those persons whom Congress regarded as participants and beneficiaries of the particular federal assistance program.

The practical scope of Title VI can best be indicated by considering its application to particular subjects.

a. Social security, veterans' pensions and similar direct federal payments. Social security benefits, under Title II of the Social Security Act, are paid directly by the United States to the ultimate beneficiary. The United States does not now discriminate, on grounds of race, in paying social security benefits or in determining eligibility for such benefits. It could not. Neither the Act nor the Fifth Amendment would permit such discrimination. And it is irrelevant, to the purposes of the Social Security Act, what the recipient of the benefit does with the money received. His employees, or customers of his business, are not participants in or beneficiaries of the Social Security program. Hence Title VI will have no effect on federal Social Security benefits.

For like reasons, Title VI will not affect veterans' compensation and pensions, civil service retirement, railroad retirement, and similar programs involving direct payments from the United States to the beneficiary.

b. State welfare programs. A number of welfare programs, administered by the states, receive federal financial assistance. These include unemployment compensation, and such state programs as old-age assistance, maternal and child

welfare, and aid to the blind and disabled, all of which receive federal grants under various titles of the Social Security Act. Title VI will not authorize imposition of any requirements on the ultimate beneficiaries of these welfare payments, for the same reasons already discussed under the preceding heading. But it will result in requirements that the state agencies administering these programs refrain from racial discrimination in the allowance of benefits and in treatment of beneficiaries. For example, a state agency administering an unemployment compensation program which participates in the federal Unemployment Trust Fund, would be prohibited from denying payments to otherwise eligible beneficiaries because they were Negroes, or because they had participated in voter registration drives or sit-in demonstrations. The state agency would also be prohibited from maintaining segregated lines or waiting rooms for, or otherwise differentiating in its treatment of, white and negro beneficiaries.

c. Housing. Title VI will have little or no effect on federally assisted housing. This is so for two reasons. First, much federal housing assistance is given by way of insurance or guaranty, such as F.H.A. mortgage insurance and guaranties. Such programs are not covered by Title VI, and hence will not

be affected in any way by enactment of Title VI. Second, in those cases where housing assistance is given by federal grant or loan, such as loans to public housing and urban renewal projects, Title VI will require that the public bodies or private entities receiving the benefits of any such loan refrain from racial discrimination. However, like requirements are already in effect under Executive Order 11063. Hence Title VI will merely give statutory support to the regulations already in effect as to these programs.

d. Employment

Whether and to what extent Title VI will affect employment in activities receiving federal assistance will depend on the nature and purposes of the particular federal assistance program.

Farm employment would not be affected by Title VI. The various federal programs of assistance to farmers, such as acreage allotments under the Agricultural Adjustment Act,

were not intended to deal with problems of farm employment, and farm employees are generally not participants in or beneficiaries of such programs. Hence Title VI would not authorize imposition of any requirements under these programs relating to racial discrimination in farm employment.

On the other hand, stimulation of employment is typically a significant purpose of federal grants for construction of highways, airports, schools and other public works. For example, in Sec. 12 of the Public Works Acceleration Act of 1962, 42 U.S.C. 2641 (a) Congress found that acceleration of public works construction, including construction assisted by federal grants and loans, was "necessary . . . to provide immediate useful work for the unemployed and underemployed." Congress has generally required payment of prevailing wages, and adherence to the 8-hour day and 40-hour week, on such construction. Where federal funds are made available in order to provide jobs, it would be unconscionable to permit racial discrimination in the availability of these jobs. Racial discrimination in construction financed by federal grants and loans is now prohibited under Executive Order 11114. Title VI would not result in imposition of new requirements for such construction employment, but would give statutory support to action already being taken.

Employees and applicants for employment are the primary beneficiaries of federal assistance to state employment services. Title VI would thus authorize adoption of regulations requiring the elimination of racial discrimination in referral practices, treatment of job applicants, etc., by such state employment services receiving federal funds. For like reasons, it would authorize action in connection with federally assisted vocational training programs.

In this area there is some overlap between Title VI and Title VII. Both Titles call for initial reliance on voluntary methods for achieving compliance. If such methods fail, then the department or agency administering a federal assistance program would consider the availability of a suit under Title VII in determining what means of obtaining compliance with its nondiscrimination requirement would be most effective and consistent with the objectives of the federal assistance statute.

e. Education

The policy of Title VI would also be applicable with respect to "impacted area" schools receiving federal grants under Public Laws 815 and 874. Racial segregation at such schools is now prohibited by the Constitution. The Commissioner of Education would be warranted in relying on any existing plans of desegregation which appeared adequate and effective, and on litigation by private parties or by the Attorney General

elimination of racial discrimination with respect to teachers in education programs, the administrator of the Hill-Burton program might be justified in adopting regulations dealing with discrimination with respect to the professional staff of a hospital, i.e., doctors and nurses.

In making grants to medical schools, hospitals and others to promote knowledge and training in the field of health, the federal government could require freedom from racial discrimination against participants in the program, just as in the case of other forms of assistance to education and training.

Banking. Title VI, contrary to the arguments of some of its opponents, would have little if any effect on banking. Programs of insurance of bank deposits, such as FDIC, would not be covered; they are expressly excluded as insurance programs.

Other. The application of Title VI is limited to persons in the United States. Thus it would not affect the administration outside the United States of foreign aid and other international programs. Title VI is also not intended to affect programs of assistance to American Indians, or to affect the special historical and legal status of American Indians under the Constitution and Treaties. The granting of direct benefits to Indians has never been thought to be a denial of Constitutional rights under the Fifth Amendment. Indians receive certain special assistance because of historical considerations, treaty obligations, and moral commitments, and not because of their race, color or national origin.

6. Objections

a. "Punitive", "vindictive." In the House, a concerted attack was made on Title VI as "punitive," or "vindictive." E.g. Cong. Rec., Feb. 7, 1964, p. 2399; see also pp. 2382, 2394. These characterizations seem premised on the assumption that the intent behind Title VI is to deny to the South the benefit of social welfare programs, and to punish entire states for any act of discrimination committed within them. The argument wrongly attributes to Title VI the intention reflected in the suggestion of the Civil Rights Commission in April, 1963, that all federal funds in Mississippi be cut off because of the resistance to federal court orders and federal authority then being offered by the Governor of Mississippi.

The argument ignores both the purpose of Title VI, and the limitations carefully written into its language.

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). 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 ensure that federal funds are spent in accordance with the Constitution and the moral sense of the nation.

Moreover, the purpose of Title VI is not to cut off funds, but to end racial discrimination. This purpose is reflected in the requirement that any action taken by the federal department or agency must be "consistent with the achievement of the objection of the statute authorizing the financial assistance in connection with which the action is taken." In general, cutoff of funds would not be consistent with the objectives of the federal assistance statute if there are available other affective means of ending discrimination. And Sec. 602, by authorizing the agency to achieve compliance "by any other means authorized by law" encourages agencies to find ways to end racial discrimination without refusing or terminating assistance.

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Title VI does not confer a "shotgun" authority to cut off all federal aid to a state. Any non-discrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies. Funds can be cut off only on an express finding that the particular recipient has failed to comply with that requirement. Thus, Title VI does not authorize any cutoff or limitation of highway funds for example, by reason of school segregation. And it does not authorize a cutoff, or other compliance action, on a state-wide basis unless the state itself is engaging in discrimination on a state-wide basis. For example, in the case of grants to impacted area schools, separate compliance action would have to be taken with respect to each school district receiving a grant.

Finally, the authority to cut off funds is hedged about with a number of procedural restrictions. Before funds would be cut off, the following would have to occur: (1) the agency must adopt a nondiscrimination requirement, by rule, regulation or order of general applicability; (2) the President must approve that rule, regulation or order; (3) the agency must advise the recipient of assistance that he is not complying

with that requirement, and seek to secure compliance by voluntary means; (4) a hearing must be held before any formal compliance action is taken; (5) the agency may, and in many cases will, seek to secure compliance by means not involving a cutoff of funds; (6) if it determines that a refusal or termination of funds is appropriate, the agency must make an express finding that the particular person from whom funds are to be cut off has failed to comply with its nondiscrimination requirement; (7) the agency must file a full written report with the appropriate Congressional committee and 30 days must elapse; (8) the aid recipient can obtain judicial review and may apply for a stay pending such review.

b. "grant of sweeping new power to the executive branch."

It has been argued that Title VI would confer sweeping new authority, of undefined scope, to federal departments and agencies. In fact, the opposite is the case. Most agencies extending federal assistance now have authority to refuse or terminate assistance for failure to comply with a variety of requirements improved by statute or by administrative action. This existing statutory authority is, however, not surrounded by the procedural safeguards for which Title VI provides.

For example, the Hill-Burton Act provides that an application for a grant for hospital construction must contain, inter alia, (1) plans and specifications in accordance with regulations adopted by the Surgeon General; (2) reasonable assurance that the applicant has title to the site; (3) reasonable assurance that adequate financial support will be available for the construction, maintenance and operation of the project; (4) reasonable assurance that prevailing wages will be paid to construction workers; and (5) assurance that the hospital will be operated in conformity with requirements of an approved state plan and of the Surgeon General's regulations prohibiting discrimination on account of race, creed or color, and requiring that needed facilities be furnished persons unable to pay; and (6) assurance of compliance with state standards for operation and maintenance. The Surgeon General must find that the project is entitled to priority over other projects in the State. If the application fails to meet any of these requirements, the Surgeon General will not approve it. The State agency is entitled to a hearing before the Surgeon General prior to final disapproval; the hospital applying for a grant has no statutory right to a hearing. 42 U.S.C. 291h. The State agency can obtain judicial review; the hospital cannot. 42 U.S.C. 291j.

After a grant has been approved, the Surgeon General may terminate payments under it if he finds (1) that the state agency is not complying substantially with the state plan or the Surgeon General's regulations; or (2) that any funds have been diverted from the purpose for which they were paid; or (3) that any assurance in the application "is not being or cannot be carried out"; or (4) that there is a substantial failure to carry out the plans and specifications; or (5) that adequate state funds for administration of the state plans are not being provided. Payments can be withheld until there is no longer a failure to comply or if compliance is impossible, until federal funds diverted or improperly expended are repaid. 42 U.S.C. 291j(a). The state can obtain judicial review of such a termination; the hospital receiving the grant cannot. 42 U.S.C. 291j(b).

The Surgeon General is given general authority to "make such administrative regulations and perform such other functions as he finds necessary to carry out" the Act. 42 U.S.C. 291k. His regulations are voluminous and detailed. See 42 C.F.R. Chapter 53.

As applied to the Hill-Burton Act, enactment of Title VI would simply delete the present provision that furnishing of "separate but equal" facilities will satisfy the statutory non-discrimination requirement -- a provision which one court has held unconstitutional and separable. It would confer no new authority to refuse a grant or terminate payments thereunder. But it would (1) afford the hospital a hearing and judicial review in connection with a refusal or termination of a grant; (2) require a report of any such refusal or termination to be made to Congress; (3) require efforts to achieve voluntary compliance; and (4) require Presidential approval of the Surgeon General's regulations relating to nondiscrimination.

The patterns of the School Construction Act, Public Law 815, 20 U.S.C. 631 et seq., and the Library Services Act of 1956, 20 U.S.C. 351 et seq. are essentially similar. So are the grant-in-aid provisions of the Social Security Act, except that they do not authorize judicial review.

The foregoing statutes spell out in some detail criteria for approval and disapproval of a grant, and for terminating or withholding payments thereunder. Many federal assistance statutes are cast in more broadly discretionary terms.

For example, the Secretary of Labor is authorized to make grants to state employment services if he finds that the state plan is "reasonably appropriate and adequate to carry out" the purposes of the federal law. 29 U.S.C. 49 g. He is empowered to determine whether the state employment service is conducted in accordance with his rules and regulations, and to withhold payments if he determines that the state "has not properly expended the monies paid to it." Provision is made for notice in writing to the state, but not for hearing or judicial review. 29 U.S.C. 49h.

Another common type of provision is that in the School Lunch Act, which simply provides for payments to states "in accordance with such agreements, not inconsistent with the provisions of this chapter, as may be entered into by the Secretary [of Agriculture] and such State educational agency." 42 U.S.C. 175b. Funds are paid by the states to public and private schools in accordance with further agreements which must also be approved by the Secretary. Implicit in the authority to enter into agreements is the further authority to refuse a grant to a state or school which refuses to agree to terms approved by the Secretary, and to terminate assistance for failure to comply with the agreements entered into. No provision

is made in the statute for notice hearing or judicial review.x/

Broad discretion to specify the terms on which grants will be made or refused, and payments thereunder withheld or terminated, is conferred by the Act of Sept. 16, 1958, 42 U.S.C. 1891, authorizing the head of each federal agency to make grants to non-profit colleges and organizations for the support of basic scientific research "where it is deemed to be in furtherance of the objectives of the agency." 42 U.S.C. 1891.

Thus, it is evident that the kind and degree of disaction conferred by Title VI is narrower, and more carefully limited by procedural safeguards, than that which Congress has frequently provided in federal assistance statutes.

c. Interference with private business. Title VI has been attacked as a sweeping interference with private business and individual rights. The fact is, however, that Title VI is not a regulatory measure; it is an exercise of the unquestioned power of the federal government to "fix the terms on which [federal

x/ The regulations of the Secretary of Agriculture expressly provide that "Any State Agency or any school may be disqualified from future participation if it fails to comply with the provisions of this part and its agreement with the Department or the State Agency. This does not preclude the possibility of other action being taken through other means available where necessary . . . " 76 F.R. § 210.19.

funds] shall be disbursed." Oklahoma v. Civil Service Commission, 330 U.S. 127, 143 (1947). No recipient is required to accept federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered. See point 3, above. And it should be emphasized that Title VI does not involve any new extension of federal authority. It merely prescribes the manner in which existing federal programs will be administered.

7. Questions and Answers

Retro-activity

Q. Would Title VI apply retroactively?

A. No. There is no intention to deal with past conduct which was not contrary to any regulation or other requirement of the federal agency at the time it occurred. Section 602 provides for the adoption of new requirements by rule, regulation or order of general applicability. Such requirements would be prospective in effect, and would apply only to grants, loans and contracts made after their effective date.

Existing Programs

Q. What effect will Title VI have on those programs, as to which a nondiscrimination policy is already in effect?

A. If an agency has already adopted and is applying such regulations and requirements as are appropriate to end discrimination, Title VI will not require it to do anything more than it is already doing. It will give its actions additional legislative support. And the procedural safeguards of hearings, express findings, judicial review, and report to the Congressional committees would be applicable to actions taken after its effective date.

Q. Would Title VI authorize the withdrawal of all federal assistance from a State which resists enforcement of federal court desegregation orders? Withdrawal of all aid to a state

A. No. Any action taken by a federal agency under Title VI must be action to effectuate Title VI with respect to the particular program or activity which that agency assists and with respect to which the action is taken. Assistance may be cut off only on an express finding that the recipient has failed to comply with a requirement of general applicability which the agency has adopted to implement Title VI in its own program of assistance. Thus aid in one program would not be cut off because of discrimination in some other program, nor would assistance to one recipient be cut off because another recipient in the same locality engaged in discrimination. Moreover, any cutoff is subject to hearings and judicial review, and a report must be filed with the appropriate committees of Congress.

Q. Section 602 permits an agency to seek compliance with its nondiscrimination requirements either by terminating aid or by use of "any other means authorized by law." What does this latter phrase mean? Other means authorized by law

A. It means only that an agency may use such enforcement powers as it may already have under existing law. It is desirable to give each agency some flexibility to choose those means of effectuating the policy of Title VI which will be most appropriate to the circumstances of its program. In many cases, some alternative to a cut-off or refusal of funds may be found, under existing law, which will enable the agency to achieve compliance without jeopardizing, even in limited fashion, its basic program objectives by terminating or refusing aid. Thus, if an agency's nondiscrimination requirement is embodied in a contractual commitment, the agency may be able to bring suit to enforce its contract. An agency with power to approve or disapprove construction plans or standards, as a condition of granting aid, could refuse to approve any facilities which would be segregated in use. Possibly it could disallow additional costs incident to maintaining segregated facilities. All such action, however, would have to be based on powers conferred on the agency by some legal authority other than Title VI.

Q. Does the phrase "shall be consistent with the objectives of the statute authorizing the financial assistance," in Consistency with

section 602, mean that any agency could continue indefinitely assisting a segregated activity, on the ground that to stop assisting it would defeat the objectives of the underlying statute?

A. No. Title VI is a clear legislative mandate to end racial discrimination with respect to participation in and receipt of benefits of federal assistance programs. It requires all agencies to take action to effectuate that mandate. The quoted phrase does, however, emphasize that, in implementing Title VI, an agency should not unnecessarily jeopardize its basic mission. For example, in an emergency situation, the overriding need may be to provide assistance which will protect health and safety. While the federal agency should take action to prevent future recurrence of any form of discrimination in connection with the administration of its assistance, it might be justified in a particular emergency in using whatever machinery is available to provide prompt assistance. The "consistent with" phrase also emphasizes that an agency should not adopt requirements which are unrelated to the basic purposes of the statutes which it is administering and which

do not affect those persons whom Congress regarded as the participants and beneficiaries of its program.

Protection of recipients of unemployment compensation.

Q. Suppose a State or locality, in administering unemployment compensation, requires its offices to maintain separate waiting lines for white and Negro recipients. Would all workmen's compensation payments to the State or locality have to be terminated?

A. Such separate lines would clearly be inconsistent with Title VI. Hence the federal agency would have authority to cut off all unemployment assistance until this form of segregation was ended. However, it is not expected that such a drastic step would be taken. Title VI is not intended to be punitive; to deprive all recipients of aid could result in great harm to many innocent individuals who desparately require assistance. Thus, for example, the agency might provide that certain administrative costs would be disallowed if such a segregation practice were followed. Or it might obtain contractual agreements from the States not to engage in such segregation, and bring suit to enforce the contract. In general, it is expected that federal agencies would not cut off assistance where other means of enforcing nondiscrimination

requirements could be found. Before taking any compliance action the agency would have to (1) try to obtain compliance by voluntary means; (2) afford the state agency a hearing; and (3) if funds are to be cut off file a written report with the appropriate Congressional Committees.

Cut off of assistance on a State-wide basis.

Q. If a number of localities in a State discriminate in connection with a program receiving federal financial assistance, could all assistance to the State under the program be cut off? Would the same result follow if only one city or town in the State practiced such discrimination?

A. It would depend on the circumstances and the way in which the federal assistance is administered. Under section 602 assistance could be terminated or refused only to a "recipient as to whom there has been an express finding of failure to comply" with a nondiscrimination requirement adopted pursuant to that section. If, under a particular program, the State is the recipient, then action could be taken with respect to the State on a finding of failure by the State to comply with such a requirement. If the discrimination were required by State law, or by a plan approved by the State, a federal agency might be justified

in concluding that all recipients of aid in the State would discriminate, without having to make separate investigations and findings as to each locality receiving aid. In most cases, however, a separate finding and order as to each particular locality would probably be necessary. Thus, absent some basis for finding that the State was responsible for the discrimination, it would be expected that action would be taken only with respect to the local unit or units (e.g., the cities, towns, or countries) actually involved.

Q. Would assistance be cut off to a private institution which engaged in segregation, where the segregation is required by the State? Segregation required by state

A. The requirements of Title VI apply "notwithstanding any inconsistent provision of any other law." Moreover, any state law or policy requiring segregation would clearly be unconstitutional. Hence no such state law or policy would excuse a failure to comply with a nondiscrimination requirement imposed pursuant to section 602. Whether a nondiscrimination requirement is appropriate and whether aid would be cut off, or the nondiscrimination requirement would be enforced in some other way, would depend on the circumstances.

Q. If any agency administers two aid programs, and a person or entity who received federal funds under both engages in prohibited discrimination in connection with one and not the other, could assistance be cut off as to both programs? Different programs

A. No. There would have to be a finding of discrimination in connection with each program under which aid is terminated or refused.

Q. Would federal milk, or school lunch programs be terminated because a school was segregated? Milk and school lunch programs

A. The federal agency could require that the school distributing milk and lunches refrain from segregation. It would have legal authority to enforce that requirement by terminating or refusing assistance. But it is not expected that such programs would be terminated so long as milk and food were made equally available to white and Negro children alike. Such termination would be inappropriate in view of the fact that other means of ending segregation were available which did not involve denying needed food to growing children. It would be more appropriate, and more consistent with the objectives of the milk and school lunch programs, for example, to rely on suits by parents,

or by the Attorney General under Title IV of H.R. 7152, as the method of bringing an end to segregation. Again, it should be emphasized that before any funds could be refused or terminated there would have to be (1) an effort to obtain compliance by voluntary means, (2) a hearing, and (3) a full report to the appropriate Committees of Congress.

Kennedy's views on cut-off of assistance

Q. Last April, President Kennedy stated he was opposed to cutting off all aid to states that engage in some form of racial segregation. Has the Administration changed its views?

A. The Administration has not changed its views in this respect. Under Title VI assistance under one program cannot be cut off because there is discrimination in another program. Therefore the Title does not provide a means for cutting off all aid to a state. This is consistent with the view expressed by President Kennedy that there should be no general power to effect a massive and general cut-off of all assistance to a State because it discriminates in one way or another. What President Kennedy said, in the question and answer period following his speech to the American Society of Newspaper Editors on April 19, 1963,

was the following:

"MR. HILL: Mr. President, will you attempt to cut off Federal Aid to the State of Mississippi as proposed by your Civil Rights Commission?

"THE PRESIDENT: I don't have the power to cut off the aid in a general way as was proposed by the Civil Rights Commission, and I would think it would probably be unwise to give the President of the United States that kind of power because it could start in one state and for one reason or another it might be moved to another state which was not measuring up as the President would like to see it measure up in one way or another. I don't think that we should extend Federal programs in a way which encourages or really permits discrimination. That is very clear. But what was suggested was something else and that was a general wholesale cutoff of Federal expenditures, regardless of the purpose for which they were being spent, as a disciplinary action on the State of Mississippi. I think that is another question, and I couldn't accept that view." (Emphasis added).

Title VI is wholly consistent with that position. It would not authorize " a general wholesale cutoff of Federal expenditures, regardless of the purpose for which they were being spent." It would authorize action, including cutoff of funds where necessary, to end racial discrimination against the participants and beneficiaries of specific programs of federal financial assistance by way of grant, loan or contract.

Q. Why does not Title VI apply to religious discrimination? Religious discrimination.

A. Religious discrimination does not appear to have been a significant problem in connection with federal aid programs. Inclusion of a reference to religion could

have caused unnecessary concern on the part of religiously-affiliated institutions which, for example, receive school lunches or participate in state welfare programs assisted by the Social Security Administration.

Use of school auditoriums

Q. Would Title VI preclude use of school auditoriums, national guard armories, etc. for meetings or social events open only to one race?

A. No. Such incidental use of public facilities would not involve racial discrimination among participants or beneficiaries of a federal assistance program.

Meaning of contract

Q. What kinds of assistance are covered by the term "contract" in Sec. 602?

A. Most government contracts do not involve assistance, and hence would not be covered. Some research contracts, for example, may be said to resemble grants, and to contain an element of assistance, as distinguished from purchase of a product or result. Another example of a contract which involves an element of financial assistance is the typical contract with reclamation districts under which the federal government provides the funds for constructing irrigation facilities which will be operated and ultimately owned by nonfederal entities. Whether a particular contract involves financial assistance, as distinguished from an

ordinary business bargain, will depend on the circumstances. Title VI does not cover contracts for procurement; it reaches only programs of assistance. Thus, for example, government purchases of equipment or supplies and military procurement would not be within the scope of Title VI.

Q. Is Title VI mandatory or discretionary? Mandatory

A. It is mandatory in the sense that it requires each federal department or agency to take action to end racial discrimination against participants in and beneficiaries of its program. It leaves it to the relevant agency to determine who those participants and beneficiaries are, in light of the purposes of the Act of Congress authorizing the federal assistance program, and subject to the requirement of Presidential approval of regulations and the right to challenge those regulations in a judicial review proceeding. It allows the agency appropriate discretion in determining the appropriate means to obtain effective compliance. It requires the agency, in taking compliance actions, to follow the procedures specified in Sections 602 and 603.

9. Possible Amendments

The following is a list of the amendments proposed in the House, the action taken thereon, and a reference to the arguments made in opposition to them. All references are to the Congressional Record for Feb. 7, 1964, except as otherwise indicated.

A. Committee Amendments Adopted.

Willis amendment, providing for reports to congressional committees in cases of termination or refusal of assistance, p. 2414. Adopted, 129-31, p. 2416.

Lindsay amendment, for Presidential approval of regulations, p. 2416. Adopted by voice vote, p. 2416.

Celler amendment, to exclude contracts of insurance and guaranty, p. 2416. Adopted by voice vote, p.2416.

Lindsay amendment, for hearings prior to compliance action, p. 2422. Substituted for Cramer amendment (see infra), 182-0, p. 2423. Adopted by voice vote, p. 2423.

B. Amendments Rejected.

Whitener amendment, to strike Title VI, p. 2378. Rejected, 82-179, p. 2414.

Harris amendment, to substitute the draft of Title VI in the bill as introduced, p.2405. Rejected, 80-206. p.2409. Opposed by Celler, Lindsay, Meader, McCulloch and other

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Pages 55-61 have been removed from orig

committee members as a "gutting" amendment, as destroying months of careful drafting, etc., pp. 2407-9.

Meader amendment, to provide for securing compliance with Sec. 601 by contracts between federal agencies and aid recipients, which would be enforced by action in a district court, p. 2409. Rejected, 82-179, p.2417. Opposed by Celler, Lindsay and Corman as denying to agencies needed flexibility, presenting problems of enforcement as to third parties, etc., pp. 2410, 2411, 2412.

Cramer amendment, to require that all action to effectuate Sec. 601 be taken after adjudication and decision under Administrative Procedure Act, p. 2418. Lindsay amendment substituted, 182-0, p. 2423. Lindsay amendment adopted, p. 2423.

Cramer amendment, to provide that agency action shall be sustained on judicial review only if supported by a preponderance of the evidence, p. 2423. Rejected, 2423. Opposed by Rodino, McCulloch, and Celler, partly on the ground that the matter should be dealt with in connection with a contemplated overall revision of the Administrative Procedure Act, p.2423.

Whitten amendment, to provide that no community, state or section of the U.S. should be discriminated against, p.2423. Rejected, p.2424.

Collier amendment, to insert "religion" in sec. 601, p.2424. Opposed by Celler on the ground the hearings showed

no evidence that religious discrimination was a problem under Title VI, and members of various denominations indicated satisfaction with the omission of "religion" from Title VI, p.2424; see also, Cong. Rec., Jan. 31, 1964, pp. 1465-6 (Mr. Celler, Mr. Rodino, Mr. Roosevelt).

Williams amendment, to prohibit discrimination against any geographic region, p.2424. Rejected, 22-120.

Roberts amendment, to prohibit furnishing government transportation to private persons, p.2425. Rejected, p.2424.

Collier amendment, to prohibit discrimination against U.S. citizens abroad, p.2426. Rejected, 58-91, p.2426.

C. Other Possible Amendments

Some or all of the amendments rejected in the House may be offered in the Senate. Other possible amendments include:

(1) Additions to coverage. Amendments may be offered to prohibit discrimination with respect to sex, age, political activity, etc. Compare Sec. 704 of the bill as passed, prohibiting discrimination in employment based on sex, and sec. 704(f) and (g). In response, it could be pointed out, first, that some differences in treatment between men and women are justified in the administration of federal assistance programs. Thus, in relief administration, the existence of a

non-working father may be given different consequences than that of a non-working mother in view of the father's legal duty to support. Special maternity benefits are another example. The President's Commission on Equal Status of Women is working to eliminate unjustified differences in treatment between men and women in connection with federal programs. Second, differences in treatment based on age can often be justified -- e.g., special assistance to the aged, special programs to combat juvenile delinquency, etc. Third, Title 18, Chapter 29 of the U.S. Code contains effective prohibitions against the use of federal relief and work relief funds for political purposes (Secs. 598, 600, 601), against expenditures to influence voting (Sec. 597), against interference in elections by federal and certain state and local employees (Sec. 595). The Hatch Act (5 U.S.C. 118 i, k) prohibits political activity by federal employees, and by state and local employees administering federal grant and loan programs.

(2) Specific exemptions. Efforts may be made to exempt particular activities, such as farm employment, school lunches, disaster relief, etc. Such a process, once started, could end by gutting Title VI of all substance.

Title VI states a general principle, which is wholly consistent with our constitutional principles and is morally

right. No sound basis appears for making exceptions from it - for saying that it is all right to use federal funds to promote racial discrimination in one area and bad in another.

The arguments for specific exemptions will often proceed from mistaken interpretations as to the effect of Title VI on the particular activity sought to be exempted. See point 5, supra.

(3) Procedure. Efforts may be made to require more cumbersome procedures in connection with compliance actions, For example, the "waiting period" under Sec. 602 (p.26, l. 23 et seq.) could be extended, or specific approval of the Committee could be required. All hearings could be required to be held in accordance with Sec. 5 of the Administrative Procedure Act. Authority to achieve compliance "by other means authorized by law" could be deleted.

As previously noted (point 6) Title VI now contains many more procedural safeguards, and requires more cumbersome and time-consuming procedures, then do most federal assistance statutes. The present requirements may create substantial administrative burdens as applied to programs involving problems of allocating limited funds among competing applications, programs requiring prompt action to fit into the fiscal and

budgetary planning of public bodies, programs involving numerous small research grants, etc. Any further procedural complexity could jeopardize effective achievement of the objectives of the underlying assistance statute.

10. Provisions of Existing Federal Assistance Statutes Relating to Racial Discrimination

1. The Hill-Burton Act of Aug. 13, 1946, 60 Stat. 1041, 42 U.S.C. 291 et seq., authorizes construction grants for public and non-profit hospitals. Sec. 622(f), 42 U.S.C. 291e(f), provides that the Surgeon General shall by regulation prescribe, inter alia:

> "That the State plan shall provide for adequate hospital facilities for the people residing in a State, without discrimination on account of race, creed, or color . . . . Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group. . . ." 1/

Sec. 625(a), 42 U.S.C. 291h(a), requires each project application to contain "an assurance that in the operation of the hospital therewill be compliance with the applicable requirements of the State plan and of the regulations prescribed under section 291e(f) of this Title regarding the provision of facilities without discrimination on account of race, creed, or color, . . ."

1/ The provision beginning "but an exception . . ." was held invalid and severable in Simkins v. Moses H. Cone Hospital, C.A. 4, No. 8908, decided Nov. 1, 1963.

2. The Second Morrill Act of August 30, 1890, 26 Stat. 418, 7 U.S.C. 321 et seq. provides for annual grants to land-grant colleges. Sec. 1, 7 U.S.C. 323, provides in part:

> "No money shall be paid out under sections 321 -- 326 and 328 of this title to any State or Territory for the support or maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of said sections if the funds received in such State or Territory be equitably divided as hereinafter set forth. . . "

3. Public Law 815 of Sept. 23, 1950, 64 Stat. 973 (reenacted as permanent legislation by the Act of August 12, 1958, 72 Stat. 551) 20 U.S.C. 631 et seq., provides for grants for school construction in federally impacted areaa. Sec. 205(b)(1)(f) of the 1950 Act (Sec. 6(b)(1)(f) of the 1958 Act), 20 U.S.C. 636(b)(1)(f), provides that each application for grant shall include

> "assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district;".

The Report of the House Committee on Education and Labor, H. Rept. 2810, 81st Cong., 2d Sess., (1950) p.15 states:

> "This provision is intended as a safeguard against discrimination against categories of children mentioned in the bill as such, but it is

not intended to disturb classification on jurisdictional or similar grounds, or patterns of racial segregation established in accordance with the laws of the State in which the school district is situated."

4. The Federal Airport Act of May 13, 1946, 49 U.S.C. 1101 et seq., provides for federal grants for airport construction. Sec. 11 of the Act, 49 U.S.C. 1110, provides that each applicant should furnish written assurances, satisfactory to the Administrator of the Federal Aviation Agency, that: "the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination." The application form prescribed by the Federal Aviation Agency provides for an assurance by the applicant that neither it nor any other person occupying space or facilities at the airport "will discriminate against any person or class of persons by reason of race, color, creed or national origin in the use of any of the facilities provided for the public on the airport." See also 16 U.S.C. 7d.

[Note re W.P.A. and P.W.A. The Deficiency Appropriation Act of 1936, 49 Stat. 1610, and the Emergency Relief Appropriation Act of 1937, 312, 50 Stat. 352, appropriating funds for W.P.A. and P.W.A., contained a provision making it a misdemeanor for any person "by means of . . . discrimination on account of race, religion or political affiliation" to deprive any person of "the benefit to which he may be entitled under the foregoing appropriation."]

Title VI

Department comments on Amendment 656 and other Dirksen proposals.

1. (1) "Notwithstanding any other provision of law."

   (2) Contract of insurance

2. Analysis of Amendment 656 explains that amended 602 will not prevent federal agency from acting against State's attempt to protect a violating political entity.

Title VI

1. Senator Dirksen questions the meaning of the clause "notwithstanding any inconsistent provision of any other law" which appears in section 601. Clause deleted in Am. 656.

This provision means that no one shall be discriminated against in federally-assisted programs even if any existing statute purports to authorize sanction or require such discrimination. It would, for example, nullify the explicit sanction of legal discrimination in hospital admissions appearing in the Hill-Burton Construction Act. The question is raised whether this title gives to the federal government "the power to invalidate existing contracts if it determines to discontinue assistance." The answer is that it does not. The title has only prospective application, and will not permit an agency to invalidate contracts retroactively.

2. The Senator also questions the meaning of the phrase "other than a contract of assurance or guaranty" appearing in section 602, which exempts such contracts from the scope of Title VI. The terms "assurance" and "guaranty" have a tehcnical meaning well known to the law. The exemption would apply, for example, to such matters as federal deposit insurance corporation insurance and FHA guaranty loans. There is no legal ambiguity in this clause, and it may be expected that the courts will be able to apply this provision without great difficulty. Retained in Am. 656

4-22-64
for Humphrey
(contrasts bipartisan amendments)

Hearing Requirement in Title VI

Sec. 602 provides that compliance with any requirement adopted pursuant to Sec. 602 may be effected by a cut-off of funds or by other means authorized by law, "after a hearing." The nature of the hearing required will depend on the circumstances and the compliance action proposed.

The first step, in all cases, will be advice to the appropriate person or persons and a reasonable effort to secure voluntary compliance. Obviously no hearing is required in connection with such efforts at voluntary compliance. It is only after the agency has determined that compliance cannot be secured by voluntary means that the occasion would arise for any formal compliance action which requires a hearing.

One typical form of compliance action would be a referral to the Department of Justice for legal action. Such action might be a suit for desegregation of public schools or public facilities under Title III or IV of H.R. 7152. Or it might be a suit to enforce the terms of a grant or loan agreement. In such a case a formal

agency hearing on the record would serve no purpose, since the facts would be tried de novo in the court proceeding. All that Sec. 602 would require in such case would be notice to the prospective defendants of the proposed referral for litigation, so as to give them one further opportunity to comply voluntarily.

Similarly, reliance to achieve compliance might be placed on available procedures under state law or municipal ordinance. A formal hearing on the record would not be required before a referral was made to such an agency.

In this connection it may be noted that Sec. 5 of the Administrative Procedures Act excludes, from its procedural requirements for hearings, "any matter subject to a subsequent trial of the law and the facts de novo in any court." 5 U.S.C. 1004.

If the compliance action involves a cutoff of funds - i.e., a refusal to grant or continue assistance, or a termination of assistance - Sec. 602 requires an express finding of noncompliance by the particular recipient and Sec. 603 provides for judicial review. The primary purpose

of the hearing requirement appears to be to ensure that an adequate record will be made for purposes of judicial review. See Cong. Rec., Feb. 7, 1964, pp. 2418-2423. Accordingly, in cases where assistance will be terminated on an express finding of failure to comply with a nondiscrimination requirement adopted by the agency, a more complete type of hearing, including an adequate opportunity for the recipient to present evidence and argument, would be required, so as to establish a full record on the issue of compliance on the basis of which a reviewing court could determine whether the agency's action was supported by substantial evidence.

Sec. 602 makes it clear that such a hearing must be held prior to the taking of final agency action. Nothing in section 602 requires that more than one hearing be afforded. Accordingly, in a situation where action is recommended at one administrative level and finally taken at a higher level, it would be necessary to afford only one hearing, which could be afforded either prior to the initial recommendation, or at some later stage prior to the taking of final action.

The requirement of a hearing prior to the cutoff of funds adds substantially to the procedural protection afforded recipients of federal assistance. Many federal grant and loan statutes contain no provisions for such hearings. For example, The Hill-Burton Act, authorizing grants for hospital construction, provides for a federal hearing to the state agency, prior to any refusal or termination of a grant, 42 U.S.C. 291h(a), 291j(a), but makes no provision for a hearing to the hospital which actually receives the grant. Grants to state employment services may be revoked by the Secretary of Labor upon notice in writing to the state stating wherein the state has failed to comply with its approved plans; no provision is made for a hearing. 27 U.S.C. 49h. The School Lunch Act, 42 U.S.C. 1751, makes no provision for hearings; the regulations under it allow a state agency or a school "opportunity to submit evidence, explanation or information" prior to a cutoff of funds. 7 C.F.R. 210.18. Lending agencies, such as the Small Business Administration, are typically under no statutory or other obligation to afford any form of hearing before refusing a loan, or before terminating

a loan for breach of any condition stated in it. The various statutes authorizing research grants by N.I.H., A.E.C., and other agencies typically contain no provision for hearing prior to either refusal or termination of a grant; a typical statutory provision is that of 42 U.S.C. 1891, which simply authorizes the heads of certain agencies to make grants for the support of basic scientific research "where it is deemed to be in furtherance of the objectives of such agency."

Many other examples could be given of grant and loan statutes which presently contain no provision for hearing prior to a refusal or termination of funds. Sec. 602 would require hearings in all such cases, where the refusal or termination was based on a finding of failure to comply with a nondiscrimination requirement adopted pursuant to Title VI of H.R. 7152.

UNITED STATES COMMISSION ON CIVIL RIGHTS

WASHINGTON, D.C. 20425

June 11, 1964

MEMORANDUM FOR THE HONORABLE BURKE MARSHALL
Assistant Attorney General

FROM : General Counsel

SUBJECT: Is a hearing necessary in order to promulgate regulations under Title VI of the Civil Rights Bill?

Here are two memorandums on the question we discussed the other day of whether a public hearing is necessary in order to promulgate regulations under Title VI of the Civil Rights Bill when it is passed.

The first memorandum concludes that the Administrative Procedure Act is not applicable to Title VI regulations. I understand that HEW has come to the same conclusion on this. The other aspect of the question is whether the debate thus far indicates that such a public hearing is contemplated by Congress. As the second memorandum indicates, a review of the debate does not indicate that the chief proponents of Title VI contemplate a public hearing in connection with the regulations. The only indication to the contrary is a statement by Representative Lindsay during the House debate which in light of the discussion of others appears simply to be a lapse.

Thus, the only reason for holding public hearings prior to the issuance of regulations would be policy considerations rather than the requirements of law. As I indicated the other day, I think that informal consultations before the issuance of regulations may be called for, but public hearings would not be a good idea.

William L. Taylor

Enclosures

OPTIONAL FORM NO. 10
5010-101

UNITED STATES GOVERNMENT

Memorandum

TO : General Counsel

DATE: May 27, 1964

FROM : Staff Attorney

SUBJECT: Applicability of the Administrative Procedure Act to Section 602 of H.R. 7152

I. INTRODUCTION

A question has arisen as to the applicability of the Administrative Procedure Act to the first three sentences of Section 602 of H.R. 7152, to wit:

> "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, shall take action to effectuate the provisions of section 601 with respect to such program or activity. Such action may be taken by or pursuant to rule, regulation, or order of general applicability and 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." (Emphasis supplied)

It is concluded that the A.P.A. does not apply to the procedure contemplated by this language.

II. APPLICABLE PROVISIONS OF THE A.P.A.

It seems clear that the procedure contemplated by the quoted language of Section 602 would be "rule-making" within the meaning of the A.P.A.

Section 2(c) of the A.P.A. defines "rule" and "rule-making" as follows:

> "'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or

> financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule." (Emphasis supplied)

Thus, only Section 4 of the A.P.A., which regulates rule making, would apply to Section 602. Section 4 of the A.P.A., however, specifically excepts from its coverage "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts . . ." (emphasis supplied). On the basis of this language alone, it seems clear that the procedure contemplated by Section 602 is not covered by the A.P.A. The legislative history of section 4 of the A.P.A., and cases arising under it, confirm this view.

III. LEGISLATIVE HISTORY OF SECTION 4 OF THE A.P.A.

The Senate Report on the A.P.A. made the following observation on the above-quoted exception to Section 4:

> "The exception of proprietary matters is included because the principal considerations in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. None of these exceptions, however, is to be taken as encouraging agencies not to adopt voluntary public rule making procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rule making procedures they will adopt in a given situation within their terms." (Emphasis supplied)

Administrative Procedure Act, Report of the Committee on the Judiciary on S.7, Sen. Rep. No. 752, 79th Cong. 1st sess. (November 19, 1945), quoted in Administrative Procedure Act, Legislative History, Sen. Doc. No. 248, 79th Cong. 2d sess. 199 (July 26, 1946). The House Report is essentially the same except for the statement that "Changes can then be sought through the petition procedures of section 4(d), by which such rule making may also be initially invoked." Administrative Procedure Act, Report of the Committee on the Judiciary, House of Representatives, on S. 7, House Rep. No. 1980, 79th Cong. 2d sess., (May 3, 1946), quoted in Administrative Procedure Act, Legislative History, op.cit. supra, 257. This statement is curious inasmuch as an exemption of such matters from Section 4 at large would seem to make

section 4(d) inapplicable as well. It suffices to say that this statement is not referred to in any of the legislative debate, in the Attorney General's Manual on the Administrative Procedure Act (U.S. Department of Justice, 1947), prepared subsequently, or in any of the cases dealing with the exceptions to Section 4. On March 12, 1946, Senator McCarran, the chief Senate sponsor of the A.P.A., referred to the exemptions by simply quoting from the Act. Administrative Procedure Act, Legislative History, op.cit. supra, 315. He apparently did not feel that any further comment was necessary. On May 24, 1946, Representative Walter, the chief House sponsor of the A.P.A., stated: "The exemption of proprietary matters is included because in those cases the Government is in the position of an individual citizen and is concerned with its own, property, funds, or contracts." Ibid., 358.

IV. THE ATTORNEY GENERAL'S MANUAL AND SECTION 4 OF THE A.P.A.

The Attorney General's Manual on the Administrative Procedure Act, op.cit. supra, 27-8, states as follows, with respect to the relevant exemptions of Section 4 of the A.P.A.:

> "Loans. This exempts rules issued with respect to loans by such agencies as the Reconstruction Finance Corporation, the Commodity Credit Corporation, and the Farm Credit Administration. It also exempts rules relating to guarantees of loans,[1/] such as are made by the Federal Housing Authority and the Veterans Administration, since they are matters relating to public loans.
>
> "Grants. Rule making with respect to subsidy programs is exempted from section 4. 'Grants' also include grant-in-aid programs under which the Federal Government makes payments to state and local governments with respect to highways, airports, unemployment compensation, etc.
>
> "Benefits. This refers to such programs as veterans' pensions and old-age insurance payments.

1/ Such guarantees are apparently not covered by Section 602.

"Contracts. All rules relating to public contracts are exempt from section 4. The exemption extends to wage determinations made by the Labor Department under the Davis Bacon Act . . . and the Walsh Healey Act . . ., as conditions to construction and procurement contracts entered into by the Federal Government. See Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)." 2/

2/ In the Perkins case, certain steel manufacturers sued to enjoin wage determinations made by the Secretary of Labor under the Walsh-Healey Act. That Act requires certain wage standards of government contractors. The Supreme Court reversed the Court of Appeals, holding that the District Court had properly dismissed the complaint. The Court said:

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." 310 U.S. at 127.

V. RELEVANT CASES

Cases arising under the exceptions to Section 4 of the A.P.A. are the following:

McNeil v. Seaton, 281 F.2d 931, 936 (D.C. Cir. 1960) (Rules relating to grazing privileges on Federal range not subject to section 4 of A.P.A.)

Lazar v. Benson, 156 F.Supp. 259, 270 (E.D.S.C. 1957)(Rules relating to tobacco price support program not subject to section 4 of A.P.A.)

Stroud v. Benson, 155 F.Supp. 482, 490 (E.D.N.C. 1957), dismissed on other grounds, 254 F.2d 448, cert.den., 358 U.S. 817. (Rules relating to tobacco price support program not subject to section 4 of A.P.A.)

Doehla Greeting Cards v. Summerfield, 116 F.Supp. 68, 75 (D.D.C. 1953), affirmed on other grounds, 227 F.2d 44. (Rules relating to mail rates not subject to section 4 of A.P.A.)

Richard K. Todd, et. al., 68 I.D. 291, 11 Ad.L.(2d) 948 (Department of Interior, October 30, 1961)(Rule relating to the closing of National Moose Range to oil and gas leases not subject to section 4 of A.P.A.)

U.S. Department of Interior, Southwestern Power Administration, 18 F.P.C. 153 (Federal Power Commission, August 9, 1957)(Rate Schedule of federally operated power administration not subject to section 4 of A.P.A.)

Jeffrey M. Albert
Staff Attorney

4-22-64 -
for Humphrey
(antedates
Dirksen
amendments

Pinpointing Cutoffs Under Title VI.

Sec. 602 of H.R. 7152 authorizes, as a means of achieving compliance with Title VI, the cutoff of funds -- that is a refusal to make or continue a grant or loan, or a termination of such grant or loan. The intention has been made very clear that

> "Fund cutoff is the last resort, to be used only if all else fails to achieve the real objective - the elimination of discrimination in the use and receipt of federal funds." (Cong. Rec., April 7, 1964, p. 6389-Senator Pastore; Cong. Rec., March 30, 1964, p. 6328 - Senator Humphrey; H. Rept. No. 914, Part 2, pp. 25-6).

It follows-and has also been made clear - that if a cutoff of funds is necessary, that cutoff

> "should be 'pinpointed . . . to the situation where discriminatory practices prevail' as Secretary Celebrezze stated in his testimony. By this means, the effect upon cutting off of funds will be limited to the county or immediate area where racial inequality exists." H.Rept. 914, Part 2, p. 26.

The same point was made in the Senate in the following colloquy on April 7, 1964:

> "Mr. RIBICOFF. By way of further amplification of the question raised by the distinguished Senator from Mississippi, may I ask the distinguished Senator from Rhode Island whether it is not correct to say

14(2)

that if a State was administering a program and athere was discrimination in one part of that program, under appropriate rules and regulations it would be possible to disallow the expenses and the allotment that would go to that section of the program where the discrimination was taking place, but to allow the expenses and allotments to areas where there was no discrimination.

"Mr. Pastore. Under the broadness of the statute, that would be correct . . . " Cong. Rec., p. 6840."

Sec. 602 provides that any compliance action "shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." It would not be consistent with the objectives to cutoff funds any more broadly than was necessary to remedy these particular situations where discrimination was occurring.

Adequate procedural devices are available to achieve this pinpointing. Some examples will illustrate the range of possibilities.

First, under many programs grants or loans are made directly to local entities. For example, grants for school construction under Public Law 815 are normally made to the "local educational agency" - i.e., the school board or other authority responsible for public schools in a county or other

school district. Under Sec. 602 cutoff of funds would be authorized only on a finding that the particular school board was not complying with the nondiscrimination requirement imposed pursuant to Sec. 602. A similar pattern is followed in most aid to education programs.

Second, under other statutes the grant is made to a state but administrative machinery now exists by which any cutoff can be pinpointed to a particular non-complying institution. For example, The School Lunch Act, 42 U.S.C. 1751 et seq., provides for payments by the Secretary of Agriculture to states in accordance with agreements between the Secretary and the state, 42 U.S.C. 1756. It further provides that the federal funds, and state matching funds, will be disbursed to eligible schools in accordance with agreements, approved by the Secretary of Agriculture, between the state and each such school. 42 U.S.C. 1757. The Secretary's regulations provide that

> "Any State Agency or any school may be disqualified from future participation if it fails to comply with the provisions of this part and its agreement with the Department or the State Agency." 7 C.F.R. 210.18. (Emphasis added).

They also provide machinery by which the Secretary may determine that a school is not entitled to reimbursement on any claim or portion of a claim submitted by it, or that a school is obligated to refund any overpayment received. 7 C.F.R. 210.15(c). Alternatively, if the Secretary disagrees with any such determination made by the State Agency, he may assert a claim against the State Agency for the amount improperly paid. / 7 C.F.R. 210.15(a) In short, the Secretary of Agriculture, under the procedures established by the existing regulations, can disqualify an individual school from further participation in the program, and has effective means by which to disallow or recover payments to individual schools. These procedures would afford ample power by which the Secretary could require a cutoff of funds to a particular non-complying school without jeopardizing funds payable to complying schools.

In fact, of course, a cutoff of funds would seldom appear necessary under the School Lunch program in view of the availability of suit under Title IV of H.R. 7152 as an alternative means of achieving compliance.

Third, the authority conferred by Sec. 602 to terminate, or to refuse to grant or continue, assistance clearly includes the power to make a partial or conditional termination or refusal. Thus it would appear appropriate, in any case where grants are made to states which are disbursed by local agencies or offices, for the federal agency to specify in its regulations or in a grant agreement, procedures by which a partial or conditional cutoff would be made in cases where a particular local agency or office had failed to comply with Title VI. For example, the federal agency could provide that the grant would be reduced by the amount normally distributable by the noncomplying local agency or office, or could enter a conditional order advising the state that unless it acted by a specified date to achieve compliance by the noncomplying agency or office, its grant would be cutoff in whole or in part.

The foregoing are intended as suggestive; under particular programs, other procedures may be possible and appropriate.

All of the forgoing suggestions assume that the state itself is endeavoring to comply with Title VI, and that non-compliance is limited to a particular locality or situation. If the state itself refuses to agree to comply with Title VI, or issues instructions or policies which are in violation of any requirement adopted pursuant to that ~~section~~ title, there may be no alternative available except a state-wide cutoff.

and types of changes in Title VI under Moderation Amendment

TITLE VI -- NONDISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS

The proposed amendments to Title VI would make no changes of substance.

All included in Am. 654

Section 601 would be amended by striking, as surplusage, the beginning words, "Notwithstanding any inconsistent provision of any other law." The sweep of the section would not be affected--that is, it would remain unrestricted by any statute now deemed to permit discrimination.

Section 602 would be amended to make a few clarifying changes and to add provisions to allay certain fears expressed with regard to Title VI. Some persons take the view that the title in its present form would authorize an agency to cut off all Federal funds flowing to a State under a particular program even though only one segment of the State were guilty of discriminating in that program. And some have even argued that the title would permit the cancellation of all Federal programs of assistance to a State or locality when discrimination occurs in only one program therein.

As explained on the floor of the Senate a number of times, these readings of Title VI are inaccurate. The title is designed to restrict the cut-off of Federal assistance to a

particular offender in the particular area where the unlawful discrimination takes place. However, to satisfy those who argue that the title is not so limited, language has been added to section 602 to spell out this limitation more precisely. This language provides that a refusal or cutoff of funds or other assistance shall be restricted to the particular political entity, or part thereof, which is violating an agency requirement under Title VI and shall affect only the particular program, or part thereof, in which such violation has occurred.

It is understood of course that the amendments to section 602 would not tie the hands of a federal agency if a State attempted to protect a political entity which was in violation of Title VI from the effect of a partial cutoff by that agency in a program of federal assistance channeled through the State. If the State, for example, failed to deprive the offending entity of such assistance and, instead, distributed a reduced amount to each participating entity, including the offender, it would be open to the federal agency to take such further action as might be necessary to obtain compliance with its requirements under Title VI.

A new section 604 would be added to preclude action by a federal agency under Title VI with respect to any employment practice of an employer, employment agency or labor organization except where a primary objective of the federal financial assistance involved is to provide employment. This provision is in line with the provisions of section 602 and serves to spell out more precisely the coverage of the title.

Effect of Title VI on Social Security, Veterans Pensions, and Other Direct Federal Payments

Repeatedly it has been asserted that enactment of Title VI will place in jeopardy all federal social security payments, veterans' pensions, and the like. Thus the gentlemen from South Carolina (Mr. Ashmore) stated, at p. 1545 of the Congressional Record for February 1, 1964:

> "Title VI holds the financial sword of Damocles over the head of every person in this country who receives a Social Security check, a pension check, farm benefits, home loan benefits, veterans' benefits, or whatever it might be."

This assertion, like so many in the "Chamber of Horrors" that opponents of H.R. 7152 have sought to construct, is simply not true. Throughout this debate, opponents of the bill have sought to divert attention from the evil fact of racial discrimination which H.R. 7152 is designed to correct, by conjuring up imaginary horrors. But these phantoms quickly disappear if you really look at them. They cannot stand the light of day.

Let us see, then, what effect, if any, Title VI would have on social security payments, veterans pensions, and other direct federal payments. The short answer is, that it would have no effect on them whatever.

Social Security. Federal social security--or, to be more precise, federal old-age, survivors and disability insurance--, is provided for by Title II of the Social Security Act. The law describes these payments as "insurance benefits"; they are paid out of an "insurance trust fund." Hence they are not affected by Title VI of H.R. 7152, for that Title does not apply to insurance programs. There is no contract between the United States and the beneficiary; his right is based purely on statute.

But there is a more basic reason why Title VI has no effect on those programs. Title VI requires that the recipient of federal funds must not discriminate, on racial grounds, among the beneficiaries of the federal program. But, in the case of these Social Security payments, the recipient is the beneficiary, and the only beneficiary. This is not a case where a State, or a school or hospital, receives funds for the benefit of others. Social security is a simple payment of benefits directly from the Federal Government to the sole beneficiary. They are the only parties involved. What the beneficiary does with the money is of no concern to the Federal Government. It doesn't matter whether he is a member of the White Citizens' Council, or the Black Muslims; it doesn't matter what policies

he pursues in his business, or his social life. None of these could affect his right to benefits, under the law as it now is, or under Title VI.

The only way in which racial discrimination could occur in participation in or receipt of benefits of this federal program would be if the United States itself engaged in racial discrimination in determining eligibility for benefits, or in its treatment of persons covered by Social Security. The United States does not engage in such discrimination. Any such discrimination would be prohibited by the Fifth Amendment to the Constitution.

And so, I repeat, Title VI will not effect, in the slightest, the right of anyone to old-age, survivors and disability benefits under Title II of the Social Security Act. There is just no possible way in which it could effect such payments.

Payments to Veterans. Various provisions of law provide for compensation to veterans and their dependents for service-connected disability or death, for pensions for non-service connected disability or death, and for veterans insurance. Title VI would not effect any of these.

Insurance payments are clearly not covered, since Title VI does not apply to insurance programs. Compensation for disability

cannot fairly be described as a form of federal financial assistance; it is rather the discharge of an obligation. For this reason it, too, is not within Title VI.

But, again, the most basic reason why none of these payments are covered is that, like social security payments, they are direct payments from the United States to the sole beneficiary of the federal program. What the recipient does with the money is irrelevant to the purposes of the federal program. The only entity which could possibly engage in any form of racial discrimination which would be relevant under Title VI would be the United States itself, and it does not engage in such discrimination and is precluded by the Constitution from doing so.

Civil Service Retirement. Civil Service retirement is in the same category. Here again, it is, properly speaking, a form of compensation for services rendered, rather than a form of federal assistance. But in any event, the payment goes directly from the United States to the ultimate beneficiary, and what he does with it is irrelevant to the purposes of the federal law. So there is no way in which Title VI could affect these payments.

Farm Benefits. The principal direct payments to farmers are crop insurance and acreage allotment payments. These

programs also are not affected by Title VI. Crop insurance is not covered by Title VI, since Title VI does not apply to insurance programs. And again, more basically, both programs involve direct federal payments to the ultimate beneficiary. It has been suggested that payments under these programs could be refused to a farmer who adopted racially discriminatory employment policies. The short answer is that Congress was not concerned with farm employment in either program; farm employees cannot be regarded as participants or beneficiaries of either. Hence there could be no withholding of funds based on a farmer's employment policies.

Home Loan Benefits. Another contention often made is that Title VI will affect every homeowner. The answer is that this is not so. Action being taken under Executive Order 11063 will, it is hoped, make it easier for individual homeowners to get financing, by seeking to eliminate existing practices of racial discrimination engaged in by some lending institutions in connection with residential housing. But there is just no way in which either that Order or Title VI could result in a denial of a loan to an individual homeowner/calling up a loan.

Other Welfare Programs. Various State welfare programs receive federal aid; examples include federal grants under the

Social Security Act for aid to dependent children, maternity and child welfare, aid to the blind, aid to the permanently disabled, etc. These programs differ from the social security payments made under Title II of the Social Security Act in that they are administered by the States and involve State as well as federal funds. Title VI would have an important application to these programs. But its effect would be, not to impair any right of individuals eligible for welfare payments, but to protect those individuals by making certain that eligible beneficiaries are not denied their rights on racial grounds, or subjected to discriminatory treatment.

It is true that if a State should follow a practice of denying welfare funds to eligible persons because of their race, or should maintain segregated lines, or waiting rooms, or other discriminatory treatment in connection with receipt of benefits, the federal agency would have to take action to end the discrimination. Such action might take the form of cutting off payment of administrative costs. But it is most unlikely that funds needed for welfare payments to needy persons would ever be cut off, except conceivably as a temporary measure to bring about a necessary and beneficial change in the policy of the State agency administering the welfare program. This is so

because it would not be consistent with the policy of the federal aid statute to cut off needed welfare funds, and because nondiscrimination could in most, if not all, cases be achieved by other means.

Indeed, any racial discrimination by the State in the administration of its welfare programs would be a clear violation of the Fourteenth Amendment, which the courts would have ample power to remedy.

* * *

To summarize, Title VI will have no effect at all on those programs which involve direct federal payments to the ultimate beneficiary of the federal program--old-age and survivors benefits under social security, veterans pensions, and the like. People receiving such federal payments can rest easy. Title VI will not affect them. The same is true of farm benefits and many other direct federal payment programs.

Title VI will have an effect on those State welfare programs which receive federal aid. But its effect will be to protect the individual beneficiaries of such programs from racial discrimination, and not to weaken or impair the rights of those individual beneficiaries.

Effect of Title VI on The President's Power to End Racial Discrimination in Housing

Executive Order 11063, November 20, 1962, directs all federal departments and agencies to take appropriate action to prevent discrimination because of race, color, creed or national origin in the sale, lease, use or occupancy of residential property which is (1) owned or operated by the Federal Government, (2) provided with the aid of federal loans, advances, grants or contributions, (3) provided by loans insured, guaranteed or otherwise secured by the credit of the U.S., or (4) provided as part of an urban renewal program supported with federal loans or grants. Discrimination in lending practices related to such poverty is also to be prevented. Pursuant to this Order, various agencies have issued regulations prohibiting racial discrimination in matters coming within the scope of the Order and prescribing sanctions for violation of the regulations. E.g., 24 C.F.R. (Supp. 1963) 200.200 et seq. (F.H.A.); 38 C.F.R. (Supp. 1963) 36.4331, 36.4361 (V.A.); 6 C.F.R. (Supp. 1963) 303.1 et seq. (Farmers' Home Administration); 45 C.F.R. (Supp. 1963) 12.3(h) (H.E.W.).

This Order, and the agency regulations issued pursuant to it, were issued in the exercise of the Constitutional powers of the President as Chief Executive, and the rule-making authority of the various agencies under the various statutes relating to housing.

Title VI of H.R. 7152 consists of three sections. Section 601 contains a general declaration of policy to the effect 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 subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 directs each federal department or 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" to "take action to effectuate the provisions of section 601 with respect to such program or activity." The remainder of section 602 relates to the authority which may be exercised and the procedures to be followed in effectuating this direction. Section 603 provides for judicial review.

Section 602 of H.R. 7152 will be applicable to housing provided with the aid of federal grants, loans, or contributions, and to housing provided through urban renewal programs supported by federal grants or loans. 1/ As to such housing, Title VI will give statutory support to the existing provisions of E.O. 11063 and the regulations issued thereunder.

Section 602 is not applicable to housing provided by loans insured, guaranteed, or otherwise secured by the credit of the United States. Hence it does not require action to end racial discrimination as to such housing. However, nothing in Title VI purports to prohibit executive action to eliminate racial discrimination, or to limit

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1/ Title VI may or may not apply to housing owned or operated by the United States, depending on the circumstances. Furnishing of government-owned housing is in some cases a form of compensation to employees, in other cases it may be deemed a form of financial assistance. Rental of repossessed housing typically involves neither. As a practical matter, however, Title VI will have little impact on such housing, since the United States is precluded by the Fifth Amendment from engaging in racial discrimination in its direct operations.

any authority under existing law to deal with such discrimination, in programs and activities not covered by section 602. By its terms, the section establishes a mandatory, across-the-board policy as to federal grant and loan programs and certain contract programs; but the terms of the section in no way relate to those federal programs which do not come within its scope. It follows that section 602 does not diminish existing authority, derived from a source other than section 602, to deal with problems of discrimination. Since VA and FHA have such authority, it would continue. As to programs outside the scope of section 602, therefore, federal agencies remain free to exercise any authority they may have under existing law to end racial discrimination.

This conclusion from the language of the bill is confirmed and strengthened by its legislative history. The House debates make abundantly clear the intention not to affect in any way the President's power to end racial discrimination in housing assisted by federal insurance and guarantees. A similar intention has been expressed in the Senate.

The need for Title VI was stated in the following terms by Congressman Celler, the Chairman of the House Judiciary Committee. He said that enactment of Title VI was proposed in order to (1) "override specific provisions of law which contemplate Federal assistance to racially segregated institutions," (2) "clarify and confirm" the authority already possessed by most federal agencies to preclude discrimination or segregation in their programs, (3) "insure that the policy of nondiscrimination would be continued in future years as a permanent part of our national policy," and (4) "avoid legislative debate over the so-called Powell amendment." Cong. Rec., Feb. 7, 1964, p. 2384. Mr. Celler stated that "the executive branch is believed in most cases to have adequate authority to preclude discrimination or segregation by recipients of federal assistance," but that clarification and confirmation of this authority was desirable. (Ibid.) Mr. Lindsay, a member of the Committee and one of the Republican floor managers of the bill, similarly stated:

> "Now we have legislation here for two reasons. One, because in some programs we will know that separate but equal provisions are explicitly written into them. Second, there is an area

of doubt as to the intent of Congress that derive from the fact that anti-discrimination riders on programs providing for federal assistance have been defeated. That casts doubt." Cong. Rec. of Feb. 7, 1964, p. 2334.

These statements of purpose contain no suggestion that Title VI was intended to take away any existing authority of the executive branch to deal with racial discrimination. Its intent was to confer and confirm authority, and require action, as to these programs subject to its provisions, and to have no affect at all on other programs.

The House debates clearly indicate that insurance and guaranty programs were excluded from the coverage of Title VI because some Members of Congress were unwilling to impose, or to appear to impose, nondiscrimination requirements with respect to lending and other policies of banks whose deposits were insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. They also make explicit the intention of the House not to affect the President's authority to deal with discrimination in housing under E.O. 11063 on any future amendment thereof.

In proposing an amendment, which was adopted, specifically to exclude contracts of insurance and guaranty from

Title VI, Mr. Celler stated:

"Mr. CELLER. The purport of the amendment is to eliminate all guarantees programs of the Federal Government, all insurance programs of the Federal Government. In other words, title VI would have no effect, if you accept this amendment, on guarantees or insurance." Cong. Rec., Feb. 7, 1964, p. 2416 (Emphasis added.)

The following colloquy then occurred:

"Mr. O'HARA of Michigan. Would the gentleman make it clear as to whether or not the amendment he offers, if adopted, will in any way affect the authority now being undertaken under President Kennedy's housing order affecting the operations of the FHA?

"Mr. CELLER. No sir. It has nothing to do with it." Id., p. 2416.

Mr. Corman, a member of the House Judiciary Committee and one of the floor managers of the bill, stated:

"Mr. CORMAN. Mr. Chairman, I rise in support of the pending amendment. The amendment would make absolutely clear the intention of the Congress that the authority conferred by title VI and the actions required by title VI, do not apply to programs of insurance and guaranty. Title VI will not affect such programs. It will leave the situation as to them just as it is now. In the field of housing, the President, by Executive order, has already acted to require that racial discrimination be eliminated. That action rests on authority other than title VI, and that action will not be affected by the adoption of title VI as amended by this amendment." Id., p. 2417 (Emphasis added.)

The following colloquy then occurred:

"Mr. RANDALL. Mr. Chairman, I move to strike out the last word.

"I wish to ask a question of the Chairman, if I may, to be sure of some things. The housing order of the Chief Executive of November 1962, is still in effect. That will not be affected by this amendment? Is that correct?"

"Mr. CELLER. Yes. Title VI has no effect over Presidential orders." Id., p. 2417.

Thus, the legislative history in the House repeatedly confirms the fact that Title VI means just what it says, and that no implication is to be drawn from it which would affect, one way or the other, the President's authority to deal with housing assisted by federal insurance or guarantees.

Similarly, in the Senate, Senator Humphrey has already stated unequivocally that enactment of Title VI, "will not affect in any way existing agency powers to deal with discrimination in programs or activities not covered by title VI, such as VA or FHA housing programs as to which existing statutes and an outstanding Executive order confer such power; any action taken in connection with such programs would be taken pursuant to power existing independently of the enactment or defeat of title VI and such power would

not be created, broadened, or narrowed by title VI." Cong. Rec., March 16, 1964, p. 5233. It would be helpful to have a similar statement made at a time when Title VI is under debate.

HOUSING AND HOME FINANCE AGENCY

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Federal Housing Administration
Public Housing Administration
Federal National Mortgage Association
Community Facilities Administration
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2 Harold Green

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APPEALS & RESEARCH SECTION
CIVIL RIGHTS DIVISION

MEMORANDUM FOR: Honorable Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

3-10-64

I wish to call your attention to an article by Professor Alexander M. Bickel, entitled "Sleepers in the Civil Rights Bill," which appeared in the February 29 issue of The New Republic. Professor Bickel is particularly critical of Title VI as passed by the House. He states as follows:

> "... The original Judiciary Committee and Administration drafts referred to programs receiving federal financial assistance 'by way of grant, contract or loan.' That took care of most everything. However, the amended version passed by the House refers to federal assistance 'by way of grant, loan or contract other than a contract of insurance or guaranty.' That guts President Kennedy's Executive Order 11063 of November 20, 1962, on Equal Opportunity in Housing. ... The little eight-word amendment in the House ... leaves the Executive Order effective only as it relates to housing built with direct federal grants or loans, and makes certain that any future wider application of the policy of equal housing opportunity will have to be achieved by Act of Congress rather than by independent Presidential action. This is no little thing."

It seems to me that Professor Bickel is clearly wrong in his view of the effect that Title VI would have on the Executive Order. First of all, I believe it is doubtful as a matter of statutory construction (in the event Title VI is finally enacted in its present form) that this language, taken alone, would over-rule

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DEPARTMENT OF JUSTICE
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the Executive Order as it affects FHA and VA. There is a well established rule of construction that "... the rejection of legislation by Congress is not to be viewed as equivalent to the enactment of legislation of an opposite tenor." By the same token, it is doubtful whether the mere fact that Congress exempts contracts of insurance or guaranty from its nondiscrimination requirement can be taken as an indication that Congress intends flatly to over-rule an already existing requirement on the part of the Executive Branch, established pursuant to clear executive authority.

Furthermore, the debates have removed all doubt as to the intent of Congress in this regard.

> "... Mr. O'HARA of Michigan. Would the gentleman please make it clear as to whether or not the amendment he offers, if adopted, will in any way affect the authority now being undertaken under President Kennedy's housing order affecting the operations of the FHA?
>
> "Mr. CELLER. No, sir. It has nothing to do with it.
>
> . . .
>
> "Mr. CORMAN. Mr. Chairman, I rise in support of the pending amendment. The amendment would make absolutely clear the intention of the Congress that the authority conferred by title VI and the actions required by title VI, do not apply to programs of insurance and guaranty. Title VI will not affect such programs. It will leave the situation as to them just as it is now. In the field of housing, the President, by Executive order, has already acted to require that racial discrimination be eliminated. That action rests on authority other than title VI, and that action will not be affected by the adoption of title VI as amended by this amendment.
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> . . .
>
> "Mr. RANDALL. Mr. Chairman, I move to strike the last word.
>
> "I wish to ask a question of the Chairman, if I may, to be sure of some things. The housing order of the Chief Executive of November 1962, is still in effect. That will not be affected by this amendment? Is that correct?

"Mr. CELLER. Yes. Title VI has no effect over Presidential orders." 110 Cong. Rec. 2417 (daily ed. Feb. 7, 1964).

I wanted to call this article to your attention in the event you haven't noticed it and to express my views on Professor Bickel's comments concerning the effect of Title VI.

Milton P. Semer
General Counsel

Memorandum on Whether the Judicial Review Provision of Sec. 603 Meets the Constitutional Requirement of a Case in Controversy

Sec. 603 of H.R. 7152 provides for judicial review of agency actions "terminating or refusing to grant or continue financial assistance." The question has been raised whether the actions authorized by that section come within the provisions of Art. III, Sec. 2 of the Constitution, which limit the jurisdiction of the federal courts to cases or controversies.

A number of federal assistance statutes specifically provide for judicial review of agency decisions refusing to approve a grant, or withholding funds under a grant. E.g., the School Construction Act (Public Law 815), 20 U.S.C. 641(b); the National Defense Education Act, 20 U.S.C. 585; the Hill-Burton Act, 42 U.S.C. 291j(b); Title II of the Social Security Act, 42 U.S.C. 405(g); the Library Services Act, 20 U.S.C. 356 (limited to withholding of funds); and the Hatch Act, 5 U.S.C. 118k(c). In no case have the courts refused to give effect to these provisions, or intimated doubt as to their validity.

In Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947) the Supreme Court held that a state, which received federal highway grants, had standing to review an order which threatened a partial withholding of the grants, and that its proceeding to review the order created a "justiciable controversy" (330 U.S. at 134). Its opinion pointed out that Congress can "create legally enforceable rights" to federal assistance (p. 136), and that in the Hatch Act it had done so by providing for judicial review by a person aggrieved by the Commission's order, (pp. 137-8).

In School City of Gary v. Barthlick, 273 F. 319 (C.A. 7, 1959), judicial review was allowed of a refusal to approve a grant under Public Law 815. And in State of Arizona v. Hobby, 221 F.2d 408 (C.A.D.C. 1954), where the court held it had no jurisdiction to review a refusal of a grant under Title XIV of the Social Security Act, it rested its decision on the ground that "the United States has not consented to be sued" and stated that "it is clear that the court would have jurisdiction to entertain the present action" if the Act "required appellee to approve

the Arizona plan." (221 F.2d at 500).

In Tutun v. United States, 270 U.S. 568, 576-7 (1926) the Court stated:

> ". . . Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. United States v. Babcock, 250 U.S. 328, 331. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. Compare New Orleans v. Paine, 147 U.S. 261; United States v. Sing Tuck, 194 U.S. 161; American Steel Foundries v. Robertson, 262 U.S. 209. It may give to the individual the option of either an administrative or a legal remedy. Compare Clyde v. United States, 13 Wall. 38; Chamberlain v. United States, 94 U.S. 307, 309. Or it may provide only a legal remedy. Compare Turner v. United States, 248 U.S. 354. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status."

In light of the foregoing authorities it is clear that the judicial review authorized by Sec. 603 satisfies the constitutional requirement of a "case or controversy."

How Judicial Review Would be Obtained Under Title VI

Sec. 603 of H.R. 7152 provides two avenues for judicial review of agency actions taken under Title VI.

First, It provides that

> "Any department or agency action taken pursuant to section 602 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."

If, under the statute creating the aid program or under other existing law, a procedure is provided for judicial review of agency actions, the same procedure would be followed with respect to agency actions taken pursuant to Sec. 602. For example, the School Construction Act, Public Law 815, now provides that a public school district or other local educational agency can obtain judicial review, in the United States Court of Appeals for the circuit in which such school district or educational agency is located, of final action by the Commissioner of Education (1) refusing to approve a grant application in whole or part, or (2) withholding payments for failure to comply with drawings and specifications or with any assurance given in the application, or (3) requiring the repayment of funds which have been diverted or improperly expended. 20 U.S.C. 641. If the

Commissioner should refuse to approve an application, or withhold payments, upon a finding of noncompliance with a nondiscrimination requirement adopted pursuant to Sec. 602, judicial review would be obtained in exactly the same way. This has the great advantage that where action is based on several grounds, a single review proceeding can dispose of all the issues at one time. For example, under Public Law 815, the Court of Appeals, in a single proceeding, could review the propriety of terminating payments under a grant where the order of termination was based on findings of any or all of the following: (1) failure to take adequate steps to eliminate racial segregation in operation of the schools, (2) failure to obtain adequate title to the site, (3) substantial failure to comply with the drawings and specifications, (4) failure to comply with prevailing local wages for construction labor, (5) failure to obtain adequate funds to defray the non-federal share of the project, and (6) improper expenditures or diversions of funds. See 20 U.S.C. 636, 641.

Second, If existing law does not provide any judicial review procedure, any person aggrieved may obtain review, in accordance with Sec. 10 of the Administrative Procedure

Act, 5 U.S.C. 1009, of actions terminating or refusing to grant or continue financial assistance upon a finding of failure to comply with a nondiscrimination requirement imposed pursuant to Sec. 602.

In the absence of a specific statutory provision for judicial review, agency action refusing a grant has been held nonreviewable, on the ground that Congress has not consented to what is in essence a suit against the United States. State of Arizona v. Hobby, 221 F.2d 498 (C.A.D.C. 1954). Sec. 603 is a specific consent to judicial review, where the agency action is based on Title VI. The last sentence of Sec. 603 also makes it clear that review should not be denied on the ground the agency's action was committed by law to its unreviewable discretion.

Review could be obtained, under the Administrative Procedure Act, by "any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. A suit in equity for declaratory judgment, or for injunction, would be the usual form of relief. In some cases a suit at law for a money

judgment might be appropriate.

The federal district courts would have jurisdiction of such suits as suits arising under the laws of the United States, under 28 U.S.C. 1331. Under Public Law 87-748 enacted Oct. 5, 1962, suit could be brought in the district where the plaintiff resides, or where the cause of action arises, or where any defendant resides. 1/

Under Section 10 of the Administrative Procedure Act, the court could set aside the agency's finding of failure to comply with the nondiscrimination requirement if it determines that such finding was "(1) arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law." The Act states that "in making these determinations the court shall review the whole record or such portions thereof as may be cited by any party."

As the APA indicates, judicial review under it is normally based on the record made before the administrative

1/ For discussion of the jurisdictional amount requirement, see Note Re Jurisdictional Amount Requirement, annexed hereto.

agency. In determining whether an agency acted arbitrarily or capriciously, or abused its discretion, the reviewing court would look to see what information the agency had before it as the basis for its action, and whether that information afforded an adequate basis for the action. However, if the administrative record was inadequate to show the basis for the agency's action, or if there were contentions that its decision was influenced by factors not appearing on the record, the court might either require the agency to supplement its record, or hear evidence itself as to what had occurred.

Section 10 of APA also provides that, in cases where the applicable statute provides for a hearing by the agency, the agency's action may be set aside if unsupported by substantial evidence. In fact, where the agency has held a hearing, whether or not a statute required it to do so, the reviewing court would probably apply the substantial evidence rule.

Finally, the court could set aside agency action which was "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." Since the Constitution does not require any form of hearing or judicial review in connection with the denial or termination of a federal grant or loan, there would not appear to

be any right to trial de novo in the usual situation that might arise under Sec. 603.

Under APA, the reviewing court would have authority, not only to set aside agency findings and action which it found improper, but also to "compel agency action unlawfully withheld or unreasonably delayed." Pending review the court could issue all appropriate process to preserve status or rights pending review, to the extent necessary to prevent irreparable injury.

The provisions just described are those which the Congress, in the APA, deemed appropriate for judicial review of agency action generally. No reason appears for applying different procedures and standards in this area than in others. Until now the general rule has been that agency actions denying or terminating federal grants or loans have not been subject to any judicial review at all. This is because no one has a constitutional right to a grant or loan from the government. See the Memorandum on Legality of Title VI, Congressional Record, Jan. 31, 1964, pp. 1464-5. Title VI goes a long way in extending, to federal grant and loan programs, the normal measure of judicial review which Congress has specified for other agency actions. There

is no reason to depart from these established principles and procedures and adopt special rules calling for more extensive judicial review in this area than in others.

- 7 -

Note re Jurisdictional Amount Requirement

Jurisdiction under 28 U.S.C. 1331 is limited to cases involving $10,000 or more. The amount in controversy would normally be the amount of the grant or loan which has been refused, or the unpaid balance of the grant or loan payments under which had been terminated or suspended. If, however, the agency's action affected eligibility for future grants or loans, that fact could be taken into account in determining the amount in controversy.

In addition, the U.S. District Court for the District of Columbia would have general jurisdiction, without regard to the amount in controversy, over a suit in equity brought against an officer of the United States who resides or is found in the District of Columbia. D.C. Code 11-306. Under this provision judicial review would be obtained in the District of Columbia in most situations, without regard to the amount in controversy.

Several acts of Congress confer jurisdiction on the District Courts without regard to amount in controversy. None of those acts appears applicable to suits under Sec. 603. Some of the suits to which the $10,000 jurisdictional

amount is inapplicable are:

1. Suits to redress the deprivation, under color of state law etc., of rights secured by the Constitution or by an Act of Congress providing for equal rights of citizens. 28 U.S.C. 1343(3). Since the suit would not seek relief from action taken under color of state law, this provision would not apply.

2. Suits for damages or for equitable or other relief "under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. 1343(4). H.R. 7152 is, broadly speaking, an act for the protection of civil rights. However, proceedings for judicial review under Section 603 would not be proceedings for the protection of civil rights within the meaning of 28 U.S.C. 1343(4). The plaintiff would typically be, not an individual member of a minority group whose civil rights had been threatened or impaired, but a public body, a non-profit institution, or in some cases a business organization, which was found to have discriminated against minority groups. The relief sought would be, not freedom from deprivation of civil rights of the plaintiff, but the receipt of payments under a federal grant or loan. Hence, Sec. 1343(4) would probably be held applicable.

3. Suits under an Act of Congress regulating commerce. 28 U.S.C. 1337. While Titles II and VII of H.R. 7152 rest on the commerce power, Title VI does not. Moreover, neither it nor the assistance statutes to which it applies can be characterized as regulatory statutes. Hence this section appears inapplicable.

Sec. 603 has been drafted to fit in to the ordinary and usual procedures and jurisdictional limitations applicable to the federal district courts.

typed 4-30-64

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Unequal Distribution of Federal Funds

APR 30 1964

The 1960 Report of the United States Commission on Civil Rights on Equal Protection of the Laws in Higher Education sets forth the following statistics on the use of federal funds in public colleges and universities in seven Southern States--Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina and Texas. Figures refer to the percentages of the total of the federal funds received used for each category.

	White	Negro	Desegregated
Natl. Defense Fellowships (p. 195)	64.6	9.2	26.2
Counseling and Guidance Institutes (p. 167)	40	0	60
Language Institutes (p. 199)	45.7	0	54.3
Educational Media Programs (p. 202)	66.5	9.8	23.7
Natl. Science Foundation Institutes (p. 206)	66.6	11.6	21.8
USDA Programs in Land Grant Colleges (p. 221)	100	0	
NIH Grants (p. 226)	43.3	0.01	56.7
Research Grants, (p. 229) Natl. Science Foundation	48.1	0	51.9

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	White	Negro	Desegregated
Atomic Energy Commission Grants (p. 233)	41.3	0	58.7
NDEA Loans (p. 241)	55.8	14.1	30.1

The Commission further reports the use of federal funds in support of public higher education in six states, from 1950 thru 1958, as follows (p. 256):

	White (Average per Student)	Negro
Alabama	$118.49	$11.77
Florida	85.34	21.66
Georgia	205.61	18.35
Louisiana	88.83	10.10
Mississippi	208.85	29.35
South Carolina	157.67	35.78

In the 1961 Report of the United States Commission on Civil Rights on Education a survey was made of about one-third of the public libraries in the 17 Southern States receiving federal aid under the Library Services Act (20 U.S.C. 351 et seq.). 39 of the 109 libraries reporting used segregated facilities. The average hours of weekly service reported for white libraries was almost twice that for Negro branches, while the number of circulating and reference books reported for white branches ranged from three to nearly seven times the number for Negro branches.

I have these figures on the Federal School Lunch program available for you in the Greenwood separate school district, Mississippi. These are the figures:

	Average Daily Attendance	White % A.D.A.	White % Free Lunch	Negro % A.D.A.	Negro % Free Lunch
1960-61	4,943	57	79	43	21
1961-1962	5,130	57	80	43	20

I am not sure to what extent the Federal Government contributes to the school lunch program. These figures will show that 43%, or nearly half of the average daily attendance who are Negroes receive only one-fifth of the free lunches distributed in the Greenwood district. Those are the only figures that I have here I do not know whether you can use them or not but Miss Blair will have something else. ~~(Mrs. Hogan(?))~~

It has been charged that section 601 is a "sleeper" which will require the FDIC and similar agencies to impose nondiscrimination requirements on their beneficiaries. This assertion is made because section 602 of the bill exempts insurance and guaranty programs from the mandatory requirement of nondiscrimination rules, while, on the other hand, section 601 does not contain any exception with respect to such programs.

There is, however, no basis to this charge. Section 601 does not create new authority to impose nondiscrimination requirements. It does override present provisions in statutes which require expenditure of funds on a separate-but-equal basis, such as in the Hill-Burton statute and the Land-Grant College Act. Section 601 also would make certain that it is well understood that nothing in any present statute would prevent any agency from administering its programs in a nondiscriminatory manner and it encourages the nondiscriminatory administration of programs where power presently exists to require nondiscriminatory clauses. However, it should be well understood that, unlike section 602, section 601 does not create new enforcement authority in this field.

SEPARATE BUT EQUAL LAWS

Following is the text of the only federal statutory provisions which include separate but equal provisions: 7 U.S.C. 323 (the Second Morrill Act):

> No money shall be paid out under sections 321-328 of this title to any State or Territory for the support or maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of sections 321-328 of this title if the funds received in such State or Territory be equitably divided as hereinafter set forth: Provided, That in any State in which there has been one college established in pursuance of sections 301-308 of this title, and also in which an educational institution of like character has been established, or may be hereafter established, and is on August 30, 1890, aided by such State from its own revenue, for the education of colored students in agriculture and the mechanic arts, however named or styled, or whether or not it has received money prior to August 30, 1890, under sections 301-308 of this title, the legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under sections 321-328 of this title between one college for white students and one institution for colored students established as aforesaid, which shall be divided into two parts and paid accordingly, and thereupon such institution for colored students shall be entitled to the benefits of said sections and subject to their provisions, as much as it would have been if it had been included under sections 301-308 of this title, and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students. Aug. 30, 1890, c. 841, §1, 26 Stat. 417.

1968

THE HILL-BURTON ACT

(42 U.S.C. 291c (f))provides:

That the State plan shall provide for adequate hospital facilities for the people residing in a State, without discrimination on account of race, creed or color, and shall provide for adequate hospital facilities for persons unable to pay therefor. Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group; and (2) there will be made available in each such hospital or addition to a hospital a reasonable volume of hospital services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial standpoint.

TITLE VI AND RELIGIOUS DISCRIMINATION

As introduced, both H.R. 7152 and S. 1731 contained a Title VI which would have applied to religious discrimination. The House Judiciary Committee deleted the reference to religion.

Religious discrimination does not appear to have been a significant problem in connection with federal aid programs. On the other hand, inclusion of a reference to religion would have caused unnecessary concern on the part of religiously affiliated institutions which receive some form of federal assistance. A number of federal statutes provide for grants or loans of federal funds for some educational objective, and some of this aid goes to nonprofit private institutions which may be under sectarian control.

For example, grade school children get the benefit of funds distributed under the National School Lunch Act, 42 U.S.C. 1760. Under this legislation, if the State is barred by its laws from distributing funds to nonprofit private schools of any category the United States may distribute funds directly to such nonprofit private schools. See 42 U.S.C. 1753. In more than half of the States the educational agency has considered that it could not make the funds available to nonprofit private schools and as a result the Secretary of Agriculture makes funds available directly to such nonprofit private schools, including those with religious affiliation.

Similarly, the National Defense Education Act of 1958 provides for loans of federal funds to elementary and secondary schools of a nonprofit character, for the purpose of equipping these schools with scientific and modern language instructional equipment. Title IV of the Housing Act of 1950 (the College Housing Loan Program), 12 U.S.C. 1749 et seq., provides for loans of federal money to provide "housing and other educational facilities for students and faculties * * *" at any public or nonprofit private educational institution, if it offers at least a 2-year program leading toward a baccelaureate degree. The United States is authorized by legislation to make grants for reactors to " * * * institutions or persons * * *." 42 U.S.C. 2051. It provides scholarship funds to various classes of deserving students, and these funds come in due time to the institutions which the students attend. The GI bill of rights is a familiar example. Also familiar is the Federal provision of Reserve officer training programs leading to Army, Air Force and Navy Commissions. See 10 U.S.C. 4382 ff. Many of these programs are in effect at colleges and universities under the control of religious orders. Other examples are grants for research, demonstration, and training projects related to vocational rehabilitation under 29 U.S.C. 34(a). Many of these grants are made to institutions of higher education. Similarly, religiously affiliated institutions participate in state welfare programs assisted by the Social Security Administration. 42 U.S.C. 1310. It is better to avoid the problems which obviously would be created by making Title VI applicable to religious discrimination.

4/27/54

NdeBK:NAS:JLM:mwf

cc - Mr. Schlei
Mrs. Copeland
Mr. Morrisson
FILES

Senator John Sherman Cooper
United States Senate
Washington, D.C.

Dear Senator Cooper:

This is in reply to your letter to the Attorney General dated April 21, 1954, asking a number of questions relating to H.R. 7152. For convenience, I shall repeat your question and follow it with my answer.

Title VI

(1) Q. Title VI, section 602, provides in part that "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." Would you list the kinds of "contracts of insurance or guaranty" which would be excepted under section 602 from the coverage of section 601?

A. Section 602 would not apply to any contracts of insurance or guaranty. Among the kinds of insurance and guaranty which are excluded from section 602 by the quoted language are: Insurance of bank deposits by the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation; Federal Crop Insurance; National Service Life Insurance; Federal Employees Group Life Insurance; and F.H.A. and V.A. mortgage insurance and guaranties.

(2) Q. Does the term "recipient" on line 16 of section 602 apply to private individuals, or does "recipient" include only Federal departments or agencies, States,

or subdivision of States?

A. "Recipient" means generally the person or entity to whom a federal grant or loan is made, or with whom a federal assistance contract is entered into. A private person or organization may be the recipient of a federal grant or loan, as in the case of a Hill-Burton grant to a non-profit hospital, a loan to a small business concern, or a research grant to a private college. I am not aware of any situation in which a federal department or agency would be the recipient of a federal grant, loan or assistance contract.

(3) Q. Would section 602 cover an employer who receives funds under a Federal program, and who discriminates in his employment practices?

A. This would depend on whether the employees were intended by Congress to be participants in or beneficiaries of the federal program. In the case of public works construction financed in whole or in part by federal grants - such as schools, hospitals, highways, airports, etc. - one purpose of the expenditure of federal funds can be said to be to stimulate employment. Hence construction employees would be deemed beneficiaries of such grant and loan programs, and Sec. 602 would require the agencies administering them to take action to prohibit racial discrimination in employment. On the other hand, nothing in the Agricultural Adjustment Act suggest that acreage allotment payments under them were intended by Congress to benefit farm employees. Hence farm employees would not be deemed beneficiaries of that program, and Sec. 602 would not authorize any action to require recipients of acreage allotments to refrain from racial discrimination in employment. See Cong. Rec., Mar. 30, 1964, p. 6325 for further discussion of this point.

(4) Q. Would section 602 apply to individuals who contract directly with a Federal agency? Would it apply

to a corporation which contracts directly with a Federal agency?

A. Title VI does not apply to procurement contracts, or to other business contracts which do not involve financial assistance by the United States. It does apply to grant and loan agreements, and to certain other contracts involving financial assistance (for example, those research "contracts" which are essentially grants in nature). In those cases in which Title VI is applicable, Sec. 602 would apply to a person or corporation who accepts a direct grant, loan or assistance contract from the federal government.

(5) Q. Would Title VI of the present bill supersede those arrangements which have been established under Executive Order 10925, March 6, 1961 (President's Committee on Equal Employment Opportunity)?

A. No.

(6) Are there any Federal agencies which now have regulations which prohibit discrimination in their programs or activities covered by Title VI? If so, which agencies, what are the regulations, and to what programs are these regulations directed?

A. Yes. The following are some examples of the actions which have been taken to preclude discrimination in federal grant and loan programs:

(a) Executive Order 11114, 28 Fed. Reg. 6485, June 23, 1963 prohibits discrimination in employment on construction financed in whole or in part by federal grants or loans.

(b) Executive Order 11063, Nov. 21, 1962, 27 Fed. Reg., 11527, prohibits discrimination in residential housing provided in whole or in part, by federal grants or loans, and in residential

housing under federally assisted urban renewal projects.

(c) Applicants for grants under the Federal Airport Act are required to furnish an assurance that neither the applicant nor any other person occupying space or facilities at the airport "will discriminate against any person or class of persons by reason of race, color, creed or national origin in the use of any of the facilities provided for the public on the airport."

(d) The Department of Health, Education and Welfare has refused to enter into contracts for teaching institutes under the National Defense Education Act with segregated institutions. See Cong. Rec., April 7, 1964, p. 6383.

(7) Q. Would persons who receive payments under various agricultural support and marketing programs be "recipients" under Title VI? If so, what type of discrimination by these "recipients" under Title VI would be grounds for cutting off their participation in a program? Would it include employment practices?

A. Farmers who receive federal grants, loans or assistance contracts would be "recipients" within the meaning of Title VI. Title VI would protect such farmers from being denied the benefits of such programs, or otherwise discriminated against under them, on grounds of race, color, or national origin. I am not aware of any situation in which Title VI would authorize imposition of any requirements on such farmers. In particular, it would not authorize imposition of any requirements with respect to farm employment, since farm employees are not beneficiaries of the programs referred to.

(8) Q. Title VI would apparently enable each Federal department or agency to establish its own rules and regulations for cutting off Federal funds. How is it intended that a consistent set of regulations prohibiting discrimination in Federal financial assistance programs shall be established throughout all departments and agencies? What procedure is provided by Title VI to secure consistent regulations pursuant to, and the uniform application of, Title VI in each and every Federal financial assistance program?

A. Sec. 602 provides that each agency's rules and regulations must be approved by the President. The validity of such rules and regulations will be subject to judicial consideration in any judicial review proceeding. Any cutoff of funds must be reported to the appropriate Congressional Committees.

(9) Q. Would you provide several examples of the kinds of discrimination in the administration of Federal financial assistance programs which have occurred? I would appreciate specific details and examples in this instance.

A. A number of examples, with supporting evidence are set forth at Cong. Rec., Mar. 30, 1964, p. 6323 (Sen. Humphrey); April 7, 1964, pp. 6834-6838 (Senator Pastore); April 7, 1964, pp. 6881-2 (Senator Javits); Dec. 5, 1963, p. 22405 (Senator Javits). Among them are the following:

1. Under the Hill-Burton Act, between 1946 and December 31, 1962, grants totalling $36,775,934 were made to 89 racially segregated facilities. Of these, $4,030,306 went to 13 all-negro facilities; the remainder went to all-white facilities.

2. Large grants have been made for construction and operation of racially segregated public schools in federally impacted areas, under Public Laws 815 and 874. For example, for fiscal year 1962 the following grants were made for construction and operation of public schools in impacted

areas in five Southern States: Alabama, $6,948,061; Georgia, $6,200,263; Mississippi, $2,151,945; South Carolina, $4,331,576; Virginia, $15,639,603; total for the five States, $35,232,048. Yet for the school year 1962-63 Alabama, Mississippi and South Carolina had no Negroes and whites together in any type of school. Georgia had only 64 Negroes in integrated schools, and only about one-half of 1 percent of Virginia's Negro children were in desegregated schools. Substantial Federal funds go to segregated schools in other States.

3. Negro children in Greenwood, Mississippi, who make up half the average daily school attendance, received only one-fifth of the free school lunches served.

4. There is substantial evidence of exclusion of Negroes from training for higher-skilled and better-paid jobs under federally supported vocational training programs.

10. Q. It is intended that the act of a Federal agency under Title VI in cutting off funds in a program will take place only if discrimination within that particular program has occurred? Or, would it be possible to cut off funds for a particular program to influence the termination of discriminatory practices to a state which are not covered by the particular program?

A. Funds could be cut off only with respect to the particular program and the particular recipient. Sec. 602 provides that a cutoff can be made only (1) upon an express finding that the particular aid recipient has failed to comply with a requirement of the agency's rule, regulation or order, (p. 26, lines 16-17) and (2) only under the particular program or activity to which that requirement relates. (p. 26, l.15). It would therefor not be possible to cut off funds under one program because of discrimination

in another program, or to cut off funds in one state because of discrimination in another locality. Even within a particular program and state, the intention is clear that any cutoff of funds should be pinpointed to the particular situation where discrimination has occurred. See H. Rept. No. 914, Part 2, pp. 25-6; Cong. Rec., April 7, 1964, p. 6540 (Senators Ribicoff and Pastore).

(11) Q. Would this Title authorize the termination of school lunch programs to influence the desegregation of public schools within the State?

A. It would authorize termination of school lunch payments to segregated schools. However, in view of the availability of suits under Title IV of H.R. 7152 as a means of achieving desegregation, it is not expected that such termination would occur. The intention is very clear that "fund cutoff is the last resort to be used if all else fails to achieve the real objective - the elimination of discrimination in the use and receipt of federal funds." Cong. Rec., April 7, 1964 (Senator Pastore).

(12) Q. Under Title VI, could such programs as the Federal-State highway program, and similar state aid programs, be terminated for the purpose of persuading or coercing the State or its subdivisions to end discrimination in public schools, public accommodations, or public facilities, etc?

A. No.

Title IV, Sec. 401(c)

Q. Would a privately endowed college which received 51% of its money each year from Federal grants qualify as a "public college" -- operated predominantly through the use of government funds? What is the test which would

bring a private school within this section?

A. The intention, by the "wholly or predominantly" phrase, is to include schools and colleges which are "private" in name only - i.e., to reach attempted evasions of the Fourteenth Amendment. If a school or college is genuinely "private" in origin and character, the fact that it received substantial federal grants (for research, language institutes, text books, school lunches, etc.) would not bring it within Sec. 401c. It should be noted that Title IV does not create new legal obligations; it merely authorizes suits by the Attorney General in those situations where private persons now have a right of action under the Fourteenth Amendment.

Title III

(1) Q. Considering that H.R. 7152 would provide the Attorney General with authority to intervene in actions brought by individuals under Titles I, II, and III (301), would section 302 provide the Attorney General with authority to intervene in cases arising under Title VII?

A. No. Cases arising under Title VII would be based on rights created by statute. Sec. 302 is limited to cases involving denials of the right to equal protection of the law under the Constitution.

(2) Q. To what type of action, other than those specifically authorized in H.R. 7152, would section 302 be applicable? Would section 302 embrace cases brought by individuals against State officials, or individuals against individuals, claiming the denial of equal protection of the law?

A. Sec. 302 would allow intervention in cases commenced in federal court seeking relief from a denial of equal protection of the laws on account of race, color

religion or national origin. Such a suit would be based on the Fourteenth Amendment and would normally be brought against a state official. It could be brought against a private individual only if some "state action" were involved.

(3) Q. Would Title III, section 302, permit the Attorney General to intervene in cases involving alleged denial of the 1st, 5th, and 6th Amendments to the Constitution?

A. No.

(4) Q. In what respect does section 302 differ from the old "Title III" of the original civil rights bill of 1957?

A. Part III of H.R. 6127 (85th Cong., 1st Sess.) as passed by the House, would have authorized suits by the Attorney General for injunctive relief from any actions which would give rise to a cause of action under 42 U.S.C. 1985. Sec. 302 differs from that provision in the following respects, inter alia: 1) it confers only a right of intervention, and not a right to initiate litigation; 2) it extends only to denials of constitutional rights, and not to denials of the additional statutory rights created by 42 U.S.C. 1985; 3) it extends only to denials of equal protection of the law on account of race, color, religion or national origin, and not to such denials on account of other considerations; 4) it does not extend to denials of privileges and immunities.

I trust the foregoing will prove helpful in your further consideration of H.R. 7152.

Sincerely yours,

Nicholas deB. Katzenbach
Deputy Attorney General

See also memo on discrimination in General Binder No. 3, Tab D

5-12-64

John W. Douglas
Assistant Attorney General
Civil Division

BM:AGM:swj

Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

Senator Pastore's Proposals

1. Definition of the term "agency"

Senator Pastore apparently feels that the word "agency" as it now appears in sections 602 and 603 of Title VI might be interpreted to include the President unless it is clarified by amendment. There seems to be little danger of such a result, and if it is thought to be a problem a clarifying statement on the Senate floor offers a satisfactory solution.

Section 602 provides that each "Federal department and agency which is empowered to extend Federal financial assistance . . . shall take action to effectuate the" nondiscrimination rule of section 601. Section 602 then provides that such action may be pursuant to rule, regulation or order of general applicability and shall be consistent with the objectives of the financial assistance statute. The next sentence provides that "[n]o such rule, regulation or order shall become effective unless and until approved by the President." It seems perfectly clear that since the action taken by a "Federal department [or] agency" is to be reviewed by the President, the President cannot be deemed included within the phrase "Federal department or agency." Otherwise, the statute would be construed as providing for the President to approve action taken by himself, a nonsensical result which the courts cannot be expected to reach. The judicial review provision (section 603), when it refers to "department or agency" action taken "pursuant to section 602," obviously refers to the "Federal department and agency" language of section 602. Thus, in our view, there is no danger of the result the Senator is concerned about.

cc: Records
Chrono
Greene
Marer

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A hurried examination of various federal statutes which do define "agency" shows that commonly the Congress does not specify whether the President is included or not. See, e.g., 50 U.S.C. 1213; 5 U.S.C. 1001(a); 31 U.S.C. 665. One statute, dealing with the Federal Register, does explicitly declare that it is applicable to the President. From all this it may be deduced that unless the Congress explicitly refers to the President, he is not covered. That, however, may be open to debate with respect to any given statute.

Thus, the language of Title VI itself seems clear enough, and perhaps some support may be drawn from analogous statutes. Any effort to amend the statute to explicitly exclude the President may well invite controversy and some criticism, and it is thought desirable to leave well enough alone.

If it is thought necessary to define "agency" the following definition might be considered:

> When used in this title, the term "agency" means any executive department, agency, commission, authority, administration, board, or other establishment, independent or otherwise, in the Government of the United States, including any corporation wholly or partly owned by the United States which is an instrumentality of the United States, except the President, the Congress, the courts, or the governments of the possessions, Territories or the Government of the District of Columbia.

2. Defining the term "recipient"

Section 602 provides that an agency may enforce compliance with nondiscrimination "by the termination of or refusal to grant or to continue assistance . . . to any recipient . . . ." The term "recipient" means the state or local governmental instrumentality, or private instrumentality, through which the benefits of the federal financial assistance are channeled or

upon which the responsibility of supervising and maintaining the program or activity is placed.

This means, for example, that the Army sergeant who has a child in a school built with federal funds under the "impacted areas" program may discriminate all he likes in his personal affairs without endangering the distribution of funds. His discrimination would not be affected by anything in Title VI. Only if the schools receiving the funds discriminate would there be a danger of loss of federal funds.

The difficulty with providing a definition in the statute itself is that Title VI applies to hundreds of different programs involving complex relationships. An attempt to define the term would run the real risk of either reducing the scope of the Title or inviting a great deal of criticism.

3. Defining the term "discrimination"

There are, of course, many federal statutes which bar discrimination of one kind or another but do not define the term. The most analogous are the provisions of the Interstate Commerce Act (part I), applicable to railroads, the Motor Carrier Act, and the Federal Aviation Act, each of which prohibits discrimination against passengers without defining the term. These provisions have been authoritatively construed (the Motor Carrier Act by the Supreme Court) to prohibit racial discrimination on carriers and in terminals. The meaning of the term is quite clear to the courts which enforce these acts; no serious question about it has arisen in the numerous decided cases.

Notwithstanding the clarity of the term, however, it would be very difficult to define it in the statute. That is because there are an infinite number of situations which might arise in which one person is treated differently from another on account of race, and no definition of workable length could encompass them all. That being so, it seems to us inadvisable to make the attempt.

4. Senator Pastore has suggested that the provision in section 602 which prescribes that the taking of agency action to end discrimination "may" be by rule, regulation or order of general applicability be amended to read "shall," on page 26, line 6. This change would then be mandatory and thus would conform to the mandatory style of the surrounding phraseology -- "shall take action" (line 4), "shall be consistent" (line 8), "shall become effective" (line 11).

This change seems desirable and it is our understanding that the Department will agree to it.

5. Senator Pastore suggests that steps be taken to make certain that judicial review will be available to agency action taken after enactment of the bill where such action would have been authorized by law prior to such enactment.

This can be accomplished as follows:

(a) On page 26, line 8, after "applicability", insert "whether existing prior to enactment of this Title or adopted thereafter".

(b) On page 26, line 10, insert before "No" "After enactment of this Title", and change "No" to "no".

(c) On page 26, line 11, delete "become" and substitute "in accordance with", "be considered."

These changes will bring about uniformity of procedure in respect to anti-discrimination rules which an agency may already have adopted and those which it adopts after enactment of the Title. The objective is to assure that the judicial review provided in Section 603 for action taken "pursuant to Section 602" will also apply to action taken under pre-existing rules but after enactment of the Title. This is a logical and desirable provision. It is quite possible that a court would hold, even under the present language of the bill, that action under pre-existing rules was taken "pursuant to Section 602." It is of course only fair and equitable that

(d) On page 26 line 13 delete "pursuant to" and substitute "in accordance with."

the same review be accorded all agency actions to abolish discrimination. The amendment would achieve this result.

6. Senator Pastore also suggests that on page 26, line 4, after the word "guaranty", insert, before the comma, "issued by the Federal Housing Administration, Veterans Administration, Federal Deposit Insurance Corporation, or any other federal agency." This amendment would simply spell out the most obvious examples of "contracts of insurance or guaranty", which are specifically exempted from coverage of Title VI. It is consistent with our interpretation of the Title in its present form and would doubtless serve to allay some of the fears of potential supporters as well as opponents of the bill.