CHAPTER II. TITLE VI

1. THE GOVERNING PRINCIPLE AND THE PROBLEM

   -- equitable distribution public funds + racial discrimination

2. EXAMINATION OF THE PROBLEM. The liaison between Federal grants and racial discrimination. Origins of the grant system and discrimination, respectively. Notes on the grant system -- Fed-State cooperation -- blossoming of health, ed., welfare grants. Administrative authority and discretion -- what it isn't, how it is delimited. Constitutional doctrine -- 15th to 14th to Plessy to Brown. Separate but equal clauses in DHEW grant statutes.

3. TRACING THE PRINCIPLE. Survey of proposals advanced since 1940s, to condition eligibility for Federal grants on absence of racial discrimination. Myrdal to CRAct of 1964. The stages of VI from permissive-discretionary June 1963 to mandatory instruction to act in June 1964.

   This section covers House debate and defeat, school aid, 1956 (Powell amendment) and DHEW deliberations 1956 and subsequently. Covers Flemming days at DHEW and his Task Force, its 1960 recommendations for action against discrimination. Covers New Frontier attitudes toward grant conditioning -- Ribicoff policy actions 1962 -- Burke Marshall opposition to grant conditioning 1962 -- etc.

4. SUMMARY -- VI as much evolutionary as revolutionary.

CHAPTER II: TITLE VI

1. THE GOVERNING PRINCIPLE AND THE PROBLEM

Considerably older than Title VI is its governing principle, which may be formulated in broad terms as follows: the practice of and the participation in racial discrimination by the Federal government is improper. Title VI makes a particular assertion of this principle, in recognition of the existence of problems violative thereof, and with the intent to remedy existing problems and to avert future ones. Title VI offers a particular formula as remedy: the conditioning of eligibility to receive Federal grants upon the absence of racial discrimination on the part of grant recipients.

We have formulated the governing principle above in an attempt to establish a general source, or origin, or motivating force for Title VI. The attempt is not without danger. We recognize that the "principle" we have posited is very broad. We recognize also that it does not stand alone, but rather, is grounded in fundamental principles of public administration, constitutional law, and morality. These fundamental principles will not receive a detailed examination in this paper. We shall of course touch upon them; but we do

not find ourselves competent to discuss them at length, to establish and synthesize them, and to relate them properly to our pursuit of Title VI. In addition, we do not find such a detailed examination essential to our purpose in this paper. [redacted] With this understanding, then, we hope that the governing principle [redacted] will be allowed to stand. [redacted]

It is possible to subject both the particular assertion of Title VI and the governing principle to analysis as to component parts. For example, we can distinguish the following:

1. Public funds spent for the common good should be distributed equitably among the members of the public for whose benefit they are intended;

2. Some racial discrimination is unconstitutional;

3. The granting of Federal funds to a racially-discriminatory institution may constitute Federal participation in some of the discriminations practiced by that institution, some or all of which may be unconstitutional.

[redacted] The components may be viewed both as general theories of public administration, and as binding legal principles established authoritatively by the courts.

Viewed as theories of administration, the components--or at least the first and the second--could at any time since enactment of the first grant statute, have provided a basis for Legislative assertion of our governing principle in a statute aimed at establishing national policy or seeking to prevent abuses, [redacted] independently of Judiciary action and without reliance upon prior Judiciary action. [redacted] Thus, Congress could have enacted a general prohibition of racial discrimination in grant-aided activities any time after 1862, when it enacted the first grant statute. [redacted]

The fact that Congress did not do so brings us to a view of the components as binding legal principles. Their establishment as such in law took place [redacted] over a considerable period

of time. [redacted]

The first component, as to equitable distribution, is venerable. But the second, as to the unconstitutionality of some racial discrimination, is young. [redacted] Its definitive assertion came only in 1954, in Brown. Subsequently, separate series of rulings touching state action and governmental participation converged upon the doctrine of Brown, to yield our third component.

The components owe their existence as binding legal principles in part to the efforts of the civil rights movement. Protests against discrimination are as old as discrimination; and one expression of protest has been the steady application to the courts for redress of grievance by the civil rights movement.

During the same period of time that Congress was refraining from applying the components and the courts were evolving them into binding legal principles--during the same period of time that discrimination and protests against it were growing--the Executive was distributing public funds in a racially-discriminatory manner, in part at the express direction of the Legislative and without substantial restraint by the Judiciary.

The civil rights movement protested this impropriety just as it protested discrimination in general. However: theories of public administration, evolving Constitutional standards, flagrant discriminations, continued minority protests, and growing Federal doubt about the impropriety notwithstanding, corrective Federal action did not come until all these forces had converged in such a manner as to influence public opinion and, thus, to pose for the Federal Government a problem too serious to be evaded.

In the following pages, we shall trace the development and recognition of the problem for whose solution Title VI offers a particular formula. The problem may be stated thus:

> When the Constitution forbids governmental action to deny equal protection of the laws and abridge civil rights;
>
> But when racial discrimination doing both these things is established, in part by governmental action;
>
> And when Federal grants are awarded without reference to discriminatory practices on the part of grant recipients;
>
> It follows that some confluence of discrimination and grants is inevitable. However, such confluence is incompatible with American principles of public administration and morality, and it may constitute governmental action violative of the Constitution.

In the examination that follows, several assumptions emerge as determinants of the problem. [redacted]

[redacted] The basic assumptions seem to be:

--that racial discrimination can be reconciled with the principles stated in the Constitution.

--that there is no primary or governing relationship between Federal grant actions and any racially-discriminatory actions of grant recipients.

--that any relationship between the two is extraneous to the Federal Executive function of administering grant statutes.

--that the solution of discrimination problems can be divorced from the Federal Executive grant function.

--that the Federal grant system is more important than racial discrimination.

--that in any conflict between the continuance of the grant system and the discontinuance of racial discrimination, the latter must yield to the former.

2. EXAMINATION OF THE PROBLEM

The problem--the improper participation of the Federal

Government in racial discrimination--arises from the confluence of two institutions: the Federal grant system, and racial discrimination. The problem developed during a century when both institutions were growing up. Behind the problem lie slavery and the Constitution; especially, the Bill of Rights and the 13th and 14th Amendments. Thus, we proceed from the Constitution, through the parallel growths of discrimination and grants, their confluence and Congressional acceptance of it in the 1880's and 1890, to Supreme Court affirmation of "separate but equal" in 1896, through the growth of protests against discrimination and the gradual judicial re-examination thereof during the 1930's and 1940's, to the growth of Executive Branch doubts as to the propriety of the grant-discrimination liaison, and then to Brown in 1954 and 1955 and in consequence to Executive dilemma from 1956 through 1964.

The grant-discrimination liaison: notes on the grant system and on discrimination.

The Federal grant system was born at a time when the nation was debating not discrimination per se, but slavery and the very survival of the Federal union. The first grant system was enacted in 1862--five years before the 13th Amendment

secured to Negroes the rights of all citizens, and eight years before the 14th Amendment secured the rights of all citizens against State encroachment and discrimination. The Morrill Land Grant Act of 1862 is silent on the score of racial discrimination in the enjoyment of Federal benefits. There had been little occasion for the isolation and systematic examination, to any degree, if such a concept. However, the second Morrill Act of 1890 contains language intending to assure nondiscrimination in access to benefits--and specifying that States maintaining racially-separate schools shall be eligible for grants so long as they share the benefits equitably among the segregated schools. Similarly, Senator Blain's bills for aid to common schools during the 1880's, which were never passed in the House, contain "separate but equal" provisions. Clearly, grant statutes from the beginning reflected the widely-held assumption that separation of the races does not deny or vitiate their equality before the law.

Before the Civil War, discrimination against Negroes took two forms: that of slavery in the South; that of the cultural by-products of slavery elsewhere. After the War, racial discrimination found other modes of expression.

Segregation is the mode most commonly recognized; but it is not the only one. Exclusion, differential treatment, systematic intimidation--these, together with separation or segregation, are perhaps the principle modes of discrimination. All the modes came in for some use in most parts of the country where there resided sufficient numbers of Negroes to prompt the expression of any discrimination. In the South, where most Negroes resided, all the modes were developed extensively; and formal state action to segregate the races became the rule.

Racial discrimination was not disestablished by Constituional amendments and civil rights statutes. Civil rights statutes seeking to secure the application of Constitutional amendments were, moreover, largely ignored, or their application to many situations held unconstitutional by the Supreme Court. Over the years, and especially after Reconstruction, racial discrimination became institutionalized. Under the banner of the "separate but equal" doctrine, Jim Crow laws flourished. This doctrine was affirmed by the Supreme Court in 1896.

The Federal grant system and racial discrimination are two distinct institutions. The latter is older than the

former. Its original mode of expression in America--slavery--died at the time the grant system was born. But racial discrimination survived slavery. It reasserted itself institutionally during the same century that saw the infancy, growth, and coming of age of the grant system. That it did so more rapidly than the grant system came of age is not our point here. What we wish to emphasize is that, from the first, the practices of discrimination infected grant operations; and grants worked to reinforce discrimination. Thus, the two institutions became fortuitously associated with each other without much notice by the majority of the country. It is ironical that recent attempts to extricate either from the embrace of the other have been met with the sort of scandalized indignation which might seem more appropriate to the existence than the undoing of the liaison.

More on Federal grants. The system had a quiet infancy and childhood for seventy-three years. In 1935, it attained adolescence. It came of age in the 1940's, most particularly after World War II. It has been recognized and accepted as a substantial presence in American society, and it is big business.

Before World War II, Congress had enacted 27 major grant statutes, providing Federal assistance for agriculture, public

health, public assistance (welfare), education, unemployment compensation, and employment services, among other things.

Since the War, the number of basic grant statutes has more than doubled. In 1964, when Title VI was enacted, there were 80 major grant statutes on the books, extending Federal assistance in about 190 programs, in dollar value of between 15 and 18 billion dollars. We shall here review the status and origin of the grant programs which DHEW was administering in 1964.

Before 1935, the Public Health Service had no granting power. It operated almost exclusively through its own Federal facilities. In 1935, the Social Security Act conferred upon it the power to make grants to States for the purpose of improving their public health capabilities. (The same statute, of course, initiated direct Federal social security insurance as well as grants to States for unemployment insurance and public assistance.) Between 1935 and 1944, the Public Health Service (hereafter PHS) diversified its grant portfolio, acquiring cancer research and veneral disease control. The PHS Act of 1944 consolidated the various health statutes and added grants for general disease research and tuberculosis care. In 1946, the PHS acquired construction grants for

public and private nonprofit hospitals under the Hospital Survey and Construction Act, commonly called the "Hill Burton" Act. Construction grants were extended in 1949 and through the fifties and sixties. Training grants were added in 1950.[1/]

Public assistance grants were created by the Social Security Act of 1935, providing benefits for the aged, the blind, and dependent children. Aid to the disabled came in 1950. Between 1950 and 1960, limited benefits for medical care, child care, unemployed parents, etc., were added.

School aid grants were the slowest to blossom. Apart from land grants and limited common school aid, the Congress confined itself in the 19th Century largely to expressions of support for the principle of free public education. In 1917, Congress recognized the propriety of a more active Federal role by granting aid for vocational education under the Smith-Hughes Act. The next major departure came in the Lanham Act in 1940. The forerunner of "impacted areas" legislation, the Lanham Act provided grants for school operation and construction in communities affected by the war and the defense effort.

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1. Legislation providing general, broad medical care failed during the forties and fifties; MEDICARE and MEDICAID came in 1965.

Proposals for general, broad school aid were advanced without success from the forties through 1965, amidst much controversy. At the heart of the controversy was, and is, the view of local control of education as a sovereign principle. The debate was enriched by two other controversial issues: religion, and racial discrimination. On religion, the question concerned the inclusion or exclusion of private--thus, sectarian--schools as recipients of aid. The segregation issue emerged as early as the forties in "separate but equal" provisions and also in proposals to deny grants to States operating segregated schools. Against this background, general school aid bills--brought both by and independently of various Administrations--failed during the forties, the fifties, and the sixties.[2/] Limited measures were enacted, however, including the 1950 Acts for School Assistance in Federally-Affected Areas (SAFA); grants for library facilities and services in 1950 and 1956; scientific research grants and the National Science Foundation in 1950; the National Defense Education Act (NDEA) in 1958; and the Higher Education Facilities Construction Act in 1963.

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2. In 1965, the Elementary and Secondary Education Act finally succeeded.

The grant system: Federal-State cooperation

The New Deal concept of Federal assistance in the 1930's gave a major role to the States. The objective was the improvement of the quality of American life by means of the application to it of larger shares of the nation's resources, in the form of Federal dollars. Obviously, any means of doing this must pose questions of administration. Direct Federal administration would not only have been impracticable in some cases, but also violative of the State sovereignty which is so integral and delicate a part of the American Federal system.

Thus, States and their proper agencies (for health, for education, etc.) were seen as the major channels through which Federal dollars would flow for the benefit of the American people. The "State plan" was devised as the means to this end. As directed by the governing statute, a State agency draws up a plan for the administration and distribution of the Federal grant it seeks. The plan must be submitted to and approved by the Federal Executive Branch agency statutorily-designated as the granting agency. Eligibility for some grants is conditioned upon the expenditure by States of specified minimums; in some cases the Federal amount available varies according to the size of a State's investment

in a given area of need. But whatever the fiscal formulae and allocation schedules, most grants in all areas are awarded to State agencies, after the State plans have been approved as meeting Federal requirements. And particular applications for "new" aid from any institution within a State are generally made either through a State plan or subject to the approval of the State agency which is administering "continuing" grants under a plan already approved.

We should note that grant statutes generally lack detailed administrative provisions and merely direct the granting agency to issue "effectuating" regulations to accomplish the statutory purpose. Administrative regulations are second in importance only to the statutes themselves. Together, statutes and regulations govern Executive granting functions. They state who may receive grants, under what circumstances, for what purposes, subject to what conditions, with what exceptions; and they establish the administrative terms of reference for the functioning of the grant operation. Thus, and in such fashion, grants have always been "conditioned" upon various things--upon application, upon the applicant's formal eligibility, upon approval of the applicant's plan as meeting requirements imposed pursuant to the statute.

The growth of the grant system produced a two-fold expansion of the Federal presence in American life--in terms of the size and diversity of the Federal investment, and in terms of the leverage power of Federal grant administrators.

A note on administrative authority, policy and discretion. The authority, or the power, of Executive Branch officials is conferred upon them by the Constitution and by Acts of Congress. The Constitution created the Executive, empowered it to perform certain functions, and empowered the Legislative to instruct it further as it might see fit. The Legislative has exercised this power to confer additional powers and duties upon the Executive and to create Executive agencies and departments. There is no authority or power enjoyed by the Executive which does not devolve upon it from the general prescriptions of the Constitution or the particular prescriptions of the Congress, and there is no authority or power which does not bring with it a corresponding duty to obey the law and uphold the Constitution. In addition, since the Constitution vests the Judiciary with the power and duty to interpret its provisions, it follows that the Executive performance of its Constitutional duties is susceptible of ultimate review by the Judiciary. Thus, neither the

the existence nor the exercise of administrative authority is completely independent of the Legislative and the Judiciary Branches of the Federal Government.

A study of Federal administrative functions conducted in 1941 offers us some helpful insights on "the increasing use of administrative action to fill the gap in the regulation of society which lies between Congress and the courts and to supply governmental machinery to supplement, not to supplant, both the Congress and the courts in the administration of the law."[3/]

For example, in discussing the powers vested by Congress in administrative agencies, the authors say of the agencies:

> "Within statutory limits they lay down the law for the future by regulation, they decide cases involving private parties, they carry on extensive investigations; they have wide powers of discretion

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3. Joseph P. Chamberlain, Noel T. Dowling, Paul R. Hays; The Judicial Function in Federal Administrative Agencies; The Commonwealth Fund, N.Y., 1942; p.ix. The study is concerned with the exercise of what the authors distinguish as the administrative "judicial" function by several regulatory agencies. The authors refer also to "legislative" functions --by which they mean administrative rule-making; whereas the "judicial" function is that wherein the agencies make decisions and give rulings. Thus, the study is a specialized one. Nevertheless, we find certain of its discussions applicable to administrative functions in general and mose useful for our understanding of the Title VI story.

in controlling the operation /of various matters governed by statute/. . .and in regulating specified social relationships." 4/

Later they observe:

"The formulation of the policies upon which it will act and the supervision of its staff to make sure that these policies will be carried out are essential activities of any administrative agency. In the statute creating an agency Congress expresses policies, which may be laid down in broad terms or contained in specific provisions. . .

The administrative agency is created for the enforcement of these policies. . . .the agency must necnecessarily determine the policies under the Act which it will apply in its enforcement. . .

A policy means more than the standards which are to be applied in dealing with particular cases. It extends to questions of how the agency will interpret its power, whether it will apply the statute strictly or liberally, whether it will endeavor to assume a broad control /over the area governed by the statute/ or will exert only the degree of control necessary to carry out the provisions of the statute narrowly construed. An agency may aim at certain purposes which it desires to accomplish and which it interprets the statute to include, and may use its power under the statute to accomplish them. On the other hand, the agency may be content to deal with cases /as they arise/, and so develop its policy from case to case without setting up particular objectives.

Where the statute declares a broad policy the agency has a wide field for the exercise of its powers of interpretation. . .

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4. Ibid; pp.ix-x.

In interpreting the broad policy of the statute the heads of an agency may be influenced by the political officers having the power of their appointment. . ." 5/

The authors later continue:

"A formal method by which administrative agencies make and express their policies is through substantive regulations. These represent the result of the exercise of legislative power /as used here, administrative rule-making authority/ and, if so provided by statute, they may have the force and effect of law." 6/

They also note:

"Under our democratic system these powerful organs of government are subject to control through Congress, the courts, and the Executive, and also by the force of public opinion. . . . . .the procedure of Congress . . .permits a strong public opinion to be reflected in hearings before committees or in debates upon the floor. It is often public opinion working. . . that starts the congressional action which may result in modifying the policies of the agency. . . Public opinion may move the President to exert his influence on the agency. . .

Congress, which has created the agency and has given it power, may limit that power or even abolish the agency. . . .accountability to Congress must always be reckoned with by an administrative agency. . .

Congress is not limited. . .to consideration of amendments to the statutes as the occasion for investigating the operations of an agency. Congress . . .may at any time create an investigating committee. . . . There is also the annual opportunity

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5. Ibid; pp.55-57

6. Ibid; p.63

> for questioning the administration of the agency. . . through the hearings conducted by the committees on appropriations of the Senate and the House. . . In these hearings the officers and heads of the agency must appear and submit to questioning, both as to their general policy and as to their expenditures, and the amount of the appropriation may depend on the result of the hearing, or a particular activity may be curtailed by cutting or omitting the item in the budget. . ." 7/

The authors' discussion of the question of court control is less useful to us than their discussions of the other controls. The authors found that the courts had little control over the policies enforced by regulatory agencies. We lack the competence to evaluate whether the same is generally true, or was generally true in 1941, in the case of granting agencies. Leaving this question then, we will simply note that the authors were discussing control. More to the point of our inquiries in this chapter and in the next ones, is the question of the courts' influence upon administrative policy. Even though courts do not control, yet case law provides guidance in both the development and the application of policies by granting agencies. We shall later see how substantial an influence court rulings were to be in DHEW's implementation of Title VI, and for what reason.

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7. Ibid; pp.69-72

Next, the authors discussed the role of the President, noting that when a new agency is set up, he will exercise great influence on its policy and that

> "it will be his general policy as well as that of the Congress that the agency is carrying out. His views. . .will have great weight." 8/

On public opinion:

> "The agencies must always consider the force of public opinion. . . The /regulatory/ agency has the initial advantage that it was created to cope with what was considered an evil by public opinion sufficiently strong to cause Congress to act. But the public is rarely unanimous in its opinion, and there is always on the other side a vigorous dissent which continues to take an active part in criticizing the agency while it is being tested by its accomplishments." 9/

They continue:

> "General criticism will go only to issues, usually dramatic issues which attract the attention of a large section of the public. . .
>
> Criticism of an agency may be unjust and may be founded on a mistaken notion of the nature of the powers or duties of the agency. There may be deliberate misrepresentation in statements pro and con. . . Unfortunate as may be the consequences of intemperate advocacy and partisan criticism, they result from that freedom of speech and of the press which, as the mouthpiece of public opinion, is an important means of informing and warning powerful agencies." 10/

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8. Ibid; p.74
9. Ibid; pp.75-76
10. Ibid; pp.77-78

With the exception noted above about court control, we believe that the authors quoted here have described admirably the circumstances in which the granting agencies have found, and find, themselves. We appreciate especially their analysis of the forces which affect the exercise by agencies of their administrative discretion. We shall later consider the question of administrative discretion with more particular reference to the grant-discrimination liaison. Here we have tried simply to establish some terms of reference for our later discussions, and to emphasize that while there is an administrative discretion, yet it is not a sovereign power by virtue of which administrative actions can be free of constraints such as the intent of the Congress, the objectives of the President, the Constitutional standards and principles defined by the courts, and the majority thrust of public opinion. An administrator is not a free agent; he is a public servant.

Within the general framework and approximate constraints sketched above, administrators have found variations in the amount and quality of "administrative authority" or "administrative discretion" accruing to them at any given time. In general, the 1950's saw the enlargement of administrative

authority and the increased exercise of administrative discretion by Executive Branch officials.

"Separate but equal" clauses in grant statutes

Congress articulated its acceptance of "separate but equal" operations in two DHEW statutes and two different formulae. The Morrill Act of 1890 prohibited grants to States discriminating in the admission of students to colleges. However, it specified that States with "separate" schools were nonetheless eligible for grants so long as they distributed the aid benefits equitably among the schools. Thus, it required the Office of Education (OE) to make grants to States with "separate but equal" schools.

The Hill-Burton Act of 1946 required that State-wide health facilities plans must provide adequate facilities for all residents without discrimination. It required PHS to fund State plans containing adequate provision of facilities. It authorized but did not require PHS to require assurances that specific facilities constructed with grant aid would be available to all without discrimination. But it required PHS to make exceptions where it exercised this authority, if the States provided "separate" facilities "equally."

Thus, under the Morrill Act, OE was required to make grants for "separate but equal" schools; while under

Hill-Burton, PHS was required to make grants to States providing equitable facilities for all, permitted to require the nondiscriminatory "availability" of specific facilities, and required to accept "separate but equal" provisions in place of "nondiscriminatory availability" of facilities. The difference is that PHS had more discretion under the Hill-Burton Act than OE did under the Morrill Act. And though the amount of discretion varied, yet in neither case was it clearly within the discretion of either granting agency to refuse to make grants on the basis of "separate but equal" operations. We shall return to this point when we examine the Executive dilemma that followed Brown.

Constitutional doctrine and precedents, civil rights

Now let us examine briefly the evolution of Constitutional doctrine on civil rights. The Bill of Rights forbids Federal encroachment upon individual rights. The 13th Amendment secures civil rights to Negroes. The 14th Amendment protects civil rights against encroachment by State action.

Civil rights laws were enacted by the Congress between 1866 and 1875, with the intention of assuring newly-enfranchised citizens the enjoyment of their civil rights.

In 1872, the Supreme Court took a narrow view of the civil rights protected by the 14th Amendment, holding that only such rights as arose from U.S. citizenship were protected; for

example, the right to run for national office. Then, in the Civil Rights Decisions of 1883, 109 U.S. 3, the Court struck down as unconstitutional, sections of the 1875 Act dealing with public accommodations. It ruled that the 13th and 14th Amendments did not authorize the Congress to enforce their terms but rather empowered the Congress only to act to correct violations of their terms. Thus, it held, Congress could legislate after the fact of State actions prohibited by the Amendments; but it could not legislate directly upon subjects properly within the domain of the States. Finally, the Court noted that the Amendments secured rights against "state" but not against private action; and it construed "state action" narrowly rather than broadly.

The Supreme Court took the next step in Plessy in 1896 discovering no denial of equal protection in a Louisiana statute requiring segregation in railroad facilities. Again construeing the 14th Amendment, the Court rested its decision on its inability to perceive in separation any real or implied inequality. There was no contention that "state action" was not involved. In denying relief to Plessy, the Court in effect recognized as Constitutional the formal establishment by "state action" of the separation of the races--and thus sanctioned de jure segregation and "separate but equal."

The formidable barrier established by Plessy was strategically weakened in 1938, in Missouri ex rel. Gaines v. Canada. Here the Supreme Court held that Missouri's offer to pay a Negro student's costs at an out-of-State law school did not justify its refusal to admit him to the white State law school. It held that such an arrangement would not afford equal service. Plessy was still governing, but the re-examination of equality was under way.

In 1949, the Court found, in Sweatt v. Painter, that a separate Negro college in Texas did not provide an education in law equal to that offered by the all-white State university. Still resting on Plessy, the C ourt ordered Sweatt's admission to the State school. In 1950, the Court took another step and held, in McLaurin v. Oklahoma, that a Negro student at the State university might not be subjected to internal segregation in class, library, and dining facilities.

Furthermore, during the 1940's and 1950's, the Court was expanding its view of what constituted prohibited "state action" under the 14th Amendment in a whole series of decisions outside school segregation issues.

Next came Brown in 1954. The Court here construed the 14th Amendment in diametric opposition to Plessy, finding

separation in inherent inequality in public education. Many important segregation decisions follow upon Brown. We shall touch on some of them in the rest of this paper, and we include notes on them in the Appendix. Here we simply note that Brown established one part of our governing principle--that some racial discrimination is illegal. In other decisions, the question of governmental participation or "state action" was so clarified as to compel examination of its relationship to the holding of Brown. For example, in Simkins v. Moses Cone Memorial Hospital, the Court of Appeals for the Fourth Circuit in 1963 found that Federal and State governments had, in administering the Hill-Burton program, become so involved in the conduct of otherwise private hospitals, that the activities of the hospitals were reached by the prohibitions of the 14th Amendment. The Court noted the "massive use of public funds" and quoted from Cooper v. Aaron, 358 U.S. 1, in which the Supreme Court had referred to Brown and stated:

> "That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property." (Emphasis supplied by the Appellate Court.)

The Court also ruled that the "separate but equal" clause in the Hill-Burton Act and its effectuating regulations were

unconstitutional. 323 F. 2d 959; 1963; cert. denied 376 U.S. 938.

Now that we have established the broad social, administrative, and legal circumstances of the problem, let us survey the slow but steady emergence of a remedy.

3. TRACING THE PRINCIPLE--1940's to 1964

Proposals seeking to assure the practice of our governing principle are much older than Title VI. The earliest proposals were couched in terms of the equitable distribution of public funds and equal participation in publicly-funded services. For example, the NAACP was advancing these arguments at least as early as the 1930's. From proposals like these to proposals specifically for the conditioning of Federal grants upon the absence of racial discrimination is just a step. We have not established to our own satisfaction just when this step was taken, or by whom. We believe that Myrdal provides an appropriate and convenient point of departure for our pursuit. It will be recalled that Myrdal, working between 1938 and 1944, conducted an exhaustive examination of American race relations and the literature on the subject; that he relied upon the assistance of many other scholars, investigators,

experts, and advisors; and that the results of this work were first published in 1944.[11]

The only explicit proposal for conditioning grants upon the absence of discrimination we find in Myrdal's study is his own, to which we shall come shortly. The other references throughout the work are to the general concept of equitable distribution.

In sections dealing with Negro leadership and improvement programs, Myrdal notes that the NAACP "has fought for. . .an equitable distribution of Federal funds for education" and against administrative discrimination in a number of other Federal, as well as local relief, programs.[12] Myrdal also notes that the Commission on Interracial Cooperation, attacking the problem on a regional-state-local plan within the South, similarly advocated "equal participation" in all social and public welfare benefits, in every field of public service supported wholly or in part with tax funds.[13]

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11. Gunnar Myrdal, An American Dilemma; Harper & Row, 1944, New York City.

12. Myrdal, op. cit.; Twentieth Anniversary Edition, p.829. Herein, and throughout this section, Myrdal cites Ralph Bunche, "Programs, Ideologies, Tactics, and Achievements of Negro Betterment and Interracial Organizations," unpublished manuscript prepared for the Myrdal study, 1940; Vol. I, pp.83-100.

13. Ibid, p. 845.

In discussing public funds, and the functions and development of the public budget, Myrdal observes:

> "The trend in public services is that they are being made available to all citizens who care to make use of them or otherwise are being distributed equally according to 'needs' as defined in laws and regulations." 14/

Myrdal then discusses two "rather fluid" principles: "ability to pay" and "equal distribution according to need" as ideals for taxation and public services, respectively. On the latter, he observes:

> "The principle of 'need' also is in flux as there is no definite and fixed dividing line between social welfare provisions. . .and general benefits for all citizens. Free schools were once for the poor only. Today they are for everybody. . . .There is a trend visible in America, as in the rest of the world, not only to increase public benefits for the benefits for the needy but to make them available to everybody." 15/

He continues:

> "One principle has been settled for a long time, however, and constitutes a main basis for the legal structure of any democracy: the principle that the individual citizens have equal duties and rights in relation to the public household. In America this principle has constitutional sanction." 16/

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14. Ibid, p.334.

15. Ibid.

16. Ibid.

Subsequently, Myrdal takes note of the theory that Negroes, by virtue of their poverty and low tax payments, are not entitled to anything more than whites care to give them; thus, that what Negroes receive is a gift of white benevolence, for which they should be thankful but to which they have no right. Myrdal asserts:

> "This popular theory is, of course, contrary to the American creed and the Constitution,. . . The discrimination that exists, therefore, has to be carried out against the laws. Rights, in our Western legal order, are not given to a group or to a race but to individuals. An individual's right to receive public services is not related to the actual amount he has paid in taxes." 17/

After some further discussion, Myrdal states:

> "Federal agencies. . .sometimes have to content themselves by working for the realization of a compromise formula: that Negroes and whites share in benefits in proportion to their numbers. This /population/ norm is in conflict with the Constitution, since it refers to the Negro group and does

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17. Ibid, p.336. In a footnote on, p.1269 Myrdal refers to the 14th Amendment, noting that its "equality" requirement applies to individuals. Thus: "Under the Fourteenth Amendment, the Supreme Court has consistently required the states to provide equal facilities to individual Negroes, and this in effect turns out to be the principle of need. . . .For this reason we shall refer to the principle of need as the 'Constitutional" norm. . ."

> not guarantee individuals their right. It has its utility only as a practical yardstick in the fight against discrimination. Its very presence in the public debate, and sometimes in public regulations, is an indication of existing discrimination." 18/

On the population norm, Myrdal observes that it could in some cases benefit Negroes. His example: if 10 per cent of desirable jobs were given to Negroes, economic discrimination against Negroes would be wiped out. Myrdal notes that advocates of the population norm do not advance it "when it refers to such a situation." 19/

In this section, Myrdal discusses Federal aid to education:

> "When the federal government does give money for education, it usually allows the states to spend it. This grant-in-aid system permits discrimination against Negroes to arise. If the federal authorities take positive action, however, they can reduce discrimination. The trend seems to be in the direction of decreasing discrimination in the distribution of federal aid, and the increasing weight of the Negro vote in the North is strengthening this trend." 20/

At the end of this passage, Myrdal refers to the 1936 Report of the Advisory Committee on Education. 21/ In a footnote, Myrdal

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18. Ibid, pp.336-337.

19. Ibid.

20. Ibid, p.343.

comments that the distribution-discrimination question is touchy and that the Committee Report deals with it rather vaguely. He notes that on the one hand, the Report upholds the concept of reserving to States the administration, control, and allotment of Federal funds; and on the other hand states also:

> "All Federal funds for educational purposes to States maintaining separate schools. . .for Negroes should be conditioned upon an equitable distribution of Federal funds between facilities for the two races." 22/

In another section, and dealing with "The Negro School and Negro Education," Myrdal returns to the question of Federal funds. He recognizes a need for substantial Federal assistance for school construction and a corresponding need for the preservation of local financial responsibility, lest the advent of the former combine with local attitudes to yield a principle that the States have no responsibility for Negroes, that Negroes are wards of the Nation. In affirming a role for increased Federal assistance, Myrdal emphasizes:

> "It is, of course, of special importance that, as far as possible, absence of discrimination be made a condition for aid." (Emphasis Myrdal's.) 23/

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22. Ibid, p.43; quoted by Myrdal.

23. Myrdal, op. cit., p.905.

This proposal is at once broader and more specific than the proposals for equitable distribution and equal participation. Thus: it envisages the very specific administrative device of conditioning grants; and it employs the broad phrase, "absence of discrimination." At the time Myrdal worked, racial separation was still a valid proposition in Constitutional doctrine. Funds distributed among separate schools, for example, were not necessarily being distributed "discriminatorily" or "inequitably." Under Myrdal's formula in 1944, "separate but equal" could satisfy a condition such as "absence of discrimination," in theory and in the eyes of the law if not in fact. The same condition, however, might also require something other than "separate but equal" depending on the evolution of legal definitions of "discrimination."

At any rate, we should acknowledge that the civil rights movement early identified as an abuse the liaison between public, including Federal, funds and racial discrimination. It protested this abuse and proposed remedies for it. In particular, the NAACP attacked the liaison. Like Myrdal, it advanced the proposal that grants be administered so as to ensure that Negroes not suffer from practices of exclusion and differential treatment. (Let us not forget that the NAACP

was also perfecting the strategy which was to lead to Brown's rejection of the theory that racial separation was not racial discrimination.)

Apart from the civil rights movement, the grant-discrimination liaison was also noted by such official bodies as the Advisory Committee on Education during the 1930's, and by students of minority affairs. Myrdal himself in 1944 proposed the specific remedy which the Congress was to enact in Title VI.

With the early forties, then as our point of departure, we shall now survey some of the proposals that came ever more urgently through the years, down to 1964.

In October 1943, considering a general school aid bill, the Senate accepted an amendment by Senator William Langer (R. N.D.), which set forth the manner in which States were to spend funds for white and Negro schools. In consequence the bill lost the support of several Southern Senators. Upon motion of Senator Taft, it was returned to committee where it remained for the rest of the session.

In 1946, Senator Taft rallied to the support of school aid, co-sponsoring with Senator Thomas of Alabama, a measure requiring States with segregated schools to key expenditures

to the population norm and allowing private schools to participate. The Senate did not complete action on the bill. Stirrings on the religious issue inherent in the private school inclusion helped to keep similar bills from floor action in 1947.

Also in 1946, Mr. Adam Clayton Powell brought an amendment to a school lunch appropriations bill, seeking to bar funds from States and schools practicing racial discrimination. After modifications, this provision emerged as a restatement of the "separate but equal" formula. The House accepted it on February 21, by vote of 259 to 109. Fifty-two Republicans, 105 Democrats, and 2 Independents supported the amendment; 99 Democrats and 10 Republicans opposed it.

The Truman Committee on Civil Rights, 1946-47.

In December 1946 President Truman appointed a Committee on Civil Rights to study and report on measures and means to strengthen and improve the safeguarding of civil rights by Federal, State, and local government. The Committee's report, To Secure These Rights, October 29, 1947, includes a recommendation for the conditioning of Federal grants upon nondiscrimination. The President omitted this from his civil rights legislative proposal to the Congress in 1948. It may be recalled that his proposal nevertheless generated much controversy and yielded a party revolt: the Dixiecrat campaign of 1948.

The Truman Committee's discussion of grants and discrimination is interesting. The Committee Report recognizes, and makes recommendations for action pursuant to each, four essential rights: to safety and security of person; to citizenship and its privileges; to freedom of conscience and expression; and to equality of opportunity. Many of the findings of discrimination in Federal operations are discussed as denials of this last right--to equality of opportunity. Thus, the Report notes that full membership in society entitles the individual not only to a voice in the control of his government, but also the "right to enjoy the benefits of society and to contribute to its progress."[24] The Report continues that each individual must have the opportunity to obtain employment and "have access to services in the fields of education, housing, health, recreation and transportation," access to all of which must be provided whether free or at a price.[25]

In discussing the right to education, the Report recognizes problems of financing the schools and notes that the maintenance of dual school systems is an extra financial burden

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24. To Secure These Rights, the Report of the President's Committee on Civil Rights, Government Pringing Office, Washington, D.C.; 1947; p.9.

25. Ibid.

on public funds. It suggests that State funds alone cannot close the gap between Negro and white schools in the South, for example, and that the extension of Federal aid seems desirable. The report then adds: "Whether the federal grant-in-aid should be used to support the maintenance of separate schools is an issue that the country must soon face." 26/

The Report discusses denials of equality of opportunity also in housing, in health services, and in access to general public services and accommodations. It states:

> "Services supplied by the government should be distributed in a nondiscriminatory way. Activities financed by the public treasury should serve the whole people; they cannot, in consonance with the democratic principle, be used to advance the welfare of a portion of the population only." 27/

Discussing discrimination in Federal services, the Report notes:

> "Discrimination is sometimes evident in the admission of individuals to the benefits of the program by local administrators. The aims of some of our broadest social legislation are negated to the extent that this discrimination occurs. . . . Negroes are sometimes not admitted locally to the benefits of certain services, or are given unequal service." 28/

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26. Ibid; p.65.

27. Ibid; p.74.

28. Ibid; pp.75-75.

The Report is very harsh with the "separate but equal" doctrine:

> "In the Committee's opinion, this is one of the outstanding myths of American history for it is almost always true that while indeed separate, these facilities are far from equal. Throughout the segregated public institutions, Negroes have been denied an equal share of tax-supported services and facilities. . ." 29/

Continuing, the Report asserts that not even a move toward equalization of separate facilities seems adequate.

> "Experience requires the prediction. . .that the degree of equality will never be complete, and never certain. In any event we believe that not even the most mathematically precise equality of segregated institutions can properly be considered equality under the law." 30/

The Report concludes its examination of segregation as follows:

> "The separate but equal doctrine stands convicted on three grounds. It contravenes the equalitarian spirit of the American heritage. It has failed to operate, for history shows that inequality of service has been the omnipresent consequence of separation. It has institutionalized segregation and kept groups apart despite indisputable evidence that normal contacts among these groups tend to promote social harmony." 31/

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29. Ibid; pp.81-82.

30. Ibid; p.82

31. Ibid; p.87

Discussing governmental responsibility to secure rights, the Report affirms a leadership role for the Federal Government. It finds the need for leadership pressing, and the Federal Government well qualified and able to provide it. It suggests that local inability to deal with such local problems as lynchings, for example, points to the need for Federal safeguards. It recognizes as highly significant, a "steadily growing tendency of the American people to look to the national government for the protection of their civil rights." 32/ It finds a persistent and deepfelt desire to be a "demand rooted in the folkways of the people, sound in instinct and reason and impossible to ignore." 33/ It suggests Federal leadership is most appropriate in view of the fact that

> ". . .there is much in the field of civil rights that it is squarely responsible for in its own direct dealings with millions of persons." 34/

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32. Ibid; p.101.

33. Ibid.

34. Ibid.

It concludes:

> "Finally, through its extensive public services, the national government is the largest single agency in the land endeavoring to satisfy the wants and needs of the consumer. By making certain that these services are continuously available to all persons without regard to race, color, creed or national origin, a very important step toward the elimination of discrimination in American life will have been taken." 35/

The Report concludes with a section of recommendations for corrective action. Recommendation V deals with the strengthening of equality of opportunity, which is to be accomplished by the elimination of segregation from American life in general. More specifically, it recommends:

> "The conditioning by Congress of all federal grants-in-aid and other forms of federal assistance to public or private agencies for any purpose on the absence of discrimination and segregation based on race, creed, color, or national origin." 36/

This theme is then explored:

> "We believe that federal funds, supplied by taxpayers all over the nation, must not be used to support or perpetuate the pattern of segregation in education, public housing, public health services, and other public services and facilities generally." 37/

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35. Ibid; p.102.

36. Ibid; p.166.

37. Ibid.

The Report recognizes that federally-financed services are much needed by all, and that grant conditioning might lead to rejections of needed Federal aid. It suggests that a reasonable time for adjustment might be allowed. However:

> "In the end it /the Committee/ believes that segregation is wrong morally and practically and must not receive financial support by the whole people." 38/

The Report notes that a minority of the Committee dissented from the recommendation that sanctions be employed, conditioning grants upon the abolition of segregation. This minority favored the continuance of aid for public benefits provided that States not discriminate in the distribution of the aid funds. Similarly, some opposed the nonsegregation requirement in educational grants on grounds it might represent Federal control over education. These members felt that education itself, with proper leadership and cultivation of principles of brotherhood and democracy, was the best way to assure a true elimination of segregation.

So much for the Report of the Truman Committee in 1947. As we stated, the President did not include the grant-conditioning proposal in his request for civil rights legislation.

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38. Ibid.

During 1947 and 1948, questions arose as to the conformity with statutory provisions of Arizona and New Mexico State public assistance plans. The Federal statutes specify eligibility criteria, including the kinds of residence and citizenship requirements States may impose upon beneficiaries. They also specify that State plans shall be in effect in all parts of a State. For their part, Arizona and New Mexico were reluctant to admit liability to meet the needs of Indian citizens residing on reservations. The States felt that the historic relationship between Indians and the Federal government, entitled the former to the direct care of the latter and thus relieved the States of the burden of care. Federal Social Security officials were unable to accept this view. They found that it produced service discrimination and subjected Indian beneficiaries to residence-citizenship-race-class distinctions offensive both to the specific enabling statutes and to constitutional doctrine. Traditionally, the Commissioner of Social Security construed the enabling statutes as requiring that State plans must recognize, and public assistance operations actually meet, the needs of all beneficiaries without any sort of discrimination. The "conformity" question was resolved temporarily by an agreement of

February 10, 1948, wherein Arizona and New Mexico undertook to meet Indian needs in cooperation with the Interior Department's Bureau of Indian Affairs. The States made no admission of their own liability. The agreement hinged upon the financial participation of the Federal Indian Services. This resolution was only temporary, as we shall see.

In Spring 1948, a subcommittee of the House Appropriations Committee, considering appropriations for vocational education and public health, recommended that the funds appropriated be denied to any segregated institution. This proposal was rejected by the full Committee. An attempt to restore the provision on the floor of the House failed on March 8, 40 to 119.

Also during 1948, a Senate school aid bill permitting private school participation stipulated that States with segregated schools must provide equally for them. Further, Senator Tom Connally (D., Texas) brought an amendment whose purpose was to preclude antisegregation amendments--by prohibiting any provisions in future appropriations for school aid. The Connally amendment was accepted, and the school aid bill passed the Senate on April 1, 58 to 22. In June, it was blocked in the House Education and Labor Committee by parliamentary tactics.

1948 also heard considerable debate on segregation in the armed forces. President Truman issued several Executive Orders in 1948 and 1949, to end segregation in the military and also to prohibit discrimination in Federal employment and by Federal contractors. Let us also recall that the Judiciary was engaged in the re-examination of "separate but equal" and that limited rulings emerging from this process were to lend to Brown in 1954. This re-examination was not taking place in a vacuum; rather it was being observed with interest by many constituences around the nation and by government officials at various levels, in various branches.

The question of Arizona and New Mexico public assistance operations' conformity to statutory and constitutional standards was posed again in 1949. Federal Social Security officials informed the States that they would be expected to meet all Indian needs should BIA funds fail. Partial financial relief was given the States by PL 474, enacted on April 19, 1950 and increasing the Federal share of welfare payments for Navaho and Hopi Indians. However, the needs of Indians other than Navajo and Hopi still confronted the States. Questions arose from time to time as to whether the States intended to meet these needs. The conformity question was

finally and conclusively resolved only in 1953 in litigation which we shall discuss shortly.

We have noted this because the actions of the Commissioner of Social Security in 1948 and 1949 foreshadow the Title VI principle and appear to be the first instance wherein DHEW, by a predecessor agency, considered the termination of grants authorized by statute, in circumstances touching on State exclusion from benefits of a racial minority. The States' discriminations, and the Commissioner's actions, do not turn exclusively upon the 14th Amendment. Nevertheless, that Amendment's prohibition of denials of equal protection of the laws, was a factor in the Commissioner's response to the actions of the States.

Also in 1949, Senator Henry Cabot Lodge offered an amendment to a general school aid bill, to deny funds to States with segregated schools. The amendment failed, 16 to 65, reflecting in part the fear that its inclusion would kill the bill. The bill passed on May 5, 58 to 15, allowing private school participation and requiring that "separate" expenditures be "equal." The House bill excluded private schools as well as all mention of segregation. It set off bitter public name-calling over the religious issue and did not

reach the floor for action. The religious controversy continued to rage in 1950 and this to doom House action on general school aid. School Assistance for Federally-Affected Areas (SAFA) was, however, enacted in 1950.

Also in 1949, a grant-conditioning amendment offered in the House to an appropriations bill for the District of Columbia, failed. Similar amendments to an omnibus appropriations bill failed in 1950.

In 1951, a bill to extend federally-affected areas aid cleared both houses with Senator Lister Hill's amendment requiring recipient schools to conform to State law. President Truman vetoed the bill on the grounds that the amendment sought to promote and preserve segregation.

In 1952, a DHEW memorandum to the files[39/] noted that a review of Morrill land grant administration indicated some violations of the statutes' provisions with respect to fiscal practices and Negro colleges. The memorandum notes that the Office of Education seemed to be aware of and to have corrected some fiscal abuses; but that no record existed of any withholding of funds or report of violations to the Congress or--prior to 1948--of any action whatsoever on violations with respect to the Negro colleges.

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39. Memorandum, Theodore C. Sorenson, to files; Federal Security Agency Office of General Counsel; February 14, 1952.

In 1952 the Indian question came up again. The Social Security Amendments of 1950 had added the permanently and totally disabled to the beneficiaries of public assistance. Arizona submitted its State plan for aid to the disabled in March 1952. Federal Security Administration (FSA; incorporating the Social Security Board) officials found the plan unacceptable in that it specifically excluded from benefits, Indians residing on reservations.

This exclusion in the plan conformed to an Arizona statute which prohibited the State welfare agency from including reservation Indians with other beneficiaries of aid to the disabled. Negotiations failing to correct this exclusion in the plan, the Federal Security Administrator[40/] held a hearing to determine whether the plan satisfied the enabling statute. He subsequently ruled that it failed to satisfy provisions as to the kinds of citizenship and residence requirements a State might impose. Arizona brought an action before the Federal District Court for the District of Columbia, claiming its right to the grant. The FSA moved to dismiss the action

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40. Oscar R. Ewing. Before this issue was resolved, Ewing was succeeded in office by Mrs. Oveta Culp Hobby. Mrs. Hobby, in turn, became the first Secretary of HEW.

on the grounds that, in the first place, no jurisdiction existed for what was essentially a suit against the sovereign United States which had not consented to be sued; but that, assuming a jurisdiction to exist, yet the action should be dismissed because the State plan had properly been rejected both on statutory and Constitutional grounds. The District Court noted but set aside the question of a jurisdiction and ruled in 1953 for the FSA on Constitutional grounds. Arizona appealed the ruling to the Court of Appeals for the District of Columbia, which held on May 13, 1954 that the suit was indeed against the unconsenting sovereign and thus must fail for lack of jurisdiction. The Appellate Court stated that the District Court should have dismissed the action on this account and remanded it for dismissal without ruling on the Constitutional issues. Arizona v. Hobby, 221 F.2d, 498.

It is of interest to note briefly the Constitutional argument advanced in the Administrator's brief before the Appellate Court. Thus:

> "The Federal Security Administrator. . .has an interest--indeed a duty--to ascertain that the huge amount of Federal funds granted to States to subsidize their public assistance programs are not used for purposes violative of the United States Constitution."

Continuing, the brief asserts strongly that Arizona's exclusion of certain Indian citizens is a violation of the Constitution, that it operates to deny benefits on account of race. It calls this "a flagrant discrimination" and asserts that it cannot be justified on grounds of any Federal Government-Indian relationship, much less on grounds of alleged Federal failure to meet alleged obligations under an actually or allegedly-particular relationship; and that whatever the relationship may be, it cannot excuse Arizona from its obligations to its citizens of whatever class or race.

1953

We have earlier surveyed the development of grant statutes in the areas of health, education, and welfare. We should also note that not until 1953 were these statutes administered by a "department" of HEW. Let us stand away from our pursuit of Title VI to look briefly at DHEW itself.

In 1953, responding to a reorganization proposal of the Eisenhower Administration, the Congress formally assembled health, education, and welfare granting units, the social security authority, and several other institutions such as Gallaudent College for the Blind, in a confederation which it christened the "Department of Health, Education, and Welfare."

The 1953 reorganization consolidated a process of loose alliance among the agencies which had been going on since the organization of the Federal Security Agency in 1939.

Some DHEW units are very old, some very young. The PHS traces its ancestry to the Marine Hospital Service created in 1798. The Office of Education, originally a part of the Department of Interior, was created in 1867, the Food and Drug Administration in 1907, the Children's Bureau in 1912, vocational rehabilitation service in 1920, social security insurance and welfare assistance in 1935, and the Administration on the Aging in 1965.

Each agency has its own governing statute, granting authority, and administrator. Each has its particular history and traditions, its area of service, its clientele.

Thus, when we speak of the "department" of HEW, we speak of a whole which is the sum of several discrete parts, each of which constitutes a whole in itself. The program agencies perform their various ministries; and the Office of the Secretary holds over them an umbrella of unity. The expansion of the grant system during the fifties and early sixties tended to multiply diversity at the expense of unity. By the mid-sixties, the Administration was again seeking to

integrate diversity into a unity calculated to improve the delivery of all services for the general welfare.

Power is widely diffused at DHEW. Most of the Department's manpower belongs to its constituent granting units. These same units, of course, are charged with the authority to make the grants. In addition, authority and opportunity to make decisions and manage resources are enjoyed not only by the Office of the Secretary but also by each granting unit, frequently at a number of levels.

Finally, an illustration of the growth of the Department. In 1953, the first Secretary of HEW, Mrs. Oveta Culp Hobby, presided over annual expenditures of about $5 billion. In 1968, the seventh Secretary, Wilbur J. Cohen, administers an annual program budget of about $44 billion--of which social security payments make up almost three fourths of the total.

Back to our governing principle. In 1953, attention was drawn to the impropriety of segregation in schools located on military bases under the direct management of the Federal Government. Questioned by Alice A. Dunnigan of the Associated Negro Press, at a news conference on March 19, President Eisenhower stated:

> "... whenever Federal funds are expended for anything, I do not see how any American can justify -- legally, or logically, or morally -- a discrimination in the expenditure of those funds as among our citizens... If there is any benefit to be derived from them, I think they must all share, regardless of such inconsequential factors as race and religion." 41/

In January 1954, the Secretary of Defense ordered the desegregation of all then-segregated on-base schools by September 1955 and forbade the opening on a segregated basis of any new on-base schools.

Legislative debate and Executive dilemma

We have seen that even before Brown there was suspicion in both the Legislative and the Executive that the Federal grant relationship to racial discrimination warranted some examination. This suspicion reflected the public awareness of discrimination which had been slowly mounting since World War II and upon which the civil rights movement was making its mark. But it was above all Brown that inspired close and serious examination of the grant-discrimination liaison during the latter half of the fifties.

Brown rejected the principle of "separate but equal" and required at a minimum fundamental changes in the school operations of seventeen Southern and Border States. And in Bolling v. Sharp, decided concurrently with Brown and arising from public school segregation in the Federally-administered District of Columbia, the Supreme Court found Federal action in this vein as repugnant

41. Public Papers of the Presidents, Dwight D. Eisenhower; for March 31, 1953.

to the 5th Amendment as it found State action to the 14th.

Brown, therefore, dispelled some doubt. But it did not dissipate ambivalence with respect to desegregation in general and to questions about Federal grant operations in particular. The presence of "separate but equal" clauses in several grant statutes, and proposals for various new grant statutes, inevitably gave rise to questions of law and policy. We shall review the debate and dilemma in some detail, particularly those of 1956; for they set a pattern of Federal response to the minority's pursuit of change -- a pattern that prevailed without substantial modification until 1960 and which was not displaced until 1964.

Legislative debate - 1955

In 1955, Mr. Powell offered amendments forbidding segregation in public housing, public schools, and the National Guard. The first two amendments failed; and the school aid bill reported by the House Education and Labor Committee, HR 7535, was held in the Rules Committee and did not reach the floor for action during the year.

Debate focused on the National Guard issue. The House accepted the Powell amendment brought to an armed forces reserve bill. Thus burdened, the entire bill was in jeopardy. President Eisenhower stated his opposition

to "extraneous" anti-segregation riders on major legislation. The House dropped the reported bill and put through another one which omitted all mention of the National Guard. The President appealed to Mr. Powell to refrain from offering an anti-segregation amendment, on the grounds that no legislation so burdened had ever passed the Senate. Nothing daunted, Mr. Powell replied that the Draft Act of 1940 had included nondiscrimination provisions. He offered another anti-segregation amendment to the new armed forces reserve bill. This amendment failed on July 1, by 105 to 156.

Legislative debate - 1956

In 1956, these lines were taken again in the House debate on the school construction bill, HR 7535, the so-called Kelley bill. As the session opened, it was known that Mr. Powell would bring his amendment. On January 25, the President was queried as to his position on it. He stated:

> "I believe in the equality of opportunity for every citizen of the United States...
>
> Now, it isn't always quite as simple as that... I believe that every law, every important bill, every important purpose from the Congress should be in a bill of its own...
>
> The Supreme Court... specifically provided /for/ gradual implementation.

But. . .the need of the American children for schools is right now, immediately, today. So I think there should be nothing that is put on this thing that delays construction." 42/

On February 10, seven members of the House wrote the President, expressing their conviction that the provision by statute of urgently-needed school construction funds was gravely jeopardized by the persistence of school segregation and of public, official defiance of the Supreme Court. The Members stated their further conviction that the Executive could resolve the problems which jeopardized the school bill, by publicly assuring that segregated schools in open defiance of the Court would not receive construction funds pending declaratory judgements to be sought in the courts by the Attorney General. Such assurance, felt the Members, would satisfy the real concerns of Members and permit enactment of the bill. The Members stated their belief that such a public assurance would remove the grounds for a Powell amendment. 43/

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42. Public Papers of the Presidents, Dwight D. Eisenhower; for January 25, 1956.

43. Messrs. Ashley, Reuss, Boyle, Quigley, Hayworth, Rhodes, Mrs. Green. Mr. Reuss read the entire exchange of correspondence from which we quote here and in the following pages, into the House record on July 6, the day following the defeat of HR 7535. See Congressional Record, bound, for July 6, 1956, at pp.11993-5.

They noted that while such an amendment could destroy the bill, yet a Presidential declaration could save it and make possible the provision of badly-needed construction funds.

On March 1, Mr. Bryce N. Harlow, Administrative Assistant to the President, replied to the Members.[44] He noted various elements of the Supreme Court's decisions in Brown: the Court's recognition of the primary responsibility of school authorities and local courts, and of the various legitimate claims made in the public interest by local conditions. He concluded:

> "It is thus apparent that under the Supreme Court decision, the Federal judiciary, not the executive branch of the Federal government, is to determine how compliance with the Supreme Court mandate is to be brought about. . ."

Mr. Harlow continued that the course of action recommended by the Members

> "would be, therefore, inconsistent both in act and in spirit with the decision of the Supreme Court."

On March 6, the seven Members, joined by Mr. Thompson, wrote again to the President expressing dissatisfaction with Mr. Harlow's reply as apparently misunderstanding the sort of assurance they sought.[45] The Members continued:

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44. Congressional Record, bound, for July 6, 1956; pp.11993-5

45. Ibid.

> "The only assurance we seek, Mr. President, is that you will take the necessary steps to make possible judicial consideration, in order to determine whether the Supreme Court mandate is in a specific case being met."

The Members urged the President to speak out on this, "perhaps the most vital domestic issue of our time. . ." and put their question to him as follows:

> "If the pending school construction legislation (which contains no specific antisegregation amendment) is enacted, and if a State whose governor and legislature have publicly proclaimed their defiance of the Supreme Court decision and their intention never 'to make a prompt and reasonable start toward integration' requests funds to build further segregated schools and thus perpetuate segregation, would you direct that Federal school construction funds be paid over to that State, or would you (as we urge) reserve such payments in order to permit a ruling by the appropriate Federal district court, in a declaratory action brought by the Federal Government or in an action brought by the State, to determine whether it was in compliance with the Supreme Court's decree and hence eligible for funds?"

The Members noted that the President's answer to this question would be vital in determing the fate of the school bill.

On March 15, Mr. Gerald D. Morgan, Special Counsel to the President, replied to the Members.[46] He stated that their question seemed

> "to involve an assumption that the judicial branch of the Government is incapable of implementing the

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46. Congressional Record, bound, for July 6, 1956, at pp.11993-5.

> Supreme Court decision. The President will not make such an assumption. . ."

Mr. Morgan continued that the President viewed the use of "extrajudicial remedies" such as those the Members suggested, as inconsistent with the philosophy of the Court's decree. Mr. Morgan concluded:

> "The President believes that the judicial implementation of the Supreme Court decision, in the manner charted by the Court in its decree, and the building of urgently needed schools, can go forward at the same time. He will not assume that it is essential, in order that progress may be made in the former, to reserve or withhold funds necessary to progress in the latter."

This exchange of correspondence offers a striking example of the assumptions we mentioned earlier--that the undoing of racial discrimination can be divorced from grant administration and, by inference, that the former is less important than the latter and thus must not jeopardize or constrain it but rather yield to it. The correspondence also reveals the dimensions of the abyss that yawned between the parties to this debate. Many House Members were persuaded that the Executive Branch could--whether or not it [redacted] would--exercise its discretionary power and that it had both the authority and the duty to do so in such a way as to bring grant operations in line with Brown. Within the Administration, however, the view prevailed that the Executive had no duty to act consistent

with Brown except as a statute or a court order might require it to do so.

HR 7535 came before the Committee of the Whole House for debate on June 28. Much of the debate between then and July 5 went to the general issue of Federal control of schools. There was plenty of opposition to the bill simply on this point. However, the segregation issue was the leitmotif of the entire debate and Mr. Powell's motions to amend guaranteed the bill's failure on July 5, just as the Members who wrote the President had predicted.

During debate on June 29, Mr. Lanham of Georgia asked Mr. Metcalf of Montana whether schools might not be denied funds with or without a Powell amendment. Mr. Metcalf answered:

> "I think they can be, and they may be denied funds. . . .The Powell amendment is not needed. Even if this bill does not pass, I believe that. . .the Attorney General. . .or the Commissioner of Education has the power to deny funds to the schools, for construction or for any other purpose." 47/

Mr. Metcalf went on to argue that a Powell amendment would actually be a repudiation of the Supreme Court. By affirming the might and pre-eminence of the Constitution and the Court,

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47. Congressional Record, bound, for June 29, 1956, at pp. 11458 passim.

Mr. Metcalf turned back on Mr. Powell the argument that legislation might be needed or warranted to effectuate Constitutional provisions:

> "I shall never agree to the proposition. . .that these provisions of the Constitution require legislation before they can be enforced. I shall never consent that basic constitutional rights of American citizens can be withheld because of the failure or refusal of the Congress to act. . ." 48/

Having thus disposed of Mr. Powell's urging of Congressional action on principle, Mr. Metcalf went on to demonstrate how unnecessary it was in practice by citing as an example of the exercise of administrative discretion, a Department of Commerce policy memorandum of April 1956. 49/ This document specified that the Civil Aeronautics Administration would make no funds available for airport construction and development in cases where facilities would be used on a racially segregated basis. (Mr. Metcalf voted no to the Powell amendments, no to recommit HR 7535, and yes to HR 7535 itself, as amended by Mr. Powell.)

Mr. Powell addressed the Committee of the Whole House on June 29, presenting an analysis of the circumstances wherein he planned to bring a grant-conditioning amendment. We present

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48. Ibid.

49. Ibid, at 11460.

here a resume of this analysis, which is useful to us for its enumeration of arguments against his amendment as well as for its answers to those arguments.[50]

> First, repeated inquiries to the Chief Executive had "failed to bring forth one statement from him or his assistants that he would use the executive power of his office to keep Federal funds from going to the States" defying the law. Though he might indeed do so in the event, yet Powell was unwilling "to posit the moral future of our country, the respect. . .for law and order upon mere speculation."
>
> Second, Congress had a responsibility to prescribe the manner and terms of the spending of public funds.
>
> Third, DHEW had "indicated that they would do nothing to withhold the money."
>
> Fourth, under Constitutional doctrine, taxpayers had no standing to sue for injunctive relief against the administration by governmental agencies of public funds. (On this point, Powell cited Mellon v. Massachusetts.)
>
> Fifth, if a Supreme Court ruling were in itself a guarantee that its Constitutional standards would be practiced, why was it that in the two years since Brown, segregated schools had continued to be constructed? If the Constitutional standard of Brown was that schools built with Federal aid could only be operated on a desegregated basis, why was it that Federal funds had continued to help segregated impacted area schools in these years? If Plessy's standard had been "separate but equal," why was it that $75 million a year of Federal funds had assisted unequal school operations for 56 years?

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50. The entire statement may be found at pp.11472-4, Congressional Record, bound, for June 29, 1956.

(Powell here gave statistics on per pupil, construction, and maintenance expenditures for white and Negro schools in some Southern States.) "The truth is that during all of the years when the Supreme Court doctrine was 'separate but equal' it was never obeyed except, and only except, when the President, through executive order, or this Body, through legislative action, implemented the Supreme Court decision. . . You cannot escape this stark fact: The Supreme Court has never had the power to compel any State to obey any of its decisions. . ." Powell went on to note that the Congress had implemented decisions of the Court when it included nondiscrimination provisions in the Draft Act, the Hill-Burton Act, and the school lunch program. As to the new ruling of Brown: "This is the first opportunity we have had to implement the Supreme Court decision which is our legislative duty and history." Powell asserted that the handing down of an order or law by any branch of the Federal Government called upon the other branches to yield to such ruling. "From where do we get this new concept that the protection of basic liberties should be left solely to the courts? In reality, are not the courts the last and not the first resort for the protection of basic rights?"

Sixth, Powell refuted the argument that the principle of his amendment was right but ought to be taken up separately from the enactment of grant statutes. "May I point out that for 9 years my distinguished colleague from New York. . .has introduced a bill 'to withhold Federal Aid from schools which discriminate. . .'" Powell was here referring to Mr. Dollinger, who later in the debate spoke on his own behalf and in support of Powell's amendment. Powell continued: "That bill is before the Committee on Education and Labor right now, H.R. 3305, and yet not a single thing has been done for 9 years to bring this bill before the House."

Seventh, that 3000,000 children had already been integrated was gratifying; but it could not excuse the States who were formally maintaining a defiant

posture vis-a-vis the law. Indeed, said Powell, his amendments would aid those few who had "dared to build expanding islands of democracy in the morass of defiance. . . My amendment will help all those districts that have integrated, are integrating, or have stated that they will integrate. . . My amendment does not punish anyone or penalize anyone. It only restrains the Federal Government from being a partner to the crime of defiance of law and order." Thus, Powell made clear that intent of his amendments to bar from Federal aid only those school districts "which by punitive and prohibitive law will not integrate and are in absolute defiance of the Supreme Court."

In conclusion, Powell asserted that Congressional rejection of amendments such as his would mean nullification by Congress of the Supreme Court's ruling and Congressional tolerance of attacks upon the authority of the Federal Government. He noted it would mean a gain for the Soviet in Asian and African nations. He noted it "might well thrust the Negro people of America into a massive, passive resistance program such as is succeeding so successfully in Montgomery, Alabama, and Tallahassee, Florida." It would also expose the United States to ridicule as "a nation of pretense and preachments but not practices." Powell rejected the notion that his amendment need kill the school bill, whether by playing into the hands of the bipartisan opponents of Federal aid to education, or by producing a bill which the Senate would feel were defeated, it would be so by his own fellow Democrats; and he urged northern Democrats to keep faith with their traditions and not become a party of reaction. He insisted that the House must act for itself, not in relation to what the Senate might or might not do. "So let us for once and for all stop these lies about my amendment will kill the bill."

On July 3, Mr. Powell offered three amendments to Title I of HR 7535, with the purpose of so ordering the administration

of construction grants that no school defying the Supreme Court could receive funds. He argued again for the propriety of legislative action to implement Supreme Court rulings. He invited the House to face this test of whether it would abide by the most recent such order of the Supreme Court. He urged Members not to be led astray by political relationships and suggested that if the Republicans should "make hay out of the Powell amendment. . .it would be because we Democrats are not wielding our own scythes and sickles."[51/]

The debate continued on July 3 and concluded on July 5. Many Members on both sides of the House were sorely tried in the confrontation brought on them by Mr. Powell's amendment. The only ones not subject to great distress were those who opposed the entire school aid bill and who welcomed the Powell amendment as a sure means, failing all else, of defeating the bill. For example, the bill lost by 30 votes; and 96 Republicans who voted no to it, had earlier voted yes to the final Powell amendment.

The striking points that emerge from the debate are these:

> - - -a negative expectation, on the part of both Northerners and Southerners, that should the bill and amendment pass and, therefore, segregated schools be ineligible for grants, the consequence must be that they remain ineligible and, inflamed

51. Congressional Record, bound, for July 3, 1956, at pp.11756-7.

into ever-hardening resistance, not act to become eligible. In other words, there was little suggestion that the availability of construction funds might be an incentive for school desegregation. One member who did touch on this was Mr. Pelly, who voted yes to the amendment and to the bill. However, more general were stirring rejections of the notion that "bribery" might ever persuade the South to accept desegregation.

- - -recognition that to defeat the bill altogether, or to pass it with an amendment conditioning grants upon desegregation, would be to perpetuate educational problems like overcrowding, obsolescence, etc., which lie at the roots of much racial misunderstanding;

- - -much less recognition that to provide funds to segregated schools would be to perpetuate segregation, prejudice, and denials of constitutional rights and to consent to the contradiction of principle by practice.

- - -scarcely even a suggestion of the possiblity that continued suppression of an already aggreved minority might imperil the tranquillity of the majority--whether or not principles be in jeopardy.

- - -continued assertions that the Executive possessed the authority to condition grants on a number of things. These came mostly but not exclusively from opponents of desegregation and of Federal control of education. They are noted here because they suggest a kind of obsession on the part of Southern Members that the Federal Government would "get them" one way or another and certainly desired to do so above all things. This despite the fact that the Executive Branch had demonstrated, if anything, its great reluctance to exercise any sort of discretionary authority in this area. After the debate was over, on July 7, Mr. Elliott of Alabama revealed his freedom from this obsession by stating that he had studied the matter and come to the conclusion that the Department of Health, Education, and Welfare would not, on its own motion, deny funds to segregated schools.

> - - -in general, a view of the Powell amendment as one, or several, or all of these things: punitive to segregated schools; a threat to the Federal grant system; an expansion of Federal administrative power; death to the school construction aid bill; a meddling by the Legislative and Executive in the functions and processes of the Judiciary; and a penalty for all children, Negro and white.

Good statements in support of the amendment came from Messrs. Powell, Dingell, Heselton, Roosevelt, and from Mrs. Green. Mr. Roosevelt, for example, argued that the matter was overridingly one of principle which must prevail even at the cost of a temporary delay in some school construction. Mrs. Green warned that to defeat the amendment would be to teach the children of the nation that the Congress was willing to sacrifice moral principles. Mr. Heselton urged that the House must act for itself and not in regard to what the Senate might do; he also agreed with Mr. Roosevelt that the pre-eminent factor involved was one of principle. Mr. Dingell recounted his vain efforts to extract a declaration of intent from the President and argued forcefully that the Executive Branch, specifically the President and the Attorney General, were avoiding the full performance of their Constitutional duties. He urged that the House not follow suit but instead accept its responsibility and act to meet them. All these members voted yes to both amendment and bill.

The vote on Mr. Powell's amendments to Title I came on July 3. The amendments were accepted, 164 to 116. However, when debate recommenced on July 5, Mr. Gwinn offered a substitute for Title I which the Committee of the Whole accepted by teller vote, 122 to 120. The Chair ruled that Mr. Gwinn's substitute, in replacing the Kelly bill's Title I, had also wiped out the Powell amendments thereto, and, if rejected by the House, would then leave only the original unamended Title I.

Subsequently, Mr. Powell offered another amendment, as a new Title VI, accomplishing the same purpose as his earlier amendments. The Committee accepted this by 177 to 123.

Finally the Committee resolved itself into the House for final disposition of amendments and bill. First, it defeated the Gwinn amendment. Then followed three votes, the first on the Powell amendment, which succeeded; the second on a motion to recommit the bill, which failed; and the third on the bill itself, which failed. It is interesting to compare the votes on the Powell amendment and on the bill:

The amendment was accepted, 225 to 192.

HR 7535 was defeated, 194 to 224.

So much for the House debate of 1956.

We may note that this confrontation took place during the same session of Congress which saw the so-called "Southern

Manifesto." Actually entitled "Declaration of Constitutional Principles," it was read into Senate record on March 12. The Senators and Representatives signing the Declaration stated their belief that Brown constituted fundamental error and usurpation of power by the Supreme Court and urged that it be resisted by all legal means. A "Civil Rights Manifesto" followed in July, when 83 Southern Representatives presented to the House on July 13 a document urging defeat of HR 627, the Administration request for civil rights legislation, including power for the Attorney General to sue for injunctions against deprivations of any civil rights. The bill passed the House but failed to reach the Senate floor for action in 1956. A modified version was enacted in 1957, giving the Attorney General power to sue for injunctions in voting rights cases.

Executive Dilemma

1956 also saw inquiries within the Executive as to the impact of Brown on grant administration. For example, several DHEW attorneys separately examined the question and arrived at differing propositions, including the following:

1. Without amendment or change to statute or regulation, Hill-Burton grants must continue according to the "separate but equal" clause.

However, so to continue raises a question as to the propriety of using Federal funds for a project of doubtful validity. Changes in the regulation might resolve the question. But changes would not bind the States without their consent vis-a-vis facilities already approved for grants.

2. Civil rights decisions, especially Brown, yield legal principles that encompass Executive operations under grant statutes with "separate but equal" clauses. Thus, grant administration, at least under the Hill-Burton and Morrill Acts, must be reviewed and may need some changes.

3. On the contrary: Brown et al do not encompass grant statutes with such clauses. The provisions of law which must fall before Brown are not grant statutes--the responsibility for which lies in the Congress, which govern Federal Executive functions, which do not govern school admissions--but are rather laws that govern school admissions, the responsibility for which lies in the States.

   However, if Brown et al did encompass any grant statutes, they would encompass all--not merely those with such clauses.

4. The mere existence of the argument in 3, above, which is a reasonable argument whether or not it be exclusive, means that DHEW cannot be certain of the unconstitutionality of "separate but equal" clauses. Instead, it provides a basis for the possible constitutionality of such clauses. This being so, DHEW has no authority or duty to refuse to administer them. On the contrary it must continue to do so so long as any reasonable argument exists for their constitutionality.

5. The question of Executive authority or duty herein turns on the responsibility of the Executive to eschew actions or associations that are

unconstitutional. Examination of this responsibility yields the conclusion that (a) the Executive has a duty to interpret the intent of the Legislative as to grant statutes with "separate but equal" clauses enacted prior to Brown; but that (b) the Executive has no duty and perhaps no discretion to question the constitutionality of statutes with such clauses enacted after Brown.

Thus, where the Legislative acts after the fact of a precedent such as Brown, the Executive may not question its intent even where it appears inconsistent with the precedent. However, in all other cases, the Executive must construe Congressional intent with the presumption that the Legislative did not intend to require the Executive to act illegally; and in doing so it must consult case law even as evolved beyond its condition at the time of enactment of a given statute.

Therefore, the Executive has both a duty to examine Morrill grant administration and the power to change grant practices in light of Brown et al.

6. On the contrary: the examination of Executive responsibility yields no such conclusion. Rather it yields the conclusion that the Executive has no authority to introduce changes in grant administration save as instructed by Congress or the courts.

7. However, the argument in 5, above, and the rebuttal in 6, are both defective. 5 confuses the exercise of administrative discretion, as intended by Congress at time of enactment of a given statute, with a speculative administrative judgment far beyond the proper function and responsibility of the Executive.

Of course statutes are properly construed as not requiring Federal action in violation of the Constitution. Indeed, they may desirably be

> construed as not requiring States to violate the Federal Constitution. But this is not to say that a grant administrator should not make grants as prescribed by statute because the grant would support or aid an unconstitutional activity.
>
> Nevertheless, Morrill grants pose a question. The statute includes a clause based on a concept which has lost its validity. If one should conclude--but this conclusion is not inevitable--that the clause no longer governs on account of Brown et al., then one would fall back upon the basic Morrill prohibition against grants to States that discriminate in student admissions. In this case, it would be necessary to inquire into State practices. The necessity would arise, however, not because the funds granted might be being used for segregated activities--but rather because the statute itself expressly prohibits the payment and therefore obliges the administrator to see that the prohibition is carried out.

These propositions reveal more eloquently than we could the nature of the dilemma which Brown brought to the Executive Branch. The overwhelming question for DHEW was whether there were in fact an obligation and authority to refuse grants to segregated institutions in certain cases or in any cases. The question was difficult. Two DHEW grant statutes specifically authorized, if indeed they did not require, grants to segregated institutions. DHEW's other statutes did not explicitly authorize DHEW to refuse grants on account of discrimination, however discrimination might be construed. Therefore, if there were an obligation or authority to refuse some or any

grants, it was not one conferred by the statutes governing grant administration. In brief, DHEW was in effect arguing the question of whether obedience to her statutory obligations satisfied all of her obligations, or whether Constitutional obligations might upon occasion override statutory ones. In so arguing, she was examining the extent of her administrative discretion. We have earlier touched on this term; here we will discuss it again briefly.

Administrative discretion exists in greater or lesser amount depending upon the terms of the governing statutes which confer duties on administrators. In some cases, discretion may exist without reference to particular statutes, and in these cases its existence depends upon the general duties and privileges of office which are conferred upon the Executive by the Constitution. Thus, whether in relation to a given Federal program or to the management and supervision of a given Federal agency, the power, or the authority of administrative discretion comes to administrators from the law--and it brings with it a duty to uphold and obey the law.

The question of exercising administrative discretion cannot properly arise until its existence and extent have been determined. This determination is usually a function

of counsel in Executive agencies. Their review of governing statutes establishes whether and to what degree it exists.

Assuming that the existence of discretion in a given case has been demonstrated, in part by consulting statutory law, then the question arises whether and how it may be exercised. Its exercise depends partly on its extent in a given case, and partly upon things beyond the immediate case. In order to determine its extent and the constraints to which its exercise may be subject, the following things must be consulted: legislative intent, general principles of equity, applicable case law, current agency practices, and underlying Constitutional standards and obligations. Counsel's advice that there is in fact room for the exercise of discretion, provides a legal basis for the decision which the administrator must take.

To sum up, the existence of administrative discretion is determined and informed by and in the law. Its exercise relies extensively, but not completely, on legal considerations. Statutes may confer greater or lesser amounts of discrimination upon an administrator; and case law may encourage him to exercise the discretion in various ways; but in the last analysis, the discretion remains an administrative one and

its exercise is properly governed by administrative considerations.

It is the responsibility of the administrator to assess all the relevent elements--strategic, tactical, logistical as well as legal. In addition to legal advice, he needs informed knowledge of the extra-legal facts and circumstances of the case in point and of their implications for every other matter of substantial importance to his agency. The administrator whose action is insufficiently informed, acts irresponsibly--even though his action is legal, and regardless of its consequences.

In 1956, the case in point at DHEW was the impact of Brown on grant administration, with particular reference to grants to State departments of education under the Morrill Act and grants for the construction of hospital facilities under the Hill-Burton Act.

We should remember that the case law in this area was less developed in 1956 than it was to be even in 1958, and far less so than it would be in 1964 when Congress provided a statutory remedy for the problem. Thus, the law provided only limited and rather inconclusive guidance to DHEW. In consequence, there was a greater necessity than might otherwise

have been the case for DHEW to look to the other sources of guidance which we mentioned early in this paper: the spirit and temper of the Congress, the policies of the President, and the thrust of public opinion.

The guidance emanating from these sources in 1956 could not have left DHEW in much doubt about the likely results of administrative action on its part to attack the grant-discrimination liaison. Even if discretion existed in a technical sense and in whatever varying degrees vis-a-vis the different grant programs, yet DHEW faced great difficulties on the questions of whether, and how much, and in what manner the discretion should be exercised. Not surprisingly, DHEW did not make up its mind on these questions in 1956.

We may also note the condition in 1956 of what we have just above called an essential prerequisite to the responsible exercise of administrative discretion: "informed knowledge of all the relevent issues."

In 1956, neither the Executive Branch nor DHEW excelled in informed knowledge of all the elements of the grant-discrimination liaison. Just as the law was still to evolve following Brown, the Executive expertise on the liaison was in state of development. Top Executive officials, as well

as subordinate grant administrators, knew racial discrimination largely as a social institution to which the majority in the nation was devoted. They possessed little detailed knowledge of the nature and functioning of racial discrimination in their own operations.

We are suggesting here a kind of official information gap on the general subject of racial discrimination and the particular subject of the Federal relationship to discrimination. We realize that this may be an exaggeration; for instance, since the Roosevelt Administration there had been various Presidential Committees with responsibilities in the area of civil rights. These Committees had been, and were to be, principally concerned with Federal employment practices and those of Federal contractors, and with segregation in the armed services. The Truman Civil Rights Committee and report of 1946 and 1947 were, of course, exceptions. We have seen that the facts and the consequences of the grant-discrimination liaison had not escaped that Committee's attention; and we have seen their recommendations for the undoing of the liaison.

Apart from that Committee, and apart from the other more specialized Committees, there was little formal and official recognition and documentation of the Federal relationship to discrimination, and of the workings of discrimination in

Federal programs.

We are confident that there was much informal official knowledge about the problem. We have just seen that DHEW counsel were not uninformed. No doubt there were other officials in many agencies with much information on the problem.

Nevertheless, we believe our suggestion of an Executive information gap in 1956 is warranted. The statutory creation in 1957 of a formal Executive body for the express purpose of studing and reporting on civil rights, does not seem to refute our suggestion.

A final note about the "information gap." It should be recognized that a gap is not only a void, an absence of something. By virtue of the absence of the thing absent, there is room for the presence and the operation of other things. Without a body of information on a problem, there can be no conscious knowledge of the nature of the problem, and without this there can be no reliable grounds for corrective action; but there is room for groundless and uninformed action, for conclusions drawn from invalid premises. An information gap may be merely a blank, a void, in which nothing is operating; but it may also afford space for the operation of invalid assumptions, denials of reality, and determined attachment to traditions and myths.

Whatever the case may have been, the Executive knew in 1956 that it had a problem. It did not know a great deal about the nature of the problem. It could see clearly only that both action and inaction were fraught with difficulties. The House debate had demonstrated the majority opposition to desegregation, had there indeed been any doubt on that score. It had also set the stage for a pattern of Federal responses to the cue proffered by the Judiciary in Brown. The question was, whose cue? During the next years, the Legislative and the Executive variously deferred each to the other and each to the Judiciary. Most members of the Executive and the Legislative held that the cue prompted neither of them but belonged rather to the Federal courts; and a minority in each of these branches claimed the cue for their own branch.

DHEW legislative schemes, 1956

In 1956 DHEW gave some thought to the proposing of legislation to resolve its dilemma. While none of the proposals considered were actually advanced, yet it is of interest to review briefly the general drift.

Most frequently discussed were bills to condition education grants on school districts' compliance with the standards of Brown. The many questions inevitably posed by this idea were carefully examined by the Office of General Counsel. Among

them were these: Should non-educational grants be covered? Should higher education be covered? Should discrimination other than racial be covered? Should grant denials work only where specific court orders exist?

The pros and cons enumerated in consideration of each of sixteen such questions, reveal yet again the power of the assumptions we mentioned at the beginning of this chapter. However, they also reveal a steady focus on our governing principle and reasoned analysis of its premises and of the possible consequences of its application. Here is a digest of DHEW counsel's analysis of three of these questions.[52]

Deny grants irrespective of specific court orders?

Pro: 1. To limit denials to court-ordered districts is unfair both to Negroes and to the school districts--since other districts equally segregated but not under court order will continue eligible for grants.

2. Litigation will yield orders in the few rather than the many districts and, in any case, is a lengthy process.

3. Where there is a court order, there will likely be compliance; hence what need of additional sanctions such as grant denial?

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52. Paper, "Discussion of policy issues" prepared in discussion of draft "anti-segregation" bill; DHEW, Office of General Counsel; November 26, 1956.

Con: 1. To limit denials is consistent with (a) the basic intent of the proposed bill--i.e., to withhold assistance from schools defying the Supreme Court; and with (b) the principle of giving everyone his day in court.

2. Without such limitation, the granting agency would be in an intolerable position--that of prejudging the courts on judgmental factors like gradualism, and that of injecting itself into all sorts of controversy, both legal and political.

Cover non-educational grants?

Pro: 1. There is already much protest by Negroes against discrimination in federally-assisted hospitals.

2. The equal protection clause of the 14th Amendment applies to all public operations; therefore there is no logical reason to limit the bill to educational activities.

3. Should litigation yield court orders for desegregation in non-educational institutions, there would be equal reason to deny grants to such institutions.

Con: 1. The immediate problem and controversy center on education.

2. Protests against hospital practices rest largely on discrimination against doctors--analogous to discrimination against employees as distinguished from discrimination against students.

3. It is unwise to prejudge future Constitutional rulings in fields other than education.

Cover religious, national origin, sex, other discrimination also?

Pro: 1. Most general nondiscrimination statutes apply to religious and national origin as well as racial discrimination.

2. Some schools discriminate on a basis of religion.

3. Some authorities contend that all Federal grants should be conditioned upon compliance with the 14th Amendment's equal protection clause standards.

4. Should courts enjoin a discrimination as to religion, et al., it would be anamolous not to deny grants.

Con: 1. The present controversy is confined to race; to extend the bill would be to broaden the controversy.

2. The unconstitutional discrimination in public schools is that based on race and color.

3. Except in special circumstances like the present one, grants should not be used as a lever to enforce Constitutional rights.

So much for DHEW's 1956 deliberations on the Executive dilemma. The dilemma was common to the entire branch, but particularly acute for DHEW. No other granting agency had, or yet has, so large an investment as DHEW in such a cross section of national institutions, aspirations, and needs. To the extent that DHEW has the lion's share of the Federal grant business, it also has the lion's share of problems arising from that business. But above all, DHEW's awareness of the problem arose, and arises, from its particular and delicate relationship with the very institution in which the presence of racial discrimination was and is the occasion of national controversy--that is, with public elementary and

secondary schools.

Summary, 1956 dilemma and debate

We have examined these 1956 deliberations in the Legislative and the Executive at length because, as we noted earlier, they set the terms of reference within which the Federal Government responded to the minority's pursuit of change for years to come. Majority opposition to the change sought by the minority was the primary determinant of the Federal response. Let us now reflect briefly upon the implications of the Federal civil rights stance of 1956.

The 1956 House defeat of school aid had validated the theory that to attach a nondiscrimination rider to a bill is to invite or assure the bill's failure. This validation of this theory produced an accommodation between recogniton of the presence of discrimination in American life/through/ /and national decisions to improve the quality of that life/ the expansion of Federal grants. In this accommodation, the enactment of social legislation was deemed more important than and--should choice arise--preferable to the desegregation of the institutions which conveyed the improvements to American citizens. It is difficult to escape the conclusion that in 1956, the enhancement of the lot of the majority in circumstances where racial discrimination was recognized to deny the minority equal opportunity, was assumed to be in the public interest. Indeed, it appears that the denial of opportunity

to the minority was accepted as a reasonable price for the advance of the majority.

1957 and 1958

In 1957 the Legislative continued to demonstrate its unwillingness to create a remedy for the grant-discrimination problem. Resort to a "Powell" amendment by a House Republican opponent of school aid, helped to defeat a general school aid bill. The amendment was accepted, 136 to 195; and then the bill was killed on a motion to strike the enacting clause. The House also rejected amendments offered by Messrs. Powell and Pelly (R. Washington) to deny construction funds to segregated hospitals.

As we noted earlier, a reduced version of the Administration's 1956 civil rights request succeeded in 1957, enlarging slightly the Federal Executive authority to protect civil rights. The Act empowered the Attorney General to bring suit in voting rights cases and created the U.S. Commission on Civil Rights (USCCR), giving it a life span of two years. The creation of the Commission was an event of prime importance. Henceforth the Federal Government was to have within its ranks a body studying and reporting on denials of equal protection of the law and appraising Federal law and policy in

this respect. The Commission was to play a large part in closing the Federal information gap as to the nature, the functioning, and the consequences of racial discrimination.

Within the Executive, the grant-discrimination question continued to receive attention. During these last years of the Eisenhower Administration, the problem was examined on a branch-wide basis, partly by an informal working group on civil rights convened by the Cabinet Secretary. In this informal "minority cabinet," representatives of Executive agencies attempted to identify problems and propose solutions, to distinguish remedies feasible via administrative discretion from those requiring Legislative action.[53] Congressional disinclination to take remedial action being clear, the group sought particularly to identify areas where the Executive had authority to act and where action would neither enrage the Congress nor disrupt ongoing operations. Thus it was that Executive authority was brought to bear during these years on segregation in the armed forces and in the employment practices of Federal agencies and contractors.

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53. Interview August 2, 1968, with Dr. Joseph H. Douglass, Chief of Inter-Agency Liaison Branch, Office of Program Liaison of the National Institutes of Health; Health Service and Mental Health Administration, PHS, DHEW. Dr. Douglass is currently serving as Director of the 1970 White House Conference on Children and Youth.

In 1958 we find the plot thickening at DHEW. Let us stand back from our narrow pursuit and attempt a brief broad perspective. The Department as such is now five years old, and so is the Eisenhower Administration. The Cold War is thriving. ——————————————————→ Abroad: coups in Algeria and Iraq, bombardments in the Straits of Formosa, American Marines in Lebanon; rumblings over Berlin; and Fidel Castro is preparing the Cuban revolution. At home: economic recession; reactions to the 1957 debut of Sputnik; massive resistance to school desegregation. The Congress is reorganizing the Defense Department, increasing the military budget, enacting the NDEA. The Administration is concerned about the national security and afraid of inflation. And DHEW continues to be concerned about the grant-discrimination liaison, principally in terms of Hill-Burton and SAFA grants for hospitals and schools.

As to Hill-Burton, there was increasing concern that the program involved Federal dollars in the construction of segregated hospital facilities and in construction contracts with racially-discriminatory employers. On SAFA, the concern was about the propriety of making Federal payments for the education of Federal military and civilian children at segregated schools, especially schools defying Federal court orders.

Against this background of diverse national concerns, with economic, military, and civil rights problems competing for Federal attention, Arthur S. Flemming became the third Secretary of DHEW, succeeding Marion B. Folsom. At age 53, Flemming had a career of teaching, journalism, and public service behind him. He left the Presidency of Ohio Wesleyan University, his alma mater, to come to DHEW. He had earlier served on the U.S. Civil Service Commission from 1939 to 1948 and on many New and Fair Deal advisory bodies concerned with manpower, with public administration, and with Executive Branch organization. A Methodist, he had been Vice President of the National Council of Churches of Christ in America from 1950 to 1954.[54/]

Flemming joined an Administration that was increasingly aware of, and uneasy about, civil rights problems. He brought to his assignment a keen interest in eliminating or reducing discrimination in the Department's operations. He is characterized by one of his DHEW advisors, Dr. Joseph H. Douglass, as a humanist and a moralist, a man with high standards of public service.[55/] In Douglass' words:

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54. Who's Who in America, Vol. 34, 1966-67.

55. Interview with Douglass; op. cit.

"As a humanist, racial discrimination was not within his ken. As a moralist, a man of religious faith, he had a strong personal commitment to solving social problems. As an educator, he was concerned about segregated education and about the Supreme Court's decree. As Secretary, he sought to exercise his proper powers for the public good, to meet his obligations as a public servant." 56/

By autum 1958, Flemming was confronting civil rights problems at DHEW approximately as follows:

- - -the general problem of discrimination in grant operations. On this, his staff proposed a broad review looking toward remedies.

- - -Hill-Burton problems. There was some consideration in 1958 of seeking statutory action to strike the "separate but equal" clause. However, not until 1959 did DHEW advance such a proposal to the Bureau of the Budget; and not until 1964 did the Congress actually amend the statute--subsequent to the 1963 holding of the Appellate Court for the Fourth Circuit, in Simkins v. Cone, that the clause was unconstitutional.

- - -SAFA problems--touching the civil rights area which, par excellence, dominated national and Federal attention: segregation in public elementary and secondary schools.

SAFA problems, 1958

We must here survey the particular set of questions connected with SAFA grants in 1958. Even before Flemming came to DHEW, the problem of segregation in SAFA-assisted schools had been worrying Department lawyers and executives.

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56. Ibid.

But in September 1958, the problem was compounded by the closing of a number of schools in massive resistance tactics. Some of these schools had been educating Federal children under SAFA grants. Thousands of Federal children were suddenly deprived of schooling because their parents were serving in the armed forces or employed by the Defense Department in areas hostile to school desegregation. DHEW suddenly had an acute and particular problem within the modest universe of its general civil rights problems. The problem was equally if not more acute for the Department of Defense. In Norfolk, Virginia, alone, about 5,500 children of military personnel and 11,000 children of civilian Federal employees were affected by the school closings. Clearly, however the grant-discrimination problem might ultimately be solved, the Federal Government faced an immediate problem of educating children of its officers, servicemen, and employees who were without schools as a direct result of their parents' duty to the Federal Government. Thus, Secretary Flemming faced a scale of SAFA-related questions as follows:

---the propriety of paying SAFA funds to schools disobeying court orders to desegregate;

---whether segregated schools were properly held "suitable" by the Commissioner of Education, whom the statute authorized to rule on the

"suitablity" of local facilities and, in certain circumstances, to provide on-base facilities where he found local ones unsuitable;

---the education of Federal children affected by the school closings.

These questions were further complicated by the terms of the SAFA statutes. The Commissioner possessed the authority to provide directly for the education of children whose parents lived on military installations in certain circumstances, but no corresponding power to provide thus for children whose parents resided off the bases. And while the Commissioner had the power to provide direct schooling for on-base children in cases where he found the local facilities "unsuitable," yet this power did not extend to the provision of on-base schools for off-base children in cases where local facilities had been closed in evasion of desegregation.

In October 1958, DHEW's Assistant Secretary gave the Secretary a synthesis of staff views and an analysis of legal issues vis-a-vis the SAFA problems, apart from the school closings.[57] From a lengthy examination of the legal issues, he distilled two policy questions:

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57. Memorandum, Elliot L. Richardson to Arthur S. Flemming; DHEW; October 4, 1958.

1. Continue payments to schools defying court orders?

2. Provide on-base facilities in each case of a segregated local facility, after revising the "suitability" ruling?

On the first question, the Assistant Secretary recited arguments both for and against continuing payments and concluded that extensive further study was urgently needed, in a broad context, for decisions which would have application beyond the DHEW-SAFA problem.

On the second question, he recited various considerations and concluded that, assuming a revision in the ruling, no legal impediment would ensue to preclude an affirmative answer but that, practically speaking, there seemed as many reasons for a negative as an affirmative answer.[58]

We should note that DHEW opinion was divided as to whether the Commissioner of Education might, on his own administrative discretion, revise the "suitability" ruling or whether a statutory amendment were necessary to sanction such a revision. In either case, revision would provide only a partial solution, a solution which in itself would contain difficulties as great as those it sought to overcome--the obligation for DHEW to finance and the Department of Defense to operate schools for thousands of children, with a whole

58. Ibid.

host of corresponding logistical and educational problems.

Furthermore there were legal arguments to the effect that neither a constitutionally-grounded administrative decision against continuing payments to schools which were defying a court order to desegregate, nor a revised "suitability" ruling, might actually relieve DHEW of its statutory obligation to continue payments. On the one hand, ran the arguments, a determination to discontinue payments would arise from the unconstitutional practices wherein schools denied personal rights of Negro children; but the SAFA payments arose from the education at such schools of <u>other</u> children--children whose rights were not being denied and who might constitutionally continue to be educated there even though the schools were segregated. And on the other hand, the rejection of schools as unsuitable because segregated and the consequent provision of on-base schooling for certain children, might not necessarily result in all Federal parents withdrawing all children from the local segregated schools. According to these arguments, if in either case parents continued to send children to segregated schools in sufficient numbers to entitle the schools to SAFA payments, then the payments would have to continue.

These delicate considerations were, of course, additional to the two grand questions which had engaged DHEW counsel's

attention since 1956: whether Federal funds should be paid to schools where courts had ruled segregation unconstitutional and had ordered its undoing; and whether a Federal granting agency had the authority and the duty to withhold funds on account of unconstitutional practices under statutes containing no explicit instructions for withholding. On the latter question, the view continued to prevail that, in absence of a Legislative or Judiciary instruction or ruling, the Executive had no discretion to withhold.

Finally, both the Hill-Burton and SAFA statutes were up before the Congress for extension in 1958. Both were duly extended. In neither case did DHEW seek statutory action to strike or add language specifically reaching the issues we have sketched here.

All these considerations, following upon the deliberations of two years and meeting the 1958 staff proposals and the Secretary's great need for timely information on school problems, yielded an assignment for Dr. Joseph Douglass. Douglass was then serving on the staff of the Secretary's Special Assistant for Program Coordination, Gerald Kieffer. To Douglass fell the task of establishing a clearinghous of information on the compliance by school districts with Brown and other desegregation rulings. Henceforth, Douglass provided daily digests

for the Secretary on school desegregation, school closings, and all related matters. In addition, he commenced a long-range study of the Department's programs, seeking to identify civil rights problems and to formulate remedial proposals.

These assignments to Douglass in 1958 foreshadowed efforts which we shall examine in detail in 1960--the "Task Force" proceedings of that year.

Douglass also worked with the Administration group we mentioned earlier, the group known informally as the "minority cabinet."[59] And of course the Administration itself was increasingly concerned during autumn 1958 as Federal children were displaced by school closings.

1959

In December 1958, Secretary Flemming discussed the school closings at a press conference, deploring them as contrary to the American tradition of public education. In January 1959, the President reported that his aides were working on the problem with the Departments of Defense and DHEW. The Navy Department soon decided to seek funds to operate schools for on-base children in Norfolk. On January 26, Secretary Flemming announced DHEW plans to seek legislation authorizing the direct education of off-base children in places where schools were closed in evasion of court-ordered desegregation.

59. Interview with Dr. Douglass, August 2, 1968

The Department's legislative proposal went to the Congress in February. It was not acted upon until 1960 when Congress granted the authority as Title VI of the Civil Rights Act of that year.

The resolution of the school closing problem sought in February still left the larger questions unanswered. During the next two years, DHEW continued to grapple with these questions. The grappling fell to a small group--members of the Secretary's immediate staff such as Assistant Secretary Richardson, Special Assistant Kieffer, and Dr. Douglass; members of the Office of General Counsel; and the program officials concerned with these questions and involved from time to time by Douglass or counsel in their deliberations.[60/]

And in 1959, DHEW was beginning to feel the presence within the Executive Branch of the U.S. Commission on Civil Rights (USCCR). The Commission had been signed into life in September 1957. The President's nominees for membership and staff direction had been confirmed by the Senate during spring 1958. The Commission had embarked upon its first study amidst the bureaucratic tribulations in regard to space, staff, and appropriations which are customarily the lot of temporary Executive Branch agencies.

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60. Interview with Douglass, August 2, 1968; interviews with Edwin Yourman, DHEW Office of General Counsel, May & June 1968.

In 1959 the USCCR made formal inquiries of DHEW as to its position on grants to segregated elementary and secondary schools. The USCCR questionnaire received the attention of the small DHEW working group mentioned just above. Douglass and counsel consulted colleagues in the Office of the Secretary and the Office of Education and submitted to the Assistant Secretary a proposed Departmental reply. The general thrust of the reply finally made was a reformulation of the Executive Branch position which had emerged from the 1956 House debate on school aid. Thus: The Federal Judiciary, not the Executive, is responsible for compliance with Brown; judicial implementation of Brown can proceed hand in hand with meeting the urgent educational needs of the country.

Within the context of the staff proposal for a reply which would repeat the now familiar refrain, however, there had been room for two thematic variations which are of some interest to us. One variation was trill embellishing the theme; the other was a contrapuntal refutation of the embellishment, developed sufficiently not only to reassert the pure theme but also to sketch the figure of another theme altogether --a theme barely audible in 1959 but which was in a few years to triumph over the earlier one.

Thus: after Douglass and company had submitted their proposal for reply, the Secretary's staff suggested a revision

of one part of the reply. Their revision elaborated upon the theme, adding to the customary affirmation of Judiciary responsibility an assertion that the vesting within the Executive of withholding power would complicate the task of the Judiciary. So much for the trill. DHEW's General Counsel advised against the revision.[61] He stated that the original theme, developed with the greatest care and so often used, needed no embellishment. He pointed out that the revisions' assertion as to Executive "complication" of Judiciary efforts, might open up argument as to whether the exercise of any kind of Executive authority in segregation problems would in fact "complicate" the work of the courts. He stated:

> "This seems to evade the main question which is whether there is any effective action the Executive Branch can take. Certainly, if the Executive Branch could take effective action through the withholding of grants which would on balance substantially contribute toward desegregation, the work of the Federal Judiciary would be simplified rather than complicated." 62/ (Emphasis added.)

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61. Memorandum, Parke M. Banta, General Counsel, to Elliot L. Richardson, Assistant Secretary; DHEW; Mary 4, 1959; drafted by Edwin Yourman, Office of General Counsel.

62. Ibid.

We shall have occasion to remark upon the views of Federal courts on this point when we examine the first years of Title VI implementation.

In September 1959, the USCCR submitted its first report to the President and the Congress. This report was the first statutorily-commissioned Federal survey of denials of equal protection on account of race. In that it was made by a statutory agency of the Federal Government, it constituted formal, official recognition of a national problem. The report came two months before the scheduled expiration of the Commission, at a time when the extension of its life requested by the President was being blocked, together with other Administration measures, in the House Rules and Senate Judiciary Committees. The Commission was preserved from extinction only by attachment of a rider for this purpose to a pending, unrelated appropriations bill. Debate on the rider provided an opportunity for Southern legislators to denounce the Commission's report.

As a body, the Commission made no formal recommendation for grant conditioning in the 1959 report.[63] However, its Chairman and two of its members made their own recommendations

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63. Report of the U.S. Commission on Civil Rights, 1959 USCCR, Washington, D.C., September 1959.

for grant conditioning in higher education.[64] One of the Commissioners[65] added a recommendation for grant conditioning with respect to elementary and secondary schools. All three gentlemen stated the further view that public housing and urban renewal efforts should be governed by the concept that segregation and the displacement of minority groups were incompatible both with program goals and with the proper use of Federal funds.[66]

And on Capitol Hill, the House rejected two amendments, one offered by Mr. Powell, seeking to bar discrimination in federally-assisted housing.

1960

As the Eisenhower Administration went into its eighth year, politics and change were in the air. The nation was preparing for a Presidential election, and the civil rights movement was working into its crescendo period. Civil rights questions had been posed with increasing urgency since 1954.

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64. Chairman John A. Hannah; Commissioners Theodore M. Hesburgh and George M. Johnson.

65. Commissioner Johnson.

66. Report of the Commission for 1959; op. cit.

Little Rock in 1957, and the school closings in 1959, had been traumatic episodes for American federalism. And since Little Rock, a national problem had increasingly received international attentin.

On Capitol Hill, the Legislative-Executive confrontation of 1956 was reenacted in yet another school aid debate. The Senate passed a school bill in February. In the House, debate on HR 10128 heard arguments on the floor that the Attorney General already possessed power to deny funds to school districts adjudicated as in contempt of the Supreme Court. Again, the Executive neither admitted nor disclaimed such denial power but simply restated that school desegregation was not its proper concern save as the courts might order. Again Mr. Powell suggested that the Legislative had a duty to mediate between Judiciary standards and Executive impotence in order that the Constitution might be upheld by the Federal Government. And again, though this time at the hands of the House Rules Committee rather than on the House floor, the bill itself failed. After passage by 206 to 189 (162 D and 44 R supporting; 97 D and 92 R opposing), the bill was held in the Rules Committee and this never got to House-Senate conference.

Other Legislative developments included the emergence of various civil rights bills previously introduced, in the

form of the Civil Rights Act of 1960. This Act, signed on May 6, provided some sanctions against expressions of massive resistance; extended Federal protection of voting rights; and empowered the USCCR to administer oaths and take sworn statements at hearings.

Authority to provide technical assistance to schools in the process of desegregation, which the Administration had requested both in 1956 and 1959, was denied. Also denied were requests on equal employment and for Attorney General entries into school desegregation suits. These defeats, as well as the debate and the filibuster, demonstrated the continuing Congressional opposition to a larger Federal role in the civil rights area.

In a 1960 report, the USCCR formally recommended action by the Executive or the Legislative to condition grants to institutions of higher education upon the absence of discrimination as to race, color, religion, or national origin.[67/]

And the continuing deliberations of the Administration's informal "minority cabinet" were making a mark. They had yielded various topics for formal Cabinet consideration; and

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67. Equal Protection of the Laws in Public Higher Education, 1960; USCCR, Washington, D.C., 1960.

late in 1959 the Cabinet had instructed the Attorney General and the Secretaries of Labor and HEW to examine their respective operations vis-a-vis racial discrimination, to identify problems, and to report on them with proposed solutions.

We shall here confine ourselves to DHEW's 1960 efforts in connection with this Cabinet directive without exploring the responses of the other agencies.[68] We shall devote some time to the DHEW response; for it sheds light on a number of conditions which bear directly upon DHEW's reception of Title VI responsibilities in 1964.

DHEW task force discussion papers, 1960

The task of preparing a discussion paper for a Departmental reply to the Cabinet fell to the informal DHEW working group we described above. Known as the "Task Force," the group was the sum of the full-time efforts of Dr. Douglass and the various part-time efforts of Special Assistant to the Secretary Kieffer and staff of the Office of General Counsel. These few worked to the great many--the program officers and grant managers throughout the Department's agencies. In

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68. Rooms to explore: The roles of the White House staff, the USCCR, and the Justice Department in Executive deliberations upon civil rights questions in general and upon grant-conditioning in particular, between 1959 and 1964 and between 1965 and 1968.

Douglass' words,

> "It's interesting to recall those days, the climate. We worked informally with the program agencies. We were few and our voices were feeble. We had no troups, no forces." 69/

The "Task Force" produced a discussion paper in March for the Secretary's use in preparing a reply for the Cabinet. 70/ The paper commenced by noting the Cabinet request. Then it referred to the 1959 inquiries of the U.S. Commission on Civil Rights as follows:

> "It became evident in the preparation of the material for the Commission that in a number of instances departmental programs have implications in the civil rights field.
>
> "With the extension of the life of the Commission and its probable future inquiry into added areas of the Department's responsibility, a subsequent informal task force was established which has been (1) inventorying departmental programs which have implications in the civil rights area, and (2) developing alternative possible methods for coping with the problem." 71/

The paper presented issues and alternatives for action, considering methods of preventing discrimination in the light of overall program objectives. It did a thorough job of

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69. Interview with Douglass, August 2, 1968.

70. Staff paper on Civil Rights; DHEW; March 7, 1960.

71. Ibid.

describing discrimination problems agency by agency and program by program. It drew tentative conclusions approximately as follows:

Office of Education (OE) grants

1. Vocational education and SAFA: statutory amendments necessary prior to action.
2. NDEA: administrative action to deny funds under some titles possible.
3. Morrill grants: Should Brown supersede the "separate but equal" clause, administrative action would be possible to reverse present policy based on that clause.

Public Health Service (PHS) grants

All grants: statutory amendment necessary prior to action. Legislative proposal to strike "separate but equal" clause from Hill-Burton already submitted to Bureau of the Budget.

Public Assistance grants: No statutory impediments to change under any program. However: "Any racial discrimination which may exist is not overt and therefore difficult to discover and substantiate."

Vocational Rehabilitation (VR) grants: No statutory impediment to change. Administrative regulations implementing the 1954 VR amendments contain requirement that State plans include nondiscrimination provisions.

Surplus Property activities: Statutory amendments necessary.

We should note that the paper dealt with discrimination in all of the Department's activities, not only in grant operations. However, we are confining our examination to the grant question and shall omit non-grant matters such as employment under merit system standards, social security operations, etc.

The March 7 paper recognized the existence of discrimination and denials of benefits in the Department's grant programs. Most interestingly, it revealed a glimmering of the perception that discrimination might work--might, indeed, be working--to frustrate the very program objectives which tradition and real politik had imbued with such sanctity.

That the paper succeeded at all in naming and locating discrimination and in offering even modest suggestions for remedies, is worth a moment's reflection. Consider the circumstances in which it was produced. A handful of officials, all burdened with other daily obligations of substance, had to thread their way through an intricate maze of statutes, regulations, legal principles and definitions and issues; through program operations, grant management, administrative sensitivities, and political delicacies; through bureaucratic incomprehension, indifference, and opposition; through personal and social group attitudes to law, race, and civil rights; and through impersonal, mindless tangles of red tape. Not only had they to find a way through the maze; but they had to observe en route whether the maze's existence and functioning had any discriminatory consequences and, if so, what sort of consequences. Not only had they to identify discrimination but also to devise means of undoing it within the terms of

functioning of the maze--that is, in consideration of over-all program objectives.

And not only had they to suggest remedies; they had to do so in the sure knowledge that the maze, simply by virtue of being a maze, infinitely preferred to go on as it was and was apt to respond to suggestions for change as to a hostile attack.

In view of these conditions, let us grant that the March 7 paper was a considerable achievement. It called the problems as it saw them. It pointed to the presence of discriminations and of remedies for it. It suggested remedies in a respectful and maze-conscious manner. Having granted so much, we may also fairly note a few other points.

The March paper contains formulations which suggest the actual working or the ritual invocation of some of the assumptions we noted at the beginning of this chapter. It affirms with clarity the demands of principles of equity that DHEW recognize and consider the rights, problems, and interests of State agency recipients. It makes no corresponding affirmation of the demands of equity vis-a-vis beneficiaries--vis-a-vis the rights, problems, and interests of the American citizens for whose benefit the grant statutes were enacted and whose taxes support the grants.

The second paper, August 1960

After extensive review and about nineteen drafts,[72] the March paper was followed by a second discussion paper dated August 19. The August paper followed the general form of the March one. It analyzed agency programs and discrimination problems in somewhat greater detail. It discussed legal issues at some length. It suggested possibilities for action and made policy recommendations.[73] It included submissions of their own views on these questions from the OE and the PHS.

The paper noted that the Commissioner of Education possessed broad discretionary powers under some statutes and less under others. It suggested that there seemed no reason why he should not consider exercising the power he had and none why he should not enforce existing nondiscrimination provisions such as those governing vocational education grants. It saw a role for "persuasion and education" in pursuit of change under many OE programs. It noted general Administration plans to seek legislation expanding vocational education programs. And it noted that the Commissioner possessed, under

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72. Interview with Dr. Douglass, August 2, 1968.

73. Staff paper on Civil Rights; DHEW; August 19, 1960.

the rural library services program, an explicit statutory authority to withhold grants if the legislative intent was not being fulfilled.

The paper noted the Department's proposal to eliminate the "separate but equal" clause from the Hill-Burton statute. Recognizing that that clause sanctioned discrimination in hospital admission policies and that, should the clause fall, there would remain questions touching internal segregation or service differentials, it suggested that persuasion and education efforts might reach these questions.

The August paper asserted the existence of reasonable cause for taking remedial action and distinguished the following categories:[74/]

---stautory amendment a prerequisite to any DHEW action;
---DHEW amendment of administrative regulation prerequisite to any policy change;
---policy change possible under present statutes and regulations;
---persuasion and education efforts appropriate.

The paper advised that any decisions must anticipate the likelihood that changes would meet with resistance which might be variously expressed by State withdrawals from programs,

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74. Ibid.

by covert recipient evasions of requirements, by litigation, and by Congressional retaliation including reduced appropriations.

Finally, the August paper suggested the problem was such as to warrant an overall Administration position and that unilateral action by DHEW was the least desirable approach. It identified four alternative approaches and, after discussing each, recommended as best the fourth one.[75]

1. A statute of general applicability covering all grant statutes.

2. Individual granting agency pursuit of individual statutory remedies.

3. Resort to Executive Branch administrative discretion by individual agencies, with each Secretary seeking to eliminate discrimination by change in regulations or other policy determinations.

4. Resort to the Chief Executive and the highest level and tone of Executive Branch leadership and example. An Executive Order or other Presidential statement. Follow through from granting agencies at policy and operational levels.

Now for the views submitted by OE and PHS.[76] Both agencies believed that persuasion and education were much preferable to changes in statutes, regulations, or policies. In

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75. Ibid.

76. Attachments to staff paper of August 19, 1960.

particular, OE made very clear its strong opposition to the concept of grant conditioning--whether under statutory or regulatory changes or under revised constructions of statutes and regulations. OE opposed amending the SAFA statute to sanction the construing of the "suitability" rule to bar segregated schools. The only area where OE found legislative action desirable was in vocational education. OE felt that the broadening and improvement of program services contemplated was the best way to deal with discrimination since the refashioning of the legislation would go far beyond "narrow" civil rights issues. Similarly, PHS believed that statutory amendments should be confined to the proposal already made for the Hill-Burton Act.

Douglass recalls that the production of the August paper was "a very hard process."[77/] Even a hasty reading of the paper suffices to explain why this might have been so. A careful scrutiny of it leads us to conclude that it must, indeed, have been a difficult task. The paper is more specific in its findings than the March one. It examines in some detail the relationship between program administration and

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77. Interview with Douglass, August 2, 1968.

racial discrimination. Its analysis of legal questions reaches points of both statutory and Constitutional law. Its recommendations envisage fairly extensive changes in grant administration and, thus, in grant relationships.

The August paper has in common with the March one a scrupulous regard for cautionary caveats as to proper Executive action and as to the limits of administrative discretion. It also shows much deference to program objectives. And it affirms the principle that the Executive has no business seeking or securing desegregation faster than the Judiciary may order it.

While the paper recognizes the existence both of cause for and means of corrective action, it does so without ever approaching in tenor or style an advocacy of the changes it finds warrantable. If it seems to slip at all from a dispassionate examination of circumstances, then the slip would seem to be on the side of negative expectations as to the consequences of corrective action. Certainly negative expectations were, and still are, most realistic. And in 1960 negative expectations were so widespread as to inhibit most Federal officials from arriving at realistic affirmative ones. Thus, the paper does not suggest what was generally inconceivable

in 1960: that Federal action to desegregate grant-aided operations might ever be greeted as timely, appropriate, and necessary assistance in a difficult local task.

We should also note that, both by virtue of being written and by virtue of their recommendations for persuasion, education, and resort to the leadership of the Chief Executive, the papers in fact acknowledge the educative and generative properties of law and policy. These properties, however, are not emphasized. Rather, the papers seem to reflect a general view of law, policy, and Executive action as forces whose value is essentially responsive--responsive to the felt needs and interests of the majority as expressed and represented by existing social and governmental institutions.

These are, perhaps, overly fine distinctions on our part. Certainly we do not mean to quibble with the perceptions, or the tactics, of the authors of these papers. Their mission was to provide basis for discussion. They fulfilled their mission admirably. Nevertheless, from the vantage point of 1968 and knowing how much and how little emerged from the 1960 discussions, the attitudes and perceptions reflected in the papers are at least as interesting to us as the purpose they served.

It appears to us that the 1960 DHEW climate was imimical to a recognition of racial discrimination as a problem

sufficiently grave, and sufficiently associated with program objectives, to warrant changes in grant administration. We suspect that the climate was so inimical to change as to render those suggesting it vulnerable to charges of distortion of fact, unprofessional advocacy of extraneous causes, and meddling. If this was indeed so, then it might also have been the case that the authors of these papers assessed the climate; that they consciously sought to handle their legally-complex and emotionally-charged subject with the most scrupulous consideration for program sensibilities consonant with their findings; and that they bent over backward in an attempt to shun the substance or semblance of that advocacy which they felt might prejudice colleagues against their proposals.

In any case, the papers certainly reflected the general progress of the Executive in its slow journey to full recognition of the grant-discrimination problem. When we recall the circumstances of 1960--that Congressional unwillingness to act was unmistakeable; that the Executive was still insufficiently informed as to the dimensions of the problem; that the slowly-accelerating civil rights movement had not yet produced a national consensus; that the deliberations on the problem which we have surveyed at such length were thus far

actually only a few voices crying in the wilderness;--then we may perhaps conclude that the 1960 Task Force papers were timely and significant analyses, and that their recommendation for Presidential action was a realistic and balanced judgment that a beginning must be made and that the Chief Executive was the man to make it.

This investigator would go further and depict the 1960 papers as a sort of aborted prophecy. Aborted, in that they did not yield direct issue in the form of Departmental action to remedy the problem. Prophecy, in two senses. First, in that they reflected the profound dislike of grant conditioning on the part of program officials which continues to this day and which has influenced the implementation of Title VI. Second, in that they expounded as lucidly as they did, the general conditions of racial discrimination at DHEW and laid down a scale of remedies; and in that the ensuing years have consistently vindicated the authors both as to the conditions they described and the remedies they suggested in 1960. While all DHEW's subsequent actions against discrimination do not trace their ancestry to the 1960 papers, yet it is true that most of the later actions are precisely the ones recommended in 1960. To regard the 1960 papers as prophetic is, perhaps, not extravagant on our part.

Reactions to the staff papers

So much for the Task Force discussion papers. Now for their consequences. The August paper caused a great stir within the Department.[78] Grant administrators viewed with dislike its conclusion that grant conditioning was warranted and actually feasible by administrative action in some programs. The General Counsel viewed its legal arguments with distress. He found the paper wrongly premised on the concept that in the absence of enabling legislation, the grant-discrimination liaison could be related to Constitutional obligations. He contended that the only proper relationship for these questions, and in any case the governing one, was to statutory law and statutorily-conferred obligations.[79]

And, of course, by September the nation at large was far gone in politics, with attention focused on the Presidential candidates and their platforms. It will be recalled that both parties had adopted sweeping civil rights planks, including pledges of Executive action to divorce Federal activities from racial discrimination.

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78. Interview with Douglass, August 2, 1968; interviews with Yourman, May, June, August 1968.

79. This is based on a review of DHEW Office of General Counsel files.

And so it was that 1960 drew to a close with the Executive dilemma unresolved, though measurably better informed than it had been in 1956. In November, Senator Kennedy won the election, whereupon the hiatus customary to a passage des pouvoirs consigned the Task Force paper to a degree of obscurity. Let us simply note that Secretary Flemming concluded that whatever power he had in hand to condition grants was something of a two-edged sword; that to seek to extend the power by statutory amendment would be a delicate pursuit; that the entire problem did indeed warrant an Administration decision; and that he communicated these views to the Cabinet in January 1961.

1961

Having proclaimed the New Frontier, the new Administration was attempting to translate eloquence into action, to give substance to its visions. The Administration was marked from the beginning by President Kennedy's belief in the obligation and the opportunity of the Chief Executive to provide leadership and to exercise his powers vigorously, together with a determined optimism as to the efficacity of such leadership for the accomplishment of a given task. Both the New Frontier and the Great Society have been marked by a readiness to employ

the educative properties of law and policy and by a desire, if not always a corresponding ability, to inspire and to teach as well as to preside, to lead, and to govern.

While the new Administration was still getting itself together, it received an early invitation to apply its philosophy of strong Executive leadership to civil rights problems. Surveying a number of problem areas, the Southern Regional Council recommended corrective Executive action, including grant conditioning.[80/]

An early test of the Administration's mettle came in the spring debate on school aid on Capitol Hill. The debate centered around religion rather than race this time. The American Roman Catholic bishops waged war against the New Frontier bill which excluded private schools from coverage. Facing the customary bipartisan "conservative coalition" plus a militant Catholic attack, the Administration sought to preserve the bill's slim chances by neutralizing the racial issue. It testified that no funds would be withheld from segregated schools without Congressional authorization. Mr. Powell was persuaded to refrain from bringing his amendment. Nevertheless, the bill died in the House Rules Committee.

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80. Southern Regional Council, "The Federal Executive and Civil Rights;" SRC: January 1961, Atlanta, Georgia.

Civil rights and the New Frontier

Within the Executive Branch, the Administration demonstrated its intentions to answer civil rights questions by setting up some administrative machinery. This is described so well by Harold C. Fleming, Executive Vice President of the Potomac Institute, in an article in Daedalus, that we can serve the reader in no better way than by quoting Fleming.

> "The first step. . .was the appointment of a special assistant for civil rights on the White House staff. . . . Two new groups were constituted to deal with racial problems. One was a small ad hoc committee that met frequently and informally to discuss ongoing programs and propose solutions for the emergencies of the moment. The second was a larger and more formal body, the Subcabinet Committee on Civil Rights, composed of senior departmental and agency staff members. . . William L. Taylor, /then a staff member and later Staff Director of the USCCR/ . . .served as Secretary of the Subcabinet Committee." 81/

Fleming goes on to note that the special assistant post was filled for a year by Harris Wofford and, upon his resignation, discontinued, with civil rights matters falling to Lee C. White, then Assistant Special Counsel and later Special Counsel to the President. Fleming notes that after the first year the ad hoc group fell into disuse and a part of its tactical and

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81. Harold C. Fleming, "The Federal Executive and Civil Rights;" in Daedalus, Journal of the American Academy of Arts and Sciences; fall 1965 special issue, The Negro American; Richmond, Virginia.

administrative assistance role was assumed by staff of the USCCR. The Attorney General and his advisors, states Fleming, took the lead on major questions. Fleming characterizes the Subcabinet Committee, in its turn, as providing "a forum for orderly discussion and communication of policy that affected all or a number of agencies." 82/

On the role of the USCCR, Fleming notes:

> "From 1961 through 1964, the Civil Rights Commission operated on more than one level. In keeping with its statutory mandate of 1957, it studied and held hearings on 'denial of equal protection of the law' in general and federal laws and policies affecting equal protection in particular. Beginning in 1959, it issued a series of memorable reports and recommendations. (Emphasis added.)
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> "As an independent, bipartisan agency, however, the Commission was not really considered an arm of the administration. In fact, there was a certain amount of periodic disagreement and tension between the Commission, on the one hand, and the Justice Department and the White House, on the other. . . . On an informal level, however, the Commission staff gave indispensable advice and assistance to overworked White House aides." 83/

With such machinery did the New Frontier come to grips with civil rights and communicate its views thereon within the Executive Branch.

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82. Ibid.

83. Ibid.

The New Frontier at DHEW

Of course, the New Frontier brought changes to DHEW. During the interregnum period, Dr. Joseph Douglass had departed from the Office of the Secretary to pursue a professional career with the Public Health Service, where he continues to serve today. A kind of latent continuity on civil rights existed, whether or not it did so to any purpose, in that the various counsel and program staff people who had worked with Douglass, continued in their regular duties. However, the mandate which had drawn them together on civil rights questions having been suspended, this continuity was neither functional nor officially designated. The Task Force papers which had caused such a stir and which continued to be held in disrepute in some quarters, now lay on a few desks and in a number of files.

The new DHEW team included Secretary Abraham Ribicoff, Assistant Secretary James M. Quigley, General Counsel Allanson W. Willcox, and later, Commissioner of Education Francis Keppel. Most immediately concerned with civil rights questions were in 1961/Assistant Secretary Quigley and his staff and the Office of General/Counsel./ By summer of 1961, the Assistant Secretary and the General Counsel or his Assistant were representing DHEW at Subcabinet Committee meetings.

Assistant Secretary Quigley was also, to some extent, representing within DHEW the New Frontier thrust on civil rights. A former Member of Congress from Pennsylvania, the Assistant Secretary had been among the members whose letters to the President prior to the 1956 House debate on school aid had elicited the Eisenhower Administration's affirmation of Executive non-interference in Judiciary implementation of Brown. The Assistant Secretary brought to his post qualities of confidence, determination, and positive thinking, all of which were perhaps particularly appropriate to his civil rights responsibilities. Corresponding measures of prudence, caution, and circumspection which are equally appropriate in civil rights matters, were supplied by the General Counsel and his staff.

We should note briefly what may be self evident: that DHEW's experience with civil rights questions had by now yielded a sort of scale of concerns. In the first place, where it remains today, was segregation in elementary and secondary schools. Ranked beneath it came segregation, racial exclusions, and other discriminations in health care facilities, colleges and universities, library facilities, vocational education, vocational rehabilitation, and public assistance operations. (Again, we are ignoring departmental

concerns apart from grants.) Let us also note that school segregation's enduring pre-eminence among DHEW civil rights concerns arises from its visibility as a national problem, the clarity of its legal standing, and the excellence of its power to generate controversy. All these properties have been constant ones since 1955. Their constancy appears unfaltering in 1968.

Although the August 1960 staff paper did not father direct DHEW action to alter grant administration, it did produce discussion, debate, and an heir: a paper called the "check list." This was a sort of print-out of grant programs classified by the statutory or other means necessary or feasible for attacks on discrimination.

Founded as it was on the August paper, the check list was held in scarcely less disrepute by the General Counsel. However, the Subcabinet Committee on Civil Rights was exhorting the granting agencies to identify and propose remedies for discrimination problems. In consequence, Assistant Secretary Quigley found himself somewhat between the devil and the deep blue sea. On the one hand, there was available for use with the Subcabinet group an analysis nicely in tune with New Frontier aspirations. On the other hand, his counsel distrusted the analysis and advised him not to use it outside

the Department.[84] In making use of the check list, the Assistant Secretary was tracing a Departmental pattern which was to be embroidered with varying results during the next seven years.

We should note that the Office of General Counsel had not, in 1961, arrived at a unanimous opinion on the grant-discrimination problem. Very briefly, and therefore at the risk of imprecision, we may sketch the counsel views as follows:[85]

Traditional: Arguments resting squarely in explicit statutory provisions.

Constitution-minded: Arguments weighing both statutes and Constitutional doctrine. Proceeding variously from the 14th or 5th Amendments or from both. Considering individual civil rights together with Executive duty to obey statutes and Executive duty to uphold the Constitution. Reaching various conclusions as to the possibility, and the appropriate resolution, of conflicts between rights and obligations and among obligations.

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84. This is based on a review of 1961 DHEW Office of General Counsel files.

85. Based on OGC 1961 files and on interviews in May, June, and August 1968 with Attorneys Edwin Yourman and Joel Cohen of OGC. The "constitution-minded" view had for some years relied upon the 14th Amendment. It had been formed by a concept that equal protection requirements were properly considered a part of a grant statute, in terms of beneficiaries' rights to benefits--a concept which influenced social security and public assistance policies. In 1961, 5th Amendment doctrine came in for consideration.

As the lawyers continued to deliberate upon appropriate grounds for corrective action, the New Frontier was pursuing these questions in its fashion. For example: during the summer of 1961, the Subcabinet Committee was consulted as to the desirability of an Executive Order requiring nondiscrimination clauses in grant agreements. The granting agencies advised against such an Order.

And so the Executive pattern of the past years still held during the first months of 1961. The forces seeking change were restrained in their pursuit by two inhibiting forces--the ambivalence of the lawyers as to grounds for action, and the opposition of program officials to the concept of grant conditioning. The Federal information gap we mentioned earlier was, of course, working to sustain both of the inhibiting forces.

Before the year was out, however, the balance of power was beginning to shift. The information gap was being filled in. The civil rights movement was accelerating. Public and private awareness of discrimination was mounting. Reasoned argument, factual documentation, political pressures were all beginning to make their mark. All this was slowly to augment the forces seeking change and simultaneously to encroach upon the territory held by the inhibiting forces. It was no more

than a trend in 1961. Two more years were to pass before the establishment of a new pattern. Nevertheless, we may say that 1961 was a sort of turning point. Here are a few 1961 developments illustrative of the new trend:

1. The Congressional seniority system brought Mr. Adam Clayton Powell to the chairmanship of the House Committee on Education and Labor. This Committee has substantive interest in and great influence upon many DHEW programs. Henceforth, Mr. Powell was to exercise his powers to inquire into Executive Branch, and especially DHEW, policies and practices with regard to discrimination.

2. In August, the Leadership Conference on Civil Rights urged the President to take Executive action to end Federal participation in discriminatory activities. 86/ It urged the Chief Executive to discontinue grant support of discrimination. It argued that he possessed, and needed no statutory underwriting of, the power to reform grant administration. It documented discrimination in many federally-assisted programs.

3. In September, similar advice came from the USCCR. In its second statutory report, a formidable study of discrimination with extensive documentation of Federal relationships thereto, 87/ the Commission made formal recommendations for grant conditioning in the library facilities program, in higher education, and with respect to Labor Department-aided State employment service activities. It also made formal recommendations for assuring nondiscrimination in

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86. Leadership Conference on Civil Rights, "Federally Supported Discrimination;" LCCR: August 29, 1961.

87. 1961 U.S. Commission on Civil Rights Reports (5 volumes); USCCR, Washington, D.C., September 1961.

FHA mortgage insurance operations, and urban renewal programs.

4. At the Office of Education there was a growing sensitivity to discrimination. The OE was assimilating the impact of the USCCR 1960 report on higher education. This report, coming after DHEW deliberations in 1960, moved OE to examine its NDEA grants with a view to appropriate administrative actions. In addition, the USCCR's 1961 report documented discrimination in library services, the area governed by a statute which specifically empowered the Commissioner of Education to withhold grants if State plans and activities failed to comply with statutory provisions.

1962

The slow trend toward Executive affirmation of our principle whose beginning we posited in 1961, became discernible during 1962. As we survey some of its manifestations, we should note that Mr. Powell, now Chairman of the House Committee on Education and Labor, was continuing his function of nagging the Executive about the grant-discrimination liaison. Within his Committee there was convened an Ad Hoc SubCommittee on Integration in Federally-Assisted Education. The Sub-Committee's interest in DHEW policies, manifested in general inquiries and in hearings on a number of bills, served as yet another source of stimulation for the ongoing DHEW and New Frontier assessments of the problem. From all this internal examination and external stimuli were to come two 1962 DHEW policy decisions to apply our principle remedially by modest administrative action.

DHEW actions in 1962

In February, appearing before the Powell SubCommittee, Secretary Ribicoff gave voice to the DHEW mood and sketched the shape of things to come when he stated:

> "My own approach is one of careful review and quiet action. What administrative authority we may have to bar discrimination in the various programs under the jurisdiction of this Department is by no means clear. We are carefully reviewing our programs to determine what authority we may have, and we are also investigating the operation of those programs where discriminatory action may be occurring. 88/

Concurrently, the Office of Education informed the Sub-Committee that henceforth NDEA teacher training institute grants would be made only to colleges that were prepared to accept Negro candidates for training. This selective grant conditioning was to be accomplished by means of the addition of a nondiscrimination clause to all NDEA grant agreements for such institutes. The OE also stated that it was studying library service and vocational training grant operations to determine whether discrimination were present.

These February announcements brought an interesting comment from the Southern Regional Council on March 13:

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88. Quoted by the Southern Regional Council in "Executive Support of Civil Rights;" SRC; March 13, 1962, Atlanta, Georgia.

> "The two studies and one action mentioned by the Commissioner are welcome. The inquiry into vocational training programs could, especially, be of profound value. If these moves represent the entrance, finally, of the Department of Health, Education, and Welfare into the civil rights cause, they are good news indeed." 89/

Reserving our own comment on what appears to be unawareness on the part of the Southern Regional Council of DHEW's protracted internal grapplings with civil rights problems, we proceed to DHEW's second 1962 application of our principle.

On March 30, Secretary Ribicoff announced that effective September 1963, in determining school eligibility for SAFA grants for the education of on-base military children, the Commissioner of Education would so construe "suitability" as to exclude segregated schools. Thus, the long-contemplated revision of the "suitability" rule was finally accomplished. We should note that this action addressed the SAFA problem only in part--for on-base children. There remained questions as to the propriety of SAFA payments for off-base children attending segregated local schools.

We have characterized these NDEA and SAFA actions as modest applications of our governing principle. Certainly we are not inclined to call them radical. Nevertheless, we must point out that they constituted a major move by the

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89. Ibid.

Department. Let us also recall that they were not the first remedial application of our principle; that ten years earlier the Department had acted against the exclusion of Indians from welfare programs.

A few points about the 1952 and 1962 actions. The Indian exclusions were not a national problem. The action taken against them was a forthright and complete refusal to make a grant to a State agency on account of practices of the State and its agents and vendors. The problem was local; the action touched only the locality of the problem. The action, and the subsequent litigation, did not receive widespread national attention.

In contrast, Negro exclusions and racial discrimination against Negroes, constituted a national problem. The problem reached the practices of public and private recipients--State agencies and vendors, and all sorts of other institutions. The problem was of far greater magnitude than the Indian problem. The action taken against it in 1962 was less than an outright refusal of grants to States, or to a State. Although it reached discriminatory practices in a number of States, it was in a sense a more limited action than that of 1952. As to reactions: the revision of the SAFA "suitability"

rule was controversial. In his study of the impact of Title VI on Southern education, Orfield characterizes the response as follows:

> "Reactions to the HEW action suggested the dilemma confronting the Department and the Administration. A handful of civil rights supporters denounced the unwillingness to deal with total problem. New York's Senator Keating called the limited ruling 'surrender to the forces which have been defying the law of the land,' while Senator Javits repeatedly argued that the President could easily solve the whole problem with an Executive Order. Senator Strom Thurmond, however, bitterly characterized the Ribicoff action as 'the rankest type of economic blackmail,' warning that Southerners would never be deceived again by assurance that there could be Federal aid without Federal control". 90/

There are still other dissimilarities in the 1952 and 1962 actions. For the former, DHEW had an explicit statutory basis in the Social Security Amendments. For the latter, and after six years of study, it had discovered grounds only for selective grant conditioning, by exercise of administrative discretion--that is to say, without violation of, though not expressly directed by, the ennabling statutes.

Further: the 1952 action had followed upon a recommendation for withholding from a granting unit with operational

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90. Gary Allan Orfield, "The Reconstruction of Southern Education: the Schools and the 1964 Civil Rights Act." Page 40, unpublished manuscript, submitted to the University of Chicago in candidacy for PhD degree in spring 1968; quoted by permission. The study is scheduled for publication in 1969.

program responsibility, a unit which had been actively concerned with the Indian problem for some years. This unit had reviewed the problem, taken advice of counsel, and come to a judgment that a State application for a grant should be refused. Thus, the Federal Security Administrator's ultimate action to refuse the grant was taken on the advice of the responsible granting unit.

The 1962 action appears rather different. Consider, as we have seen in previous pages, that in 1960 the Office of Education had voiced strong opposition to the idea of grant conditioning. In 1960, OE program officials and executives alike had opposed both the seeking of statutory authority for action under NDEA and SAFA, and the revising of NDEA and SAFA policies on its own administrative discretion. They had favored education and persuasion as the means of dealing with any discrimination in these programs.[91] Acknowledging that in 1962 the OE was functioning under a new Administration and a new Commissioner, Francis Keppel, in tune with New Frontier objectives; acknowledging further that this new leadership was likely making an impact on program officials; still it is difficult to believe that the latter's strong reservations about grant conditioning had been disspelled in two years.

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91. OE attachment to Staff Paper of August 19, 1960, op. cit.

Instead we may perhaps without extravagence suspect that the 1962 applications of our principle selectively in two OE programs, were made against the opposition of operational granting units rather than on their recommendations. If this was indeed the case, we may also assume that the 1962 action was more difficult to take than its forerunner in that it ran counter to the views not only of a widely-dispersed and segregated clientele but also of some of the very program officials responsible for its accomplishment.

The 1962 action was like the earlier one in that it applied our principle. Both the actions were exercises of administrative discretion wherein the Department construed statutorily-prescribed powers and Constitutional obligations in light of the grant-discrimination problem, in order to condition grants upon the absence of racial discrimination.

The 1962 action was unlike the earlier one in the following ways: it responded to a national and controversial, rather than a limited local, problem; it affected a heterogeneous class of recipients in a number of States rather than one State; it was less radical and uniform, more selective and limited than the earlier one; it was taken without explicit statutory authority; it aroused strong and mutually contradictory national responses; and it was probably a more

difficult action to take than the earlier one.

Finally, the 1952 action foreshadowed that of 1962. The legal principles and counsel arguments supporting the 1952 action were resorted to again and again during the decade that followed. When it acted in 1962 the Department cautiously extended that foundation. So much is self evident from the tracing of our principle down through the years from 1952. However, the deliberations of that decade unfolded within the privacy of the Executive Branch, within offices at DHEW, at the Department of Justice, at the White House, and at the U.S. Commission on Civil Rights. There was little public awareness of this process and of the fact that Department officials were actually examining the idea of grant conditioning during this decade. Even within the Executive family there was no extensive awareness of the HEW deliberations. This reflects, among other things, the relative absence of informed public opinion on this point during the period and may, perhaps, suggest that the HEW deliberations were somewhat in advance of their time. In any case, the process was not a public one; and so it was that the Southern Regional Council, with a staff broadly versed in civil rights issues and events, could greet the 1962 NDEA nondiscrimination policy as DHEW's "entrance", seemingly overdue, on the civil rights scene.

The New Frontier and civil rights in 1962

We must now examine the general Administration position in Spring 1962. Let us distinguish between the Administration positions on the grant-discrimination liaison and on civil rights in general. On the latter, the Administration's position was not, perhaps, so much a "position"--which implies a static quality--as it was a multiple, volatile, and innovative approach. For example: while the Administration sought no broad civil rights legislation in 1962, it did support two measures on voting rights.[92] The Department of Justice was preparing to engage and to intervene in litigation seeking the desegregation of several SAFA-aided schools and a hospital constructed with Hill-Burton funds.[93] Since 1961,

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92. One measure, on literacy tests, failed. The other, on poll tax, succeeded and was ratified as the 24th Amendment.

93. The Department of Justice brought five suits to enjoin school districts from segregating federally-connected children in SAFA-assisted schools. It won one of these suits, U.S. v. County School Board of Prince Georges County, Virginia; 221 F. Supp. 93, 1963. It lost the other four suits, brought on similar grounds,, in Alabama, Louisiana, and Mississippi. In each case, Federal District Courts ruled against the U.S. in 1963. On appeals, the Fifth Circuit affirmed the lower court rulings in 1964. U.S. v. Madison County Board of Ed., consolidated with U.S. v. Gulfport Municipal Separate School District and U.S. v. Biloxi Municipal Separate School District, 326 F. 2d 237, January 7, 1964; rehearing denied April 10, 1964.

the Administration had been advancing the desegregation of transportation--by administrative actions of the Federal Aviation Agency, by federally-prosecuted litigation, and by determined and imaginative use of the Attorney General's powers to petition, persuade, and negotiate. And the Administration was cultimating principles of nondiscrimination within its own back yard, so to speak. By means of appointments to Federal office, Presidential statements, White House directives for Federal agency conformity in official conduct, public appearances, attendance at meetings and conferences, hiring and training policies, the Administration was seeking to imbue the entire Executive Branch with an awareness of civil rights. Further examples are the creation of the President's Committee on Equal Employment Opportunity in 1961 and the President's Committee on Equal Opportunity in Housing in November 1962.

(Continuation of footnote 93.)

U.S. v. Bossier Parish School Board, 336 F. 2d 197, August 25, 1964. The Department of Justice intervened in Simkins v. Moses Cone Memorial Hospital on appeal from Federal District Court in North Carolina. The Fourth Circuit reversed the lower court ruling against Simkins and held the Hill-Burton "separate but equal" clause unconstitutional. 323 F. 2d 959, November 1, 1963; cert. denied 376 U.S. 938.

Of such things was the Administration's approach to civil rights made. Its qualities were awareness, determination, hope, and faith. The Administration had a sober appreciation both of the extent to which civil rights were going unprotected and of the Federal responsibility to protect them. It had some confidence, perhaps slightly inflated by hope, that unflinching exercise of the Attorney General's powers combined with innovative if limited exercises in administrative discretion, might suffice to deal with--at least to contain--civil rights problems in general.

This approach to civil rights gave most of the action and leadership to the Attorney General. It gave a large role to federally-prosecuted legal actions. And in 1962, it brought the Administration to a position on grant conditioning very close to that of its predecessor. Grant conditioning was viewed as a drastic remedy, one to be considered only as a last resort.

Let us illustrate this by surveying the testimony of the Assistant Attorney General, in April, before the Powell Sub-Committee mentioned above.[94/] Burke Marshall's testimony on

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94. Department of Justice; Statement of Burke Marshall, Assistant Attorney General, before the Ad Hoc Subcommittee on Integration in Federally-Assisted Education of the House Committee on Education and Labor; April 16, 1962. (Mimeographed copy.)

we may reasonably assume that this testimony is an accurate statement of the Administrations views at that time.

Marshall testified in favor of a bill to amend the Morrill Act by striking its "separate but equal" clause, and of eight bills which sought variously to accelerate compliance with Brown et al by enactment of a Federal statutory requirement to this end; to empower the Attorney General to bring school desegregation suits; and to provide assistance to schools in the process of desegregating. Touching these eight bills, Marshall stated:

"We favor the objective and the principle of these measures." 95/ He noted that eight years after Brown, about 1900 school districts remained segregated. Affirming the merit of Congressional action to require compliance with Brown, and that of recognition of local responsibility for school desegregation he stated:

> "I strongly believe that this is the proper approach; that every effort should be made to avoid placing the full burden of desegregation on the courts." 96/

The remaining two bills, HR 10056 and HR 668, were essentially grant conditioning proposals. The first reached SAFA-assisted schools in general, including the schools which were

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95. Ibid.

96. Ibid.

not touched by the DHEW revision of the "suitability" rule. The second bill, HR 668, reached all federally-assisted education at the elementary, secondary, and higher levels. On these two bills, Marshall's testimony was less favorable.

Marshall dealt first with HR 10056 and the SAFA schools. He affirmed the repugnance to the Federal Government of the compulsory segregation of military children at schools "constructed, maintained, and operated with financial support from the Government."[97] Asserting that the military services themselves imposed no such segregation on their children, he declared that it was intolerable to subject these children to school segregation. He noted that the Commissioner of Education lacked power to protect off-base children by such means as the "suitability" rule, without a clear Congressional directive "which would permit Executive action with respect to the bulk of the program."[98] He recognized the propriety of the Congress acting to clarify its intent in light of Supreme Court decisions and admitted that HR 10056 was "suited to that end."[99] He then stated:

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97. Ibid.

98. Ibid.

99. Ibid.

"Unless no other course is available, however, I question whether the withholding of funds is best adapted to achieving the desired result. . .

In short, while the proposed action is preferable to doing nothing, it is essentially negative and punitive in character. Where possible we favor the positive, direct approach of a desegregation suit to a withdrawal of funds." 100/

Noting that the Department of Justice was considering bringing suits to compel the desegregation of SAFA-assisted schools, he added:

"A successful lawsuit of that kind would be the most effective means of solving the problem /in these schools/. It would avoid the undesirable consequences of withholding funds. . . I think that the United States has standing to bring such a suit. In view of the advantages of a suit, I suggest that the Committee may wish to consider deferring action on H.R. 10056 until the possibilities of other legal action have been fully probed." 101/

Finally, Marshall discussed the last bill, H.R. 668, for the prohibition of Federal assistance to all segregated education at all levels. He noted the heavy Federal involvement in multi-purpose educational programs "which contribute immensely to the educational well-being of our Nation." 102/

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100. Ibid.

101. Ibid.

102. Ibid.

He concluded:

> "I have grave doubts whether these varied Federal aid-to-education programs are the proper vehicles for dealing with problems of racial and religious discrimination. The goals are important for the survival of our Nation and for the economic and intellectual health of our people. The programs themselves are of great benefit to citizens of both races.
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> "Even at that I would favor this kind of legislation if there were no other effective way of making progress. But there are in fact other ways of eliminating racial discrimination in public education. Litigation to open up the impacted area schools, and the bills now pending which would directly require compliance with the Supreme Court decisions are examples. These remedies would be both more direct and less disruptive of educational programs. I think they are preferable to the approach taken in H.R. 668." 103/

This concludes our survey of Marshall's testimony. It reveals both the Administration's faith in its favored remedies and its hope that these might eventually prove efficacious and might in the meantime avert that deterioration of the situation which might warrant recourse to remedies it held "negative and punitive."

And from this we may draw the following conclusion. The circumstances of the New Frontier were markedly different from those of its predecessor. In 1962, the Kennedy Administration was measurably better informed on civil rights problems than the Eisenhower Administration had been. It had a measurably

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103. Ibid.

different concept of Executive leadership and Federal responsibility to protect civil rights. The crescendo stage of the civil rights movement in 1962 was a marked contrast to the gradual acceleration of the previous decade. Nevertheless, the Kennedy Administration in 1962 took much the same position as its predecessor on the grant-discrimination liaison: an unwillingness to intervene in grant administration and a hope, if not a conviction, that discrimination might be undone separately from grant administration.

Before we proceed to 1963, let us see what Orfield has to say about this stage of the Executive dilemma in his study of the impact of Title VI on Southern education.

> "As the civil rights movement gained strength in the country it was increasingly difficult to answer the embarrassing questions raised by Adam Clayton Powell. Yet the Administration saw serious obstacles to further action both within the Federal establishment and in the States. In keeping with the conventions of American federalism and in response to popular commitment to local control of the schools, education program administrators had been scrupulously careful to avoid any taint of Federal control. . . This was the kind of relationship demanded by the States and by the Congress and the Congressional commitment to localism pervaded the attitude of program administrators. . ." 104/

Orfield continues:

> "Again and again the idea of withholding Federal aid was put forward and again and again it was dismissed.

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104. Orfield, "The Reconstruction of Southern Education;" op. cit.; at p.41.

Because it was a basic alteration in Federal-state relations it appealed to civil rights advocates and for the same reason it was opposed both by locally oriented politicians and by program officials. Negro spokesmen insisted that localism guaranteed continued segregation while opponents argued that expansion of Federal power would disrupt Federal-state cooperation and produce a dangerous centralization of authority in the Federal system." 105/

1963

During 1963 the momentum of the civil rights movement increased steadily. Much civil rights legislation was introduced in both Houses of the Congress--by Republicans and Democrats, Northerners and Southerners. Among the more modest of the bills was the Administration's request of February. Introduced in March in the Senate and in April in the House, it covered voting rights, assistance for school desegregation, and an extension for the USCCR.

In a special report marking the centennial of the Emancipation Proclamation, the USCCR acknowledged fundamental and positive civil rights developments of recent years, cited progress in the South despite a pattern of resistance to law there, recognized other more subtle forms of discrimination elsewhere, and concluded that citizenship for the Negro was not yet fully realized. 106/

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105. Ibid.

106. Freedom of the Free: Century of Emancipation, 1890-1963; USCCR, Washington, D.C., February 1963.

On April 15, the USCCR submitted a report to the President on "open and flagrant violations of constitutional guarantees" and "subversion of the Constitution" by the State of Mississippi.[107] The Commission questioned the propriety of Federal funds being available to any State which persisted in defying the Constitution and laws of the United States. It recommended that the President explore his authority to withhold all Federal funds from Mississippi until the State should demonstrate compliance with the Constitution. In his reply the President made clear his view that to deprive Mississippi of Federal funds could not but result in depriving individual citizens of the State, including Negroes, of benefits upon which they depended. He assured the Commission that its proposal for Executive Branch and Congressional consideration of the propriety of legislation to withhold grants from defiant States, would be "promptly and carefully reviewed within the Executive Branch."[108] The President also stated his views publicly on April 19, in response to a question about the Commission proposal.

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107. Interim Report of the U.S. Commission on Civil Rights, 1963; USCCR, Washington, D.C., April 1963. (Mimeographed report alleging denials of Constitutional rights in Mississippi since October 1962, with recommendations for Federal action.)

108. Public Papers of the Presidents; John F. Kennedy; letter to John A. Hannah, Chairman, USCCR, April 19, 1963.

"I don't have the power to cut off the aid in the general way as was proposed by the Civil Rights Commission, and I think it would probably be unwise to give the President of the United States that kind of power. . . I don't think that we should extend Federal programs in a way that encourages or really permits discrimination. That's very clear. But what was suggested was something else. . . /a wholesale disciplinary cut-off action/ I think that's another question, and I couldn't accept that view. . . . The Federal Government is putting twice as much money into Mississippi as it takes out in taxes. . . . I hope that the people of Mississippi would recognize the assets that come with the Union as well as what they may feel to be the disadvantages of living up to the Constitution." 109/

At an April 24 press conference, replying to a question about the Commission proposal and alternative ways of protecting Constitutional rights, the President enlarged upon the views he had expressed earlier, making clear his reliance upon the powers of the Attorney General to deal with civil rights problems:

"Well, in every case that the Civil Rights Commission described, the United States Government has instituted legal action in order to provide a remedy. . . . We are attempting through the established procedures set out by the United States Constitution to give protection through law suits, through decisions by the courts, and a good deal of action has been taken in all of these areas. . .

We shall also continue not to spend Federal funds in such a way as to encourage discrimination. What

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109. Ibid; for April 19, 1963.

they were suggesting was something different, which was a blanket withdrawal of Federal expenditures from a State. I said that I didn't have the power to do so, and I do not think the President should be given that power, because it could be used in other ways differently." 110/

Meanwhile, the SCLC had initiated a series of protest demonstrations on April 3 in Birmingham, Alabama. Running through May, these demonstrations produced confrontations between citizens and local authorities which in turn served to prompt national and international responses of indignation and sympathy on behalf of the demonstrators.

On May 2, 700 demonstrators, including children, were arrested on charges of parading without a permit. On May 3, city officials uses firehouses and police dogs in attempts to disperse the demonstrators, some of whom retaliated by throwing bottles and stones. Justice Department representatives came to the city. During the next week, tensions rose, disorders continued, and a riot moved Governor Wallace to call out State troops. Talks and meetings were initiated between local officials and representatives of the protesting citizens. By May 10 these meetings had yielded some consessions by the city and a kind of settlement. A city official publicly invited white citizens to subvert these minority gains by such means as boycotts of desegregated stores.

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110. Ibid; for April 24, 1963.

On May 11, Negro homes were bombed and a riot ensued. Crowds were dispersed by State troopers. On May 12, Federal troops were alerted and stationed at bases in Alabama. Governor Wallace challenged the President as to the authority for this move. The President replied that Federal troops would be deployed in Birmingham should circumstances there require such intervention to preserve order. The President cited as authority, 10 USC 333 (1).

In subsequent developments the Governor moved in court to enjoin the Federal Government from using Federal troops in the city. The City Board of Education took reprisals against some Negro students who had been among the demonstrators. Moves to enjoin the Board from such action were eventually upheld in court. And on May 27, the Supreme Court dismissed the Governor's suit for injunction against the use of Federal troops.

During the height of the tension in Birmingham, on May 8, Subcommittee #5 of the House Judiciary Committee opened hearings on the many civil rights bills thus far introduced. These hearings elicited testimony which articulated the national consensus on civil rights and suggested that a growing number of Americans were prepared to accept broad civil rights legislation. The Administration bill came in for some sharp

criticism. Senator Javits, for example, characterized it as inadequate and spelled out six points he believed essential for an effective civil rights statute. Among these points he included the striking of "separate but equal" provisions from grant statutes governing assistance to hospitals and land grant colleges. A further example bearing on our particular interest is found in the testimony of the ADA, which urged a statute including remedies for discrimination in all Federal grants in aid.

By June the Administration was busy drafting a broad civil rights package bill. On June 11 the President sketched the general thrust of these efforts in a public address. On June 12 the murder of Medgar Evers in Mississippi brought fresh waves of indignation and sympathy to the civil rights cause. On June 14, protests against discrimination in Cambridge, Maryland, produced confrontations and civil disorders. Between June 13 and June 18, the President conferred with a number of Governors and with labor and religious leaders in regard to civil rights.

On June 19, in a special message to the Congress, the President requested comprehensive civil rights legislation. Senators Mansfield, Dirksen, and Magnuson introduced bills,

incorporating his request in the Senate on June 19. In the House, Mr. Celler followed suit on June 20.

The Administration's June request included a section on Federal grants which would have overriden "separate but equal" clauses in existing grant statutes and conferred upon the Executive discretionary power to withhold grants. President Kennedy discussed this point in his covering message to the Congress:

> "Many statutes providing Federal assistance. . . define with such precision both the administrator's role and the conditions upon which the specified amounts should be given to the designated recipients that the amount of administrative discretion remaining--which might be used to withhold funds if discrimination were not ended--is at best questionable. No administrator has unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. . ." 111/

Thus, urged Kennedy, the passage of this section of his bill would make clear that the Federal Government was not required under any statute to furnish any assistance in circumstances where racial discrimination was practiced. The requested provision:

> "would clarify the authority of any administrator with respect to Federal funds or financial assistance and discrimination practices." 112/

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111. Public Papers of the Presidents; John F. Kennedy; for June 19, 1963.

112. Ibid.

The Administration's inclusion of a section seeking discretionary power to condition grants on nondiscrimination should not lead us to the conclusion that it (the Administration) had, in June, dismissed its reservations and arrived at a single-minded advocacy of this concept. On the contrary, the Administration continued ambivalent. Of major concern was the perception that to condition grants on nondiscrimination could not but result in extensive denials of grants--denials which would hurt the the intended, and innocent, individual beneficiaries. The Administration's--indeed, the nation's--dilemma is apparent in this perception, which arises from and depends upon recognition that the society in which the grants work is largely a discriminatory one.

If the Administration tended to boggle at the prospect of denying grants, it also boggled at the apparent alternaive: the use of public funds to subsidize violations of the Constitution, and the defraying by Federal agencies of substantial portions of the costs of illegal racial discrimination.

The inclusion of a discretionary section in the June request is conjectured to have been a move by the Administration to demonstrate its grasp of the problem and to strengthen its hand for the bargaining to come on Capitol Hill. On the basis

of interviews with White House aides, Orfield concludes that the section "was put in for bargaining purposes."[113] Orfield attributes to one of these aides the recollection that the Administration had little expectation that the section would survive.[114]

The actual intentions of the Administration on this provision need not concern us here. In the first place, they were only one of several forces operative in the legislative, or enactment, process. Second, the Administration that proposed a discretionary title in June 1963 is not the same Administration that received a mandatory directive in July 1964. Had President Kennedy not been assassinated in November 1963, and had his Administration been the one to receive the Title VI mandate, we might find more reason to discuss here the Administration's intentions on the point. In the event, however, his assassination yielded first a transformed, and later a new Administration. Attitudes and perceptions as well as intentions underwent modification. The challenge of implementing Title VI was to be met not by the New Frontier under President Kennedy, whatever its intentions may have been in June 1963, but by the Great Society under President Johnson.

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113. Orfield, op. cit.; p.47.

114. Ibid.

Intentions aside, and more to the point, we may note that the framing of the Federal grants provisions in terms of permission rather than command, reflected the actual ambivalence of the Administration on resort to this remedy. What we have now to do is to survey the progress of this section from June to November when it emerged as a mandatory provision in the House bill.

On June 26, with 158 civil rights bills on its agenda, Subcommittee #5 of the House Judiciary Committee took up the Administration bill. The Attorney General testified on it the same day. Subsequently, Labor Secretary Wirtz appeared and supported the request. Congressional Quarterly notes that he:

> ". . .specifically urged support of a provision granting HEW discretionary authority to bar aid, in any federal program, to states or institutions which practiced racial segregation." 115/

Subcommittee #5 continued to hear testimony through August 2. Among those pleading for a stronger statute than that requested by the the Administration were the NAACP, SCLC, CORE, the American Friends Service Committee, the American Veterans Committee, and the American Civil Liberities Union.

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115. Congressional Quarterly Almanac, 1963; p.345.

We may note that both the NAACP and CORE urged a mandatory provision on grant conditioning.

During the weeks of the Subcommittee hearings, the President continued to confer with national leaders, and the March on Washington was in process of organization. The wide support for the March from organizations and individuals all over the nation continued to manifest a growing national consensus on civil rights. Both in conjunction with and independently of the March mobilization and preparation, the civil rights organizations intensified their protests against discrimination. The Leadership Conference on Civil Rights, speaking for national groups representing labor, civil rights interests, religion, and general community interests, was beginning its campaign to secure the strongest possible civil rights bill.

During August, negotiations proceeded among Administration officials, SubCommittee members, House Republican leaders, and civil rights spokesmen. The Administration's objective was to meet the nation's apparent readiness for broad civil rights legislation with a bill framed to gain the votes necessary to defeat Southern Democratic and other conservative opposition in the House. Among House Republican leaders were

concerns directed toward the reliance on the 14th Amendment which they deemed proper for sections dealing with public accommodations. A number of liberal Northern Democrats on the SubCommittee were convinced of the necessity and propriety of a bill stronger than many of the pending measures. And the civil rights spokesmen were pushing for the toughest possible bill.

August also saw the initiation of hearings before the Senate Judiciary Committee on portions of the Administration request. Testifying before the Committee on August 23, the Attorney General presented a revision of the Administration's June request on grants--recommending mandatory rather than discretionary authority to cut off funds.

On August 28, the March on Washington took place. Among its ten stated goals or demands was mandatory grant conditioning.

The negotiations characterized just above continued in September. The determination of the liberal Northern Democratic SubCommittee members to push for a strong measure continued unabated and seemed partially out of sympathy with the Administration's concern that too strong a bill might not survive at the hands of House opposition. These SubCommittee

members, in any case, drafted a measure to their taste. The SubCommittee accepted it on September 25 and reported it to the full Committee on October 2.

The SubCommittee bill incorparated all and strengthened some of the Administration's requests and added to them. A mandatory provision on grant denial and termination was included, very similar to that recommended by the Attorney General on August 23. Also included were tough provisions on public accommodations, Attorney General powers to sue, and equal employment. These latter provisions occasioned some distress within the Committee and within the Administration, which feared that they might jeopardize the entire bill.

On October 15, the Attorney General appeared before the full Committee, requesting modifications in the SubCommittee bill which might make the whole more palatable to the opposition. He supported the mandatory provision on Federal grants.

Mr. Celler, who was Chairman both of the full Committee and of SubCommittee #5, agreed to work to modify the Sub-Committee bill. Civil rights spokesmen critized the Administration's efforts, and liberals on the Committee voiced some opposition to modification of the SubCommittee bill. Republican leaders, on the other hand, insisted upon modification.

Further negotiations took place between Administration officials and Messrs. Celler, McCulloch, Halleck, and others. From these efforts emerged a rewritten measure, the so-called "bipartisan" bill. The bipartisan bill was stronger than the original Administration request and milder than the SubCommittee bill.

On October 29, the House Judiciary Committee rejected the SubCommittee bill by vote of 15 to 19. Votes for the rejected bill came from some Southern Committee members as well as liberals. The Committee then agreed, by vote of 20 to 14, to substitute the bipartisan bill for the SubCommittee bill. Then it voted, 23 to 11, to report the bipartisan bill to the House.

The same day, President Kennedy commented on the Committee bill, saying:

> "The House Committee. . .has significantly improved the propects for enactment of effective civil rights legislation in Congress this year. The bill is a comprehensive and fair bill." 116/

On November 20, House Report 914 reported the Committee bill, H.R. 7152. Chairman Celler asked the Rules Committee to act promptly to provide a rule to bring the bill to the floor for debate.

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116. Papers of the Presidents, John F. Kennedy, for October 29, 1963.

On November 22, President Kennedy was assassinated. On November 27, in his first message to the Congress, President Johnson urged that body to give its priority attention to civil rights legislation. By the first week in December, the Rules Committee had given no indication of plans for an early hearing on H.R. 7152. Resort by Republicans and Democrats to such parliamentary tactics as Calendar Wedensday procedures and discharge petitions came next; these moves, however, did not have the effect of bringing the bill directly to the floor. It is conjectured that they may have helped to persuade Mr. Smith, Chairman of the House Rules Committee, to schedule hearings. In any case, on December 18, Mr. Smith announced that his Committee would open hearings on January 9.

In his State of the Union message on January 8, the President again exhorted the Congress to enact civil rights legislation. On January 9, the Rules hearings began. On January 30, by vote of 11 to 4, the Rules Committee cleared H.R. 7152 for debate under an open rule.

We may pause here to note that the section on Federal grants had thus far undergone several mutations. First, in June, it had been a statement of national policy, stipulating that no provision in existing law might be construed to require Federal agencies to grant Federal assistance in any

case where beneficiaries were subject to discrimination or denied access to benefits on account of race. Thus, the June version would have given grant administrators the authority to condition grants, without stipulating as to the exercise of the authority; it permitted but did not require action. Second, in the Attorney General's presentation to the Senate Judiciary Committee in August, the title had become a mandatory one, directing grant administrators to take action to assure nondiscrimination. Third, the House Judiciary SubCommittee September version was very similar to that of the Attorney General in August. It directed Federal agencies to take action to assure nondiscrimination in grant-aided programs. It authorized them to take such action pursuant to rules, regulations, or orders of general applicability. It provided that compliance might be effected by the termination of or refusal to grant or continue assistance, or by means of civil actions brought by the Attorney General to enforce nondiscriminatory requirements under the title, or by other means authorized by law. It required the agencies to seek compliance by voluntary means before moving to deny or discontinue aid. It provided that all agency actions to effectuate compliance were subject to judicial review. Fourth, the October bi-partisan version of the title was substantially the same

as the SubCommittee version except that it omitted the provision for Attorney General enforcement suits.

On January 31, the House opened debate on H.R. 7152. During the debate which continued until February 10, nine attacks on the title were repulsed. Eight of these amendments sought to limit or weaken the title, and one sought to delete it. Students of the enactment process cite this as illustrative of the determination, solidarity, and skill of the bipartisan coalition which was seeking the bill's passage.

Congressional Quarterly gives as further illustration the parliamentary drama enacted on February 7.[117] On that date, Mr. Harris of Arkansas offered an amendment substituting for Title VI a discretionary provision like that first sought by the Administration. Tradition has it that the bipartisan coalition was rather shaken when the Majority Whip, Mr. Boggs of Louisiana, rose to support the Harris amendment. Thus, it is told, Republican Members were assailed by the fear that Boggs' move might herald an Administration tactic looking to a weakening of the bill in the House in order to propitiate

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117. Congressional Quarterly; Revolution in Civil Rights; CQ Background, Third Edition; pp.53-54.

Southern opposition in the Senate. Mr. Lindsay of New York articulated this concern:

> "I am appalled that this is being supported in the well of the House by the Majority Whip. . . Does this mean there is a cave-in in this important title?" 118/

The cave-in notion was promptly disclaimed by Mr. Roosevelt of California. Next, Messrs. McCulloch and Celler conferred hastily, following which Mr. McCulloch informed the House he would withdraw his support for H.R. 7152 should the Harris amendment be accepted. Mr. Celler then proclaimed his unalterable opposition to the amendment. Finally, on teller vote, the amendment was defeated, 80 to 206. 119/

At any rate, the bill's floor managers and the entire bipartisan coalition held firm, refusing all amendments to which the former did not agree. Four amendments, however, were accepted: Mr. Celler's, exempting from coverage Federal insurance and guaranty contracts; Mr. Lindsay's requiring Presidential approval of regulations of general applicability; Mr. Cramer's (modified by Mr. Lindsay), requiring opportunity for hearing before any denial or termination of grants; and Mr. Willis', requiring thirty days notice to Congressional committees of any denial or termination action before it might

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118. Ibid.

119. Ibid.

take effect.

The vote on H.R. 7152, as amended, came on February 10. The House accepted the bill, 290 to 130, and sent it to the Senate.

The civil rights bill had spent the greater part of its active life on the House side in committees, being debated on the floor only from January 31 to February 10, 1964. On the Senate side, the process was reversed. Of course, Senate Committees spent some time on the bill; but the major action was in the Senate chamber, between February 26, when the body voted to put the bill directly on the calendar, and June 19, when the bill passed. The stages of this Senate deliberation are approximately these: On March 9, Senator Mansfield offered a motion to commence debate on the bill. Being offered after 2 P.M., his motion was debatable. Debate duly occupied the Senate until March 26, when his motion was accepted. On March 30, formal debate on the bill began. During May, serious negotiations on possible compromises took place between Administration officials, Senators Humphrey, Dirksen, and Mansfield, and House leaders. On May 26, the package of amendments known as the "Mansfield-Dirksen" substitute was introduced. On June 8, petition for cloture was filed. On June 10, the Senate voted to close debate. On June 17, the Senate accepted the

Mansfield-Dirksen substitute. And on June 19, the bill, as amended, passed the Senate, by vote of 73 to 27.

Some further changes came to Title VI during this process. It will be recalled that the version passed by the House required agencies to take action, and permitted them to do so pursuant to rules and regulations. The Mansfield-Dirksen version strengthened the mandatory nature of the title by rephrasing this section as follows: the granting agencies were "authorized and directed" to effectuate the nondiscriminatory provisions of the title "by issuing rules, regulations, and orders. . ." Thus, the Senate version made mandatory the issuance of rules and regulations where the House bill merely made "action" mandatory, and allowed such action to be taken pursuant to rules.[120/] In addition, the Mansfield-Dirksen amendments included three on Title VI, and the Senate also accepted one amendment from Senator Long on June 11. The latter provided that the title neither added to or detracted from existing program authority. The three package amendments provided: 1) that there be express findings on the record as to noncompliance before any denial or termination action; 2) that denials or terminations be confined to the locale and political unit or subdivision of the noncomplying program or

activity; 3) that no employment practices be covered save where a primary objective of a grant program might be to provide employment.

Twelve amendments to Title VI were defeated in the Senate. Eleven of these sought to limit the title, and one to delete it.

The Senate-passed bill was accepted by the House, and signed into law by the President, on July 2, 1964. Thus, as Title VI of Public Law 88-352, the mandatory conditioning of Federal grants on the absence of racial discrimination became the law of the land.

Title VI emerged from this legislative process with Congressional intent generally clear. Its purpose was as much remedial as preventative. Its objective was the desegregation of federally-aided activities and the assurance that Federal funds not be used to support illegal racial discrimination. Its objective was not the denial and termination of grants. Nevertheless, by directing Federal granting agencies

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120. For a competent analysis of the Title's evolution during enactment, see the George Washington Law Review, Vol. 36, No. 4, for May 1968; "Comment - Title VI of the Civil Rights Act of 1964--Implementation and Impact;" pp.832-842.

to resort to these sanctions in order to effectuate compliance with the law, the Congress affirmed our governing principle and the even more basic principles of public

The Congress did this by substantial majority votes in both Houses, during active legislative processes of eight months in the House and approximately five months in the Senate.

SUMMARY

Our purpose in this chapter has been to depict very broadly the circumstances that preceded and produced Title VI. We have tried to make plain that the formula of Title VI had been explored for years in both the Legislative and Executive Branches and advocated with steadily increasing frequency since 1959. We emphasize that the concept embodied in Title VI was not a new one in 1964; that it had a long history; that it had both administrative and legal precedents; in brief, that it did not spring fully armed from the forehead of an American Zeus.

We underline also the constancy of Executive Branch ambivalence about applying the concept. We have seen that the Truman Administration declined to act upon a recommendation for general grant conditioning; that during the Eisenhower

Administration the idea was considered extraneous to, and injurious for the expansion of, the grant system; that the Kennedy Administration viewed its general application as punitive of innocent beneficiaries and came to expouse it only in 1963 and only with reluctance. Finally, we have seen that its ultimate enactment depended at least as much upon bipartisan Congressional commitment to it as upon the Administration's desire to secure it.

In the following chapters we shall examine the implementation of Title VI during the first years of its statutory life. We shall have much occasion to note views of Title VI not only as punitive of beneficiaries or threatening of the grant system, but as revolutionary, radical, and unprecedented. These views will be discussed at some length; here we simply note that the only truly "revolutionary" quality of Title VI is its statutory prescription for the breaking of a tradition. This tradition is the century-old liaison between public funds and racial discrimination. In this sense, Title VI is properly termed revolutionary. We suggest, however, that it is at the same time, in a larger sense, evolutionary. Title VI affirms and continues a tradition which is older than the liaison it proscribes. A lawyer associated with Title VI implementation for several years put in these words:

> "The morality aspect should not be overlooked. Behind American institutions--law, statutes, legal precedents in case rulings--lies a traditional, at least in theory, of ordering society according to basic principles of morality, fairness, justice. This is so despite the patent betrayals of principle in relationships between the races." 121/

In this sense, Title VI is a faithful expression of fundamental American tradition. To view it as revolutionary on its merits is to raise the question, which tradition is more truly faithful to the ideals and aspirations of the American people? How can it be revolutionary to affirm in statute the principles professed by the nation?

Herein we are again reminded of Cash's analysis of the mind of the South. It will be recalled that Cash attributed to the average Southerner the following qualities, among others: incapacity for analysis; sentimentality; lack of realism; attachment to fictions and false values; and a confirmed tendency to justify cruelty and injustice in terms of these values. Characterizing such Southerners Cash states:

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121. Derrick A. Bell, Jr., in an interview May 20, 1968. Bell served as Deputy Director of DHEW's Office for Civil Rights from 1965 to 1968. He is presently Executive Director, Western Center on Law and Poverty, University of Southern California Law School.

> "Speaking by and large, shifty-eyed hypocrisy was the last thing to be discovered in them. They looked at you with level and proud gaze. The hallmark of their breed was identical with that of the masters of the Old South--a tremendous complacency. They walked about the Southern land with the consciousness of goodness and integrity written large upon them, as men who have served God and their country well. . ." 122/

Cash insists that it is essentially the Southerner's simplicity, rather than an hypocrisy, which explains, supports, and indeed makes possible his betrayal in practice of what he professes in theory. This analysis may offer some food for thought in consideration of the American, as well as the Southern, contradiction of principles by practice.

At the risk of laboring the point, let us emphasize also that the distinctive quality of Title VI is remedial. The statute creates a particular remedy for practices violative of our governing principle. The violations were the dynamic factor in producing affirmation of the principle. In simple words: if racial discrimination had not existed or, existing had not become intertwined in the Federal grant system, there would have been no reason for the enactment of Title VI. This may seem obvious, but it is frequently overlooked in views

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122. W. J. Cash, The Mind of the South, Alfred A. Knopf, Inc.; Vintage Books edition, N.Y.; 238.

of the grant denial and termination provisions of Title VI as punitive, drastic, extreme. In fact, Title VI is a pound of cure--which tradition commonly observes to be more expensive than an ounce of prevention.

The last point we want to note here touches the grand question with which the Executive Branch struggled so mightily in the years following Brown: does the Executive possess the power to condition grants upon the absence of discrimination on its own administrative discretion and without statutory instruction? We have noted briefly the existence of arguments that it did and did not possess this power. We have seen that no conclusive answer had been established by 1964, when the enactment of Title VI rendered the question moot. We do not find ourselves competent to discuss these arguments or to analyze the legal issues inherent in the question. We have alluded to them here simply to introduce our last point: that the practical advantage for the Executive of a specific mandate from the Legislative is superlative in a matter as delicate and extended as the grant-discrimination problem. Whether or not the Executive welcomes the mandate, and whether or not it needs it, its actions in areas of great delicacy and political import are more securely founded in a statute than

is possible without a statute. This, too, may be obvious; nevertheless both the fact and its implications are sometimes overlooked or misconstrued by students of the Federal role in the civil rights area.

With these things in mind, let us now examine the manner in which the Executive, or specifically DHEW, received and acted upon the mandate of Title VI.