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Federal Civil Rights Enforcement Effort

A Report of
The United States
Commission on
Civil Rights
1971

B. Brooks

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, or national origin, or by reason of fraudulent practices;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution;

Appraise Federal laws and policies with respect to equal protection of the laws;

Serve as a national clearinghouse for information in respect to denials of equal protection of the laws; and

Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission:

Rev. Theodore M. Hesburgh, C.S.C., *Chairman*

Stephen Horn, *Vice Chairman*

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Letter of Transmittal

U.S. COMMISSION ON CIVIL RIGHTS,
Washington, D.C., September 1970.

THE PRESIDENT,
THE PRESIDENT OF THE SENATE,
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

SIRS: The U.S. Commission on Civil Rights presents to you this report pursuant to Public Law 85-315, as amended.

The report describes the structure, mechanisms, and procedures utilized by Federal departments and agencies in carrying out their civil rights responsibilities. Over the years the Commission has issued a number of reports evaluating the civil rights activities of individual departments and agencies and identifying inadequacies that call for corrective action. This report attempts to evaluate for one moment in time the status of the entire Federal civil rights enforcement effort—to determine how effectively the Federal Government as a whole has geared itself to carrying out civil rights responsibilities pursuant to the various constitutional, congressional, and Presidential mandates which govern their activities. While the report deals with specific agencies and specific civil rights programs, it does not purport to treat them exhaustively. Rather, the principal purpose of the report is to survey the status of civil rights in the Federal Government generally—to identify those problems that are systemic to the Federal establishment and to determine ways in which the civil rights effort of all Federal departments and agencies may be strengthened.

Our research has disclosed a number of inadequacies common to nearly all Federal departments and agencies—inadequacies in agency recognition of the nature and scope of their civil rights responsibilities, in the methods used to determine civil rights compliance, and in the use of enforcement techniques to eliminate noncompliance. These inadequacies exist regardless of the kinds of programs the agencies administer or the specific civil rights laws they enforce. In the Commission's view, strong remedial measures are needed if all departments and agencies are to carry out their civil rights responsibilities with maximum effectiveness.

We urge your consideration of the facts presented and recommendations made for corrective action.

Respectfully yours,

Rev. Theodore M. Hesburgh, C.S.C., *Chairman*

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Preface

Dramatic changes have occurred in civil rights over the last decade. When the 1960's began only one of the three branches of the Federal Government—the judiciary—had been actively engaged in the fight to protect the rights of minority citizens. Through such cases as *Shelley v. Kraemer*, the U.S. Supreme Court helped awaken government—Federal, State, and local—to its responsibility to assure equal protection of the laws for all persons. And through *Brown v. Board of Education of Topeka*, the Court made it clear that equality could not be achieved constitutionally under a system of apartheid.

The executive and legislative branches had only begun to stir themselves to action. Presidential Executive orders, issued during the 1940's and 1950's, desegregated the Armed Forces and began an attack on employment discrimination. Congress, in 1957, passed the first civil rights law since post-civil war years, which was, however, extremely limited in scope.

But during the 1960's civil rights, in a sense, came of age. For the first time all three branches of the Federal Government acted with vigor to secure basic legal rights for the country's minorities. The courts continued to define the civil rights responsibility of government and brought new life and substance to constitutional and statutory protections in such key areas as education, employment, housing, and voting. The executive branch, through additional Presidential Executive orders, strengthened its attack against employment discrimination and moved also to end housing discrimination. And Congress enacted four major civil rights laws covering such areas as education, employment, housing, public accommodations, public facilities, and voting. In short, by the end of the 1960's, there existed a significant array of Federal laws and policies to protect basic rights of minorities.

What also changed dramatically in the

course of that decade was the attitude and perspective of the American people and their leaders toward civil rights problems—a change from optimistic hope that they could be resolved quickly and simply to sober realization that the problems were so deep seated and complex that they could not yield readily to easy solutions. They involve not only denials of basic legal rights but social and economic injustices which have been allowed to grow and ferment for many years. The civil rights laws attack only the first aspect of the problem—denials of basic rights. As for the second, as a Nation, America has barely begun to deal with them.

Measured by a realistic standard of results, progress in ending inequity has been disappointing. Even in securing basic rights—by far the easier part of the problem—success has been spotty and moot. In many areas in which civil rights laws afford pervasive legal protection—education, employment, housing—discrimination persists and the goal of equal opportunity is far from achievement. The plain fact is that some of these laws are not working well. The Federal civil rights effort has been inadequate to redeem in full the promise of true “equal protection of the laws” for all Americans. As a result, many minority group members are losing faith in the Federal Government's will and capacity to protect their rights. Some also are losing faith that equality can be achieved through law. It is important that their faith be restored and that the promise of the hard fought battle for civil rights laws be redeemed.

From its establishment in 1957, this Commission, through hearings, investigations, and reports, has documented the need for many of the civil rights laws and participated in the effort to enact them. The civil rights struggle now has shifted in large part from legislating to administering and enforcement. In recent years, the Commission has closely examined

the civil rights enforcement operation of various Federal departments and agencies. It has investigated the role of agencies charged with responsibility for assuring against employment discrimination by Federal or federally assisted contractors. It also has looked into policies and practices of agencies with civil rights responsibilities in housing and home finance. It has paid particular attention to Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs or activities receiving Federal assistance, and has studied the structure and mechanism by which enforcement of that important law is carried out. The Commission has issued reports based on these studies concerning such diverse agencies as the Department of Agriculture, the Civil Aeronautics Board, the Department of the Interior, and, most recently, the Department of Health, Education, and Welfare.

To some extent, the problems and inadequacies in the civil rights structure and mechanism of Federal agencies can be considered unique and attributable to the special qualities of their programs. Many problems and inadequacies, however, are shared by all the examined agencies and cut across program lines. By the same token, the wide disparities in the effectiveness of civil rights enforcement efforts can be attributed, partly but not totally, to program differences.

The Commission's experience in its investigations of contract compliance, housing, and Title VI persuaded it of the utility of conducting an across-the-board investigation of the Federal civil rights enforcement effort—of discovering, for one given period of time, where various Federal departments and agencies with significant civil rights responsibilities stand in terms of effectiveness.

This study represents one of the Commission's most ambitious undertakings. An effort was made to review the civil rights operation of some agencies not widely recognized as having significant civil rights responsibilities such as the Department of Commerce, the Department of the Interior, and those regulating particular industries, such as radio and television broadcasting, rail, air, and motor transportation, and gas and electric power—as well as those whose importance has been generally recognized, such as the Department

of Health, Education, and Welfare (HEW); the Department of Housing and Urban Development (HUD); and the Department of Agriculture. In addition, inquiry was made into areas which have not received widespread public attention in civil rights discussions, such as programs of assistance flowing directly from the Federal Government to individual beneficiaries, as well as programs of insurance and guaranty. Not neglected, however, were those activities which have been in the eye of the civil rights storm, such as federally assisted loan and grant programs, covered by Title VI of the Civil Rights Act of 1964.

Nonetheless, this study is not an exhaustive one. Limits necessarily have been placed upon it, in terms of the laws, agencies, and programs covered. For example, the Voting Rights Act of 1965, which has been treated in previous Commission reports, is not covered. Further, in the sections dealing with various Federal programs, it was impossible to treat more than a representative sample. In addition, considerable variation in the depth of treatment of the included programs and agencies was inevitable, due to restrictions of time and staff resources.

Since it was not possible to investigate firsthand the field civil rights operation, the study has involved work almost exclusively in Washington, D.C. However, information on field activities, as well as central office operations, was obtained through examination of central offices files, interviews with agency personnel, and agency responses to questionnaires. The Commission received excellent cooperation throughout its work and is grateful to department and agency personnel who provided the requested information.

To assure the accuracy of the report, the Commission forwarded copies of it in draft form to departments and agencies whose activities are discussed in detail and requested their comments and suggestions. Their responses invariably were helpful, serving to correct factual inaccuracies, clarify points which may not have been sufficiently clear, and provide updated information on activities undertaken subsequent to the time of Commission staff investigations. These comments have been incorporated in the report. In some instances, agencies expressed disagreement

with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, and in such cases their point of view, as well as that of the Commission, has been noted. In their comments, agencies sometimes provided new information not made available to Commission staff during the course of its interviews and investigations. Sometimes, the information was inconsistent with the information provided earlier. Although it was not always possible to evaluate this new information fully or to reconcile it with what was provided earlier, in the interest of assuring that agency compliance and enforcement activities are reported as comprehensively as possible, the new material has been noted in the report.

This report does not deal primarily with the substantive impact of civil rights laws. The Commission has not attempted here to measure precise gains made by minority group members as a result of civil rights actions of the Federal Government. This will be the subject of future Commission studies. Rather, it has attempted to determine how well the Fed-

eral Government is doing its civil rights enforcement job—to pinpoint for one period of time (March–June 1970) the posture of a number of Federal agencies with key civil rights responsibilities.

The purpose is not to criticize particular departments and agencies, but to analyze on a comparative basis the effectiveness of the overall enforcement effort. Through a comparative study, the Commission believes all agencies can profit from the experience of others, particularly those whose activities clearly call for improvement.

Finally, while the report deals primarily with the current civil rights posture of the Federal Government, it should be understood that the inadequacies described have roots that lie deep in the past. They did not originate in the current administration, nor was there any substantial period in the past when civil rights enforcement uniformly was at a high level of effectiveness. Rather, the inadequacies are systemic to the Federal bureaucracy and it is only through systemic changes that the great promise the civil rights laws hold will be realized.

CHAPTER 1

THE FEDERAL CIVIL RIGHTS ARSENAL

I. INTRODUCTION

Over the past three decades, the Federal Government has demonstrated a growing concern for the rights of minorities, after nearly three-quarters of a century of governmental indifference. The courts have led the way, providing substantive civil rights meaning to the broad constitutional mandates of the equal protection clause of the 14th amendment and the due process clause of the fifth amendment. The executive branch followed, through a series of Executive orders by the last six Presidents, directing Federal departments and agencies to assure against discrimination in their own activities and in the practices of those with whom they deal. Congress was the last of the three branches to act. Since 1957, Congress has enacted five civil rights laws, including the landmark Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968 (the Federal fair housing law).

These governmental actions have been taken in response to increasing protest by minority group members against the second-class citizenship to which they have been relegated throughout America's history. Protests led by black Americans such as the Montgomery, Ala., bus boycott in the mid-1950's and the 1963 march on Washington, helped many white Americans develop a better understanding of the nature of civil rights denials. Violent suppression of peaceful protest by white citizens and law enforcement officers in Birmingham, Ala. in 1963, in Selma, Ala. in 1965, and elsewhere in the country aroused national indignation and spurred passage of Federal civil rights laws. In recent years, the voices of Mexican Americans, American Indians, and other minority groups have also begun to be heard in objection to the denial of

full equality. These protests, like those of the black community, have begun to strike a responsive chord in the Federal Government.

The ensuing laws, Executive orders, and judicial decisions constitute a formidable array of civil rights guarantees. They provide broad protections against discrimination in virtually every aspect of life—in access to places of public accommodation, administration of justice, education, employment, housing, participation in the benefits of federally assisted programs, and voting. Further, while some of the remedies require the aggrieved individual to take the initiative in securing his own rights, in most cases, responsibility is also placed on Federal departments and agencies to act affirmatively in support of the guaranteed rights.

In short, there exists today a powerful Federal arsenal of weapons available to cope with racial and ethnic discrimination. Set forth in the following sections is a brief discussion of the breadth of protection afforded and the scope of Federal responsibility.

II. CIVIL RIGHTS PROTECTIONS

A. Employment

Equal opportunity in employment is mandated by a host of Federal enactments—statutes, judicial decisions interpreting the Constitution, and Executive orders and regulations. Taken together, they constitute a comprehensive ban on job discrimination, covering all Federal, State, and local jobs and nearly all private employment. Almost any act of discrimination by a government or private employer violates some aspect of Federal law. The remedies available to eradicate such discrimination, however, vary widely in their scope and efficacy.

1. FEDERAL EMPLOYMENT

The most complete Federal policy of equal job opportunity is that dealing with Federal employment. On August 8, 1969, President Nixon issued the most recent Executive order dealing with this subject,¹ superseding and strengthening previous presidential orders. The order reaffirms governmental policy both to assure equal opportunity in Federal employment to all persons regardless of race, color, religion, sex, or national origin and "to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency."²

Every Federal department and agency is required to take necessary steps to assure that the order's goals are achieved. For example, each agency is required to provide sufficient resources to carry out its equal employment opportunity program, to insure that recruitment methods reach all sources of job candidates, to fully utilize the skills of employees, and to provide maximum opportunity for employees to develop their abilities and to advance accordingly.

The Civil Service Commission is the agency chiefly responsible for implementing the order. The Commission is directed to provide leadership and guidance to other executive departments and agencies in the conduct of equal employment opportunity programs. It is also directed to review and evaluate agency performance and report to the President, and to assure fair consideration of complaints of discrimination including impartial review within the various agencies.

2. STATE AND LOCAL GOVERNMENT EMPLOYMENT

In a very general sense, it may be said that Federal law is as comprehensive in prohibiting discrimination in State and local government employment as it is in barring discrimination in Federal jobs, for the courts have held that discrimination by State and local governments—including job discrimination—violates the 14th amendment.³ But in actuality,

¹ Executive Order 11478 (1969).

² Executive Order 11478 (1969).

³ See e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

protection against discrimination by State and local governments is not nearly as complete, because—with certain exceptions—there is no Federal administrative machinery to assist the victim of discrimination. In most cases, a private lawsuit is the only means he has to secure his constitutional right.

The exceptions pertain to certain areas where Congress and the executive branch have acted to provide an administrative remedy because the Federal and State governments participate jointly in furnishing the government service. For example, an administrative remedy is provided by the Federal Merit Standards System, which applies to a variety of federally funded programs and covers approximately 250,000 State employees.⁴

Originally promulgated under a 1939 amendment to the Social Security Act of 1935, the merit standards require that State employees administering these programs be selected, promoted, and compensated according to a federally approved, State-administered merit system. Among the specific criteria established in the 1939 standards was a prohibition against discrimination on the basis of religious and political affiliation. In 1963, the prohibition was extended to include race and national origin, and State regulations were required to provide an appeal procedure in cases of alleged discrimination.

The major programs covered by the merit standards provision are: Aid to families with dependent children, old age assistance, other federally aided public assistance programs, and certain State health programs financed by the Department of Health, Education, and Welfare (HEW); State employment services and unemployment insurance systems, which are funded by the Department of Labor; and civil defense activities supported by the Department of Defense (DOD).

Each Federal agency authorized to grant financial assistance has the final responsibility for assuring the implementation of approved State plans for program operation. For administrative convenience, however, supervision of the implementation of all aspects of merit standards, including the nondiscrimination

⁴ For a full discussion of Federal Merit Standards System see U.S. Commission on Civil Rights, *For ALL the People . . . By ALL the People*, 91 (1969).

clause, rests with the Office of State Merit Systems in the Department of Health, Education, and Welfare.

In addition to protection against State employment discrimination provided by the Federal Merit Standards System, such discrimination is also prohibited by contractual requirements of the Department of Housing and Urban Development (HUD) in two important programs it administers—urban renewal and public housing. Under these requirements, nearly 900 local urban renewal agencies and 2,000 local public housing authorities, which are State agencies, are required to be equal opportunity employers.⁵

Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs and activities receiving Federal financial assistance, also forbids employment discrimination by States or localities in programs and activities where a primary purpose of the assistance is to provide employment. These include apprenticeship training, work-study, or economic development programs. Under Title VI, discriminatory employment practices also are prohibited if they tend to result in discriminatory or unequal treatment for intended beneficiaries of the program or activity, such as teachers in a federally aided school system, doctors or nurses in a federally aided hospital, or agricultural extension workers.

3. PRIVATE EMPLOYMENT

a. Employment by Private Government Contractors

The last six Presidents, over a period of nearly 30 years, have used the Federal contracting power to require nondiscrimination in employment by Government contractors. Executive Order 11246, issued in 1965, prohibits employment discrimination by Government contractors or federally assisted construction contractors, and requires them to take affirmative action to remedy the effects of past discrimination. In addition, banks which are depositories of Federal funds or which handle Federal savings bonds are subject to the same mandate.

The Office of Federal Contract Compliance (OFCC) in the Department of Labor is re-

⁵ *Id.*, at 109, for a full discussion of HUD equal opportunity requirements in State employment.

sponsible for establishing overall policy and overseeing the entire program of equal employment opportunity by Federal contractors. Primary responsibility for securing compliance in specific industries, however, rests with 15 Federal agencies, called "predominant interest agencies". Sanctions available to these agencies and the OFCC under the order include cancellation of contracts, debarment of contractors from future Federal contracts, and public identification of noncomplying contractors.

b. Private Non-Federally Related Employment

(1) Title VII of the Civil Rights Act of 1964 prohibits employment discrimination by all employers with 25 or more employees, labor unions which have 25 or more members or which operate a hiring hall, and employment agencies which regularly obtain employees for an employer covered by the title.

It also created the Equal Employment Opportunity Commission (EEOC) with responsibility to administer the title and conciliate and negotiate differences between aggrieved individuals and the accused parties. The EEOC also may make studies, provide technical assistance, and carry on other activities designed to stimulate employers, unions, and employment agencies to develop effective equal employment opportunity policies. The EEOC is granted no power to require a discriminatory party to cease engaging in prohibited activities. Lawsuits, however, may be brought by private parties or by the Department of Justice.

(2) Section 1 of the Civil Rights Act of 1866⁶ provides that all persons shall have the same right to make and enforce contracts as white citizens of the United States. A recent Supreme Court decision indicated that a similar provision of the 1866 law prohibits racial discrimination in housing.⁷ Similarly, lower court decisions have ruled that this law prohibits employment discrimination.⁸ Thus, de-

⁶ Now codified as 42 U.S.C. 1981.

⁷ *Jones v. Mayer and Co.*, 392 U.S. 409 (1968).

⁸ See *Dobbins v. Local 212, Int'l Bhd. of Elec. Workers, AFL-CIO*, 292 F. Supp. 413 (S.D. Ohio 1968); *Int'l Bhd. of Elec. Workers, Local Union No. 5 v. United States Equal Employment Opportunity Commission*, 283 F. Supp. 769 (W.D. Pa. 1967), cert. denied, 393 U.S. 1021 (1969); *State of Washington v. Baugh Constr. Co.*, 318 F. Supp. 598, (W.D. Wash., 1969)

spite limitations in coverage of other equal employment opportunity provisions, any individual who believes he has been discriminated against in employment because of his race may bring Federal suit for relief under the Civil Rights Act of 1866.

(3) The National Labor Relations Act (NLRA) and related laws regulate the conduct of employers and unions. Although not specifically designed to provide relief for employment discrimination, the NLRA has a significant impact on the Federal effort to end such discrimination. The act creates an obligation on the part of all unions representing employees under the act to do so fairly, impartially, and without discrimination. A union failing to comply with this obligation would be in violation of its duty of fair representation.⁹ In addition, a union's discriminatory membership policy constitutes an unfair labor practice under the act.¹⁰ With respect to employers, a recent U.S. Court of Appeals opinion indicated that discrimination by an employer in his employment practices can constitute an unfair labor practice.¹¹

Persons who have been subjected to discrimination covered by the act may file a complaint with the National Labor Relations Board. The Board is empowered, after a finding of discrimination, to issue a cease and desist order against an employer or union, to revoke or deny certification or exclusive representation status of a union, or to refuse to require an employer to bargain with an offending union.

B. Housing

Like employment, equal opportunity in housing is a broadly protected Federal right. Almost all housing, federally assisted or not, must be made available without discrimination.

1. FEDERALLY ASSISTED HOUSING

(a) Executive Order 11063, issued in Nov-

CCH Employment Practices Rep. (61 CCH Lab. Cas.) par. 9346.

⁹ See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Syres v. Oil Workers, Local 23*, 350 U.S. 892 (1955). See also *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

¹⁰ *Independent Metal Workers Union, Local 1 (Hughes Tool Co.)*, 147 NLRB No. 166 (1964).

¹¹ *Farmer's Cooperative Compress v. NLRB*, 70 L.R.R.M. 2489 (D.C. Cir. Feb. 7, 1969), cert. denied, 38 U.S. L.W. 3171 (Nov. 10, 1969).

ember 1962, constituted the first significant Federal requirement on nondiscrimination in housing. Discrimination is prohibited in the sale or leasing of all federally assisted housing provided after the order's issuance, including housing owned by the Government, housing purchased in whole or in part with Government loans (such as low-rent public housing), housing provided through loans insured or guaranteed by the Government (such as Federal Housing Administration (FHA) and Veterans Administration (VA) housing), and housing provided through slum clearance or urban renewal programs. The prohibition also extends to lending practices insofar as those practices relate to loans insured or guaranteed by the Federal Government. Finally, the order directs all executive departments and agencies with functions relating to housing to "take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin" ¹²

The order provides for the following remedies to be applied in cases where discrimination is found and conciliation and persuasion fail to bring about compliance: cancellation or termination of agreements or contracts with offenders; refusal to extend further aid under any program to offenders; refusal to approve a lending institution as a beneficiary under any program which is affected by the order; and revocation of such approval if previously granted.

(b) Title VI of the Civil Rights Act of 1964 covers all federally assisted housing except those instances in which the assistance provided is solely in the form of contracts of insurance or guaranty. (Although this exclusion exempts FHA home mortgage insurance and VA home loan guaranty programs, they are covered by Executive Order 11063.) Title VI does apply to such varied housing programs as urban renewal, housing rehabilitation, relocation grants, low-rent public housing, and code enforcement programs. Remedies under Title VI include suspension or termination of Federal financial assistance, or refusal to grant or to continue such assistance. In addition, the Department of Housing and Urban Development may refer noncompliance matters to the Department of Justice for litigation.

¹² Executive Order 11063, sec. 101 (1962).

2. PRIVATE, NONFEDERALLY ASSISTED HOUSING

a. Title VIII of the Civil Rights Act of 1968

The Federal fair housing law covers not only federally assisted housing, but most private housing as well. The only significant exceptions from coverage are rental housing with fewer than five units, one of which is owner-occupied, and single family houses owned by a private individual and sold without the use of a real estate broker. It is estimated that 80 percent of all housing is covered by Title VIII. In addition to prohibiting discrimination in the sale or rental of housing, Title VIII requires all Federal departments and agencies with functions relating to housing to administer their programs and activities affirmatively to further the purposes of fair housing.

Although the coverage of Title VIII is much broader than that of the Executive order or Title VI, the remedies are not nearly so strong. Compliance with Title VIII can be brought about through administrative conciliation by HUD, through action by a State or local enforcement agency, through private litigation, or, in the case of patterns or practices of discrimination, through lawsuits brought by the Attorney General. Administrative enforcement is not available under Title VIII.

A provision of the Civil Rights Act of 1866,¹³ which grants to Negro citizens the same rights as white citizens to rent or purchase property, was construed by the Supreme Court in 1968 in *Jones v. Mayer and Co.*¹⁴ to prohibit racial discrimination in all housing, private as well as public. The means of enforcement, however, appears to be limited to privately instituted litigation:

In addition to HUD, there are a number of other Federal departments and agencies with direct responsibility to insure that minority group citizens are not deprived of their right to equal housing opportunity. These include: the Department of Justice, which has authority under Title VIII to institute lawsuits to eliminate patterns or practices of discrimination; agencies which supervise mortgage lending institutions; the General Services Admin-

istration (GSA), the Federal Government's real estate agent which is responsible for insuring that housing problems of low-income and minority group employees are taken into consideration when sites for Federal installations are selected; the Department of Defense, which has the obligation of insuring that its minority group servicemen are able to secure adequate, non-segregated, off-base housing; and the Veterans Administration, which administers a major program of housing loans and guarantees.

C. Federally Assisted Programs

Of all of the provisions of civil rights law, Title VI of the Civil Rights Act of 1964 is the one with the broadest coverage. It is designed to insure equal treatment not merely in federally assisted housing and employment but in all loan and grant programs administered by the Federal Government. As a result, nondiscrimination requirements apply to public schools, hospitals and other health facilities, highway construction, and public parks. All told more than 400 programs administered by 23 Federal departments and agencies are covered by this title.

When a violation is uncovered, agencies must try to obtain compliance by voluntary means. If this fails, administrative proceedings may be initiated to terminate grants or to refuse to grant or continue assistance. In addition, agencies may utilize any means authorized by law, such as requesting the Department of Justice to file suit to compel compliance with Title VI.

In addition to the 23 departments and agencies involved in enforcing Title VI, the Department of Justice and HEW are assigned roles of special importance. Under Executive Order 11247 (1965) Justice is responsible for coordinating enforcement efforts of all Federal agencies administering programs covered by the title. HEW, under a series of coordination plans, has been delegated authority for securing compliance from recipients of assistance under higher education, elementary and secondary schools, and medical facilities programs even though other agencies may provide assistance to the same recipients.¹⁵

¹³ Now codified as 42 U.S.C. 1982.

¹⁴ 392 U.S. 409 (1968).

¹⁵ The legal requirement of nondiscrimination by Federal recipients in their distribution of Federal assistance antedated the passage of the Civil Rights Act of 1964. Supreme Court and lower court decisions had

D. Direct Federal Assistance

The programs covered by Title VI are those in which there is an intermediary between the Federal Government and the ultimate beneficiary of its assistance programs. It is through these intermediaries, called recipients, that the Federal aid flows. Title VI is concerned with assuring against discrimination by the intermediaries in the distribution of program benefits. In many Federal programs and activities, however, the relationship between the Federal Government and the ultimate beneficiary is a direct one. Programs such as those concerned with retirement and disability payments, hospital and supplemental medical insurance payments, veterans insurance and benefit payments, and unemployment benefit payments, are among those involving such a direct relationship. In addition, the Federal Government operates a number of direct loan programs, providing business and housing loans, which also go directly to beneficiaries. More than 100 programs of direct Federal assistance involving annual expenditures of more than \$75 billion are in existence.¹⁶

Many of these programs are outside the scope of Title VI. To the extent that discrimination is practiced in direct assistance programs, however, it is the Federal Government itself

indicated much earlier that this was both a Federal and local responsibility. In *Hurd v. Hodge*, 334 U.S. 24 (1948), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that the Federal Government could not itself discriminate and in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), it was held that where Government and private parties act together in a unified fashion or where governmental involvement in private discrimination is substantial, the private party also is constitutionally barred from discriminating. The U.S. Court of Appeals for the Fourth Circuit in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963); *cert. denied*, 376 U.S. 938 (1964), stated the test of constitutionality:

"[I]n our view the initial question is * * * whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and perform under their aegis without the private body necessarily becoming either their instrumentality or their agent in a strict sense (at 966)."

¹⁶ See Office of Economic Opportunity, *Catalog of Federal Domestic Assistance* (1970) and *The Budget of the United States Government, 1971: Special Analyses* (1970).

that is discriminating. Such discrimination clearly is in violation of the fifth amendment of the Constitution.¹⁷

The right of nondiscriminatory access to direct assistance programs is enforceable through the sanction of disciplinary action against Federal employees guilty of discrimination, pursuant to administrative procedures or regulation,¹⁸ and through litigation by aggrieved beneficiaries.¹⁹

E. Programs of Insurance and Guaranty

Some Federal aid programs do not involve financial assistance in the form of loans or grants, either through intermediaries or directly to beneficiaries. Rather, they rely on Government insurance and guarantees to include private lenders to provide funds for specific purposes. In these programs the Federal Government's role is that of underwriter, while the funds are made available through ordinary private credit channels. FHA and VA housing programs, for example, use the vehicles of insurance and guaranty to stimulate private credit for housing. The Small Business Administration (SBA) acts similarly to encourage the availability of private credit to help small businessmen.

Such insurance and guaranty programs are specifically exempt from coverage under Title VI.²⁰ The substantial governmental involvement in these programs, however, undoubtedly would prohibit discrimination under the due process clause of the fifth amendment.²¹ Moreover, insurance and guaranty programs in the housing area also are covered by Executive Order 11063, and insurance programs for business loans are covered by nondiscrimination requirements of the Small Business Administration.

The only remedy for discrimination under these programs is private litigation, except in the housing and business loan area where administrative sanctions to assure against dis-

¹⁷*Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁸ Most Federal agencies have regulations regarding employee conduct which prohibit discrimination by their employees. See, for example, Veterans Administration regulations on this subject at 38 C.F.R. §0. 735-10(c).

¹⁹ Jurisdiction for suits against the United States is found in 28 U.S.C. 1343, 1346, and 1361.

²⁰ Secs. 602 and 605, Civil Rights Act of 1964.

²¹ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

crimination are provided pursuant to Executive Order 11063 and SBA regulations.

F. Other Federal Protections

1. PUBLIC ACCOMMODATIONS AND PUBLIC FACILITIES

The Civil Rights Act of 1964, in addition to creating the statutory rights of equal employment opportunity and equal access to the benefits of federally assisted programs, also prohibited discriminatory practices in other vital areas of American life. Among these were discrimination in places of public accommodations, such as hotels, restaurants, and theaters,²² and in public facilities such as publicly owned or sponsored parks, beaches, swimming pools, golf courses, and bowling alleys.²³ Principal responsibility for enforcement of the public accommodations and public facilities provisions rests with the Department of Justice.²⁴

2. EDUCATION

Another was discrimination and segregation in education which was approached in two ways: the first was through the leverage of Federal financial assistance, since under Title VI schools and colleges could not receive such assistance unless they ended discriminatory practices; the second was through litigation by the Department of Justice. Under Title IV of the act, the Attorney General is authorized to bring lawsuits to eliminate unconstitutional discrimination by public schools and colleges. Thus, even if schools are willing to forego Federal financial assistance as the price of continuing discriminatory practices, they face the prospect of litigation by the Department of Justice to require an end to discrimination.

3. VOTING

The Voting Rights Act of 1965 assured the right to vote by suspending literacy tests and other discriminatory qualifications for voting in six States and 40 counties in another State.²⁵

²² Title II, Civil Rights Act of 1964.

²³ Title III, Civil Rights Act of 1964. Discrimination or segregation in public education is covered by Title VI of the act.

²⁴ Under Title II, Attorney General may initiate an action on his own, but under Title III, the Attorney General may institute litigation only on the basis of a written signed complaint.

²⁵ 42 U.S.C. 1973 (1965).

Under the Voting Rights Act, the Attorney General has authority to appoint voting examiners to register individuals in cases where it does not appear that local officials are willing to do so. The Attorney General also has the duty to review and approve proposed changes in voting qualifications or procedures of any State or subdivision covered by the act.

4. REGULATED INDUSTRIES

Under the Constitution and specific statutory authority granted by Congress to a number of Federal agencies to license and regulate particular industries, the practices of a large number of business corporations are subject to nondiscrimination requirements. For example, railroads and bus companies are licensed and regulated by the Interstate Commerce Commission (ICC); radio and television stations are licensed and regulated by the Federal Communications Commission (FCC); hydroelectric plants and many natural gas companies are licensed by the Federal Power Commission (FPC), as are many electrical power companies; and airlines are regulated by the Civil Aeronautics Board (CAB). The involvement of the regulatory agencies in the activities of these industries is pervasive and their control over industry practices is plenary. They have constitutional responsibility to assure that the companies they regulate do not practice racial or ethnic discrimination in employment nor in the provision of services or facilities.²⁶

III. MECHANISMS FOR COORDINATING CIVIL RIGHTS ENFORCEMENT²⁷

The ultimate responsibility for assuring that the various civil rights laws and executive orders are carried out with maximum effectiveness rests with the President in whom the

²⁶ See Legal Appendix.

²⁷ The U.S. Commission on Civil Rights has statutory responsibility for appraising Federal civil rights laws and policies, and reporting its findings and recommendations to the President and the Congress. The Commission has no authority for enforcing civil rights laws or requiring changes in agency civil rights policies or practices. In carrying out its appraisal function, the Commission, in addition to reporting publicly on its findings and recommendations, works informally with departments and agencies that have civil rights responsibilities and with those who provide staff assistance to the President. An evaluation of the Commission's role is outside the scope of this study.

Constitution places the Government's Executive power. A number of agencies and mechanisms have been used or are capable of being used to assist the President in coordinating, evaluating, and directing the civil rights efforts of Federal departments and agencies.

A. White House Staff

The President is aided most closely in carrying out civil rights responsibilities by his own staff of White House assistants. Their chief function is to provide him, on an informal basis, with information necessary to make civil rights policy decisions and to determine the most appropriate courses of action to meet existing problems. Although White House staff members have no formal authority to require changes in policies or practices of Federal departments and agencies, the influence they enjoy through their close working relationship with the President frequently affords them unusual persuasive leverage to bring about such changes.

B. Bureau of the Budget²⁸

The Bureau of the Budget is part of the Executive Office of the President and, like the White House staff, provides direct staff assistance to the President. The Bureau assists the President in five specific areas: (a) formulation of the annual budget; (b) analyses of proposed legislation and Executive orders; (c) improvement of Federal management and organization; (d) coordination and improvement of Federal statistical programs; and (e) planning and evaluation of Federal substantive programs. Civil rights is an integral part of each of these five areas.

The Bureau's two most important civil rights related functions have consisted of its role in reviewing agency budgetary submissions for civil rights activities and its role in planning and evaluating Federal programs. A principal purpose of program evaluation is to determine whether the intended beneficiaries of Federal assistance are actually deriving the benefits, and, if not, whether racial or ethnic discrimination or other such factors are the cause.

²⁸ Effective July 1, 1970, the Bureau of the Budget was incorporated into a new Office of Management and Budget.

C. Department of Justice

The Department of Justice, as the Government's chief litigator, plays a central role in the Federal Government's civil rights effort. It is, in effect, the agency of last resort where noncompliance is found and sanctions either are unavailable to the Federal agencies (as in the case with EEOC under Title VII of the Civil Rights Act of 1964) or the sanctions available (such as the withholding of Federal welfare payments from an entire State) are deemed less appropriate than the bringing of a lawsuit. Further, the Department of Justice passes on the legality of significant new civil rights policies proposed by all other Federal departments and agencies. For example, the "Philadelphia Plan" which sets minority employment goals for Government contractors, and the school desegregation guidelines issued by HEW, were reviewed and approved by the Department of Justice before they were issued.

In addition to its litigative and other legal responsibilities, the Department, through its Community Relations Service (CRS), also serves as an information and conciliation bridge between the minority community and the Federal establishment. The principal purpose of this is to promote peaceful race relations. In carrying out its functions, CRS obtains information about Federal programs that can be of assistance to minority group members and transmits to Federal officials information on the needs and desires of the minority community. CRS also works with local groups in an effort to bring about institutional changes in well-defined areas, such as police-community relations, education, and minority economic independence.

D. Specific Coordination Responsibilities

The civil rights concerns of the White House, the Bureau of the Budget, and the Department of Justice extend to all civil rights laws and policies. In some areas, however, Federal agencies have coordination responsibilities for specific subjects.

For example, under Title VIII of the Civil Rights Act of 1968, the Department of Housing and Urban Development has responsibility for coordinating the activities of all other Federal

departments and agencies to promote fair housing.

In the employment area, the Office of Federal Contract Compliance and the Equal Employment Opportunity Commission share responsibility for coordinating the Government's efforts. Under Executive Order 11246, OFCC sets overall policy and coordinates the activities of the 15 Federal agencies initially responsible for assuring equal employment opportunity by Government contractors in specific industries. EEOC, while not specifically authorized to act as coordinator or policymaker, plays a leadership role by virtue of its competence in the employment field. In the area of Federal employment, the Civil Service Commission is responsible for establishing policy and coordinating activities of all Government agencies in assuring equal employment opportunity in the Federal Government.

The Department of Justice, in addition to its broad mandate to help determine the direction of the entire Federal civil rights effort, has specific responsibility, under Executive Order 11247, for coordinating activities under Title VI of the Civil Rights Act of 1964.

The Cabinet Committee on Opportunity for the Spanish Speaking is still another Federal agency with specific coordinating responsibilities. Composed of the heads of various executive departments and agencies, it is concerned with possible discrimination by Federal agencies against Mexican Americans, Puerto Ricans, Cubans, and Latin Americans, and the formulation and administration of substantive Federal programs to insure that Spanish surnamed Americans receive equitable treatment.

The Federal executive boards and the Federal regional councils are organizations composed of top Federal agency officials located in certain metropolitan areas. They are designed to assist in the implementation of Government-wide policy, to improve Federal service and management, and act as a coordinating mechanism with regard to the Government's efforts to deal with urban problems.

IV. IMPACT OF CIVIL RIGHTS LAWS AND POLICIES

The civil rights laws and policies provide

the Federal Government with significant authority to assure equal opportunity in such fields as education, employment, housing, voting, and in all Federal programs. There are few aspects of life unaffected by Federal non-discrimination laws.

This is not to say that all necessary laws have been adopted. In some areas already covered, serious gaps in coverage exist. For example, effective Federal requirements for equal opportunity in State and local government employment are largely limited to Federal Merit Standards and HUD contractual requirements, which affect less than 5 percent of all State and local government employees. Title VII of the Civil Rights Act of 1964 exempts State and local governments from coverage. An amendment to Title VII to include employment by State and local governments could provide protection to all of the 7½ million State and local government employees.²⁹

Moreover, coverage of Title VII is currently limited to employers of 25 or more employees.³⁰ It is estimated, however, that an additional 6½ million workers are employed by employers who have between eight and 25 employees. Many of these employers are located in areas where minority group members are heavily concentrated. An appropriate amendment to Title VII could provide protection to these millions of employees as well.

In the field of education, the principal concern of the Federal Government has been with eliminating school segregation in Southern States where it existed by law. Yet there is also extensive segregation of children in areas of the North and West. In the absence of proof that governmental involvement in such school segregation is so significant as to render it *de jure*—which requires painstaking, lengthy, and costly investigation—this *de facto* form of school segregation, according to the weight of court decisions, is currently beyond the reach of Federal law.³¹

²⁹ This Commission so recommended in its 1969 report, *For ALL the People . . . By ALL the People*, *supra* note 4.

³⁰ *Hearings on S. 2453 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 91st Cong., 1st Sess., at 168 (1969).

³¹ See the recommendations in U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967). The report documented the high degree of

In addition, enforcement-mechanisms provided under some civil rights laws are weak. Under these laws, while minority group members are assured of their legal right to equal opportunity, the means of actually securing this right are frequently lacking. In the important fields of employment and housing, for example, enforcement is limited largely to efforts at voluntary compliance, with recourse to litigation only if those efforts fail. In both areas, Federal agencies are charged with responsibility for administering the laws (EEOC in employment and HUD in housing), but neither agency has authority to issue cease and desist orders to bring a quick halt to discriminatory practices.

Despite these gaps and weaknesses, the laws already on the books represent an impressive array of protections. Most have been in force for 5 years or more and they have brought about salutary change. There is evidence, however, that discrimination persists even where it is prohibited by Federal law or regulation.

A. Progress in Ending Discrimination

Civil rights laws and policies by the Federal Government can be of value even when they do not contain strong enforcement mechanisms. The fact that Government speaks out in favor of principles of equal opportunity frequently brings about substantial changes in attitudes and behavior. In some cases, the mere enactment of a civil rights law has brought about a dramatic and almost immediate end to discrimination. In other cases, the laws, accompanied by effective enforcement, have brought about a similar end to discriminatory practices.

1. PUBLIC ACCOMMODATIONS

One of the most dramatic examples of the weight a civil rights law can carry is seen in the field of public accommodations. A decade ago, segregation of restaurants, motels, hotels, and theaters was the rule throughout the South and parts of the North. So rigid and inflexible was adherence to this rule that in cases where African diplomats, who traveled frequently between New York City and Washington, D.C., were denied service in restaurants along the route, even the urgent pleas of the Department of State could not induce a change in

racial isolation in virtually all of the Nation's cities and metropolitan areas.

racially discriminatory policies. In 1964, Title II of the Civil Rights Act of 1964 was passed outlawing racial discrimination in most places of public accommodation. While the law has not brought a complete end to this kind of discrimination, thousands of hotels, motels, restaurants, and theaters have abandoned their discriminatory policies. A number of factors are responsible for this success. For example, the sit-ins of the early 1960's had brought about some change before Title II was enacted. Other private and public efforts to achieve voluntary desegregation of public accommodations before passage of the Civil Rights Act of 1964 helped create a climate of opinion ready to accept desegregation. One other factor that undoubtedly contributed to the impact of this law was the quick action taken by the Department of Justice immediately after the law was passed. Within a few months after enactment, the Department of Justice brought several enforcement actions that tested the constitutionality of the public accommodations law. The law was upheld by the U.S. Supreme Court;³² and it was made clear that equal access to places of public accommodation was, and would remain, the law of the land.

2. VOTING

The Voting Rights Act of 1965 has also resulted in historic, statistically measurable progress. Before its passage, registration of black citizens of voting age in the six Southern States affected by the law was less than 31 percent. By the spring of 1969, approximately 57 percent of eligible blacks in these States were registered.³³ Black registration in the deep Southern States has increased by more than 740,000 persons since passage of the act.³⁴ More than 400 blacks now hold elective office, in the deep South, as compared to 70 in 1965.³⁵ To be sure, the Voting Rights Act has not resulted in full use of the franchise. Means other than

³² *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

³³ Speech by Vernon E. Jordan, Jr., Director of the Voter Education Project of the Southern Regional Council, 21st Annual Conference of the National Civil Liberties Clearinghouse, Washington, D.C., Mar. 20-21, 1969.

³⁴ *Id.*

³⁵ *Id.*

disqualification, such as the exploitation of continued economic dependence of rural Negroes, still constitute deterrents to the exercise of the right to vote in the South.³⁶ Nonetheless, impressive progress has been made as a result of the Voting Rights Act.

3. HOSPITALS

Hospital and health facility practices reflect an outstanding example of salutary change resulting directly from civil rights laws. The combination of the existence of the Civil Rights Act of 1964, the introduction of a new Federal program—Medicare—and a large-scale compliance effort by HEW brought a swift and almost total end to discrimination and segregation as an official policy of hospitals.

The Medicare program was enacted in 1965. In 1966, HEW's Office of Equal Health Opportunity undertook a massive compliance effort, using a large staff—sometimes as high as 500—of reviewers, to conduct thousands of visits to hospitals and other health facilities to determine whether the requirements of Title VI were being met. Anxious to obtain Federal certification for participation in Medicare, many of these institutions abolished long-standing discriminatory practices in order to qualify for the substantial aid offered by the new program. No longer were black patients refused admission; no longer, when admitted, were they segregated in wards, wings, and services. By January 1, 1968, HEW was able to report that 97 percent of the Nation's hospitals were committed to nondiscrimination in the provision of services. More than 3,000 hospitals and other health facilities changed previous policies and practices to comply with Title VI.³⁷

4. EDUCATION

In school desegregation as well, progress, however slow, has resulted directly from the

³⁶ For a description of other methods used to discourage or dilute minority voting, see U.S. Commission on Civil Rights, *Political Participation* (1968).

³⁷ For a detailed account of the HEW effort, see U.S. Commission on Civil Rights, *HEW and Title VI* (1970). Following the massive Medicare compliance operation, however, field reviews of hospitals and other health facilities were sharply curtailed. Many hospitals which had discontinued long-standing discriminatory practices have not been reviewed since 1966. There have been reports that some hospitals and other medical facilities have reinstated some of their discriminatory practices.

enactment of civil rights laws. Ten years after the decision in *Brown v. Board of Education of Topeka*,³⁸ holding that legally compelled school segregation was unconstitutional, only 3 percent of the black school children in the South were attending public schools with white children. By the 1968-69 school year, however, 5 years after enactment of the Civil Rights Act of 1964, more than 20 percent of the black school children attended desegregated schools in the region.³⁹ Energetic use of the administrative mechanism of Title VI by HEW was the principal factor responsible for this significant acceleration of southern school desegregation.

B. Persistence of Discrimination

Despite the progress made possible by recently adopted civil rights laws and policies, there still is substantial evidence that discrimination persists in many areas. Generally, civil rights laws have been most successful in dealing with practices that do not require complex institutional change. Thus desegregation of public facilities, places of public accommodation, and hospitals and other health facilities required basic but simple changes in conduct and was accomplished without either violent opposition or massive Federal enforcement efforts.

In the area of voting, progress may be attributed primarily to the fact that the Federal Government—by suspending literacy tests and authorizing the appointment of Federal examiners to register citizens—intervened more directly to protect the rights of individuals in this context than it has in other civil rights areas.

In fields where complicated institutional change is required and the Federal Government has not intervened so directly, progress has come slowly and, in some cases, at a pace which can barely be discerned.

I. EMPLOYMENT

In the employment field, elimination of dis-

³⁸ 347 U.S. 483 (1954).

³⁹ U.S. Department of Health, Education, and Welfare Press Release, Jan. 16, 1969. The 1968-69 school year was the last year for which official figures were obtained by HEW. It was generally anticipated that desegregation would reach approximately 40 percent for the 1969-70 school year.

criminary practices to facilitate full participation of minority group members in the Nation's economic mainstream has proved to be an intricate process. As the following examples suggest, equal employment opportunity still is far from a way of American life.

a. Federal Employment

In the area of Federal employment, where the degree of Federal control is absolute, minority group representation has increased substantially but black and Spanish surnamed Americans are still grossly underrepresented in the higher salary brackets. According to a survey of minority group employment in the Federal Government as of 1969, by the U.S. Civil Service Commission, less than 2 percent of General Schedule (GS) grade-13 and above of classified workers were Negro. Less than 0.7 percent of such workers were Spanish surnamed.⁴⁰ The employment record of some individual agencies is even worse. For example, the Federal Aviation Administration, an agency of the Department of Transportation, employed more than 20,000 air traffic controllers as of June 30, 1969. Of these, only 547 were minority employees. Moreover, there were only 13 minority group employees among the 1,600 supervisory and administrative personnel at grade GS-14 or above.⁴¹

b. State Employment Under Federal Merit Standards

Despite nondiscrimination requirements in the merit system applicable to federally aided State programs, minority group employment often remains low. For example, the Mississippi Welfare Department had only 38 blacks on its staff of more than 1,500 in 1967. Data for 1968 indicated that only 5.3 percent of the employees of the Louisiana State Employment Security Agencies were black and only 7.7 percent of the employees of the Texas State Employment Security Agencies were of Spanish American descent. In both these States, most minority group employees were in nonprofessional positions.⁴²

⁴⁰ U.S. Civil Service Commission Press Release, May 14, 1970.

⁴¹ U.S. Department of Transportation, Federal Aviation Administration, Office of Civil Rights, *Minority Group and Women Employment Reports, as of June 1969*, Report No. 5 (1969).

⁴² U.S. Commission on Civil Rights, *For ALL the*

When the State of Alabama refused to amend its standards for the Merit System of Personnel Administration to include a non-discrimination clause, the Department of Justice filed suit against the State. Evidence introduced at the trial indicated that in 1968 the six State agencies involved in the merit system had one black among 988 clerical employees and 26 blacks on their staffs of 2,019 professional, technical, and supervisory employees. Of the 70 custodial, labor, and laboratory helper positions, however, 67 were occupied by blacks.⁴³

c. Private Employment

Despite the fact that equal employment opportunity requirements have been imposed on Government contractors since the 1940's and that since 1964 Title VII has extended that requirement to most other employers, evidence gathered by this Commission indicates that employment discrimination in the private sector is still prevalent throughout the United States.

At an April 1966 hearing of the Commission on Civil Rights in Cleveland, Ohio, for example, testimony showed that there were 139 Government contractors with facilities in Cleveland with 50 or more employees. These firms had a total complement of more than 93,000 employees. Although blacks constituted 34 percent of Cleveland's population, 21 of the firms employed none at all and 86 employed less than 10 percent in their work forces.⁴⁴

In San Francisco at its hearing the following year, the Commission found no black electricians, ironworkers, or plumbers working on the construction of the Bay Area Rapid Transit System, a federally funded project.⁴⁵

In a 1968 hearing in Montgomery, Ala., the Commission examined employment opportunities in a 16-county area in that State and

People . . . By ALL the People 103, 95, and note 2 to table 4-1 on 95 (1969).

⁴³ Pre-Trial Brief for the United States at 17, *U.S. v. Frazer*, C.A. No. 2709-N (M.D. Ala. 1969).

⁴⁴ *Hearing Before the U.S. Commission on Civil Rights*, held in Cleveland, Ohio, Apr. 1-7, 1966, exhibit No. 21 "Population," p. 645 and exhibit No. 37 "Employment," table 9, p. 801.

⁴⁵ *Hearing Before the U.S. Commission on Civil Rights*, held in San Francisco, Calif., May 1-3, 1967, and Oakland, Calif., May 4-6, 1967, exhibit No. 42, "BART Ethnic Count On-Site Work Force," p. 1084.

found that, while 62 percent of the area's population was black, companies filing employment data with EEOC in 1967 reported that only 22 percent of their employees were black. More significantly, black persons were hired almost exclusively for the more menial jobs. They held 63 percent of unskilled positions compared with 8 percent of the white-collar and skilled jobs.⁴⁶ The hearing revealed that the Dan River Mills textile plant, a Federal contractor in Greenville, Ala., had only three Negro employees out of a total of 200 and that the American Can Co., also a Federal contractor, owned a segregated company town, complete with segregated schools and homes.⁴⁷

A December 1968 Commission hearing in San Antonio, Tex., disclosed that the El Paso Natural Gas Co., which holds Federal contracts and is regulated by the Federal Power Commission, employed 1,450 persons in its headquarters of whom only 10.6 percent were Spanish surnamed. The company maintains its home office in a city where Mexican Americans account for 43.6 percent of the population. A little over half of the company's Mexican American employees were in blue-collar jobs.⁴⁸

In June 1969, statements received at an open meeting of the Commission's Massachusetts State Advisory Committee in Boston showed that of approximately 1,000 building trades apprentices in the Boston area, just 58 were black⁴⁹ and that the skilled building trades in the Boston area had a total journeyman nonwhite membership of 1.4 percent out of a total of 11,120 members. But 6 percent

⁴⁶ *Hearing Before the U.S. Commission on Civil Rights*, held in Montgomery, Ala., 27-May 2, 1968, [hereinafter cited as *Montgomery Hearing*], exhibit No. 3, "A Population, Employment and Income Profile . . .," table 1, p. 694 and exhibit No. 15, "Employment," p. 805.

⁴⁷ *Id.*, at 401 and 387-390.

⁴⁸ *Hearing Before the U.S. Commission on Civil Rights*, held in San Antonio, Tex., on Dec. 9-14, 1968 [hereinafter cited as *San Antonio Hearing*], exhibit No. 35, "Equal Employment Opportunity Employer Information Report EEO-1," El Paso Natural Gas Co., Separate Headquarters Report, p. 1074, and exhibit No. 8, "Demographic Economic and Social Characteristics . . .," table 14, p. 788.

⁴⁹ Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights, *Contract Compliance and Equal Employment Opportunity in the Construction Industry 4* (July 1970).

of the population of the Boston metropolitan area is black.

Testimony at a Commission hearing in St. Louis, Mo., in January 1970, also uncovered gross underutilization of minority group individuals in the employment area. While tremendous growth in both white- and blue-collar jobs has taken place in the suburbs of St. Louis County, a relatively small number of these positions have been filled by blacks. For example, the McDonnell Douglas Aircraft plant—the Nation's fourth largest defense contractor—employed more than 33,000 persons in its St. Louis County plant, of whom only 2,500, or less than 8 percent were Negro. The Negro percentage of the population for the St. Louis metropolitan area is at least 14 percent. Moreover, less than 1 percent of the company's officials, managers, and professionals were Negro; no black person was a general foreman or a salesworker in the plant.⁵⁰

The truck plant of the Chrysler Corp. at Fenton, Mo., in St. Louis County, employed 1,469 employees of whom 194 were black. Of the 118 officials and managers, only three were Negroes; none of the 43 professionals and only one of the 20 technicians were Negro.⁵¹

Department store hiring in St. Louis County showed a similar pattern. Only 2.5 percent of J. C. Penney's 1,128 employees were Negro, and only 4.8 percent of Sears Roebuck's 2,105 employees in the St. Louis County stores were Negro.⁵²

Other Federal agency investigations have yielded similar results. The Department of Labor, in adopting the "Philadelphia Plan" to establish goals and targets for hiring of minority group individuals in the construction trades, concluded that eight construction trade unions in the Philadelphia area showed a pattern of discrimination against minority group individuals. Specifically, the Department found that in the Philadelphia area over a period of years, less than 1 percent of the membership of the ironworkers, plumbers,

⁵⁰ Unpublished Transcript of *Hearing Before the U.S. Commission on Civil Rights* held in St. Louis, Mo., evening session, Jan. 15, 1970, at 60-63, 83 [hereinafter cited as *St. Louis Hearing*].

⁵¹ *St. Louis Hearing*, evening session, Jan. 15, 1970, at 8, 9.

⁵² *St. Louis Hearing*, afternoon session, Jan. 15, at 54.

pipefitters, steamfitters, sheet metal workers, electrical workers, roofers and water proofers unions have been Negroes.⁵³

A review of Department of Justice litigation in the employment area shows that the Attorney General has alleged patterns of discrimination against such major companies as Continental Can Co., Georgia Power Co., Owens-Fiberglass Corp., Cannon Mills Co., Bethlehem Steel Corp., H. K. Porter Co., Roadway Express, Inc., and a number of labor unions representing such diverse groups as mineworkers, longshoremen, teamsters, electrical workers, ironworkers, plumbers, and steelworkers. In addition, the Department of Justice recently negotiated an agreement with 73 motion picture producers, nine craft locals, and other organizations affiliated with the motion picture and television industries to eliminate discrimination against minority group members in employment for craft, administrative, and clerical jobs in those industries. At the time of the initial investigation by EEOC the labor unions in the industry had a combined membership of approximately 12,000, including 800 members of other minority groups but only 45 blacks.⁵⁴

2. HOUSING

The denial of equal opportunity in housing also remains a severe and persistent problem. In 1959, before adoption of any Federal fair housing laws or policies, it was estimated that less than 2 percent of the new houses provided through FHA mortgage insurance since 1946 had been available to minorities.⁵⁵ In 1967, nearly 5 years after issuance of Executive Order 11063, the situation had not improved appreciably. A 1967 national FHA survey of minority group occupancy in subdivisions built after the date of the Executive order, and subject to its provisions, found that of the more than 400,000 units surveyed, only 3.3 percent were reported as having been sold to black families. In some areas, the survey showed even less encouraging results. In the St. Louis area, for example, only 56 units, or

⁵³ Report of Chairman Warren P. Phelan, Philadelphia Federal Executive Board (FEB) to all members FEB, pt. A at 2, and pt. B at 1, Oct. 27, 1967.

⁵⁴ Department of Justice News Release, Mar. 31, 1970.

⁵⁵ U.S. Commission on Civil Rights, *Housing* 63 (1961).

0.85 percent of the total, were reported to have been sold to black families.⁵⁶

In public housing, the pattern of all-white or all-black projects has remained the rule, even after laws and Executive orders have prohibited segregation. The most extreme example, perhaps, is found in the Robert Taylor Homes, a project in Chicago housing 28,000 tenants. As of the end of 1965, 3 years after issuance of Executive Order 11063 and a year and a half after enactment of title VI of the Civil Rights Act of 1964, all of the units were occupied by black families. Other projects in that city were substantially all-white.⁵⁷ The situation in Chicago is not atypical. As of June 1968, of six projects in Jacksonville, Fla., four were all nonwhite and two were all-white.⁵⁸

Another major HUD program, Urban Renewal, was found by the Commission at its January 1970 public hearing in St. Louis, Mo., to have had the effect of uprooting black families living in suburban areas and forcing them into the center city, thus further intensifying the pattern of racially segregated neighborhoods throughout the metropolitan area.⁵⁹

3. EDUCATION

Despite some progress in southern school desegregation occurring over the last 5 years, a substantial majority of black school children in the South still attend segregated schools.

In a number of southern school districts, including some under court desegregation orders, the amount of actual integration is negligible. For example, in the Monroe Parish, Claiborne Parish, Concordia Parish, Union Parish, Quachita Parish, and East Feliciana Parish school systems in Louisiana—all under

⁵⁶ U.S. Commission on Civil Rights, staff paper, *Housing in St. Louis* 21 (1970).

⁵⁷ U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 38 (1970). In 1969, a Federal District Court in Chicago found that the tenant assignment and site selection policies of the Chicago Public Housing Authority had a discriminatory effect and enjoined the authority from continuing these practices. *Gautreaux v. The Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

⁵⁸ Department of Housing and Urban Development, *Low-Rent Project Directory* 57, Dec. 31, 1969.

⁵⁹ U.S. Commission on Civil Rights, staff paper, *Housing in St. Louis* 50 (1970).

court order to desegregate—fewer than 2 percent of the black students attended predominantly white schools in the 1968–69 school year.⁶⁰

At the Commission's April 1968 Montgomery, Ala. hearing, it was found that, despite Federal requirements, only 1.7 percent of the black children in 20 school systems in the hearing area, for whom information was available, were attending white schools as of September 1967. Teachers in the 15 county systems involved were desegregated only on a token basis.⁶¹

A 1969 Commission survey documented extensive segregation of Mexican American students in the five Southwestern States. Although Mexican Americans comprise 17 percent of the student enrollment in these States, more than 65 percent of the Mexican American students were in schools with 50 percent or more Mexican American enrollment. Twenty-two percent were found in schools with 80 to 100 percent Mexican American enrollment.⁶² In Texas, where one of every five students is Mexican American, the ethnic isolation was most severe. Two-thirds of the Mexican American students were in schools with 50 percent or more Mexican American enrollment, and 40 percent were in schools with 80 to 100 percent Mexican American enrollment.⁶³

A 1968 Commission study of nine San Antonio school districts demonstrated the inequality of educational opportunity offered in the predominantly Mexican American school districts, as evidenced by the disparities in educational finances, teacher qualifications, and quality of school facilities. The predominantly Mexican American school districts were characterized by lower pupil expenditures and teachers with fewer pedagogical qualifications than in predominantly Anglo districts. In Edgewood, for example, a school district with an 89 percent Mexican American enrollment, 160 teachers, or 19.7 percent of all teachers,

held no college degree. In contrast, in the three predominantly Anglo districts studied, which employed more than 2,000 teachers, all but 14 teachers held a college degree.⁶⁴

Segregation of Mexican Americans is often perpetuated by granting school transfers to students on a discriminatory basis. One such example occurred in Del Rio, Tex., where, since 1959, the children of military personnel [mostly Anglo] connected with the Laughlin Air Force Base have been bused outside a predominantly Mexican American school district to a wealthier and predominantly Anglo district. Laughlin Air Force Base is located entirely within the boundaries of the predominantly Mexican American San Felipe School District. This practice has resulted in almost complete segregation of the Mexican American students of San Felipe [97 percent Mexican American] and the loss of more than \$300,000 per year in Federal aid to the district.⁶⁵

Nor has discrimination been eliminated in the treatment received by black students and other minorities at colleges and universities. In some States, colleges and universities originally established to serve only Negroes continue to be virtually all-black and schools from which Negroes were previously excluded enroll only token numbers of black students. Earlier this year, the Department of Health, Education, and Welfare indicated to 10 States that their State-operated institutions of higher education were not in compliance with Title VI and requested that the States file desegregation plans. This action was taken with respect to such States as Louisiana, Pennsylvania, Mississippi, Maryland, Virginia, and Oklahoma.⁶⁶

4. AGRICULTURAL SERVICES

In its 1965 report, "Equal Opportunity in Farm Programs," the Commission found gross discrimination and inequity in a number of Department of Agriculture programs, partic-

⁶⁰ U.S. Commission on Civil Rights, *Federal Enforcement of School Desegregation* 16–19, September 1969.

⁶¹ *Montgomery Hearing*, exhibit No. 26, staff report, "Education," p. 861.

⁶² U.S. Commission on Civil Rights, report No. 1—*Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest* 13, 30 (unpublished report, August 1970).

⁶³ *Id.*, at 14, 30.

⁶⁴ *San Antonio Hearing*, exhibit No. 11, "A Study of Equality of Educational Opportunity for Mexican Americans . . .," pp. 871, 830, 839, and table 9 on p. 840.

⁶⁵ *San Antonio Hearing*, Testimony, at pp. 295, 301–302, and 310–311.

⁶⁶ Interview with Louise Lucas, civil rights specialist HEW, Apr. 23, 1970.

ularly the Cooperative Extension Service. The report was based on information concerning conditions before enactment of Title VI of the Civil Rights Act of 1964. A recent audit of the operation of the Alabama Cooperative Extension Service conducted by the Office of Inspector General of the Department of Agriculture found, more than 5 years after Title VI had been enacted, that the situation had not noticeably improved. Among the findings of the Inspector General were the following:

Our review at 12 county offices disclosed that the professional staffs were providing service through direct contacts to clientele predominantly of their own race This is a repeat finding of a condition reported [in a previous audit]. . . .

Our review of office arrangement and housing of personnel at 12 county offices disclosed that personnel at five county offices were grouped by race instead of occupying space according to their functional assignment. . . .

In four of the 12 county offices reviewed mailing lists were maintained on a racially separate basis. . . .

. . . In three of the 12 counties examined, some nonwhite professionals with the same or higher academic degrees, longer tenure and similar duties received less salary than their white counterparts."⁶⁷

Discrimination persists in the operation of other Department of Agriculture programs. For example, the Agricultural Stabilization and Conservation Service, which administers programs to stabilize farm income through price support payments and crop allotments, runs its program through a system of locally elected farmer committees. In addition to administering the programs, committees serve as an informational link to farmers who participate in and receive the benefits of the programs. Prior to 1968, no black farmer ever had been elected to any committee at the county level in the South.⁶⁸ Even in 1970, although the 1964

⁶⁷ U.S. Department of Agriculture, Office of Inspector General, Audit Report 6089-29-A of Inspector General, 11, 15, and 19 (1969).

⁶⁸ U.S. Commission on Civil Rights, *Civil Rights Digest*, Spring 1969, "1 in 4,000 or a Federal Farm Agency Makes Progress," at 26.

⁶⁹ Letter from Victor B. Phillips, Assistant to the Administrator, Agricultural Stabilization and Conser-

Census of Agriculture indicated that blacks comprised a majority of the farm operator population in 58 counties in the South, only two blacks are among the more than 4,100 such committeemen in the region.⁶⁹

5. DEPARTMENT OF LABOR PROGRAMS

In a September 1968 report of Title VI activity in the programs of the Department of Labor, a wide variety of discriminatory practices in State employment security agencies was disclosed.⁷⁰ These included discrimination in the referral of applicants to employers, segregated facilities in employment offices, discrimination due to location and organization of offices, discriminatory counseling, and discriminatory advertising. In recent compliance reviews and complaint investigations by Department of Labor officials there are continued reports of discrimination. In 1968, the Department of Justice brought suit against the Ohio State Employment Security Agency, charging the agency with discrimination against Negroes.⁷¹ The Department also conducted investigations and lengthy negotiations with the Texas Employment Service agency in an effort to eliminate discriminatory practices without resorting to legal action.⁷²

6. PUBLIC ACCOMMODATIONS

Despite significant progress in opening places of public accommodation, incidents of discrimination are still found. For example, attorneys from the Civil Rights Division of the Department of Justice reported to the Interstate Commerce Commission in May 1967 the segregated use of waiting rooms in the Greyhound Bus Terminal in Greenville, Miss. Two waiting rooms were in use; one for white customers and one for black customers. Even though there were no signs requiring segregation of white and black customers, the fact that all the black customers were in one room

vation Service, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Mar. 23, 1970.

⁷⁰ U.S. Department of Labor, Equality of Opportunity in Manpower Programs, Report of Activity Under Title VI of the Civil Rights Act of 1964 (September 1968).

⁷¹ *United States v. Ohio Bureau of Employment Services*, C.A. No. 68-391, S.D. Ohio (Dec. 10, 1968).

⁷² Interview with Benjamin Mintz, Deputy Director, Office of Special Assistant to the Attorney General, Department of Justice, Feb. 5, 1969.

and all the white customers in the other, showed that a sign was unnecessary.⁷³ A similar observation of the Trailways Bus Terminal in Jackson, Miss., was made by a Civil Rights Commission attorney and reported to the ICC in 1969.⁷⁴ In fact, the Department of Justice continues to receive a substantial number of complaints each year of discrimination in places of public accommodation.⁷⁵

7. PUBLIC FACILITIES

The publication currently used by the State of Virginia to advertise its State park system clearly demonstrates, through the use of photographs, which of the State parks are for whites and which are for blacks. All of the parks except one, formerly called the Prince Edward Lake Negro State Park, show white persons utilizing the facilities, but in the case of Prince Edward State Park, the photographed clientele is all-black. This is a clear violation of Title III of the Civil Rights Act of 1964 and since the State is a recipient of funds from the Bureau of Outdoor Recreation of the Department of Interior, this also represents a violation of Title VI of the Civil Rights Act.⁷⁶

At the Commission's hearing in Montgomery, Ala., in 1968, it was disclosed that public parks in Jackson and Monroeville, Ala. were still operated on a segregated basis.⁷⁷

In 1969, the Mexican American Legal De-

⁷³ Letter from John Doar, Assistant Attorney General, Civil Rights Division, Department of Justice, to Bernard A. Gould, Managing Director, Interstate Commerce Commission, Nov. 3, 1967.

⁷⁴ Letter from George Bradley, Assistant General Counsel, U.S. Commission on Civil Rights, to Bernard F. Schmid, Managing Director, Interstate Commerce Commission, Aug. 19, 1969.

⁷⁵ Interview with Gerald Jones, Chief, Voting and Public Accommodations Section, Civil Rights Division, Department of Justice, Nov. 12, 1969; 1967, 1968, and 1969 Annual Reports of the Attorney General, at 185-186, 67 and 48-49, respectively.

⁷⁶ This matter was called to the attention of the Department of the Interior by a letter from Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, to Edward E. Shelton, Director, Office of Equal Opportunity, Department of Interior, May 8, 1970.

⁷⁷ Letter from William L. Taylor, Staff Director, U.S. Commission on Civil Rights, to Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, Department of Justice, May 22, 1968.

fense fund brought suit to enjoin the Marlin, Tex., community swimming pool from refusing to admit Mexican Americans. The management of the pool agreed to change the policy prior to the pending trial date.⁷⁸

These examples of continuing discrimination do not purport to be exhaustive nor has the Commission undertaken special investigations to uncover them. Rather, they represent some of the instances of continuing discrimination and inequity that have come to the Commission's attention in the normal course of its work. They indicate, however, a national pattern of continuing abridgement of the rights of minority citizens.

They also demonstrate that while progress has been made in eliminating discriminatory practices, many of the problems which existed before civil rights laws were passed, before various Executive orders were issued, and before key court decisions were rendered, continue to exist. The adoption of these civil rights laws and policies have given hope to minority group citizens that they would be freed from the second-class status to which they had been relegated for generations and could assume the role of equal members of American society. Their expectations of equal status have been reasonable, but in many cases they have been frustrated.

It is clear that the full potential of civil rights laws and policies has not been realized. The promise of equal protection of the law for all citizens has not yet been redeemed.

The persistence of discrimination raises serious questions about the way Federal departments and agencies charged with civil rights responsibilities have carried them out. Have these agencies established adequate goals and priorities? Are the mechanisms and procedures adopted to secure compliance adequate to the task? Have the officials responsible for enforcement pursued their duties vigorously enough?

In the chapters that follow, these questions will be examined with respect to the activities of a number of Federal departments and agencies having key responsibilities for civil rights enforcement.

⁷⁸ See final decree in *Noel Beltran v. John C. Patterson*, C.A. No. 68-59W (W.D. Tex. 1969).

CHAPTER 2

EMPLOYMENT

I. INTRODUCTION

Equal employment opportunity is a broadly protected Federal right. Through Presidential Executive orders and congressional legislation, the Federal Government has established this right in its own institutions and has named the Civil Service Commission (CSC) as the agency to oversee and coordinate equal opportunity efforts at the Federal level. The Government also established this right in much of the private business sector and has created a variety of administrative mechanisms in an effort to make it a right in fact, as well as in legal theory.

The Federal requirement of nondiscrimination in private employment, while not as pervasive as that applying to the Government itself, covers most of the Nation's labor force. Through Presidential Executive orders, all private businesses contracting to supply goods or services to the Government, as well as those engaging in federally assisted construction contracts, are required to follow policies and practices of equal job opportunity. Penalties for noncompliance include contract cancellation and debarment from future Federal contracts. While primary responsibility for securing compliance in specific industries is divided among a number of Federal departments and agencies, overall responsibility has been placed in the Office of Federal Contract Compliance within the Department of Labor.

Congress also has acted to prevent private employment discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination by all private employers with 25 or more employees as well as by labor unions and employment agencies. The same title established the Equal Employment Opportunity Commission to administer the law's provisions and promote achievement of its goals.

The formal tools given EEOC to carry out its mission are limited, however, to lawsuits, brought by private parties or the Department of Justice. Nonetheless, EEOC has a variety of other, less formal powers available to it in promoting equal job opportunity.¹

Despite these provisions against employment discrimination, the problem of unequal opportunity remains severe. Minority employment in the Federal establishment remains disproportionately low and minority employees rarely are found in high grade positions or supervisory positions. Despite strong Federal contract requirements, the record of Government contractors, heavily reliant on Federal contracts for their livelihood, is no better than that of employers not subject to these requirements. And while there have been some overall minority employment gains in the general private labor market, discrimination continues largely unabated 6 years after Congress ordained equal employment opportunity as organic law.

¹ There are several other laws affecting public and private employment discrimination. For example, Federal Merit Standards and HUD contractual requirements prohibit employment discrimination by States which participate in a number of Federal programs. For a discussion of the effectiveness of these requirements, see U.S. Commission on Civil Rights, *For ALL the People . . . By ALL the People* 1969. Further, Title VI of the Civil Rights Act of 1964 prohibits employment discrimination in federally assisted programs where a primary purpose of the program is to provide employment. For a discussion of Title VI as related to employment, see ch. 4, *infra*. In addition, an 1870 civil rights law providing that all persons shall have the same right to make and enforce contracts as white citizens has been ruled by some courts to prohibit all employment discrimination. The National Labor Relations Act, while not specifically designed to provide relief for employment discrimination because of race, has been held by courts to prohibit such discrimination by employers and labor unions. Treatment of these laws is beyond the scope of this report.

The harsh fact is that these laws are not working very well. In some cases, enforcement procedures and mechanisms have inherent weaknesses which limit the law's effectiveness. In most cases, however, the enforcement agencies have not used their procedures and mechanisms with the boldness and imagination necessary for maximum effect. And the area of private employment has been marked by a failure of coordination which has diluted the Federal enforcement effort.

II. FEDERAL EMPLOYMENT—The Role of The Civil Service Commission

A. Introduction

With a work force of nearly 3 million civilians (almost 4 percent of the country's total work force), the Federal Government is the Nation's largest employer.² There are thousands of different job categories within the Federal civil service, ranging from unskilled laborers to those involving highly complex technical and scientific skills and administrative positions of broad scope and responsibility. Although Washington, D.C., is the focal point for most Federal activity, U.S. Government employees are located throughout the country and in most places throughout the world.

All issues of importance to the Nation—foreign relations, rural and urban problems, social welfare, and military activities—are reflected in the variety of occupations and skills within the Federal civil service.

If for no other reason than the size and diversity of its work force, the Federal Government serves as the standard bearer in the employment field for the entire country. In fact, the Government today compares favorably with private employers, as measured by such commonly accepted indicia as wage and salary levels, job security, insurance protection, vacation and sick leave benefits, retirement plans, grievance and appeal procedures, and other mechanisms designed to assure equitable treatment for all who are employed or who seek employment. But in terms of equal employment opportunity the relative position of the Federal Government is less clear. A

² As of January 1970, civilian employment in all branches of the Federal Government totaled 2,929,564, (116 Cong. Rec. E1521, Mar. 3, 1970).

tradition of discrimination in the Federal service accounts in part for both the aura of suspicion and the actual shortcomings which characterize the Federal Government employment picture.

For more than 50 years following passage of the Civil Service Act of 1883,³ discrimination against nonwhite employees—often total minority exclusion—was accepted practice among Federal agencies. For example, racial segregation in the Census Bureau, which was started during William Howard Taft's administration, continued into the 1920's. During President Woodrow Wilson's administration, Secretary of the Treasury William G. McAdoo and Postmaster General Albert S. Burleson established similar policies. The President condoned their actions, stating: "I would say that I do approve of segregation that is being attempted in several of the departments."⁴ In 1914, the Civil Service Commission introduced a requirement that a photograph be attached to applications for Government jobs. And during the First World War, Negro clerks employed by the Navy were required to work behind screens.⁵

Overt discrimination continued well into the administration of Franklin D. Roosevelt. For example, the congressional restaurant was still segregated in 1934,⁶ as were dual lunchrooms in many Federal agencies. Various Federal projects, most notably the Civilian Conservation Corps, embraced discriminatory practices during the New Deal era.⁷

Not until late 1940—a mere 30 years ago—did the Federal Government officially promulgate a policy of nondiscrimination. Remedial action was initiated by Congressman Robert Ramspeck of Georgia, who introduced legislation to revise the civil service, including provisions to prohibit racial discrimination. On November 7, 1940, a few weeks before passage of the Ramspeck Act, President Roosevelt issued an Executive order barring discrimina-

³ See Supplement to the Revised Statutes of the United States, vol. I, 2d ed, ch. 27, p. 392, 47 Cong., 2d Sess., Jan. 16, 1883.

⁴ Krislov, *The Negro in Federal Employment: The Quest for Equal Opportunity* 20, 1967.

⁵ *Id.*, at 21.

⁶ *Id.*, at 26.

⁷ *Id.*, at 23.

tion in employment and promotion within the Federal service.⁸

Thus, skepticism expressed by many minority group members about the genuineness of recent Federal pronouncements on equal employment opportunity is, at least in part, a legacy of the history of discrimination by the Federal Government, itself. If this cynicism is to be overcome, it is necessary that the Federal Government do more than merely speak out on the subject, more than adopt measures designed to bring about the desired ends. It must actually produce the kind of results that demonstrate its credibility to reduce the distrust between minority groups and their own government.⁹

B. Background and Legal Authority for the Federal Equal Employment Opportunity Program

Although discrimination by the government because of race, creed, color, or national origin has always been contrary to constitutional principles, it is thus only within recent years that presidential directives and congressional action have reflected this fact. Federal law today is unequivocal with respect to equal employment opportunities for Federal employees. The U.S. Code states:

It is the policy of the United States to insure equal employment opportunities for [Federal] employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.¹⁰

⁸ Executive Order 8587 (1940).

⁹ Discrimination against women has also characterized Federal employment practices. The comprehensive CSC, Bureau of Management Services' *Study of Employment of Women in the Federal Government* 1968, contains an outline of milestones in the quest for women's rights in U.S. Government employment, and provides a detailed statistical picture of the status of women within the Federal work force, as of Oct. 31, 1966, and Oct. 31, 1968.

Many of the issues discussed in the ensuing pages, e.g., training, complaint procedures, sanctions and remedies, goal setting, interagency liaison, etc., are as pertinent for women as for blacks, Mexican Americans, and other minority groups. However, numerous other problems unique to the status of women have not been dealt with in this chapter. Similarly, the Federal Women's Program and the actual function of the Federal Women's Program Coordinators in each of the agencies would have required separate treatment which was beyond the scope of the present study.

¹⁰ 5 U.S.C. 7151.

Executive action has outpaced that of the legislative branch. During the past quarter of a century, each of our Presidents has issued at least one Executive order dealing with equal employment opportunity in the Federal service.

1. EXECUTIVE ORDERS 9980, 10590, 10925, AND 11246

In 1948, President Truman issued Executive Order 9980 setting forth "a policy of fair employment throughout the Federal establishment, without discrimination because of race, color, religion, or national origin" ¹¹ President Eisenhower reiterated that policy in Executive Order 10590 ¹² and sought to have it applied in a "fair, objective, and uniform manner" by establishing the President's Committee on Government Employment Policy. A significant shift in program emphasis, from nondiscrimination to affirmative action, occurred in March 1961. Recognizing the "urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity," President Kennedy promulgated Executive Order 10925, establishing the President's Committee on Equal Employment Opportunity (PCEEO). ¹³ Kennedy directed the newly established committee to study and recommend "affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of non-discrimination within the executive branch of the Government." ¹⁴

In 1965, President Johnson promulgated Executive Order 11246. ¹⁵ Part I of that order reaffirmed the Government's policy of providing equal opportunity in Federal employment and prohibiting discrimination on the basis of race, creed, color, or national origin. ¹⁶ The Civil Service Commission was called upon to "super-

¹¹ Executive Order 9981 (1948).

¹² Executive Order 10590 (1955).

¹³ Executive Order 10925 (1961).

¹⁴ Executive Order 10925 (1961), sec. 201.

¹⁵ Executive Order 11246 (1965). Part II of this order, which deals with "Nondiscrimination in Employment by Government Contractors and Subcontractors" is much more specific and rigorous with respect to duties imposed on contractors than is Part I with respect to Federal agencies' responsibilities.

¹⁶ Executive Order 11375 (1967) amended Executive Order 11246 to prohibit discrimination on the basis of sex.

wise and provide leadership and guidance in the conduct of equal employment opportunity programs . . . within the executive departments and agencies and . . . review agency program accomplishments periodically." CSC was further authorized to issue appropriate regulations, orders, and instructions with which agencies were directed to comply. In addition, CSC was directed to consider complaints of discrimination in Federal employment and to hear appeals of decisions following impartial review of the agency involved. Agencies themselves were charged with establishing and maintaining a "positive program of equal employment opportunity for all civilian employees and applicants . . ." ¹⁷ After consultation with minority and civil rights organizations, unions, and Federal agencies, the Civil Service Commission issued comprehensive equal employment opportunity regulations which outlined action program requirements for agencies and an improved system for the processing of individual complaints of discrimination.

2. CSC'S ROLE UNDER EXECUTIVE ORDER 11246

Despite this mandate, CSC's role under Executive Order 11246 was more characterized by passivity than by "leadership"; more by neutrality than by "guidance." A January 1969 memorandum prepared for John W. Macy, Jr., then CSC Chairman, by the staff of the Community Relations Service, in cooperation with several high level black Federal officials, was sharply critical of the equal employment opportunity posture of the Federal Government and, specifically, of CSC's performance under the Executive order. ¹⁸ The memorandum stressed that "application of the merit system without regard to existing preferential practices and procedures is tantamount to ignoring the most prevalent form of discrimination in employment." ¹⁹ Indeed, as the memorandum

¹⁷ Executive Order 11246 (1965).

¹⁸ "The Equal Employment Posture of the U.S. Federal Government," memorandum prepared by Roger W. Wilkins, Director, Community Relations Service, and others, for John W. Macy, Jr., Chairman, CSC, Jan. 14, 1969.

¹⁹ Id., at 4. The memorandum set forth other areas, such as recruitment, security clearance, and training, in which it alleged that inadequate activity by CSC and other agencies had allowed discrimination to continue unabated.

pointed out, the CSC approach, which focused primarily on problems of overt discrimination, failed to significantly affect most of the more subtle, pervasive, and institutionalized forms of bias. ²⁰

It was also charged that CSC avoided "defining acceptable standards of performance against which realistic measurements of progress" might be made; failed to act energetically to eliminate racial and cultural bias in examinations; permitted agencies to follow traditional (and hence discriminatory) methods in promotion policies; was hesitant to recommend, much less require, adequate data systems by race, to enable agency equal employment opportunity programs to be adequately evaluated; and failed to establish within its own agency the necessary centralized, high level structure for adequately directing and coordinating equal employment opportunity efforts. ²¹

3. CONTINUING INEQUITIES IN FEDERAL EMPLOYMENT

Whether judged by absolute numbers, grade levels, agency functions, or geographic distribution, employment disparities were evident.

²⁰ Robert Hampton, Chairman of the CSC, has recently indicated to this Commission that:

"[E]qual employment opportunity under our merit system is not a program to offer special privilege to any one group of persons because of their particular race, religion, sex, or national origin. Equal employment opportunity applies to all persons including those of different races, women, handicapped persons, veterans, rehabilitated offenders, and others. It means the elimination of any discrimination on factors irrelevant to the job. It means helping persons without the necessary skills to gain those skills so they can qualify and compete for a job and advancement. It means making all segments of the population fully aware of employment opportunities. It means the removal of unnecessary barriers to the employment of particular groups of persons and it means support of community activities designed to facilitate employment of persons who otherwise might not have the opportunity. In short, it means the taking of affirmative action to make it possible for all groups of persons, including those who are disadvantaged educationally or otherwise, regardless of their race, sex, or national origin, to compete for Federal employment on an equal footing with other citizens. Letter from Robert E. Hampton, Chairman, Civil Service Commission, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, July 24, 1970."

²¹ Id., at 5, et seq.

For example, 1967 data²² showed less than 70,000 Spanish Americans [this category includes Mexican Americans, Puerto Ricans, and others of Latin American or Spanish origin or ancestry] out of a total of more than 2½ million Federal employees—2.6 percent of the work force—despite the fact that there are an estimated 10 million Spanish Americans in the United States—approximately 5 percent of our total population.²³

Nearly 15 percent [399,842] of Federal employees were Negroes, according to the 1967 study.²⁴ The postal service alone, with 18.9 percent Negro employment, accounted for one-third of the total. Minority representation in other agencies was less impressive. For example, fewer than 5 percent of Department of the Interior employees were Negro; National Aeronautics and Space Administration (NASA) had less than 1,000 blacks among its more than 33,000 employees—a 2.9 percent representation. Certain bureaus, divisions, and occupational categories within the various agencies presented an even more dismal picture. For example, despite the high proportion of nonwhites in the Post Office, only 16 minority group employees could be counted within the elite cadre of 1,134 postal inspectors as of April 1968. The picture was even more discouraging with respect to rural carriers. Within this category, only 161 (slightly more than one-half of 1 percent) of 31,071 employees were from minority groups according to July 1968 data.²⁵

The Federal Aviation Administration, a component agency of the Department of Transportation, employing more than 20,000 air traf-

²² U.S. Civil Service Commission, *Study of Minority Group Employment in the Federal Government* (1967) at 155.

²³ Census data as of Nov. 30, 1969, show an increase in employment of Spanish surnamed workers to 73,619 from 68,945 in 1967. Spanish surnamed employees now comprise approximately 2.8 percent of the Federal work force. CSC News Release, May 14, 1970.

²⁴ U.S. Civil Service Commission, *Study of Minority Group Employment in the Federal Government* (1967) supra note 22, at 3. November 1969 data list 389, 251 Negroes; 15 percent of the work force. CSC News Release, May 14, 1970.

²⁵ U.S. Post Office Department, *Equal Employment Opportunity in the Post Office Department*. A report to the Postmaster General by the Post Office Department Advisory Board, 1969 at 52.

fic controllers as of June 30, 1969, had fewer than 550 minority employees within this occupational group. Moreover, there were only 13 nonwhites among the 1,612 supervisory and administrative personnel in GS grades 14 through 18. The category of flight standards inspectors was filled by 1,764 employees of whom 27 were nonwhite. Of these, only two were among the 428 employees at GS-14 and above.²⁶

Taking into account the racial composition of certain areas in the country, disparities in minority employment are often even more striking. Census data for November 1967 for the Atlanta Civil Service Region²⁷ is illustrative. Negro employment, listed at 13.1 percent, is overwhelmingly concentrated at the lowest pay levels. Thus, only 130 out of more than 25,000 GS-12 through GS-18 employees were Negro (0.5 percent of the total). Less than 1 percent of wage-board employees earning \$8,000 or more per year were black. And among 538 Postal Field Service (PFS) employees in grades 12 through 20, there were only three Negroes.²⁸

During the past decade, the ratio of Negroes to whites in the Federal service has slightly exceeded the ratio of Negroes to whites in the total U.S. population.²⁹ However, year after year, most black employees have been consistently concentrated at the lower end of the salary scale within every pay plan. A comparison of 1962 and 1967 data is revealing.

In the former year, 0.8 percent of all employees in GS-12 through GS-18 positions were Negro. By November 1967, the percentage had only risen to 1.8. Wage-board and Postal Field Service pay categories showed fast-

²⁶ U.S. Department of Transportation, Federal Aviation Administration, Office of Civil Rights, *Minority Group and Women Employment Reports* as of June 30, 1969, Report No. 5 (1969).

²⁷ Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virgin Islands.

²⁸ U.S. Civil Service Commission, *Study of Minority Group Employment in the Federal Government* 1967, supra note 22.

²⁹ Negroes constituted 13 percent of the Federal labor force in June 1962; 13.1 percent in June 1963; 13.2 percent in June 1964; 13.5 percent in June 1965; 13.9 percent in June 1966; and 14.9 percent in November 1967. (Preliminary data from the November 1969 census lists Negro employment at 15 percent of the total Federal work force.)

er rates of improvement, although the 1967 picture still reflected gross underrepresentation of Negroes in better paying jobs.³⁰

Spanish American³¹ employees fared no better than blacks during the same period. In 1962, this group constituted 2.2 percent of all Federal employees.³² By November 1967, the percentage had only risen to 2.6. And in 1967, Spanish Americans were a mere 0.6 percent of Federal employees earning more than \$8,000 per year.

4. PRESIDENT NIXON'S MESSAGE— EXECUTIVE ORDER 11478

Shortly after taking office, President Richard M. Nixon called on the Chairman of the Civil Service Commission to review the Government's efforts to achieve equal employment opportunity and make recommendations for policy and program changes.³³ Based on CSC's report³⁴ the President issued Executive Order 11478 on August 8, 1969,³⁵ prefacing it with a statement reemphasizing several points made in the report. The President's statement underscored the following points:

1. Assuring equal employment opportunity in a Federal department or agency is the responsibility of the organization's head.

2. Equal employment opportunity must be

³⁰ In June 1962, 0.6 percent of wage-board employees earning over \$8,000 per year were black; by November 1967, the figure had risen to 3.9. Postal Field Service showed 0.4 percent black employment in June 1962 in PFS grades 12 thru 20, and 2.4 percent in November 1967 in PFS 12 through 20 positions. Negro employment in PFS grades 13 thru 21 had risen to nearly 3.7 percent as of November 1969 according to information published in a May 14, 1970 CSC News Release.

³¹ As used in reporting Federal employment data for 1967, the term "Spanish American" included persons of Mexican American, Puerto Rican, and other Latin American or Spanish origin or ancestry. Currently, the terminology "Spanish surnamed" has replaced "Spanish American."

³² Interview with George Mills, Chief, Statistical Processing Section, Bureau of Manpower Information Systems, Feb. 17, 1970.

³³ President's Memorandum of March 28, 1969, to heads of Departments and Agencies on Equal Employment Opportunity.

³⁴ U.S. Civil Service Commission, *Toward Equal Opportunity in Federal Employment*, A Report to the President from the United States Civil Service Commission, August 1969.

³⁵ Executive Order 11478 (1969).

come an integral part of day-to-day management.

3. Emphasis should be on best possible utilization of the skills and potential of the present work force. Opportunities to improve skills and serve at supervisory and administrative levels should be provided.

4. Efforts to publicize opportunities in the Federal Government at professional levels should be widespread so that persons from diverse ethnic, racial, and religious backgrounds can assume positions of leadership.

5. The Government must provide special employment programs for the economically and educationally disadvantaged.

Executive Order 11478 extends and enlarges the policy enunciated in previous Executive orders. By its terms agencies are required to establish and maintain an affirmative program of equal employment opportunity, including provision of sufficient resources to administer the program. Full utilization of present skills of each employee is called for. Other measures include: providing maximum opportunity for employees to enhance their skills; offering managerial and supervisory training designed to assure understanding and implementation of the Federal policy; and expanding recruitment activities and local level efforts designed to reach all sources of job candidates and to improve community conditions affecting employability. The Civil Service Commission is directed to review and evaluate agency program operations, obtain necessary reports, and advise the President as is appropriate on overall progress.

5. CSC'S RESPONSE—CHAIRMAN HAMPTON'S STATEMENT

Two weeks after Executive Order 11478 was promulgated, CSC announced a staff reorganization designed to implement "the newly strengthened program . . ." ³⁶ On September 4, 1970, a meeting was convened of Department Assistant Secretaries for Administration, agency executive directors, directors of Equal Employment Opportunity, directors of personnel, and coordinators for the Federal women's program, to discuss plans for carrying out the new directives on equal opportunity. In a statement distributed to participants

³⁶ CSC News Release, Aug. 25, 1969.

at the September 4 meeting, Chairman Robert E. Hampton said:

With the issuance of Executive Order 11478, President Nixon set new directions to assure equality of opportunity in every aspect of Federal employment. For the first time in an Executive order, the responsibilities of Federal department and agency heads for affirmative action in equal employment opportunity are clearly enunciated. The order emphasizes the integral relationship of equal opportunity and personnel management in the employment, development, advancement and treatment of civilian employees of the Federal Government.

C. Role of the Civil Service Commission under the Executive Order

Prior to August 1969 CSC's civil rights responsibilities were widely diffused throughout the agency. The problems which this posed, especially with respect to its responsibilities under Executive Order 11246, had been widely noted.³⁷ In response to the new Executive order, the staff reorganization took place.

1. STRUCTURE OF THE EQUAL EMPLOYMENT OPPORTUNITY OFFICE³⁸

In conjunction with the reconstituted operation, Nicholas J. Oganovic, CSC's Executive Director (level V of the executive schedule), was named Coordinator of Federal Equal Employment Opportunity, reporting directly to the Commissioners. Two high level staff positions, Director of Federal Equal Employment Opportunity (Communications) and Director of Equal Employment Opportunity (Operations), were located immediately below that of the Coordinator. These roles were occupied respectively by James Frazier, Jr. (GS-15) and Irving Kator (GS-16). The former was made responsible for "coordinating operations with minority group organizations and with other Federal agencies having civil rights responsibilities"; the latter, responsible for program

³⁷ E.g., "The Equal Employment Posture of the U.S. Federal Government," supra note 14. See also, "Memorandum on Equal Employment Opportunity Organization of the Civil Service Commission" and covering letter from Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, Justice Department, to John W. Macy, Jr., Chairman, Civil Service Commission, Sept. 18, 1968.

³⁸ The office originally called the "Office of Coordination of Equal Employment Opportunity," is now the "Office of Federal Equal Employment Opportunity."

operations and activities within the Commission and in Federal agencies as well.³⁹

As of October 1969, a 16-member staff was planned for the newly created Equal Employment Opportunity Office. On November 18, 1969, Mr. Hampton announced the designation of CSC's 10 regional directors as coordinators for the Equal Employment Opportunity program in their respective areas.⁴⁰ Subsequently, a new midlevel position of Equal Employment Opportunity Representative was created within each of CSC's regional offices.

Although such a centralized, high level office is essential for the direction, cohesiveness, review, and stature of the equal employment opportunity program, many equal opportunity functions are so intrinsically tied to CSC's mission that it is impossible to separate these from other responsibilities in its bureaus. While the equal employment office provides substance, coordination, and stimulation, heavy responsibility for the program's success rests within the Commission's several bureaus.

2. MAJOR COMPONENTS OF THE EQUAL EMPLOYMENT OPPORTUNITY EFFORT

a. Recruitment

Recruitment is the logical first step to consider in attacking job discrimination and inequitable job opportunity since it is the principal means of bringing new employees into Federal service.

In recent years, concepts of affirmative action have begun to take hold. CSC officials, with whom Commission staff spoke, recognized the need for their own agency and others to exercise initiative in searching out, informing, and attracting minority group⁴¹ candidates.

³⁹ CSC News Release, Aug. 25, 1969. On May 21, 1970, CSC announced a further reorganization of its civil rights office. Mr. Frazier was promoted to a GS-16 and named as the sole Director of the Office of Federal Equal Employment Opportunity. He will assume all of the duties of the office which had previously been shared with Mr. Kator and will continue to report directly to Mr. Oganovic. Mr. Kator was named Assistant Executive Director and will work with Mr. Oganovic on a variety of special assignments not necessarily relating to civil rights. Civil Service Commission News Release, May 21, 1970.

⁴⁰ Civil Service Commission News Release, Nov. 18, 1969.

⁴¹ The euphemism, "disadvantaged" was generally used. Most CSC officials appeared to be sensitive to pos-

A variety of recruiting methods are used in keeping with the diversity of jobs, skill levels, location of Federal offices and installations, and sources of potential manpower. Edward Dunton, Director of the Bureau of Recruiting and Examining, describes the problem in terms of "getting the word out."⁴² Post offices—more than 1,000—provide information on job openings and give tests at frequent intervals. Announcements are sent to labor unions, minority group organizations, veterans organizations, college placement centers, U.S. employment offices, and other public and private agencies. Written materials in Spanish are utilized in parts of the country with high concentrations of Spanish-speaking people. Announcements are sometimes given to radio and press. Federal Job Information Centers are located in 65 cities throughout the country, including Alaska, Hawaii, Puerto Rico, and the Canal Zone. Finally, considerable information is disseminated simply through personal contacts—present Federal employees passing the word to relatives, friends, and neighbors.

CSC is responsible for general recruiting—informing the public about employment opportunities, getting people to apply, and take qualifying examinations for Federal hiring. CSC also trains recruiters from other agencies.⁴³

Recruitment training concentrates on problems of minority group recruitment including sources of referral, techniques, and the value of using recruiters who are themselves black, Spanish-speaking, or members of other minority groups, to reach blacks, Mexican Americans, and other minority group members.

sible accusations of "preferential treatment" or "reverse discrimination" and, therefore, tended to speak of programs aimed toward helping the "disadvantaged" rather than programs aimed toward helping "minority groups" or, more specifically, "Negroes," "Mexican Americans," or other ethnic minority groups.

⁴² Interview with Edward Dunton, Director, Bureau of Recruiting and Examining, Oct. 24, 1969.

⁴³ Recruitment in its true sense is seeking applicants for specific jobs and is a basic agency responsibility. Thus, in addition to the ongoing general CSC recruitment effort, other Federal agencies recruit for their own specific needs. In some instances, Federal agencies pool their efforts in recruiting for particular occupations or join in conducting job clinics on college campuses and other central locations.

The pace of the college recruitment program, especially that directed toward black students, has picked up in recent years. CSC estimates that one of every 10 recruitment visits to predominantly white colleges is made by the Government [CSC and/or other agencies], while one out of every five recruitment visits to predominantly black colleges is conducted by Federal officials. The ratio of visits to numbers of students clearly reveals the emphasis being put on minority recruitment. A visit by one or more Federal officials is made for every 20 black students; the ratio for whites is estimated at 1:225.⁴⁴

CSC reports that similar, specialized efforts are made to recruit Spanish Americans, although data are not kept.⁴⁵ Despite the intensity of these efforts, no method for assessing the efficacy of recruitment has been developed to date.⁴⁶

Not all recruitment efforts are directed to college students or are aimed at filling white-collar jobs. A summer employment program for disadvantaged youths has provided part-time jobs for approximately 70,000 teenagers during each of the past 2 years.⁴⁷ Priority is given those in greatest need, i.e., children from families on welfare or others near the poverty level. Recruitment is done through local U.S. Employment Service (USES) offices,⁴⁸ which,

⁴⁴ Interview with Thomas McCarthy, then Director of College Relations and Recruitment, currently, Assistant to the Deputy Executive Director of CSC, Nov. 12, 1969. Hard racial data are not maintained. These estimates are on the assumption that all students at predominantly black colleges are black and that all students at predominantly white schools are white. Consequently, the ratios may be slightly exaggerated.

⁴⁵ Id.

⁴⁶ However, College Placement Services, Inc., recently conducted a survey of June 1967 graduates from 51 black colleges. Of nearly 1,400 graduates, 656 had accepted jobs with government (primarily Federal Government) while only 741 had gone into private industry. Federal employment comprises less than 4 percent of all U.S. employment. McCarthy interview, supra note 44.

⁴⁷ Interview with James Poole, Director, Office of Youth and Economic Opportunity, Nov. 18, 1969.

⁴⁸ CSC officials have expressed satisfaction with the cooperation given and the effectiveness of USES efforts on behalf of the summer program and other programs designed to aid disadvantaged youth. Poole interview, supra note 47. However, as reflected elsewhere in this report, the overall USES operation has fallen short with

in turn, maintain contracts with high school guidance counselors.

Although racial data are not maintained, James Poole, CSC's Director of the Office of Youth and Economic Opportunity, estimates that 85 percent of the more than 260,000 summer youth hired under the program during the past 4 years are from minority groups.⁴⁹

Recruitment for low-skill and blue-collar jobs is frequently closely linked to the special training programs which are discussed later in this report. Recruitment of minority group members for senior level and executive positions has often been planned primarily for filling civil rights and staff assistant slots which carry limited decisionmaking authority.⁵⁰

b. Examinations and Hiring

The examination process of various kinds is the vehicle for selection of most Federal employees.⁵¹ It is the means of screening more than 2.5 million applicants annually and helping provide 300,000 to 450,000 new Federal employees each year. The crucial function of examinations has brought the entire procedure under which they operate under attack from individuals and groups concerned with equal opportunity. Over the years, examinations often have had the effect of barring blacks and Spanish-speaking Americans from the chance to obtain a Federal job. In some instances, heavy emphasis on verbal skills—often not related to the requirements of the job—have tended to screen out minority group members denied an adequate basic education. Similarly, the premium placed on higher education as an aid in evaluating candidates for promotion has drastically curtailed upward mobility for many black and brown employees. In recent years, the inherent cultural bias in objective tests has come to be recognized.⁵²

regard to many other aspects of equal opportunity. See ch. 4 infra.

⁴⁹ Poole interview, supra note 47.

⁵⁰ "The Equal Employment Posture of the U.S. Federal Government." Memorandum prepared by Roger W. Wilkins, Director, Community Relations Service, and others, for John W. Macy, Jr., Chairman, CSC, Jan. 14, 1969, at 9-10.

⁵¹ Certain positions are exempt from the examination requirement, e.g., attorneys.

⁵² See U.S. Commission on Civil Rights, *Employment Testing: Guide Signs, Not Stop Signs*, Clearinghouse Publication No. 10, 1968. And, currently CSC, in coop-

Moreover, Albert Maslow, Chief, Personnel Measurement Research and Development Center, advised Commission staff that studies have shown that the nature of the test setting and interview environment may significantly inhibit performance by minority group members. The impersonal, formal, authoritarian aspect of large-scale testing situations, which are generally conducted by white officials in "establishment" settings, epitomize for many persons from minority groups the dominance of white society. Perceived as alien and unfriendly, the examination setting is scarcely conducive to optimum performance.⁵³ CSC is cognizant of these factors, and has been working to assure that examiners exhibit appropriate understanding to all applicants.

(1) Types of Examinations

(A) In General. For many, the term "examination" connotes a written question and answer test. However, as used by CSC, an "examination" is any method by which a candidate is determined to be qualified for a Federal job. Currently there are some 20 basic examination plans.⁵⁴ These can be broadly grouped as: (1) written examinations, and (2) unassembled examinations. The former category includes both aptitude and achievement tests. The aptitude test in widest use is the clerk/carrier postal examination which screens an estimated three-quarters of a million applicants each year.⁵⁵

The Federal Service Entrance Examination (FSEE), designed to select candidates for a wide range of professional, technical, and management jobs, is another of the more familiar written aptitude tests.⁵⁶ Achievement tests are used to fill positions such as typists and stenographers. Examinations for apprentice trades are primarily achievement tests.⁵⁷ Ar-

eration with the Educational Testing Service, is conducting in-depth studies of cultural bias in employment testing. Interview with Albert P. Maslow, Chief, Personnel Measurement Research and Development Center, Bureau of Policies and Standards, Nov. 19, 1969.

⁵³ Maslow interview, supra note 47.

⁵⁴ Dunton interview, supra note 42.

⁵⁵ About 100,000 hirings are made annually in the Postal Service.

⁵⁶ The FSEE accounts for up to 10,000 placements each year. See U.S. Civil Service Commission *Preparing for the Federal Service Entrance Examination* 1966.

⁵⁷ Several years ago a "programed" learning test was started on an experimental basis. The examination is de-

arithmetical and algebraic components, formerly contained in these exams, have been largely eliminated with a view toward designing the exam to predict more accurately the applicant's ability to do the job. Also, by dropping the older tests, CSC sought to give greater opportunity to students who lacked good high school preparation in these subjects but who might have the ability to learn them in the apprentice program itself.

Unassembled examinations have no written test component. They consist of an evaluation of education, experience, or both.⁵⁸ An attempt is made to quantify educational and experiential elements in each applicant's background as measured against job standards established by CSC's Bureau of Policies and Standards.

Regardless of whether the examination is written or unassembled, efforts have been underway at CSC for some time to reassess all examinations in terms of their relevance to the actual job to be performed. A recent example of this approach is the Worker-Trainee Examination which has been in use since 1968.

(B) Worker-Trainee Examination. The Worker-Trainee Examination is a method of bringing unskilled persons into Federal service at beginning grade levels. No written test is given nor is experience necessary. The examination, inaugurated in July 1968 in conjunction with the Concentrated Employment Program (CEP),⁵⁹ is aimed at finding persons who are

signed to test the ability of applicants to become familiar with the principal elements and their application in a particular trade. The Bureau of Engraving has begun using this with promising results from the standpoint of EEO. Dunton interview, *supra* note 42.

⁵⁸ In comparison to written examinations, the unassembled examination is time consuming and costly to score. In large-scale selections, such as post office jobs, it would be impractical to have an examination which did not lend itself to mass administration and scoring.

⁵⁹ The Concentrated Employment Program (CEP) is a system of packaging and delivering manpower services. Working through a single contract with a single sponsor (usually a Community Action agency), the Manpower Administration of the Department of Labor provides a flexible package of manpower programs, including outreach and recruitment; orientation; counseling and job coaching; basic education; various medical, day care, and other supportive services; work-experience or vocational training under a variety of individual manpower programs; job development and placement; and individualized followup after placement.

likely to be satisfied with a steady, secure, routine job despite low salary. Motivation is evaluated and willingness to work at a job that may be boring and tiring is an important requirement. Thus, an overqualified candidate—a college student or a high school graduate, for example, as compared to a high school dropout—would actually score lower on this examination. Candidates who have participated in CEP job training programs are given highest priority. In fiscal year 1969, about 10,000 disadvantaged persons, mostly from minority groups, entered Federal service at GS grade one, Postal Field Service grades one through three, and wage-board grades one and two, via the worker-trainee route. As of the fall of 1969, an estimated 1,000 persons were being hired through this examination each month.⁶⁰ CSC has been encouraging agencies to develop more openings at the worker-trainee level by breaking certain higher grade jobs into their component parts—creating for example, two low-skill positions to perform one more complex job or separating menial tasks involved in certain mechanical, technical, or even professional positions, in order to create another job while simultaneously utilizing persons with high level skills more comprehensively.⁶¹ Expansion of the program had been limited, however, by agency personnel ceilings. In the fall of 1969, CSC requested that the Bureau of the Budget exempt worker-trainee placements from personnel ceilings. BOB responded favorably and by January of this year, advised CSC that 25,000 spaces

Concentrated employment programs are established by priority in urban neighborhoods or rural areas having serious problems of unemployment and underemployment, coordinating and concentrating Federal manpower efforts to attack the total employment problems of the hardest hit of the disadvantaged in a way that will make a significant impact on the total well-being of the area. See, Office of Economic Opportunity, *Catalog of Federal Domestic Assistance* (1969).

⁶⁰ The examination is offered at approximately 100 locations throughout the country, including all of the more than 70 CEP cities. Between 75,000 and 80,000 applications had been received during the first 5 months of fiscal year 1970.

⁶¹ The Worker-Trainee program ironically tends to exacerbate the problem of the disproportionately heavy concentration of nonwhites within the lowest grade levels. Opportunity for advancement from worker-trainee slots is limited.

would be exempt on a Government-wide basis for use by agencies participating in the Public Service Careers program.⁶² CSC has responsibility for allotting exemptions to agencies upon their request.⁶³

The Worker-Trainee Examination program, in common with most of the newer, innovative examinations, training programs, and recruitment efforts, is being evaluated by the Research and Development Center of the Bureau of Policies and Standards under the direction of Dr. Maslow.

(C) **The FSEE.** From a civil rights viewpoint, the Federal Service Entrance Examination (FSEE) has undoubtedly been the most widely criticized of all examinations utilized by the CSC. A written test in use since 1955, the FSEE is designed to screen, via a single testing device, applicants for approximately 200 different types of managerial, technical, and professional occupations in approximately 50 Federal agencies throughout the country. The FSEE is intended to measure verbal ability⁶⁴ and quantitative ability⁶⁵ required by these positions. These factors correlate significantly with individual academic background. Educational disabilities experienced by many Spanish Americans, blacks, and other minorities necessarily have placed members of these groups at a decided disadvantage in this test.

Precise racial data, which would enable an accurate appraisal of the extent to which the FSEE screens out minority group applicants, are not available. CSC officials concede, however, that the percentage of blacks and Mexi-

⁶² See CSC Bulletin No. 410-52, June 3, 1970. The Public Service Careers Program is an effort to "employ persons with limited education and skills within the Federal Government and to expand current activities to upgrade lower level Federal employees." It is described as a "hire first and train later" program designed for career development with a timetable for training and promotional opportunities.

⁶³ Telephone conversation with Edward Dunton, Director, Bureau of Recruiting and Examining, June 5, 1970.

⁶⁴ "Verbal ability" includes the knowledge of words, comprehension of reading materials, and appreciation of the correct use of language.

⁶⁵ "Quantitative ability" is the ability to understand ideas presented in terms of number concepts and the ability to apply basic arithmetic to solving practical problems.

can Americans who pass is low. Over the past several years, an average of 10,000 to 14,000 persons out of approximately 150,000 applicants entered Federal service annually via the FSEE. The majority of these new employees are recent white college graduates.

Basic FSEE requirements for entry-level GS-5 positions are:

(1) A bachelor's degree or 3 years of responsible experience, or a combination of the two; plus a minimum FSEE rating of 70, or a combined score on the Graduate Record Examination Aptitude Test of 1,000; or

(2) A bachelor's degree within the previous 2 years and either a 3.5 grade point average (4.0 equals an "A") or rank in the top 10 percent of the class. No written test is required.

Entry at the GS-7 level is also possible. Additional education and/or higher scores on the written portion of the examination are required.

Requirement No. 2 above, instituted in 1967 with a view toward bringing more minority group members into managerial and administrative positions, has had only limited value. Thus, only about 600 persons (approximately 5 percent of those appointed from the FSEE register) enter Federal service through this avenue each year. Of this total, however, an estimated 200 or 300 are nonwhite.⁶⁶

(2) Other Special Hiring Programs

(A) **Mexican Americans.** CSC has urged Federal agencies with southwestern offices and installations to make special efforts to recruit, hire, and promote Mexican Americans.⁶⁷ These agencies are also expected to be alert to available job opportunities outside their region (and outside their own agency) which will enable more Mexican Americans to move into the mainstream of Federal employment.

(B) **Indians.** In recent years, CSC has moved more imaginatively to reach and enlist other minority group members in Federal service. For example, it is working with the Bureau of Indian Affairs (BIA), especially in

⁶⁶ This number represents about 2 percent of the total FSEE hires each year.

⁶⁷ Interview with James Behr, Chief, Manpower Sources Division, Bureau of Recruiting and Examining, Oct. 29, 1969.

the Seattle and Denver regions, to increase Federal employment of Indians.⁶⁸ Since BIA is authorized to give preference to Indians in employment, that agency is being encouraged to serve as an entry vehicle for Indians who can subsequently move more readily into jobs with other Federal agencies.⁶⁹ BIA in cooperation with CSC has also begun giving examinations directly on reservations to reach more potential employees.

(C) Disadvantaged Alaskan Natives. A program, designed for "disadvantaged" Alaskans, provides preemployment training for about 200 native Alaskans each year. In 1967, when the program was launched, only 1,400 natives [Indians, Aleuts, and Eskimos] were among the 13,700 Federal employees in the State. Currently, 1,505 natives of approximately 12,751 full-time Federal civilian employees hold positions. In 1969, BIA conducted recruitment for the program and provided transportation, housing for entire families, and a small stipend for 206 trainees. Currently, 76 of these are employed. BIA hopes to attain 200 placements this year.⁷⁰

(D) Project Value. In 1968, another coordinated Federal effort, involving the Civil Service Commission, the Department of Defense, and Department of Labor, produced Project Value. Under the program, DOD agreed to employ up to 5,625 disadvantaged youths following a 9-month training program under Neighborhood Youth Corps auspices.

The project has operated in 44 CEP areas and enrolled nearly 4,800 trainees. More than 2,800 are currently employed or are still in training. Racial data have not been kept but,

⁶⁸ Id.

⁶⁹ Despite the statutory preference accorded to Indians in appointments to BIA and despite the efforts noted in the text, April 1969 data revealed that only 1 percent of all Bureau employees in grades GS-12 through GS-18 were American Indians.

⁷⁰ In addition, as part of a joint Federal effort, the Defense Department, the largest Federal employer in Alaska, has undertaken Project Hire, a program to hire 200 natives each year for Manpower Development and Training Act on-the-job training. CSC has been instrumental in developing the program—qualifying candidates through the Worker-Trainee Examination (non-written) and providing a basis for exempting the trainee from the usual personnel ceilings. Although employees enter at the lowest levels, the training provided is designed to lead to higher paying jobs.

according to CSC, the program has been "substantially" nonwhite.⁷¹

(E) Outreach Programs. CSC provides leadership in a variety of summer, part-time, and temporary employment programs. Under these programs, racial data are not maintained, but CSC officials contend that the majority of persons involved, especially in the summer and youth opportunity programs, are from minority groups.⁷² The 1968 Revenue and Expenditure Control Act exempted up to 70,000 jobs from being counted under the program. Beyond that number, summer employees would have been counted in the same manner as other employees against agency personnel ceilings. Following repeal of the act, administrative controls remained. However, at the Commission's urging, these were subsequently relaxed to allow exemption of disadvantaged program employees.

c. Advancement and Upgrading

As noted earlier, one of the greatest problems in the Government's equal employment opportunity program lies in the disproportionate concentration of blacks and Spanish Americans at the lowest echelons of Federal employment. The true measure of the equal employment opportunity program's effectiveness is its ability to produce a representative number of minority group members at all grade levels in all agencies and in all regions of the country. By these criteria, the Federal equal employment opportunity effort cannot yet be considered a success.⁷³

⁷¹ Poole interview, supra note 47.

⁷² At least one CSC official, who did not wish to be quoted, stated, and others have intimated, that maintenance of racial data would give critics of some of these outreach programs a basis for complaining about "reverse discrimination."

⁷³ In response to this problem, the Civil Service Commission has issued comprehensive guidelines for a broad-band program of upward mobility for lower level employees. The new upward mobility instructions call for:

- Career systems to increase opportunities for advancement, utilization, training, and education.
- Career development plans for lower grade employees.
- Career counseling and guidance.
- Education and training opportunities.
- Personnel procedures to assist upward mobility.
- Occupational analysis, job redesign, and job restructuring.

(1) Merit Promotion Program

Although the Civil Service Act of 1883 gave the Civil Service Commission responsibility for establishing basic requirements for promotions to all positions in the competitive service, it was not until 1959 that a Government-wide Merit Promotion Policy was instituted.⁷⁴ The 1959 Government-wide merit policy: (1) provided that agencies adopt systematic procedures to insure that merit principles were observed in making promotions in competitive service; (2) required agency heads to develop and publish promotion guidelines and merit promotion plans; and (3) established general principles and procedures under which agency promotion programs were to operate.

There were several weaknesses in the original policy⁷⁵ and in September 1966, a CSC task force was formed to consider revisions in the merit promotion policy. In April 1967, agencies and employee organizations were asked to comment on a draft of proposed changes. At the same time the Second Annual Interagency Advisory Group (IAG.)⁷⁶ Conference was held and, "Merit Promotion and Performance Appraisal" was the subject of one workshop at the conference.⁷⁷

Based on a variety of suggestions and criticisms, a revised policy was formulated and again submitted for review to agencies, in-

Qualifications standards facilitating upward mobility.

Communication of program information to employees.

⁷⁴CSC Bureau of Recruiting and Examining, "Some Features of the Revised Federal Merit Promotion Policy," Nov. 1, 1968.

⁷⁵Weaknesses of the 1959 policy included: incomplete understanding and appreciation of agency promotion programs by employees and supervisors; inappropriate evaluation methods; and failure to use competitive promotion procedures for certain placement actions where they were needed to assure quality staffing.

⁷⁶The Interagency Advisory Group (IAG) is a device for maintaining interagency communication under the auspices of the Civil Service Commission. Composed of approximately 60 top personnel officials from all departments and most agencies, the IAG is convened about once a month. See pp. 41-42 *infra* for further discussion.

⁷⁷"Report of the Second Annual Personnel Directors Conference, sponsored by the U.S. Civil Service Commission, Interagency Advisory Group, Apr. 20-23, 1967."

terested groups, and Federal executive boards in CSC's regional office cities. On August 27, 1968, the Federal Merit Promotion Policy currently in use was promulgated.⁷⁸ On November 22, 1968, the IAG Committee on Merit Promotion Policy was established to obtain agency involvement in developing plans to implement the revised policy. The committee held nine meetings during fiscal year 1969 and continues to meet regularly.⁷⁹

Since that date, CSC has issued further statements, bulletins, and Federal Personnel Manual System (FPM) letters dealing with promotion policy.⁸⁰ These criteria, set forth in considerable detail, cover such matters as evaluation process and methods, determination of important elements of job performance, selection of instruments for evaluating employees, arrangement of employees in order of merit, and production of guidelines for use in written tests.⁸¹

Regardless of CSC suggestions, guidelines, or directives, in the final analysis, promotion and upgrading rest with the various agencies.⁸² Moreover, supervisory personnel in each agency ultimately make the crucial individual

⁷⁸Bulletin No. 335-8, Changes in Merit Promotion Policies, Aug. 27, 1968. See also FPM Chapter 335, Promotion and Internal Placement, Sept. 20, 1968.

⁷⁹IAG Annual Report for Fiscal Year 1969, at 15.

⁸⁰The most significant of these issuances is FPM Letter No. 335-4, May 2, 1969, "Evaluation of Employees for Promotion and Internal Placement," which runs to more than 50 pages, including attachments and appendix.

⁸¹The salient features of the Revised Federal Merit Promotion Policy as set forth by CSC include:

Assuring that employees are considered for higher-level jobs for which they are eligible and in which they are interested.

Using the most effective evaluation methods to identify highly-qualified candidates for promotion, with written tests being allowed only when approved by the Commission.

Requiring selection from among the best-qualified candidates.

Eliminating all forms of discrimination or personal favoritism.

Keeping employees fully informed about their agency's promotion program and about their own promotion opportunities.

⁸²For example, the individual agencies are responsible for reviewing the status of each employee in a "dead-end" job with a view toward finding an avenue for further advancement or else advising the employee of the unlikelihood of future promotion.

determinations which affect promotion. No matter how precise, detailed, and equitable the criteria may be, a broad degree of agency discretion inevitably must remain. Evaluations and promotions ultimately come down to matters of subjective judgement. Personal preferences, preconceptions, and biases come into play. Recognizing the imperfect nature of merit ratings and the importance of allowing some flexibility, the revised Federal Merit Promotion Policy suggests that candidates be considered from as broad an area as "practicable" (with agencywide consideration normally for promotions to GS-14 and above), with final selection made from an "adequate number" (e.g., three to five) of the best qualified candidates. The principle of freedom to select from among the best qualified is expressly recognized.⁸³

Aware of the implications for equal employment opportunity in promotion policies, CSC has taken steps to reduce the possibility of deliberate or inadvertent discrimination. The Merit Promotion Policy requires, for example, that all first-level supervisors be provided with "suitable initial training" (including emphasis on equal opportunity) either before assuming their new duties or as soon after as possible.⁸⁴ Efforts are underway aimed at encouraging supervisory support of equal employment opportunity through incentive programs and through inclusion in supervisory ratings of an evaluation of performance in the area of equal employment opportunity. There is

⁸³ CSC Bureau of Recruiting, and Examining, "Some Features of the Revised Federal Merit Promotion Policy," at VII, Nov. 1968.

⁸⁴ Mr. Hampton has stressed the vitally important role which individual supervisors play:

"The key to effective equal employment opportunity and to affirmative action to achieve this goal is the individual supervisor. He must have understanding of and sensitivity to the objective of the program and the needs and aspirations of individual employees. Training can be an effective tool in bringing this kind of understanding to him."

To achieve this end, we plan to take the following steps:

"Require each employee who becomes a supervisor in the Federal Government to participate in appropriate training courses to bring him understanding of and sensitivity to the goals of equal employment opportunity; . . . *Toward Equal Opportunity in Federal Employment*, A Report to the President from the United States Civil Service Commission, August 1969."

also a civil rights component in virtually all general management and supervisory courses offered by CSC.⁸⁵ Use of written examinations for promotion purposes has been sharply curtailed. Agencies are prohibited from using a written test as the sole means of ranking or evaluating employees. Moreover, CSC has numerous requirements which limit the scope and purpose of such tests. Agencies using written tests for inservice placement purposes are required to review and evaluate them periodically. CSC conducts its own review and evaluation of all such devices. Other equal employment opportunity safeguards in the promotion system lie in the right to complain, to be heard, to appeal, and finally in CSC's own inspection system. Each of these avenues is discussed later in the chapter.

(2) Executive Manpower

In no area is the disparity in minority group employment more evident than the executive supergrade level, GS-16 through GS-18. Only 87 minority group members⁸⁶ could be identified in the 5,492 supergrade positions canvassed in November 1967. Although all agencies fared poorly in this regard, some were particularly deficient. The Department of Agriculture, for example, had only two blacks and no Spanish Americans or other minority group members among 207 GS-16 through GS-18 executives. The Office of the Secretary of Defense presented an almost identical picture, with two blacks as the sole minority group representatives among 265 supergrade employees.

Government-wide figures based on the November 1969 census of minority group employees reveal only slight progress. Out of 5,319 supergrade positions, less than 100 were held by members of minority groups.⁸⁷ An ex-

⁸⁵ The usual formula calls for devoting one session of each general management or supervisor's course to analysis and discussion of a case study involving discrimination. Emphasis is on preventive and remedial action.

⁸⁶ 66 Negroes, nine Spanish Americans, five American Indians, seven Orientals. (Source: Minority Group Study, 1967—Summary by Agency—CSC printout data.)

⁸⁷ 63 Negroes, 14 Spanish Americans, seven American Indians, 13 Orientals. CSC News Release, May 14, 1970. The U.S. Commission on Civil Rights, as of June 1, 1970, listed three Negroes and one Mexican American among its six supergrade employees.

amination of the source from which supergrades are drawn helps explain this. Only 11 percent of all supergrades enter from outside the Government. The rest are promoted from within their own agency (generally from within the same bureau) or, in 10 percent of the cases, from another Federal agency.⁸⁸ In view of the miniscule number of minority group members in GS-14 and GS-15 positions, the chances for them to come up from the ranks to a supergrade opening are slight. Moreover, in selecting Federal executives, program knowledge and experience are key factors; but many among the relatively few minority group members in senior levels (GS-13 through GS-15) occupy staff rather than line positions. That is, they frequently serve in special assistant or public relations categories which carry little if any authority and tend to be outside the policy-determining, administrative positions. Thus, they are generally limited in acquiring substantive program knowledge and administrative experience.

An analysis of occupational categories comprising most GS-15 through GS-18 executive positions also is revealing. For example, medicine and engineering in the broadest sense—occupations long virtually closed to minority group members—make up nearly one-third of all such positions. More than 50 percent of Federal executive level employees hold master's degrees or doctorates. Again, the premium placed on higher educational attainment works to the disadvantage of minority group members who have been systematically deprived of equal educational opportunities for generations. Other characteristics of GS-15 through GS-18 executives are long years of Federal service (two-thirds of the group have more than 20 years of Federal experience) and age level (more than 80 percent are 45 or older). These facts shed additional light on the grossly inadequate minority group representation within the upper grades.⁸⁹

The crucial identification and development of potential executive talent and selection of candidates via appointment, promotion, or reassignment reside within the agencies.

CSC's role with respect to supergrade pro-

motions and appointments is limited. It is only responsible for: allocating spaces and determining agency priorities; classifying positions in GS-16, GS-17, and GS-18 levels; approving candidate qualifications for GS-16, GS-17, and GS-18 positions; approving agency requests to place positions in excepted or competitive service; establishing pay rates and approving qualifications for scientific and professional positions; and administering the executive assignment system.

d. Training

Training plays three major roles in equal opportunity: first, to improve, upgrade, and utilize fully the skills of minority group employees in the Federal service; second, to assist compliance personnel in developing the skills necessary to carry out such diverse responsibilities as monitoring Title VI programs; third, to help Federal managers and supervisors understand their role in equal employment opportunity.

The Government Employees Training Act⁹⁰ made CSC responsible, subject to supervision and control by the President,⁹¹ for promotion and coordination of Government training operations.⁹² The act confers broad authority on CSC and the agencies to provide inservice training "for the development of skills, knowledge, and abilities which will best qualify them [Federal employees] for performance of official duties."⁹³ Provision is also made to a limited extent for utilization of non-Government training facilities. The number of man-years of training permitted through these facilities may not exceed 1 percent of the total number of man-years of civilian employment for such department in the same fiscal year.⁹⁴

⁸⁸ 5 U.S.C. §4101 et. seq. Supp. III, 1968. "An act to increase efficiency and economy in the Government by providing for training programs for civilian officers and employees of the Government with respect to the performance of official duties."

⁹¹ President Johnson reaffirmed and clarified CSC role and agency responsibilities for training by Executive Order 11348 (1967).

⁹² However, CSC is not authorized to prescribe types and methods or regulate details of intradepartmental training programs. 5 U.S.C. §4101 et. seq. Supp. III, 1968.

⁹³ 5 U.S.C. §4101 et. seq. Supp. III, 1968.

⁹⁴ CSC has advised that non-Government facilities are not, nor does CSC believe they should be, the principal training avenue for upward mobility. At its peak, par-

⁸⁸ CSC, *Characteristics of the Federal Executive* 12 (Nov. 1969).

⁸⁹ *Id.*, at 2-3.

Nor may training be provided: (1) Solely for the purpose of obtaining an academic degree, or (2) solely for the purpose of obtaining an academic degree in order to qualify for appointment to a particular position for which such degree is a basic requirement.⁹⁵

With respect to funding, the act directs the Bureau of the Budget to provide for "absorption by the respective departments, from the respective applicable appropriations or funds available . . . to such extent as the Director (BOB) deems practicable, of the costs of the training programs and plans provided for by this act."⁹⁶ Under these and related restrictions the possibilities for large-scale inservice training for Federal employees are virtually precluded.

(1) Training to Upgrade Federal Employees

Between the 1958 enactment of the Government Employees Training Act and April 1967, when the Bureau of Training was established in the Civil Service Commission, little analysis or evaluation of the training activity of Federal departments and agencies had been undertaken. The training act established few reporting requirements and, although the Commission had authority to establish additional ones, it did not do so because it lacked the resources to collect and analyze the large amount of data needed to document training activity in the Federal service. Thus, neither the size of the total investment nor its impact could be approximated with any degree of certainty.

The new Bureau of Training was established to provide better coordination and promote interagency training activities. It helps agencies assess their training needs and evaluate their own program and coordinates and promotes interagency training activities. It also provides training to agencies through a nationwide network of training centers which conduct courses in executive development, general and personnel management, communications, office skills, automatic data processing,

participation in non-Government facilities never exceeded two-tenths of 1 percent of the total number of man-years available.

⁹⁵ 5 U.S.C. §4101 et. seq. Supp. III, 1968.

⁹⁶ 5 U.S.C. §4101 et. seq. Supp. III, 1968.

financial management, and planning, programming, and budgeting.⁹⁷

During fiscal year 1968 more than 1 million Federal employees participated in at least some formal classroom training; Federal agencies listed a total of 5,605 full-time training personnel; and agencies spent nearly \$31 million for interagency and non-Government training.⁹⁸

Types of training range widely in content, but most courses deal with immediate job needs and enhancement of skills required to perform the task at hand.⁹⁹ Except as noted later, the equal opportunity significance of Federal training programs lies primarily in the nature and extent to which such programs aid minority group employees. Although data on training by race are not maintained, some inferences can be drawn by comparing grade levels of persons trained with grade levels of employees by race. For example, among General Schedule participants in training programs, more than half were at or above the GS-9 level; fewer than 20 percent were in grades 1-4.¹⁰⁰ As of November 1967, only 3.1 percent of full-time employees in grades GS-9 and above were black as compared with more than 16 percent black employment in grades below GS-9.¹⁰¹ In addition, although GS employees comprised fewer than half the total Federal civilian work force [as of November 1967] they received nearly two-thirds of all training given during 1968.¹⁰² Negroes com-

⁹⁷ U.S. Government Organization Manual 1969-70, at 513.

⁹⁸ CSC Bureau of Training, *Statistical Annex to Employee Training in the Federal Service, Fiscal Year 1968* (1969) at 5 and 101.

⁹⁹ E.g., SEC sent teams of regulatory staff members to New York City for 3-day periods to acquire firsthand exposure to the problem of the New York Stock Exchange and its member firms; the Department of the Air Force trained its own personnel in generator maintenance which previously had been performed by non-Government workers; GSA provided "cross-training" for various employees in its motor equipment and communications divisions—e.g., training teletypists as switchboard operators and automotive inspectors as motor pool chiefs.

¹⁰⁰ *A Statistical Annex to Employee Training*, supra note 98, at 5.

¹⁰¹ U.S. CSC, *Study of Minority Group Employment in the Federal Government, 1967*, at 3.

¹⁰² *A Statistical Annex to Employee Training*, supra note 98, at 5.

prised only 10.5 percent of the GS work force as compared to 20.4 percent of all wage-board employees and 18.9 percent of all postal employees.¹⁰³ Similar correlations can be found with regard to training opportunities for Spanish Americans.

It seems obvious, even in the absence of precise data by race, that minority group employees do not share equitably in benefits of Federal training programs.¹⁰⁴

(2) Equal Opportunity Training—Compliance Personnel

The focal point for equal opportunity training for compliance officers from many agencies throughout the Government is the General Management Training Center (GMTC), within the Bureau of Training.¹⁰⁵ In common with other CSC training programs, courses for contract compliance specialists, Title VI compliance officers, and others holding comparable positions are provided on a reimbursable basis.¹⁰⁶ CSC tries to anticipate the demand

¹⁰³ U.S. CSC, *Study of Minority Group Employment in the Federal Government 1967*, supra note 101, at 3. As of Nov. 30, 1967, total GS employment was 1.27 million; wage-board and postal service employment combined totaled 1.29 million. Within GS grade groupings (i.e. GS 1-4; 5-8; 9-11; 12-18) the majority of employees were found in the GS 1-4 and GS 5-8 categories (about 719,000).

As of Nov. 30, 1969, total GS employment was 1.29 million; wage-board and postal field service combined totaled 1.25 million. (Data derived from CSC News Release of May 14, 1970, reporting preliminary results of the November 1969 minority employment survey of Federal agencies.)

¹⁰⁴ In June 1970, the Commission developed and sent to the heads of Federal agencies, a comprehensive plan for "upward mobility" of lower grade employees calling for more career planning, counseling, training, and similar activities on the part of agencies. The plan also commits the CSC to a wide variety of actions to support agency efforts.

¹⁰⁵ Other Federal agencies, notably HEW, have their own training programs specifically designed to meet their particular compliance problems. Such agencies vary in their utilization of CSC training.

¹⁰⁶ Congress does not allow any portion of CSC's annual appropriation to be used to support Bureau of Training operations. Consequently, the entire cost of operating the Bureau of Training—salaries, overhead, and other expenses—must be recovered by charging other agencies tuition for each staff member who attends a course given by the Bureau.

The present "rule of thumb" is that a minimum of 25 participants is needed per course to break even. Interview and telephone conversation with Dr. Ronald

for various training programs well in advance of each fiscal year and to devise courses to meet the need.¹⁰⁷ In some instances CSC perceives a need for a particular type of training and encourages agencies to enroll staff members. If the response is poor, CSC bears the cost and must make it up elsewhere.

For example, there has been decreasing interest among the agencies in Title VI training¹⁰⁸ and CSC has had to rely on "overcharging" or overenrollment in other courses to take up the slack. Wilton Dickerson, Director of GMTC, in an interview with Commission staff, said he felt the Department of Justice should take a more active role in planning and fostering Title VI training. In contrast to contract compliance courses, he believed Title VI "lacked content" and that the Department of Justice had failed to supply this. He explained that Title VI courses emphasized attitudinal change whereas, in his opinion, equal opportunity courses should concentrate on legal requirements and the way investigations should be carried out.¹⁰⁹ Similar criticisms have been expressed by participants in CSC-sponsored Title VI training programs.

(3) Equal Opportunity Training—Federal Managers and Supervisors

In areas other than direct training of com-

Semone, Director, Executive and Entry Level Training, General Management Training Center, Bureau of Training, Nov. 3, 1969, and June 12, 1970, respectively.

¹⁰⁷ Based on estimates of enrollment, duration, and expense of planning and conducting the training, CSC sets a price tag on each course offered.

¹⁰⁸ Interview with Wilton Dickerson, Director, General Management Training Center, Bureau of Training, Nov. 3, 1969. In the years immediately following passage of the Civil Rights Act of 1964 there were about four Title VI courses offered. Mr. Dickerson suggested that agencies were primarily concerned with courses which had specific, tangible content. He felt that too much attention was given in Title VI courses to trying to "change hearts and minds" and that program managers, for whom many such courses were designed, reflected this and often participated only because of assignment by a higher administrative level. Dr. Semone also indicated that Title VI training had been the special province of Richard Parkins [formerly with GMTC] who subsequently joined the civil rights office in HEW. With Parkins' move to HEW the inservice training program of that agency was further expanded and interest by HEW officials in Title VI training found expression in programs provided by HEW's Office for Civil Rights rather than in courses offered by CSC.

¹⁰⁹ Id.

pliance officers, CSC has significantly expanded the equal opportunity aspects of various management, personnel, and supervisory courses.¹¹⁰ In all management and supervisory training, equal opportunity considerations are emphasized as an integral part of good management. In one of the basic courses, "Introduction to Supervision,"¹¹¹ a discrimination case is included as part of the standard teaching materials. One of the 14 sessions of the course of about 1½ to 2 hours is devoted entirely to equal employment opportunity. The two courses given to middle level managers in "Management and Group Performance" also have equal opportunity components. Equal employment opportunity has also been a prominent topic at the Federal Executive Institute in Charlottesville, Va.

The Personnel Management Training Center (PMTTC) is also heavily involved in equal opportunity activity. It is responsible for training an estimated 6,000 persons who have been designated by their agencies as equal opportunity counselors under the revised discrimination complaint procedures which went into effect in July 1969.¹¹² Having anticipated the new procedures, which place heavy emphasis on resolving complaints through informal means, PMTTC inaugurated training early in 1969. By July 1969, 3,500 equal employment opportunity counselors had participated in training provided within their own agencies or by CSC. PMTTC also offers courses for complaint investigators¹¹³ and for appeals examiners, and at one time also provided a course for Title VI hearing examiners.¹¹⁴

¹¹⁰ Several courses in the CSC's curriculum are primarily designed to explain the role of equal opportunity to Federal managers and supervisors. For example, "The Role of the Manager in EEO" has been conducted over the past 4 years. In fiscal years 1969 and 1970, approximately 1,430 participants attended this course in regional offices, while 120 attended it in the central office.

¹¹¹ All new supervisors are required to take this course.

¹¹² See FPM Letter No. 713-11. See also discussion at pp. 37-38 *infra*.

¹¹³ In fiscal years 1969 and 1970, CSC provided training to about 800 agency employees in the investigation of complaints of discrimination, 500 of whom were trained in the regions, 300 in the central office.

¹¹⁴ Other components within the Bureau of Training, which at different times and in varying degrees become

e. Inspections

"The eyes and ears of the Commission," is one CSC official's¹¹⁵ characterization of the Bureau of Inspections (BI). Working out of Washington and 10 regional offices, the Bureau directs nationwide evaluations of the personnel management practices of Federal agencies. Although the scope and emphasis of reviews vary, equal opportunity considerations have been given increased attention in recent years.¹¹⁶

In discharging its new responsibilities under Executive Order 11246, CSC took a number of noteworthy actions. In March 1966, the Agency distributed guidelines to all other Federal agencies that would be used by CSC inspectors in reviewing agency equal employment opportunity programs. The guidelines suggested that agencies might find them "useful in planning self-evaluations" of their own programs and urged "wide dissemination among personnel officers and Equal Employment Opportunity officers."¹¹⁷ The guidelines were detailed and insightful. A section on affirmative action, for example, stated:

An affirmative program must go beyond mere non-discrimination. It must be devised to overcome obstacles that impede equality of opportunity for minority group persons and should be governed by a plan of action tailor-made to the problems and needs of the installation.¹¹⁸

involved in civil rights activities include:

"(1) The Office of Agency Consultation and Guidance (OACG), which provides consultation, guidance, and technical assistance to other Federal agencies on request. (OACG) also develops guidelines for training and works with various agencies on programs which involve training the disadvantaged such as Project Hire, Project Value, and others discussed earlier in this chapter.

"(2) The Executive Seminar Centers, which offers training for senior level (GS 13-15) employees, in general management and administration. Civil rights issues are generally incorporated in the curriculum."

¹¹⁵ Interview with Eugene Campbell, Chief, Evaluation Branch, Philadelphia Regional Office, Jan. 15, 1970.

¹¹⁶ Since 1962, every general management survey has included an EEO component and in 1963 the concept of EEO community reviews was introduced in Birmingham, with particular emphasis on recruitment efforts. Interview with Gilbert Schulkind, Director of Inspections, Oct. 30, 1969.

¹¹⁷ U.S. CSC Bulletin No. 272-9, "Civil Service Commission Inspection of Agency Equal Employment Opportunity Programs," Mar. 7, 1966.

¹¹⁸ CSC Operations Letter No. 273-322, "Inspection of

"Participation in community activities which work toward improved and equal opportunity for minority groups" was another enlightened recommendation reflecting new trends.

Later in the year an Equal Employment Opportunity Committee consisting of directors of personnel and Equal Employment Opportunity officers from 20 agencies was created as a study committee within the Interagency Advisory Group. The committee, still in existence, provides a means for facilitating inter-agency communication on equal employment opportunity matters as well as consultation and response to CSC on matters of program and policy.

On November 18, 1966, CSC issued an "Operations letter," the implications of which go to the heart of the Federal EEO effort.¹¹⁹ The four-page letter, distributed to CSC Washington and regional staffs, sharply limited the scope of affirmative action and appeared to neutralize the entire thrust of the program. The following excerpts are revealing:

(1) The point which must be made again and again is that the purpose of the program and our efforts is to insure this equality of opportunity, not to give preference in opportunity to any one group. Unless it is forcefully made, agency managers may issue statements and take actions such as establishing numerical quotas and goals which are contrary to policy and which lay the program open to charges of reverse discrimination.

In discussing use of comparisons of employment and population statistics for a particular installation the letter stated:

(2) Such statistical comparisons are to be used only for establishing a frame of reference within which the program can be considered and analyzed. It must be made clear that their use does not require or justify the establishment of numerical goals or quotas or imply that program success will be measured on the basis of whether the employment ratio is below or above the population ratio.

With respect to grade, occupational, and organizational analyses:

. . . the purpose is to provide a frame of reference for discussion and evaluation and not to require or suggest that agencies must have minority group members present in every grade level, organization, or occupa-

Agency Equal Employment Opportunities Programs," Feb. 11, 1966, at p. 4.

¹¹⁹ CSC Operations Letter No. 273-372 "Reporting on Equal Employment Opportunity," Nov. 18, 1966.

tional group. This purpose must be spelled out in discussions and reports. Otherwise, the requiring of analyses may be interpreted as demanding the presence of minority group members in all such groups or indicating that they should be present in particular proportions.

Its conclusion, however, was as follows:

[T]he instructions contained in this letter should not be construed as indicating a desire for a less direct approach or a change in program orientation. They are intended to point up those situations where less than complete agency understanding of what is expected can result in serious problems which adversely affect the EEO program and Commission-agency relationships.

Nonetheless, the CSC directive served to undercut efforts of many EEO officers and impair the entire program. EEO officers who tried to develop plans replete with specific percentages and/or numerical goals and target dates were taken to task by CSC's Bureau of Inspections which, in essence, praised the intent but vetoed the most expeditious measure for attaining the goal.

In the face of such limitations, agency plans of action developed pursuant to CSC guidelines issued on Sept. 1, 1966,¹²⁰ dwindled to a large extent into "excellent policy and position documents."¹²¹ As such, however, they were hardly a precise yardstick against which the Bureau of Inspections could measure change.

On December 30, 1969, a new set of comprehensive and specific guidelines was issued by CSC. Based on these, agencies were called upon to submit agencywide plans of action within a month. The guidelines cover such matters as organization and resources to administer the Equal Employment Opportunity Program, recruitment, training, participation in community efforts, internal evaluation, and various other aspects of the subject. They specifically recommend "active support of com-

¹²⁰ CSC Bulletin No. 713-5.

¹²¹ CSC Bulletin No. 713-12, "Equal Employment Opportunity: Agency Plans of Action," Dec. 30, 1969. See attachment thereto: "Outlining of Action Areas and Suggested Elements for Inclusion in Agency Plans of Action to Implement Executive Order 11478 (Equal Employment Opportunity)."

Bulletin No. 713-12 takes cognizance of the limitations in the September 1966 guidelines but offers only a partial solution. More specific guidelines have been provided and restrictions on affirmative action have been removed but the key step of goal setting has not been taken.

munity equal housing efforts," "development of programs to identify and reward supervisors and managers who contribute notably to Equal Employment Opportunity program success," and other affirmative actions.

The guidelines also speak of "emphasis on results" and the covering letter (Bulletin No. 713-12) recommends that "action items . . . be geared wherever possible to specific goals." However, the vital step, goal-setting in quantitative terms (i.e. numbers and/or percentages), is not taken. CSC still adheres to a policy which approves of result-oriented equal employment opportunity programs but rejects the establishment of specific quantitative goals in hiring of minority employees as representing preferential treatment.¹²²

f. Complaint Procedures—Appeals and Review

Adequate procedures for redress of grievances are vital to any effective equal opportunity program. At a minimum, such procedures must include the right to be heard—including the right to be represented by counsel—and the right of appeal and review. Moreover, if the use of these procedures is not to be

¹²² See, for example, the letter from Gilbert A. Schulkind, Director, Bureau of Inspections, to Walter G. Ingerski, Equal Employment Officer, Defense Supply Agency (Department of Defense) Oct. 30, 1967, in response to that agency's proposed plan of action. Mr. Schulkind's letter reads in part:

"We strongly endorse the Center's positive approach in the equal employment opportunity area. However, on reviewing its plan we find that significant revisions to the plan are needed.

"Among the goals in the Center's present plan of action are percentage increase of Negro employees from 4.5 percent to at least 5 percent in higher graded jobs, from 22.8 percent to at least 24 percent in middle grades, and from 5.2 percent to at least 7 percent in higher level wage-board rankings, by the end of the fiscal year. A long-range objective included in the plan is continuing increases in the percentage of Negroes at middle and higher grade levels.

"We have a strong conviction that results are important and must be achieved in the equal employment opportunity effort. However, we also firmly believe that the intention of the equal employment opportunity program is not preferential treatment for any particular ethnic group and that plans of action should be in terms of providing equal opportunity for all persons. As indicated in Commission Bulletin 713-5, we consider the establishment of numerical quotas of any kind for minority group employment to be clearly contrary to Executive Order 11246 and Commission regulations."

an exercise in futility, remedies commensurate with wrongs must be available.

(1) New Regulations

In March 1969, in an effort to improve existing complaint procedures, CSC, after consultation with the Equal Employment Opportunity Committee of the Interagency Advisory Group and with a number of other agencies, amended that portion of its EEO regulations governing processing of discrimination complaints.¹²³ The amendments which became effective on July 1, 1969, contain the following salient features:

1. Establishment in each agency of a Director of Equal Employment Opportunity and sufficient staff to carry out an affirmative program, including handling of discrimination complaints.

2. Establishment of Equal Employment Opportunity Counselors, disassociated from the formal complaint process, whose function is to seek resolution of complaints on an informal basis.¹²⁴ Employees must consult the counselors before a formal complaint of discrimination may be filed with the agency.

3. Independent, impartial investigation of formal complaints by persons not associated with that part of the agency involved in the complaint,¹²⁵ with a copy of investigative file given to complainant.

4. Hearing, if requested by complainant, before an appeals examiner from another agency, with findings of fact and recommended decision on the merits.

5. Decision by the agency head adopting, rejecting, or modifying the hearing examiner's recommended decision with explanation of reasons therefor given to complainant.

¹²³ FP, Letter No. 713-11 "Amendments to Equal Employment Opportunity (and Related) Regulations," Mar. 13, 1969. The letter states in part:

"The purposes of the changes are to guarantee a fair and impartial hearing of discrimination complaints by trained appeals examiners, to provide an independent investigation of the facts involved in any case, to provide the maximum opportunity for informal resolution of problems which otherwise might turn into complaints, and to speed up the entire complaint process."

¹²⁴ In almost all instances persons designated as "EEO Counselors" carry this role on an "as needed" basis in addition to other regular job duties.

¹²⁵ It would appear desirable to provide complainants the option of requesting that the investigation be conducted by someone from another Federal agency.

6. Right of appeal to CSC's Board of Appeals and Review.

(2) Agency Counseling System

The intent of the revised procedures is to develop informal resolution of complaints. Introduction of the counseling system was motivated in part by a desire to filter out specious complaints and to settle disputes before they had become polarized.

On March 10, 1970, a CSC press release announced results of a Government-wide survey covering the period July 1 through September 30, 1969, i.e., immediately following inauguration of the new procedures. The survey revealed that 2,744 employees had sought out EEO counselors and that 257 formal complaints had been filed—about half the number for a comparable period under the formal procedures.¹²⁶ Although these early figures indicate that the number of formal complaints was reduced, the significance of this fact is unclear.

(3) Appeals and Review

The final administrative step in the complaint procedures is appeal to the Civil Service Commission's Board of Appeals and Review (BAR). As of December 1969, BAR had had no experience with appeals under the revised complaint procedures. However, figures for fiscal year 1969 are of interest. Approximately 2,100 appeals of all kinds were considered that year.¹²⁷ The bulk of these concerned adverse actions and retirement issues. Of the 336 EEO appeals,¹²⁸ 280 cases were decided on their merits; the rest were either remanded to agencies for further processing or disposed of

¹²⁶ Further study showed that during the 5-month period ending Nov. 20, 1969, an average of 79 formal complaints had been lodged as compared with an average of 147 under the old system. An analysis of a sampling of 282 cases showed that "corrective action" had been taken in 85 instances, about 30 percent of the sample. In more than half of the 85 cases the corrective action directly benefited the employee. CSC News Release, Mar. 10, 1970.

¹²⁷ Interview with William P. Berzak, Chairman, Board of Appeals and Review, Nov. 5, 1969.

¹²⁸ More than two-thirds involved allegations of discrimination based on race or color; the remainder were based on national origin, sex, or religion. ("Statistics on EEO Appeals to the Board of Appeals and Review for Fiscal Years 1967, 1968, and 1969"—unpublished tables.)

for technical reasons.¹²⁹ Of the cases decided on their merits, a decision of "no discrimination" was rendered in 214 instances [75 percent]; in the other 66 cases, corrective action by the agency or CSC was ordered.¹³⁰ William P. Berzak, BAR chairman, expressed the opinion that because discrimination can only be proved in a small number of cases, a serious credibility gap exists between minority groups and the Federal Establishment.¹³¹

(4) Sanctions and Remedies

As noted earlier, the effectiveness of the entire grievance process rests largely on the adequacy of available remedies. However, in the vital matter of promotions, which comprises almost half of all EEO appeals, the Comptroller General has ruled against awarding either back pay or retroactive upgrading even

¹²⁹ Although hearings are not held before the board, the board is not restricted to the information in the record. In about 25 percent of the cases, it goes back to the agency for more documents, statistics, and other information, in order to determine the past practices of the accused official with reference to his treatment of persons of the minority group involved in the case. The complainant may also submit further arguments in writing to the Appeals Board. Oral argument by counsel is not permitted at this stage. Berzak interview, supra note 127.

¹³⁰ In many of these cases the allegation of discrimination was not adequately substantiated but remedial action was warranted. In almost every instance, remedial action was predicated on the basis of poor personnel practice and/or some type of unfair or unduly harsh action. It should be noted that only cases which the complainant has "lost" at the agency level are brought to BAR's attention. Cases of blatant discrimination generally are resolved within the agency and fail to reach BAR's attention. The agency has three opportunities to correct a situation or find discrimination before the case ever reaches the board, i.e., (a) during the EEO counselor's inquiry; (b) after investigation; and (c) at time of agency's final decision. Thus if there is a case of apparent discrimination, it would be disclosed at one of these three stages.

¹³¹ Berzak indicated that discrimination cases reaching BAR are never clear-cut. Generally, questionable or downright poor personnel practices are part of the picture. When an agency finds a poor personnel practice and corrects it by offering the appellant what he wants, the agency in such cases often does not make inquiry into the past practices of the accused official to determine whether discrimination was present. However, the board does make such inquiry if the case is appealed to it. Berzak interview, supra note 127.

when the complainant is found to have been discriminated against in the action at issue.¹³²

In many instances, the matter is moot by the time the decision is rendered—the complainant may have already lost a conference or training opportunity, or may have been placed on an undesirable temporary special detail. Granting the complainant top priority for the next available opening may be the only remedy possible under the circumstances, but it does not afford full relief.

Other corrective actions have value from an equal employment opportunity standpoint, although they may be of little direct benefit to the complainant. CSC reports that supervisors found culpable in discriminatory actions have been “appropriately disciplined including demotion, reassignment, reprimand or warning, and removal from supervisory authority to make appointments or promotion selections.”¹³³ Generally, in its decisions, the board does not recommend disciplinary action beyond that prescribed by the agency, but in a number of cases it has recommended that agencies take or consider taking disciplinary action, such as a reprimand or warning against the guilty official. In no instance, however, has BAR upheld a complainant’s request for disciplinary action against a supervisor above and beyond what the agency has prescribed.¹³⁴

Theoretically, CSC can require an agency to secure CSC’s prior approval of every appointment and promotion it seeks to make. This authority represents a potentially strong sanction, which could be used against an agency persisting in discriminatory practices. But in fact, use of this sanction has never been seriously contemplated. Mr. Hampton takes a

¹³² 48 Comp. Gen. No. B-165571, Jan. 31, 1969.

¹³³ Mr. Hampton’s reply of Sept. 22, 1969, to questions submitted by the Senate Subcomm. on Labor. (See covering letter of Sept. 22, 1969, from Hampton to Senator Harrison A. Williams, Jr., Chairman, Subcommittee on Labor, Committee on Labor and Public Welfare.) Data on the number of supervisors found guilty of discrimination and the number of those against whom disciplinary action has been taken are not available. Both CSC officials and agency EEO officers agree that the number in each instance is small. Moreover, little, if any, publicity is given to disciplinary actions which have been taken against supervisors found to have discriminated.

¹³⁴ Berzak interview, *supra* note 127.

broader view of the role CSC should play in furthering the cause of equal opportunity:

Our reviews of equal employment opportunity indicate . . . that the obstacles to equality of opportunity are not so much overt acts of discrimination which can be proved and thus which could be overcome by the imposition of sanctions, but rather lack of affirmative action to achieve equality of opportunity. The thrust of our regulations and guidelines is therefore premised on the conviction that equality of opportunity must be achieved through positive action, and that it does not occur simply with the removal of discrimination.¹³⁵

g. Collection and Evaluation of Data

Virtually every aspect of the Federal civil rights effort has suffered from lack of sufficient data on which to base compliance activity or evaluate the impact of existing programs. The Federal equal employment opportunity effort shares this deficiency and suffers from absence of data. Thus, access to accurate knowledge of the dimensions of a particular problem or a realistic assessment of the value of newer programs is diminished. The extent of the racial impact of examinations remains a matter of controversy in the absence of information by race of those being examined. The significance of current recruitment efforts cannot be appreciated without racial data on persons contacted and interviewed. Training efforts cannot be fairly appraised from an equal employment opportunity standpoint unless such material is collected and analyzed. Only in the matter of full-time Federal employment as of a specified date e.g., November 30, 1967, are racial data available. Although information is categorized by agency, grade, and race [other breakdowns, e.g., by CSC region, by State, by metropolitan area, are also compiled], much relevant information is either not gathered, not collated, or not widely available. Such data as years in grade by race, race by sex, rates of hiring, promotion, and separation by race, are not kept. A perennial problem, that of racial designations, has been particularly troublesome with respect to Spanish Americans. As used by CSC, this category includes “persons of Mexican American and Puerto Rican as well as other Latin American or Spanish origin or ancestry.” The broad inclusion currently in use, however, may act to obscure the problems of

¹³⁵ Hampton reply to Senate Subcommittee on Labor, *supra* note 133, at 5.

particular minority groups within the "Spanish American" category.¹³⁶

(1) New Regulations

CSC officials have contended that past attempts to expand collection and maintenance of racial data have encountered opposition from civil rights groups. In the 1940's civil libertarians fought to expunge racial identifications from official records on grounds that they were being used to facilitate discrimination. In November 1942, CSC urged all agencies to eliminate photographs from the standard employment form. Many who had struggled to eradicate racial designations two decades earlier found it difficult to reverse their position in the 1960's. Until fairly recently the National Association for the Advancement of Colored People (NAACP) reportedly opposed racial head counts and the American Civil Liberties Union (ACLU) also raised objections based on allegations of invasions of privacy.¹³⁷

In 1966, Federal employment statistics were gathered largely by means of an employee "self-designation" system, on a voluntary and confidential basis. Information obtained, however, was of doubtful validity.¹³⁸ The following

¹³⁶ CSC officials have indicated that the use of the category "Spanish American" is not as troublesome as it may appear. Since there is a high correlation between certain geographical areas, e.g., the five Southwestern States; the metropolitan New York City area; and the two major Spanish American subgroups (Mexican American and Puerto Rican), a more detailed breakdown is not essential for equal employment opportunity purposes. Thus, for example, most Spanish American employees in the New York Civil Service region are Puerto Rican.

In deference to objections of some Spanish-speaking groups to the terminology "Spanish American," the Civil Service Commission now refers to this minority as "Spanish surnamed."

¹³⁷ Interview with Charles Sparks, Director, Bureau of Manpower Information Systems, Oct. 31, 1969. Sparks reported that "sometime in 1966 or 1967" he and Anthony Rachal (former Special Assistant to the Chairman for EEO) tried unsuccessfully to gain the support of the NAACP for the collection of racial data. About a year later the NAACP modified its position but was still reluctant to go on record. Sparks also reported that a spokesman for the ACLU was hesitant about the desirability of including race on personnel records. However, this same ACLU official reportedly expressed support for the new computerized data processing system recommended by the CSC in September 1969.

¹³⁸ Apparently a significant number of Federal employees who resented the racial self-designation survey

year statistics were obtained by a visual identification survey conducted by supervisory personnel. This same method was used in the November 30, 1969, census.¹³⁹

Mindful of the need for an improved data base, CSC has authorized Federal agencies to institute new automated procedures.¹⁴⁰ Taking account of earlier objections, CSC states that the conditions under which the employment statistics are to be maintained, "are designed to safeguard individual privacy and assure the separation of minority employment data from personnel records."¹⁴¹ The procedures include four distinct phases:

(1) *Initial identification and collection*: Essentially, the same method is used as was used in the 1967 and 1969 censuses. However, the supervisor's visual identification is recorded on a list which includes the employee's name and identification number.

(2) *Establishment of an independent minority identification file*: The employee's name is removed and the identifying number with racial designation is fed into an automatic data file.

(3) *Update of file*: New employees are continuously added; separated employees are deleted.

(4) *File output*: Outputs, e.g., data by race on hiring, promotions, training, and separation, are achieved by merging the agency's personnel record file with the minority identification file. In all cases only gross data without identification of employees by name are to be used. After use, the merged file is destroyed or stored under safeguards for future use.

either failed to respond or deliberately gave facetious answers. A disproportionately high number of respondents designated themselves "American Indian" either for the reason stated or because a grandparent or great grandparent was an American Indian.

¹³⁹ The 1969 census requirements were similar to those of the 1967 census. Significant changes included expanded coverage of Standard Metropolitan Statistical Areas (SMSA) from 41 to 75; salary groupings by every grade level (in contrast to subgroupings, each of which encompassed several grades); and reports from selected bureaus and other organizational units.

¹⁴⁰ FPM Letter No. 290-2, "Automated Procedures for Processing Minority Group Statistics," Sept. 30, 1969. The letter authorizes and "encourages" agencies to install the approved procedures. However, they are not required to do so.

¹⁴¹ *Id.*, at 1.

Specific authorization by agency head or responsible EEO official is required for its use.

Agencies were instructed to report to CSC if they planned to install the new procedures and, if so, by what date. Initial responses are encouraging.¹⁴²

h. CSC's EEO Role Vis-a-Vis Other Federal Agencies

Since September 1965 when Executive Order 11246 assigned supervisory and leadership responsibility for equal employment opportunity programs within the executive branch to CSC, that agency has played an increasingly responsible role in this aspect of the Federal civil rights effort. With promulgation of Executive Order 11478 in August 1969, renewed emphasis was placed on equal employment opportunity in the Federal service, and, correspondingly, on CSC's jurisdiction in this effort. It is further reflected in its activity as

coordinator of the Federal equal employment opportunity effort.

(1) Interagency Advisory Group

A major device for developing and exchanging ideas and proposals on personnel policies, projects, and continuing programs has been the Interagency Advisory Group (IAG), established in January 1954. Composed of approximately 60 top personnel officials from all departments and most agencies, the full IAG meets under CSC auspices about once a month and follows an agenda prepared by its Secretariate.¹⁴³ The Secretariate is also responsible for establishing ad hoc committees, preparing memoranda, notices, and correspondence, providing CSC staff assistance, and for general administration.

Much of IAG business is performed by a variety of ad hoc and standing committees. The chairman of each is an official from the CSC bureau most closely related to the function of the committee. In fiscal year 1969, 29 committees were active and met a total of 56 times.¹⁴⁴ However, most committee work is simply handled by phone and correspondence. In addition to full IAG meetings and those of its various committees, informal luncheon meetings are held about once a month for each of four subgroups of the IAG (about 15 persons each).¹⁴⁵

Although equal employment opportunity matters occasionally provide the agenda for the monthly IAG meetings¹⁴⁶ and have been the concern of various committees, it was not until

¹⁴³ Interview with Donald Williams, then Director, Office of Complaints, Oct. 29, 1969. The Secretariat was actually the office of Donald Williams who served as Executive Vice Chairman of the IAG and also acted as CSC's Director of the Office of Complaints (largely an information and referral function). The position is now held by Clinton Smith.

¹⁴⁴ U.S. CSC *Interagency Advisory Group Annual Report, July 1, 1968-June 30, 1969*.

¹⁴⁵ Two of the groups are comprised of representatives from large agencies; two of the groups are made up of personnel directors from smaller ones. These meetings are designed to give IAG members a chance to become better acquainted with one another and/or serve for special consultative purposes in lieu of full IAG consultation. Williams interview, *supra* note 143.

¹⁴⁶ *Id.* Mr. Williams reported that equal employment opportunity was the subject of four meetings within the past year and a half (April 1968 through October 1969).

¹⁴² As of October 31, 1969, most agencies had responded and CSC reported:

"The following agencies plan to use automated procedures in taking the census and to automate statistical processing of the data, as of Nov. 30, 1969: Civil Service Commission; Navy; Air Force; Veterans' Administration; Agriculture; Interior (five bureaus now, remainder in 1970); Justice; Health, Education, and Welfare; Commerce; State; Transportation; and Treasury. Total number of employees, 1,432,779."

"The following agencies plan to use automated assistance in taking the census with later development of the statistical processing systems: Department of Defense, by December 1970; General Services Administration, beginning in February 1970; Interior, remaining bureaus in 1970; Post Office, under consideration for late 1970; and Labor, by August 1970. Total number of employees, 833,599."

"Those agencies indicating in writing that they do not intend to automate are: Army (Army has since indicated it will automate by January 1971); Federal Deposit Insurance Corporation; Selective Service; and National Capital Housing Authority. Total number of employees, 479,334."

CSC further noted:

"This was not intended to be a comprehensive survey, but in covering agencies employing the bulk of the Federal work force, it is apparent that a large percentage will take advantage of the capabilities of ADP in maintaining and processing data for the management of equal employment opportunity programs. The total of the first two groups above is 2,266,378 personnel, or 74 percent of the work force." U.S. CSC unpublished report, "Report on Implementation Plans-Automated Procedures for Minority Group Identification and Processing of Statistics," Oct. 31, 1969.

November 1966 that a standing committee on equal employment opportunity was established. During fiscal year 1969, Directors of Personnel and Equal Employment Opportunity Officers from the score of agencies¹⁴⁷ comprising the Equal Employment Opportunity Committee met four times under the chairmanship of Edward A. Dunton, Director, Bureau of Recruiting and Examining.¹⁴⁸ The group's attention was directed primarily to the revised discrimination complaint procedures. Although the group also made suggestions regarding the agency equal employment opportunity action plans, there is no way of determining the extent of its influence. In the final analysis Government-wide policy decisions on equal employment opportunity are made by the CSC.

(2) Other Types of Liaison

In addition to the IAG, other devices have been used in recent months to convey Federal equal employment opportunity policy and to elicit suggestions for improvements. On September 4, 1969, CSC convened a meeting of Department Assistant Secretaries for Administration, Agency Executive Directors, Directors of Equal Employment Opportunity, Directors of Personnel, Coordinators for the Federal Women's Program, and others, to hear Mr. Hampton and CSC staff members describe some of the new directions taken and being contemplated. Although the meeting was billed as a discussion and a question and comment period was provided for, it proved to be mainly a one-way communication medium.

Somewhat different, however, was the 2-day seminar on equal employment opportunity in the Federal service which was held by CSC on December 4 and 5, 1969. Representatives from a number of private civil rights groups, labor unions, professional associations, and a few Federal agencies were invited to participate. CSC bureau and division heads described various equal employment opportunity efforts in recruiting, examining, promoting, training, complaint processing, and other related areas.

¹⁴⁷ Agencies represented: Agriculture, Air Force, Army, DOT, GSA, HEW, HUD, Labor, NASA, Navy, Post Office, State, Treasury, AEC, Defense Supply Agency, FCC, GPO, Interior, VA, Justice, OASD (M).

¹⁴⁸ James Frazier is currently Chairman of the IAG and Irving Kator will assume the chairmanship for fiscal year 1970.

Each speaker was subjected to questions—often sharply hostile—from seminar participants. For much of the 2-day session there was free discussion, with CSC officials receiving criticism for the Federal Government's failure to increase minority representation more substantially.¹⁴⁹

The December 4 and 5 seminar reflected an attempt to narrow the communication gap between CSC, as the embodiment of the Federal equal employment opportunity effort, and representatives of the minority community. However, unless the Government can point to results in terms of minority representation, as well as procedures, it is doubtful that this gap can be fully closed. Creation of equal employment opportunity committees, conferences and workshops of Federal officials, meetings and dialogues with private groups, will be perceived as palliatives rather than as solutions.

III. FEDERAL CONTRACT COMPLIANCE

A. Introduction

Fully one-third of the Nation's labor force is employed by companies which are Government contractors. Generally, these companies are among the Nation's largest and most prestigious business firms. Typically, they are leaders in the business community and the policies they adopt are frequently the prototypes which other businesses follow.

Over the years elaborate mechanisms have been established to assure effective administration and enforcement of the Government's equal employment opportunity policy within industry. Resources of the various Federal departments and agencies which contract with private businesses are available to monitor compliance. Particular agencies have been assigned responsibility for compliance in specific industries and mechanisms have been established for coordinating and overseeing the entire Federal compliance effort. Further, strong sanctions, such as termination of Government contracts and debarment from future contracts are available to assure full compliance with equal opportunity requirements.

Despite the increasingly strong Presidential commitment to the goal of equal employment

¹⁴⁹ Observations of U.S. Commission on Civil Rights staff members who attended the seminar.

opportunity, despite the strength of the sanctions available to secure it, and despite the potential effectiveness of the Federal monitoring mechanisms, equal opportunity in Government contract employment, when measured in terms of employment of minorities, has not been achieved. Presidential commitment has not been realistically communicated to the community of Government contractors; sanctions have rarely been used; and the Federal monitoring mechanisms have proved relatively innocuous.

B. Patterns of Discrimination

The responsibilities given by Executive Order 11246 to the Department of Labor are extremely significant in civil rights terms. It is estimated that almost one-third of the Nation's labor force is employed by Government contractors and that there are more than 100,000 contractor facilities covered by the order.¹⁵⁰ In fact, a major proportion of the largest industrial employers are Government contractors.

Documentation abounds that the minority labor force continues to face a serious disparity in the rate of unemployment and promotional opportunities.¹⁵¹ Indeed, in its public hearings across the country, this Commission has heard innumerable charges of flagrant employment discrimination. Employment statistics submitted by major Federal contractors appear to bear out the assertion, at least as measured by the acid test of results, that Executive Order 11246 and its predecessors have

not been successful in bringing about equality of job opportunities for America's minorities.

For example, in a May 1967 Commission hearing in the San Francisco Bay Area of California, a review was made of one large federally funded construction project—the Bay Area Rapid Transit (BART) system. For this construction, the Commission was told, BART anticipated grants of up to \$80 million in Federal funds and employment of about 8,000 people at peak construction periods. As of May 1967, the Commission found no Negroes among the electricians, ironworkers, or plumbers engaged in this construction.¹⁵²

In April and May 1968, the Commission held a 5-day hearing in Montgomery, Ala., in which it examined problems affecting the economic security of blacks in a predominantly rural 16-county area of Alabama.¹⁵³ The Commission found that blacks had been largely excluded from the new industrial jobs created in the area;¹⁵⁴ that Government contractors in the region had done little to improve the situation for the area's black people; and that many contractors had, in fact, contributed tangibly to patterns of segregation and oppression.¹⁵⁵

Among the large Government contractors, with several facilities in the hearing area, was the American Can Co. At its pulp and paper mill in Choctaw County, American Can had contracts with the General Services Administration in the first three quarters of fiscal 1968 for more than \$1.7 million. The Commission found that of 1,550 persons employed at this mill, only 108, or 7 percent, were Negro, and that only several of these employees occupied skilled positions. This mill draws its employees from an area whose population is approximately 57 percent black. Since 1960, American Can Co. also had owned a company

¹⁵⁰ OFCC Order No. 1 to Heads of All Agencies, Oct. 24, 1969. Though estimates vary, it appears that the government had more than 225,000 contractor facilities and sites with at least 20 million workers in 1969. *The Budget of the United States Government, 1969 Appendix*, at 711.

¹⁵¹ See, for example, *Hearings on Discrimination in White Collar Employment Before the United States Equal Employment Opportunity Commission*, held in New York, N.Y., Jan. 15-18, 1968 (particularly the employment report on pages 527-668); *Hearings on Utilization of Minority and Women Workers in Certain Major Industries Before the United States Equal Employment Opportunity Commission*, held in Los Angeles, Calif., Mar. 12-14, 1969 (particularly the background data on pages 350-58); and F. H. Schmidt, *Spanish Surnamed Americans Employment in the Southwest* (a study prepared for the Colorado Civil Rights Commission under the auspices of the Equal Employment Opportunity Commission) (1970).

¹⁵² *Hearings Before the U.S. Commission on Civil Rights*, held in San Francisco and Oakland, Calif., on May 1-6, 1967, at 289, 291.

¹⁵³ Many blacks in this area—the population of which is 62 percent black—have been displaced from their former principal employment as sharecroppers or tenant farmers.

¹⁵⁴ In 1967 reports to the Equal Employment Opportunity Commission from the area, blacks accounted for only 22 percent of industrial jobs.

¹⁵⁵ *Hearing Before the U.S. Commission on Civil Rights*, held in Montgomery, Ala., Apr. 27-May 2, 1968 [hereinafter cited as *Montgomery Hearing*].

town at Bellamy, Ala. This town provided rental housing for employees of the company's nearby sawmill. At the time of the hearing, the town was totally segregated; only eight of the 123 Negro houses had running water and inside toilet facilities, while every white-occupied house had running water and inside toilets.¹⁵⁶

Another large Government contractor in the hearing area was Alabama Power Co., which grossed about \$2.5 million a year under a contract with the General Services Administration. The company employed 5,394 persons, of whom just 472 were Negro; of these about three-fourths were in unskilled positions. The Commission learned that the company still maintained segregated facilities at locations in Birmingham, Ala.¹⁵⁷

Dan River Mills, another large Government contractor in the hearing area, manufactures uniforms for the Armed Forces. At its Greenville, Ala. plant, the Commission found that white employees used restroom facilities on the inside of the building while Negro employees used facilities on the outside.¹⁵⁸ Of approximately 200 employees only three were

¹⁵⁶ The Commission also found several segregated churches, two segregated swimming pools, and a company-owned Negro school house. *Montgomery Hearing*, supra note 155, at 391, 394-397. It should be noted that some change has taken place since the hearing. There is now one black foreman and six black assistant foremen; from March 1969 to September 1969, 10 to 12 promotions went to blacks. J. Williams, "Bellamy, Alabama-Company Town Revisited," *Civil Rights Digest* fall 1969, at 17. An official of the American Can Co., reported that as of June 1970 two black foremen were employed.

¹⁵⁷ *Montgomery Hearing*, supra n. 155, at 414. In 1966, of the company's more than 1,000 craftsmen, only three were Negroes; 2 years later, at the time of the hearing, the number of Negro craftsmen had risen to four. From 1967 to 1968, the proportion of the company's male employees who were Negro actually declined.

¹⁵⁸ A Negro witness, formerly employed at the plant, was asked whether he had been told not to use the inside facilities; he replied:

"I was not told that I couldn't use any of the facilities. I was just pointed out the one to use." *Id.*, at 38.

The same witness testified that although there was a drinking fountain in the plant, he "was told that the other Negro employees always got a coke bottle to drink out of." *Id.*, at 38. The plant manager of the mill testified that he was unaware of any segregation in the plant. *Id.*, at 404.

Negro—a watchman, a warehouseman, and a truck driver doubling as a janitor.¹⁵⁹

Finally, officials of Allied Paper Co., a large GSA contractor in the hearing area, testified that they believed their company to be in compliance with Federal equal employment requirements. Operating a pulp and papermill in Jackson, Ala., the company employed a personnel manager who reported that 47 out of a total of about 445 employees were Negro and that none of the Negroes was part of clerical or supervisory personnel.¹⁶⁰

At a December 1968 Commission hearing in San Antonio, Tex., it was discovered that less than 15 percent of the employees of Southwestern Bell Telephone Co. were members of minority groups. In fact, only 12 of the 626 craftsmen, less than 2 percent, were Spanish surnamed despite the fact that the company headquarters is in San Antonio, a city which is more than 40 percent Mexican American.¹⁶¹

Another major Government contractor, the El Paso Natural Gas Co., presented a similarly distressing picture. Most of the company's employees are located in west Texas and New Mexico, areas with large numbers of Mexican Americans. Yet of its 5,612 employees only 237, less than 5 percent, were Mexican Americans, and of the company's nearly 1,500 officers, managers, professionals, and technicians, only 20, less than 2 percent, were Mexican American.¹⁶²

At the Commission's hearing in St. Louis, Mo. on January 15-17, 1970, the Commission found that the Chrysler Truck Assembly Plant, a Federal contractor in suburban St. Louis, employed 1,420 persons, of whom 204 were black. Of those, 187 were in assembly line jobs.¹⁶³ The Commission also found that the McDonnell Douglas Corp., a holder of a multibillion dollar Department of Defense contract, employed a total of 33,007 employees, of whom 2,507 or 7.6 percent were black. Of the more than 11,000 officers, managers, and professionals,

¹⁵⁹ *Id.*, at 401-02.

¹⁶⁰ *Id.*, at 427-429.

¹⁶¹ *Hearing Before the U.S. Commission on Civil Rights*, held in San Antonio, Tex., on Dec. 9-14, 1968, at 593, [hereinafter cited as *San Antonio Hearing*].

¹⁶² *Id.*, at 1078.

¹⁶³ Transcript of *Hearing Before the U.S. Commission on Civil Rights*, held in St. Louis, Mo., Jan. 14-17, 1970, [hereinafter cited as *St. Louis Hearing*].

fewer than 1 percent were black. Yet the estimated black population of the city of St. Louis, which is located within 10 miles of the McDonnell Douglas installation, is 43.7 percent.¹⁶⁴

Some of the discriminatory acts denying minority citizens equal employment opportunity are personal and overt, but the most significant and omnipresent type is institutional or systemic—discriminatory practices that operate automatically to impede minority access to employment opportunity. For example, in cases where an employer or union relies for recruitment mainly upon word-of-mouth contact, minority persons, who have less access than nonminority persons to established informal networks of employment information, are necessarily denied equal access to available opportunities. Recruitment carried out through schools or colleges with a predominantly majority group enrollment also inevitably excludes minority group applicants.

By the same token, qualifications not substantially related to job needs unfairly penalize minority group persons with limited education and little job experience. In addition, minority employees who have been assigned to “traditional” jobs or departments are not afforded equal access to training opportunities or advancement within the organization. These factors, too, represent continuing obstacles to equal job opportunity.

C. The Executive Orders

1. PRIOR EXECUTIVE ORDERS

Executive action to prevent employment discrimination by Government contractors began with Executive Order 8802, issued by President Franklin D. Roosevelt on June 25, 1941.¹⁶⁵

¹⁶⁴ Id. A review of employment patterns of 12 of the largest Department of Defense contractors, who had 1.4 million employees and \$9.5 billion dollars in contracts in 1968, showed distinct under-utilization of minority employees in total employment and extremely few minorities in professional or managerial positions. The A. Philip Randolph Institute, *The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws* (prepared for the Office of Economic Opportunity, 1969) ch. 1, at 31-35.

¹⁶⁵ Executive Order 8802 (1941). See generally, U.S. Commission on Civil Rights, *Employment* vol. 3 (1961). This first Executive order established a five-member, Fair Employment Practice Committee (FEPC), responsible solely to the President. The order applied to

It was superseded by Executive Order 9346, issued on May 27, 1943, which was in effect until June 28, 1946.¹⁶⁶ No further significant effort was made to require nondiscrimination in employment by Federal contractors until 1951 when President Harry S. Truman issued Executive Order 10308 which created an 11-man Committee on Government Contract Compliance to study the effectiveness of the existing compliance programs.¹⁶⁷ Its report, with more than 20 recommendations,¹⁶⁸ was provided to the President at the end of his term of office and was the basis for issuance of President Dwight D. Eisenhower's Executive Order 10479.¹⁶⁹ This order, however, like all its predecessors, did not specifically provide for the use of sanctions in the case of noncompliance.¹⁷⁰

all defense contracts, but provided no enforcement power to the committee. The Committee, in effect, suspended operations in early 1943.

¹⁶⁶ Executive Order 9346 (1943). This order applied to all Government procurement contractors and was administered by a new seven-man FEPC. The Committee lacked power to enforce its decisions except by negotiations, moral suasion, or the pressure of public opinion.

¹⁶⁷ Executive Order 10308 (1951).

¹⁶⁸ One of the recommendations called for contracting agencies to enforce the nondiscrimination clause, if conciliation failed, by termination of contracts and debarment from further contracts. The President's Committee on Government Contract Compliance, *Equal Employment Opportunity* (terminal report) 70 (1953).

¹⁶⁹ Executive Order 10479 (1953). The order created a 15-man President's Committee on Government Contracts, headed by Richard M. Nixon, then Vice President. The Committee functioned basically in an advisory and consultative capacity with the primary responsibility for investigating complaints, making compliance reviews, and securing compliance resting with the contracting agencies.

¹⁷⁰ As a result of contracting agencies relying solely on persuasion, conciliation, and mediation to obtain compliance, in 1957, Vice President Nixon wrote to the head of each contracting agency requesting adoption of a firmer approach, i.e., the denying of new contracts, where conciliation failed to bring a contractor into compliance. Although General Instruction Number 2, issued by the Committee on October 1957, provided procedures for finding a company ineligible to receive a Government contract, it does not appear that any contracting agency ever denied a contract on the basis of a company's employment practices and no contract was ever terminated for failure to comply with the nondiscrimination clause. See, President's Committee on Government Contracts, *Five Years Of Progress*, 22 (1958) and *Fourth Annual Report of Equal Job Opportunity* 6-7 (1957).

Executive Order 10925, issued by President John F. Kennedy on March 6, 1961,¹⁷¹ for the first time set out strong and specific penalties for noncompliance, and centered ultimate enforcement responsibility in a single administrative unit.¹⁷² Although the order had important potential because of its sanctions, it did not bring about significant changes because its penalty provisions were never employed.

The prohibitions required by all these Executive orders were extended to Federal and federally aided construction projects on June 22, 1963, when President Kennedy issued Executive Order 11114.¹⁷³

2. EXECUTIVE ORDER 11246

a. *Administrative Structure*

President Johnson's Executive Order 11246 of September 24, 1965, like its predecessor, covers both Federal procurement¹⁷⁴ and Federal and federally assisted construction contracts.¹⁷⁵ The new Executive order established a new administrative arrangement, with the

¹⁷¹ Executive Order 10925 (1961).

¹⁷² The order established a President's Committee on Equal Employment Opportunity, under the Chairmanship of Lyndon B. Johnson, then Vice President, with overall responsibility and authority for implementing the order. Although the contracting agencies were still considered primarily responsible for enforcement, the Committee was authorized to assume jurisdiction over any complaint alleging a violation of the order and to conduct compliance reviews of Government contractors; it also had final authority over the imposition of sanctions. On paper, the order embodied most of the recommendations made by President Truman's Committee on Government Contracts. See discussion in note 168, *supra*.

¹⁷³ Executive Order 11114 (1963).

¹⁷⁴ Federal procurement refers to Federal service and supply contracts other than construction contracts. Office of Federal Contract Compliance regulations define a "Government contract" as any agreement between a contracting agency, i.e., any Federal agency which enters into contracts, and any person for the furnishing of supplies and services to the Federal Government. The term "services" includes, for example, utilities (gas, telephone, and electricity), construction, transportation, research, insurance, and fund depository. 41 C.F.R. 60-1.3(g)(m).

¹⁷⁵ Executive Order 11246 (1965). Part II is entitled Nondiscrimination in Employment by Government Contractors and Subcontractors. Part III is entitled Nondiscrimination Provisions in Federally Assisted Construction Contracts. Part I covers Federal employment. A ban against sex discrimination has been added, effective October 1968.

Secretary of Labor, rather than a Presidential committee, charged with supervising and coordinating the activities of the contracting agencies. The contracting agencies maintained primary responsibility for obtaining compliance.¹⁷⁶

The Secretary of Labor was empowered to issue regulations implementing the order, investigate complaints, conduct compliance reviews, hold hearings, and impose sanctions.¹⁷⁷ The Secretary also has authority to virtually direct contracting agencies to conduct such complaint investigations, compliance reviews, hold hearings, and impose sanctions as he deems necessary for implementation of the order.¹⁷⁸ An Office of Federal Contract Compliance (OFCC) was established in the Office of the Secretary of Labor on October 5, 1965, to administer the new Executive order.¹⁷⁹

b. *Scope and Coverage*

(1) *Employers*

Executive Order 11246 is addressed most directly to employers—those who are Government contractors. Like its predecessor, it not only requires that all Federal contractors assure the Government they will not discriminate in employment practices, but that they will undertake affirmative action to assure that non-discriminatory practices are followed in all areas of employment.¹⁸⁰ The order also indi-

¹⁷⁶ Executive Order 11246 (1965). Sec. 201 and 205. The designation of the Department of Labor as the responsible agency for contract compliance is not a complete break with tradition because the Department of Labor has been involved with contract compliance since 1953, when the Secretary was first designated vice chairman of the President's Committee on Equal Employment Opportunity (PCEEO). President Kennedy extended the Secretary's duties to general supervision and direction of the work of the PCEEO. Executive Order 10925, p. I, sec. 102(b).

¹⁷⁷ Executive Order 11246 at sec. 201, 206, 208, and 209.

¹⁷⁸ Executive Order 11246 at sec. 205, 206, 208(b), and 209.

¹⁷⁹ Secretary of Labor, Secretary's order 26-5, Oct. 5, 1965.

¹⁸⁰ Executive Order 11246 (1965), sec. 202(1). The concept of affirmative action was further clarified in OFCC's regulations, issued May 28, 1968, which noted that affirmative action programs are required to correct problems identified. In the preparation of his plan a contractor is required to complete a thorough minority group personnel utilization evaluation including up-grading, transfers, and promotions. 41 C.F.R. 60-1.40.

cates that all the facilities of a contractor are covered by its provisions¹⁸¹ even if only one of them is engaged in work on a Federal contract. It further requires that the contractor, unless exempted by the Secretary of Labor, obtain similar guarantees from his subcontractors.¹⁸²

The OFCC regulations which implement the Executive order require each executive department and agency administering a program of Federal financial assistance in the nature of a grant, loan, insurance, or guarantee involving a construction contract, to obtain from these contractors assurances identical to those required of direct Government contractors.¹⁸³

An equal employment opportunity clause is required in all contracts and subcontracts except those under \$10,000.¹⁸⁴ In federally assisted construction contracts, the total amount of the contract or subcontract, and not the amount of the Federal financial assistance, determines whether the clause is required. Open-ended and similar-type contracts must include the equal employment clause if the total amount purchased by the Federal agency thereunder exceeds \$10,000. Contracts for work to be performed outside the United States and contracts with State and local governments generally are not required to include a nondiscrimination clause regardless of their size.¹⁸⁵

The Director of the Office of Federal Contract Compliance is empowered to exempt any agency or contractor, in a specific contract or group of contracts, from the requirements of including the nondiscrimination clause, if he

¹⁸¹ Executive Order 11246 (1965), sec. 204.

¹⁸² Executive Order 11246 (1965), sec. 202(7) and 301.

¹⁸³ 41 C.F.R. 60-1.4(a),(b).

¹⁸⁴ 41 C.F.R. 60-1.5. It is unfortunate that the requirement of affirmative action to undo past employment discrimination and to assure true equal opportunity is limited to those contractors with contracts of \$10,000 or more. Even contractors with 25 or more employees with no Government contracts at all are prohibited by Title VII of the Civil Rights Act of 1964 from discriminating in their employment practices. The point of the matter is that OFCC is charged with the responsibility for assuring that Federal funds are not unconstitutionally disbursed through contracts with discriminatory contractors, and the \$10,000 minimum for application of the Executive order is an unjustifiable and arbitrary limit.

¹⁸⁵ 41 C.F.R. 60-1.5(a).

finds that "special circumstances in the national interest" require it.¹⁸⁶

(2) Unions

The Executive order, while not addressed directly to labor unions, nonetheless affects them.¹⁸⁷ It requires a contractor to inform the labor union or the representative of the workers with which he has a labor contract that he has equal employment commitments under the Executive order. No explicit obligations are undertaken by the employer to assure that the union does not discriminate. Nor does the order force a union to accept any equal employment obligations, although the Secretary of Labor is directed to use his best efforts to cause a labor union performing work for a contractor to cooperate in implementing the affirmative action plan.¹⁸⁸

A contractor with a collective bargaining agreement must submit in its compliance report information showing how the unions' policies and practices affect the contractor's ability to comply with its equal employment obligations. Refusal on the part of a union to comply in furnishing needed information must be disclosed to OFCC, accompanied by an indication of the contractor's efforts to comply with the disclosure requirement. In the case of a union's failure to cooperate in furnishing information or its interference with the affir-

¹⁸⁶ 41 C.F.R. 60-1.5(b)(1). Notwithstanding the power of the Director to make national interest exemptions, each individual agency head may also award a contract without a nondiscrimination clause where he makes a determination that the national security is involved. 41 C.F.R. 60-1.5(c). In the case of both national interest and national security exemptions, the Director of OFCC may withdraw the exemptions upon his own initiative; however, where a national security exemption has been granted by an agency, the Director of OFCC may not affect any contracts granted by the agency during the time the exemption was in effect. 41 C.F.R. 60-1.5(c) and (d). Although exemptions under the national security and the national interest provisions have not been used, it is undesirable to maintain such exemptions in the regulations unaccompanied by precise guidelines explaining what the terms mean, and procedures for review and evaluation of the use of the exemptions.

¹⁸⁷ The Executive order amends Title 41 of the Code of Federal Regulations—Public Contracts and Property Management—and thus deals with obligations of Federal contractors. The order therefore does not speak to obligations of unions unless they are Federal contractors.

¹⁸⁸ Executive Order 11246 (1965), sec. 207.

mative action program, the Secretary of Labor may report to the Equal Employment Opportunity Commission, the Department of Justice, or the National Labor Relations Board, actions which violate Title VII of the Civil Rights Act of 1964 or the National Labor Relations Act and recommend action be taken.¹⁸⁹ If any other agency's regulations or any other Federal laws are violated by the union's discriminatory conduct, the Secretary of Labor may also notify the appropriate agency.

OFCC's Order No. 4,¹⁹⁰ spelling out the meaning of affirmative action, requires an employer to meet with union officials to inform them of his affirmative action responsibilities and request union cooperation in effecting the program.¹⁹¹ The employer must also include nondiscrimination clauses in his collective bargaining agreements and seniority clauses in union contracts.¹⁹² All contractual provisions between the contractor and the union must be reviewed by the contractor to insure that they are not only nondiscriminatory but will not evoke a discriminatory reaction.¹⁹³ Since discrimination by a labor organization in its membership policies or failure of a union to represent minority group members fairly is a violation of Title VII, which would affect the employment practices of a contractor, such discrimination may also fall under the Executive order.

(3) Employment Agencies

In most situations, the Executive order only indirectly affects the practices of employment agencies. A Federal contractor assures, as part of the equal employment opportunity clause, that he ". . . will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin."¹⁹⁴ Furthermore, the con-

tractor undertakes an affirmative obligation to insure that the applicants employed have not been selected on the basis of race or other prohibited factors. These obligations may be interpreted as prohibiting a contractor from utilizing an employment agency that refuses to refer employees to him on a nondiscriminatory basis. However, the primary responsibility of guaranteeing equal employment opportunity rests with the contractor and cannot be shifted to an employment agency. Only those agencies servicing Federal contractors are affected by these provisions of the order.

An employment agency has a much clearer obligation when it has an agreement with a contractor under which the agency supplies the work force for the Federal job. In such cases the compliance report which is required to be filed by the contractor must indicate the employment agency's employment practices. In addition, the agency must submit information in writing showing that its practices and policies are nondiscriminatory and declaring that it will affirmatively cooperate with the contractor in carrying out his equal employment responsibilities or that the terms and conditions by which it will recruit and employ under its contractual agreement will conform to the purposes of the Executive order.¹⁹⁵

These obligations require the contractor not to utilize an employment agency refusing to refer employees to him on a nondiscriminatory basis. When an employment agency interferes with the equal employment purposes of the order, a contractor, despite a contractual agreement between the agency and himself, must terminate further dealings with the agency.

In instances where an employment agency directly refuses to comply with the equal employment obligations of the Executive order or where, during the course of the execution of the Federal contract, it fails to cooperate in carrying out the purposes of the order, the Di-

sources actively recruit and refer minorities for all positions listed." 41 C.F.R. 60-2.21(b)(1).

¹⁹⁵ Executive Order 11246 (1965), sec. 203(d) and 41 C.F.R. 60-1.9. Nothing in the Executive order would prevent the employment agency from discriminating with regard to other employers to whom it may supply personnel. Likewise, a contractor is not prevented from using employment agencies who discriminate as long as that agency agreed not to discriminate in its referral policies with regard to the contractor.

¹⁸⁹ Executive Order 11246 (1965), sec. 209(a).

¹⁹⁰ For a discussion of the implementation of order No. 4, see p. 60 *infra*.

¹⁹¹ 41 C.F.R. 60-2.21(a)(6).

¹⁹² *Id.*, at 2.25(f)(7).

¹⁹³ *Id.*, at 2.21(a)(7).

¹⁹⁴ 41 C.F.R. 60-1.4(a)(2). OFCC Order No. 4, the affirmative action guidelines, recommends that the contractor "inform all recruiting sources verbally and in writing of company policy, stipulating that these

rector of OFCC may notify EEOC, the Department of Justice, or other appropriate Federal agencies, to obtain effective relief under Title VII or any other Federal law which may have been violated.

(4) Testing

The requirements for an acceptable testing program under the Executive order and Title VII appear to be substantially the same.

Each contractor is required to provide evidence showing the tests used have predictive value or significantly evaluate the skills required in the precise jobs for which the test is administered. Many contractors rely exclusively on test results to make employment and promotion decisions. This is desirable if, in fact, the tests are result-oriented and not discriminatory in effect. The guidelines issued by the Department of Labor assert, however, that there has been ". . . a notable increase in the incidence of doubtful testing practices which, experience indicates, tend to have racially discriminatory effects."¹⁹⁶ In order to remedy the situation, OFCC published the guidelines requiring that tests be valid indices of performance potential.¹⁹⁷

(5) Seniority

The Executive order, through implementation of Order No. 4 and the June 1969 Philadelphia Plan,¹⁹⁸ has been interpreted as prohibiting seniority systems which exclude minorities from employment or deprive them of promotion rights. This determination is essentially the same under the requirements of Title VII.

The seniority policy rule of OFCC was formally communicated to all contract compliance officers in a memorandum of August 8, 1968. It developed from Court decisions in the *U.S. v. Crown Zellerbach* and *Quarles v. Philip Morris* cases which defined discriminatory seniority systems and determined they violated Executive Order 11246, as well as Title VII of the Civil Rights Act of 1964. OFCC stated that

discriminatory seniority systems, previously permitted by contractors, were unacceptable and not negotiable as principles or as to the extent of remedy required; only the method of remedy was to be open to discussion.¹⁹⁹

Order No. 4 requires in-depth analysis of seniority practices and the seniority provisions of union contracts to determine whether such plans result in underutilization of minority group members.²⁰⁰ In situations where seniority provisions contribute to discriminatory employment practices the employer must undertake corrective action.²⁰¹

The Department of Labor, in issuing the Philadelphia Plan,²⁰² maintained that it was necessary because of the long-standing history of discrimination by contractors and, more importantly, by construction craft unions in Philadelphia. Unions were, as a practical matter, the exclusive source of labor for the contractors. Where, because of past discrimination, maintenance of apparently neutral hiring principles, such as referral by seniority, perpetuates the effects of the past, the Executive order is violated. Thus, under the Philadelphia Plan, a contractor may not justify his failure to meet the minority employment goals on grounds of the union's seniority system. The union, itself, regardless of its seniority system, must make an affirmative effort to refer minority employees. The absence of such an affirmative effort may result in the contractor being directed to draw his employees from a source other than the union.

¹⁹⁹ Memorandum from Ward McCreedy, Acting Director, OFCC to contract compliance officers, "Discriminatory Seniority Systems," Aug. 8, 1968.

²⁰⁰ 41 C.F.R. 60.2-23(a) (6).

²⁰¹ 41 C.F.R. 60.2-23(b) (11).

²⁰² The Philadelphia Plan, which applies to all Federal and federally assisted contracts for projects in the Philadelphia metropolitan area valued in excess of \$500,000, states that no contracts or subcontracts shall be awarded . . . unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization. In fact, in an order issued Sept. 23, 1969, as guidelines to the revised Philadelphia Plan, percentage ranges of acceptable levels of minority employment were adopted for each of the next 4 fiscal years. Failure to meet the designated percentages requires that the employer demonstrate that he made every good faith effort to meet the goals. A failure to make such a showing will subject the contractor to the sanctions available to OFCC.

¹⁹⁶ 33 Fed. Reg. 14392 (1968).

¹⁹⁷ 33 Fed. Reg. 14392 (1968). The recently issued Order No. 4, although not extensively dealing with testing, requires that tests be validated. 41 C.F.R. 60-2.23(b) (7). Furthermore, since a total evaluation of the minority employment must be done under Order No. 4, testing evaluation is only one aspect of the requirement.

¹⁹⁸ See discussion of Order No. 4, p. 60, and the Philadelphia Plan on pp. 50, 63-64, *infra*.

D. Office of Federal Contract Compliance (OFCC)

1. EARLY RESPONSE OF OFCC (1965-68)

a. Procurement-Contract Compliance

Executive Order 11246 carries significant potential for having a major impact on the problem of unequal job opportunities faced by minority groups. In its first 5 years, however, it has not fulfilled this potential for a number of reasons.

The staff of OFCC and the contracting agencies devoted to this program have been numerically inadequate. In 1967, OFCC maintained a small full-time staff of 28 in Washington,²⁰³ while the contracting agencies employed only 228 full-time contract compliance specialists plus 40 others who devoted more than half-time to this activity.²⁰⁴

From the beginning, OFCC has had a Director, a Deputy Director, and two major units: Contract Compliance [Procurement] and Construction Contract Compliance. An Assistant Director for Construction, with one assistant, supervised the area coordinators who, beginning in April 1965, were stationed in more than a dozen large metropolitan areas to assist the contracting agencies in obtaining compliance from construction contractors.²⁰⁵ The Contract

Compliance Unit consisted of seven senior compliance officers and seven assistant compliance officers responsible for liaison with the 26 contracting agencies. Their job was to establish governmentwide goals, targets, and priorities; review selected preawards, followup compliance investigations and complaint investigations; participate in the most significant contract compliance negotiations conducted by the agencies; and monitor the manner in which the compliance agencies implement their own compliance programs. Because of insufficient staff,²⁰⁶ the informal nature of the relationship between OFCC and the agencies,²⁰⁷ and, in relation to the other duties of OFCC, the lower priority assigned to the monitoring function,²⁰⁸ comprehensive agency compliance program evaluations received scant attention. In fact, agency evaluations by OFCC appeared superficial and were conducted on an ad hoc basis.²⁰⁹

The gross lack of staff of OFCC and the agencies had obvious effects on the agencies' ability to perform their roles in this area. This was both a cause and effect of the reluctance of agencies to take vigorous contract compliance action.²¹⁰

The rationale for separating construction compliance from other contract compliance is based on the different nature of construction employment. Construction employment begins and ends with the contractor having no control of employment opportunities for particular individuals once his project is complete. See pp. 57-58 *infra* for current structure.

²⁰⁶ Interview with Leonard Bierman, Senior Compliance Officer, OFCC, Nov. 27, 1969. Interview with Robert Hobson, Senior Compliance Officer, OFCC, Dec. 4, 1969.

²⁰⁷ Interview with Ward McCreedy, Assistant Director for Contract Compliance, OFCC, Dec. 2, 1969; interview with Alex Estrin, Senior Compliance Officer, OFCC, Dec. 3, 1969. [It was felt that it is difficult for one cabinet agency to give orders to another. Furthermore, since OFCC staff had to work with the agencies on a regular basis, they could not afford to antagonize them.]

²⁰⁸ Bierman interview, *supra* note 206.

²⁰⁹ *Id.* McCreedy and Estrin interviews, *supra* note 207. Response by 15 contract compliance agencies to a Dec. 23, 1969 Questionnaire from the U.S. Commission on Civil Rights.

²¹⁰ Leonard Bierman, an OFCC Senior Compliance Officer, testified at the Commission's Alabama hearing that, "95 percent of the contracting agencies' staff and attention and desires are aimed at awarding contracts . . . [it is therefore necessary] to overcome

²⁰³ R. Nathan, *Jobs and Civil Rights*, (prepared for the U.S. Commission on Civil Rights by the Brookings Institution) 101 (1969). The data are for fiscal year 1967. A small additional staff supported the private "Plans for Progress" program, which attempted by purely private voluntary means to improve equal employment opportunity. This support was provided for in sec. 402 of the Executive order.

²⁰⁴ *Id.*, at 113. The Department of Defense, at the time of the Commission's hearing in Montgomery, Ala., had a contract compliance staff of 11 professionals with responsibility for monitoring the compliance of more than 5,800 contractor facilities in the seven States and Puerto Rico that make up its southeast region. To supervise equal employment opportunity in GSA contracts in the amount of \$1,350,400,000, GSA provided three professionals in Washington and 10 compliance investigators in the field. Only one investigator covered the entire seven-State region, and he devoted a portion of his time to matters other than contract compliance. For a more detailed discussion of agency staffing, see pp. 76-81 *infra*.

²⁰⁵ The area coordinators were to assist in the application of uniform compliance standards by the contracting agencies with construction contracting responsibilities. Although they report to OFCC, the funds for their salaries are paid by the contracting agencies.

OFCC failed to exercise its own role effectively as leader or coordinator of the compliance effort. It did not even issue regulations until 2½ years after it was created.²¹¹ Until recently, OFCC even avoided explicitly defining what was required by the order's mandate of "affirmative action". For example, in a January 1967 statement, Edward C. Sylvester, Jr., then Director of OFCC, defined affirmative action, not in terms of specific actions the contractor had to perform, but vaguely, in terms of undefined results that had to be achieved:

Affirmative action is going to vary from time to time, from day to day, from place to place, from escalation to escalation. It depends upon the nature of the area in which you are located, it depends upon the kinds of people who are there, it depends upon the kind of business that you have. There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is "results."²¹²

The failure of OFCC to provide specific guidance on affirmative action requirements gave rise to the use of indefinite or otherwise ineffectual standards by the contracting agencies. For example, a booklet published by the Department of Defense's Contract Administration Services, entitled *Nondiscrimination in Employment*, which appeared to be the principal Department statement on standards for compliance, failed to state any requirements at all. Instead, the booklet listed actions or

this built-in resistance that we find in every contracting agency." Federal agencies are loathe to upset their relations with contractors. Effective enforcement might result in the disqualification of low bidders or other preferred contractors, or cause delays in the letting or performance of contracts. *Alabama Hearing*, supra note 155, at 471.

²¹¹ The regulations were finally issued on May 28, 1968, although it had been indicated that they would be issued in early 1967. *1967 Plans for Progress Report* 75. Until the new regulations were issued OFCC continued to use the regulation of its predecessor, the President's Committee on Equal Employment Opportunity. This delay may be one measure of the impotence of OFCC in the Federal bureaucracy. See pp. 60-61, infra, for a discussion of the latest clarification of affirmative action by OFCC.

²¹² Statement of Edward C. Sylvester, Jr. in *Report of 1967 Plans for Progress Fifth National Conference*, Jan. 23-24, 1967, at 73-74; also see *Jobs and Civil Rights*, supra note 203, at 92-93.

practices which a contractor might undertake in support of the equal employment opportunity program. Further, the booklet stated that "the absence of any of these factors (including desegregated facilities and the elimination of other forms of discrimination) does not necessarily establish a condition of noncompliance."²¹³ This uninformative and even misleading exposition of substantive compliance standards was an inadequate substitute for the guidance which was OFCC's responsibility—perhaps its most important responsibility—to provide.

With regard to its leadership and coordinative role OFCC did not take aggressive and effective action to require contracting agencies to comply with their responsibilities under the order. In many cases OFCC was unaware of the fact that the agencies were not operating in accordance with its regulations²¹⁴ and in some cases where the facts were known, it failed to insist upon strict compliance with policies.²¹⁵

Still another impediment to effective enforcement was the inadequacy of the reporting system used in assessing employment practices

²¹³ Department of Defense, Defense Supply Agency, *Nondiscrimination in Employment*, November 1968.

²¹⁴ For example, the Alabama hearing disclosed that OFCC's directive creating a program of preaward compliance reviews by the agencies—potentially a most effective method for obtaining compliance—was not being carried out by the Department of Defense, in that 40 to 50 percent of the supposedly preaward compliance reviews in the Southeast region in fact were being conducted days or weeks after award of the contract. The Commission learned that in the 16 months prior to the hearing, in DOD's Southeast region, contract compliance officers in 95 percent of their compliance inspections said that a followup inspection was necessary; yet in only 10 percent of the cases was a followup inspection actually made. *Alabama Hearing*, supra, note 155, at 460. Interview with Kenneth W. Eppert, Chief, Office of Contract Compliance, Defense Contract Administration Services, Atlanta Region, Atlanta, Ga., Mar. 16, 1968.

²¹⁵ For example, when the Commission's Alabama hearing uncovered serious problems of discrimination in Alabama facilities of the American Can Co., a General Services Administration contractor, OFCC became involved in their resolution. But apparently by reason either of hesitancy to exercise its supervisory authority, or of inadequate resources with which to do so, OFCC permitted GSA to adopt an enforcement course which was clearly inadequate. Also see discussion on textile industry compliance problems, pp. 73-74 infra.

of Government contractors. Companies subject to Title VII of the Civil Rights Act of 1964 and companies with substantial Federal contracts are required to submit annually an employment data report called the "EEO-1" form. The report gives employee statistics, by race or national origin, for each of the employer's facilities. The data in general use were outdated. For example, in 1968, Federal agencies were relying principally on data from forms submitted in 1966. Moreover, the agencies did not have reports covering all the facilities for which they were responsible.²¹⁶

Of even greater significance is the fact that current racial data on applications, hiring, and promotions, crucial for evaluating present employment policies, were not gathered systematically. The official responsible for administering the Department of Defense contract compliance in the area comprising Alabama, Mississippi, and portions of neighboring States, indicated that in 1968 less than a dozen of his 1,300 facilities were submitting special compliance progress reports giving such current data.²¹⁷

The ineffectiveness of the program, however, was due at least as much to failure to impose sanctions on known noncomplying contractors, as to the lack of staff of OFCC and the agencies and OFCC's lack of leadership. All contract compliance efforts prior to Executive Order 11246 had been characterized by voluntarism—designed to achieve compliance by consultation and mediation without resort to sanctions.²¹⁸ This policy had been ap-

²¹⁶ While GSA has responsibility for an estimated 5,000 contractor facilities, GSA has indicated that it has in its files EEO-1 forms covering only 1,600 facilities. Interview with Robert J. Harlan, contract program policy officer, GSA, Feb. 11, 1968.

²¹⁷ Eppert interview, supra note 214.

²¹⁸ Voluntarism was best exemplified by the Plans for Progress approach. The organization, whose members are private employers who pledged compliance with the order, was serviced by Federal employees. It was established in 1961 as an "adjunct" to the President's Committee on Equal Employment Opportunity. There was considerable feeling at the time of President Kennedy's first Executive order that before it could be effectively enforced, it would be necessary to have leading Government contractors take voluntary action, thereby setting the climate for the Government to insist that other contractors follow suit. The program was not notable for its success. In 1969, the program was

appropriate initially because of OFCC's and the contracting agencies' need to establish policies, procedures, and ground rules and the need to inform compliance agency personnel and contractors of the program's importance and the manner in which it was expected to operate.

From its beginning, OFCC indicated its preference for enforcement as opposed to continued emphasis on voluntarism.²¹⁹ Notwithstanding this stated preference it was not until May 24, 1968 that first notices of debarment were sent to contractors.²²⁰ At that time there had not been a single cancellation or termination because of a contractor's discriminatory policies. Furthermore, only two noncomplying contractors had been sued or recommended for suit;²²¹ the administrative

merged with another private group, the National Alliance of Businessmen, which had as its goal and purpose the provision of large numbers of full-time jobs for disadvantaged unemployed persons including minorities.

²¹⁹ For example, see *Jobs and Civil Rights*, note 203, at 102-03 supra.

²²⁰ On May 24, 1968, notices of proposed debarment (ineligibility for future Federal contracts) were sent to five different contractors. They were: The Bethlehem Steel Corp., Timken Roller Bearing Co. (Columbus and Canton, Ohio), Allen-Bradley (Milwaukee, Wis.), B & P Motor Express (Pittsburgh, Pa.), and Pullman, Inc. (Bessemer, Ala.). Memorandum from Edward C. Sylvester, Jr., Director, OFCC, to the Secretary of Labor, Debarment Hearings, May 24, 1968.

The only subsequent debarment notices were sent in August 1968. On Aug. 5, 1968, a debarment notice was sent to Hennis Freight Lines, Inc. and on Aug. 8, 1968, a debarment notice was sent to the Bemis Co., Inc.; both firms requested hearings within 10 days, but no further action has been taken, i.e., no hearings have been held and no agreements reached. Interview with Gresham Smith, Assistant Solicitor of Labor, June 9, 1970.

DOD was the compliance agency for four of these contractors. B & P Motor Express and Hennis Freight Lines, Inc. were Post Office Department contractors and Bemis Co., Inc., was the responsibility of the Department of Agriculture. Hearings were actually held for Bethlehem, Timken, and Allen-Bradley—and agreements were reached with two others before a hearing. Timken is functioning under an agreement while Allen-Bradley is being considered for court action. Although the Bethlehem hearing is completed, no decision has been rendered. Interview with Robert Hobson, Senior Compliance Officer, OFCC, Apr. 15, 1970.

²²¹ Interview with Barney Sellers, principal author of *The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws* (prepared for the Office of Economic Opportunity, 1969), June 8, 1970.

authority to suspend contractors from Government business during pending of hearings had never been used; only one hearing had been held by a contracting agency since the start of the compliance program;²²² the Department of Labor was in the fifth year of negotiation with the only contractor it had found guilty of discrimination;²²³ and enforcement cases were before the Department of Labor's Office of Federal Contract Compliance only after the agencies that had let the contracts failed to take action against the contractors.²²⁴

The lack of utilization of sanctions by contracting agencies²²⁵ forced OFCC to become involved in some of the most difficult negotiations of major noncompliance situations. For several reasons, including the paucity of OFCC's staff, this deference to OFCC in enforcement actions caused many to believe that sanctions would be imposed only in exceptional cases and only with OFCC involvement. Failure to make sanctions appear a likely result of noncompliance undermined all enforcement efforts in the early stages of implementing the order.²²⁶ Many compliance officers and contractors seemed to take the substantive provisions of the order casually and acted only when absolutely required to do so. In numerous cases, public exposure was the only vehicle which seemed able to bring about even minimal compliance.²²⁷

²²² Id.

²²³ Id.

²²⁴ Memorandum from Edward C. Sylvester, and Smith interview, *supra* note 220.

²²⁵ A striking illustration of differences in agency treatment of civil rights enforcement and its treatment of other responsibilities is afforded by the Department of Defense. Since 1964, DOD has cancelled more than 6,500 defense contracts for shortcomings in quality or production—yet it has never cancelled a single contract because of a firm's unfair hiring practices. This is typical of the behavior of the other contracting agencies. The A. Philip Randolph Institute, *The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws* (prepared for the Office on Economic Opportunity) (1969) ch. 1 at 30.

²²⁶ Kenneth Eppert, Chief, Contract Compliance for the Atlanta Region, Department of Defense, stated that unless all of a company's business was with the Federal Government, it would not be terribly concerned about timely compliance with the Executive order. *Alabama Hearing*, *supra* note 155 at 460-61.

²²⁷ For example, see discussion on compliance failures regarding the textile firms agreements at pp. 73-74

b. Construction Compliance

From its inception, OFCC handled construction contracts differently than supply contracts. Construction employment is temporary and no fixed site of operations exists. Further, construction contractors do not maintain employee forces of workmen, instead they assemble the necessary crews for each job. The various construction trade unions have established hiring halls which are fully utilized by contractors and subcontractors. Job selection in the union hall is usually based on (a) union membership and (b) seniority. For these reasons, plus the fact that there was no body of knowledge concerning methodology in securing compliance in the construction area,²²⁸ OFCC officials believed that a method other than regular compliance reviews would be needed to promote minority employment progress in this industry.²²⁹

To coordinate compliance efforts of each agency with construction contracts, OFCC developed "special area plans" in four cities: St. Louis, in January 1966; San Francisco, in December 1966; Cleveland, in February 1967; and Philadelphia, in November 1967.²³⁰

The St. Louis Plan resulted from local minority group agitation regarding job discrimination on a large construction job, the famous St. Louis Commemorative Arch, which received Federal funds and, potentially, could

infra and the McDonnell Douglas case at pp. 74-76 *infra*. Recently a Newport News agreement was held up by OFCC. *Washington Post*, Apr. 15, 1970.

²²⁸ Executive Order 11114 included construction as a responsibility of the President's Committee on Equal Employment Opportunity. No previous attempt had been made to establish any uniform approach to construction compliance and little was accomplished in this area by the President's Committee.

²²⁹ Interview with Nathaniel Pierson, Deputy Assistant Director for Construction, OFCC, Nov. 27, 1969.

²³⁰ Beginning in 1965, area coordinators were established in more than a dozen metropolitan areas to try to improve minority construction employment within an entire labor market or metropolitan area. The four special area programs were developed to strengthen this approach and develop methods which might be used in other metropolitan areas. These plans or approaches, in their most comprehensive form, tried to set up a governmentwide construction plan for an area. All Federal agencies in selected areas with construction in progress or pending were expected to participate and the same rules and guidelines were to be used on all contracts. Hobson interview, *supra* note 220.

have provided job opportunities for many minority group persons. Prior to settlement, work was shut down several times by recalcitrant unions, which were importing white craftsmen rather than hiring local minority craftsmen.²³¹ In the end, a compromise plan was agreed to, permitting some minority group contractors to receive subcontracts on the job. Measured by results, the plan was a failure. Job penetration by minority groups into the St. Louis construction trades was small and temporary.²³² Further, no methods or institutions to extend minority hiring to other construction jobs were developed.

The San Francisco Area Plan also came about as a result of a large Federal fund commitment, the Bay Area Rapid Transit (BART) project.²³³ The area plan called for BART, a local public authority, to require all bidding construction contractors to comply with affirmative action commitments previously established by the contracting agency (HUD) and OFCC. BART did not adequately enforce the program and significant minority entrance into the local building trades did not take place. Thus, this plan must also be judged a failure.²³⁴

The Cleveland plan was not primarily aimed at one Federal project, but involved all Federal construction contractors in a seven-county

area. The plan's approach was sophisticated and required a preaward conference²³⁵ at which contractors had to agree on a set of minority "manning tables"²³⁶ for the job. The "manning tables" were project-connected, covering six building trades and containing modest requests in ratio to local minority manpower resources. Federal pressure was exerted in support of the plan by postponing a number of federally financed construction projects when contractors with acceptable "manning tables" were not forthcoming.

The Comptroller General, while not passing on the legality of "manning tables" as such, ruled on May 22, 1968, that companies cannot legally be asked to bid on federally assisted construction contracts unless they are first informed about the affirmative action obligations which will run with the contract.²³⁷ Since the "manning table" requirement was not in bid specifications but, rather, was developed by the contractor and contracting officials at a later date,²³⁸ the Comptroller General found it illegal. The ruling severely limited the application of "manning tables" in other metropolitan areas and thus the Cleveland plan could not be called a significant success.²³⁹

The original Philadelphia Plan, which was modeled after the Cleveland Plan, required an effort by compliance agencies, coordinated by OFCC, to obtain a preaward commitment on a detailed affirmative action plan which would result in an increase in minority employment in eight technical trades.²⁴⁰ It was

²³¹ Finally on Feb. 4, 1966, the Department of Justice filed suit against the Building and Construction Trades Council of St. Louis and local unions of the pipefitters, sheet metal workers, electricians, plumbers, and laborers.

²³² A Federal court suit charging discrimination and seeking remedial steps was finally won in September 1969. The U.S. Court of Appeals for the Eighth Circuit in revising the decision of the U.S. District Court for the Eastern District of Missouri, found discrimination in actions of the sheet metal workers and the electricians, and outlined the steps to be followed by the District Court to implement the holding. *United States v. Sheet Metal Workers Int'l Ass'n.*, 280 F. Supp. 719 (E.D. Mo. 1968), *rev'd*, 416 F.2d 123 (8th Cir. 1969).

²³³ For a full discussion of the San Francisco Plan, see *Hearing Before the United States Commission on Civil Rights*, held in San Francisco and Oakland, Calif. on May 1-6, 1967, at 355-71.

²³⁴ The latest report on BART from OFCC indicates that little has changed regarding employment of minorities by building contractors although a few contracts have gone to some minority group contractors. Interview with Nathaniel Pierson, Deputy Director for Construction, OFCC, June 12, 1970.

²³⁵ A preaward conference is a meeting between apparent low bidders and Federal officials, which is held prior to the acceptance of the winning bid.

²³⁶ "Manning tables" are the contractor's way of planning work for a job. These tables are established by trade and work week, indicating how many men of each skill will be used at each point in the project. Minority "manning tables" noted how many of each working trade each work week would be members of a minority group.

²³⁷ 47 Comp. Gen. 666 (1968).

²³⁸ Once a low bidder for a contract was selected, a meeting or conference was held with the contractor prior to the official award of the contract, which is usually 30 days later. At these conferences the nature of the affirmative action requirements was discussed and the "manning table" commitment was negotiated.

²³⁹ Pierson interview, *supra* note 229.

²⁴⁰ The plan began on Nov. 30, 1967 and was directed by the Construction Contract Compliance Committee (CCC Committee) of the Philadelphia Federal Execu-

based on a finding of significant discrimination by building trade unions in the Philadelphia metropolitan area and that voluntary efforts to change this situation had been ineffectual.²⁴¹

Since the procedures of the November 1967 Philadelphia Plan, like those of the Cleveland Plan, required that affirmative action requirements be determined after bids were made, the Comptroller General on November 18, 1968, held it to be a violation of competitive bidding principles.²⁴² This action temporarily ended the preaward approach to construction compliance.

2. CURRENT OFCC ACTIVITIES

After a slow and inauspicious first few years, OFCC began to take positive action. In May 1968, for the first time it began proceedings to debar five contractors from further Government contracts for noncompliance with the Executive order. In the same month it issued its first regulations, including a relatively specific section on affirmative action requirements. They obligated the contractor to analyze and identify problems of minority group utilization and, where deficiencies were found, to adopt specific goals and timetables for increasing minority group utilization.²⁴³ Since then, OFCC has issued an order on non-discrimination in employment testing and other selection procedures, to be followed by covered contractors and a further order to clarify the affirmative action requirements of compliance agencies.²⁴⁴

The Secretary of Labor announced in July

²⁴¹ 41 C.F.R. 60-1.40:

"(a) *Requirements of Programs.* . . . a necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity. . . .

"(b) *Utilization Evaluation.* The evaluation of utilization of minority group personnel shall include the following: (1) An analysis of minority group representation in all job categories. (2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories. (3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

"(c) *Maintenance of Programs.* Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the agency or Director upon request and the contractor's affirmative action program and the result it produces shall be evaluated as part of the compliance review activities."

²⁴² 33 F.R. 14392 (1968); 41 C.F.R. 60-2 (1970).

²⁴³ Minority employment opportunities in the Philadelphia construction industry were extremely limited in the higher skilled trades. The eight locals most lacking in minority group representation had a combined membership of about 8,500-9,000, including between 650-750 apprentices. Of these no more than 25-30 were minority journeymen and only 15 apprentices were of minority groups. Id., at p. C, at 2.

²⁴⁴ The Comptroller General said:

"Accordingly, in our view where federally assisted contracts are required to be awarded on the basis of publicly-advertised competitive bidding, award may not properly be withheld pursuant to the Plan from the lowest responsible and otherwise responsive bidder on the basis of an unacceptable affirmative action program, until provision is made for informing prospective bidders of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of such program would be judged." 48 Comp. Gen. 326 (1968).

This opinion was not entirely unexpected because of the Comptroller General's opinion of May 22, 1968, which had held that there appeared to be a technical defect in bid specifications which included no statement of the minimum standards of affirmative action required. 47 Comp. Gen. 666 (1968).

1970 that goals and timetables would also be used to achieve equal job opportunity for women in Federal contract work.²⁴⁵ The previous month, on June 3, 1970, the Department of Labor had issued sex discrimination guidelines which apply to employment with Government contractors and subcontractors covered by Executive Order 11246. Effective June 9, 1970 they require written personnel policies which pledge that the employer will not discriminate on the basis of sex. The guidelines prohibit, among other things, distinction by sex in conditions of employment; distinction between married and unmarried women; penalties against women because they require time off for childbearing; maintenance of seniority lines and tests based solely on sex; and differing retirement ages by sex. Covered employers are also required to take affirmative action to recruit women for those jobs from which they had previously been excluded.²⁴⁶

a. Organization and Staffing

In May 1969, OFCC was transferred from the Office of the Secretary to the Wage and Labor Standards Administration, now called the Workplace Standards Administration.²⁴⁷ The transfer was reportedly made to increase the flexibility of OFCC manpower and improve

²⁴⁵ Department of Labor News Release, No. 11-366, July 31, 1970.

²⁴⁶ 41 C.F.R. 60-20 (1970). Executive Order 11375, issued Oct. 13, 1967, which adds sex discrimination to the employment practices banned under Executive Order 11246, was effective on Oct. 13, 1968. To prepare for this an OFCC memorandum noted that the approach of OFCC to "sex discrimination is the same as it is with respect to the other forms of discrimination covered by Executive Order 11246 . . . emphasis should be placed upon affirmative action and compliance reviews in a pre-award process." Seminars were organized for compliance personnel on the subject of sex discrimination, to be held in Sept. 1968. Memorandum from Ward McCreedy, Acting Director, OFCC, to all contract compliance officers, "Implementation of Executive Order . . .", Aug. 8, 1968.

²⁴⁷ Secretary of Labor's Order, No. 24-69 (effective May 19, 1969). The Wage and Hour and Public Contracts Divisions and the Division of Wage Determinations, Office of the Solicitor, were also transferred to the Wage and Labor Standards Administration, effective July 1, 1969. During the week of July 27, 1970, it was announced that the Wage and Labor Standards Administration had been renamed and reorganized. It is now called Workplace Standards Administration. The effect of this change on OFCC is not yet clear, but appears to be minor.

the unit's status.²⁴⁸ Assistant Secretary of Workplace Standards, Arthur Fletcher, is the highest ranking black official in the Department of Labor.²⁴⁹ The Deputy Assistant Secretary, John L. Wilks, who is also black, is Director of OFCC.

A reorganization of OFCC, approved February 6, 1970, significantly alters the form and missions of the subunits of the office. The new organization is not completely staffed, but the major positions have been filled. Three major and two minor subunits have been created under the jurisdiction of Mr. Wilks and his deputy director.²⁵⁰ The three major subunits of OFCC are: the Office of Program Operations (OP), the Office of Technical Assistance (OTA), and the Office of Program Review (OPR).²⁵¹ The two minor subunits are the Special Projects Office and the Office of Plans and Programs.²⁵²

²⁴⁸ Interviews with Robert Hobson, Senior Compliance Officer, OFCC, Nov. 17, 1969, and Nathaniel Pierson, *supra* note 229. It was also noted that the transfer was the first step in an expected OFCC reorganization.

²⁴⁹ Mr. Fletcher has shown a keen interest in effective enforcement of the Executive order. He has made numerous public statements urging its vigorous enforcement. For example, when speaking before contract compliance officers from 26 Federal agencies on June 23, 1969, Mr. Fletcher noted that it was apparent that the Executive order was not being adequately enforced in accordance with OFCC procedures. Those areas where "we have been falling down must be immediately . . . corrected," he stated. On Mar. 30, 1970, at a human relations workshop for teachers in Phoenix, Ariz., Mr. Fletcher interpreted President Nixon's pronouncement on equal job opportunity in construction as presenting a "golden opportunity" to provide minorities with an appreciable portion of the 2 million new construction jobs expected to be created in the next 8 years. He added that this effort would not be preferential treatment but a deliberate effort to share national wealth with minorities.

²⁵⁰ As of September 1970, the position of Deputy Director had been vacant for more than 6 months. Civil Service Commission approval for the position had not been granted as of Aug. 20, 1970.

²⁵¹ The units are headed by two whites and a black; there is no Mexican American or other Spanish-speaking professional in the Washington headquarters. Interview with Robert Hobson, Senior Compliance Officer, OFCC, Apr. 15, 1970.

²⁵² Organization Chart, dated Feb. 6, 1970. The Special Projects Office does not have its mission defined, but it will be concerned with compliance agency technical management problems as well as OFCC communication opportunities.

The Office of Program Operations has been divided into three divisions: Conciliation, Operations Support, and Training. The conciliation division is concerned with establishing policies, procedures, and methods for implementation of affirmative action requirements by compliance agencies.²⁵³ The division also becomes involved in affirmative action negotiations expected to result in landmark agreements. When required, the division approves or disapproves compliance agency recommendations for sanctions and hearings.

The operations support division concentrates on surveillance, guidance, and evaluation of the Washington and regional offices of the contract compliance agencies, and also provides Washington-level coordination of the construction compliance programs.²⁵⁴

The training division is responsible for training OFCC personnel in Washington and the 11 regional offices created under the recent reorganization.²⁵⁵ It is also authorized to coordinate and direct special training programs for compliance agencies. The training will cover questions about contract awards and complaint investigations, compliance reviews, and methods of handling special problems of contractor management or unions.²⁵⁶

The Office of Plans and Programs is concerned with providing overall policy guidance and direction to OFCC and the compliance agencies. The Office is responsible for OFCC budget preparation and budget coordination with compliance agencies. It is also concerned with the development of long range objectives while maintaining a continuing review of the impact of OFCC policies. OFCC Mission and Function Statements Feb. 6, 1970; Hobson interview, *supra* note 251.

²⁵³ OFCC Mission and Function Statements, *supra* note 252.

²⁵⁴ *Id.* The surveillance or monitoring plan is expected to be based on a target selection system (a method for selecting contractor facilities to be reviewed) which it is hoped will select suitable industries for each of the compliance agencies to concentrate their efforts. The operations support division is particularly responsible for directing the compliance agencies to develop and effectively implement programs for complaint investigations, preaward compliance reviews, postaward reviews, and followup reviews.

²⁵⁵ *Id.* The reorganization of Feb. 6, 1970, established 11 regional offices which incorporate all the previous functions of area coordinators plus technical assistance responsibilities with regard to procurement contract compliance.

²⁵⁶ *Id.* As of Aug. 25, 1970, the division will have "three professionals including a Director of Training,

The principal task of the Office of Technical Assistance (OTA) is to supervise and direct the 11 regional offices,²⁵⁷ thereby assisting regional agency personnel to develop and implement industry compliance programs. OTA continues the previous work of the area coordinators in helping the compliance agencies develop cooperative, areawide affirmative action programs in the construction industry, which impose uniform requirements on all construction contractors performing on Federal or federally assisted contracts.²⁵⁸ In addition to these tasks, OTA will develop a comprehensive agency, construction contractor, and industry reporting system, to determine minority group employment in covered industries and the rate of improvement in the future.²⁵⁹

The Office of Program Review (OPR) is concerned with: (1) evaluating the effectiveness of OFCC policy and agency programs which implement that policy through field investigations of selected contractor facilities, (2) evaluating new policy and technical pro-

a Training Officer, and an Employee Development Officer. Thus far, one of the positions has been filled."

The specific purposes "include (1) an employee development program for OFCC and the contracting agencies, (2) an orientation and training component [as a part of] all OFCC issuances relating to new policies, programs, standards, and procedures . . . and (3) a comprehensive training course for agency compliance officers."

OFCC indicates that, "[e]ach of these activities will be undertaken in such a manner as to overcome past obstacles to effective training. For example, in the past, the OFCC operated in connection with the Civil Service Commission a comprehensive training course of one weeks duration. These courses were offered on the average of one each 6 weeks. The major problem was that many of the contracting agencies would not permit their compliance officers to implement the knowledge gained through the training course." The intention is "to resolve this problem by obtaining a commitment at the highest level of the contracting agencies that all OFCC policies, programs, standards, priorities, procedures, etc., will be adhered to. This commitment will be obtained prior to undertaking the training effort." Memorandum from Robert R. Hobson, Director, OPA, OFCC, to George Travers, Economist, OFCC, Aug. 25, 1970.

²⁵⁷ OFCC Mission and Function Statements, Feb. 6, 1970.

²⁵⁸ Hobson interview, *supra* note 251.

²⁵⁹ OFCC Mission and Function Statements, *supra* note 257.

posals through field tests, and (3) investigating and assisting in conciliation efforts when the resolution of contractor compliance problems establishes a new precedent or has other national impact.²⁶⁰

The new organization has been structured in anticipation of increased staffing levels. While staffing of these three offices is not complete, for fiscal year 1971, OPO is expected to have a staff of 25 professional and clerical personnel; OTA is scheduled to have 11 regional directors and a Washington supervisor; and OPR is to have a staff of 13.²⁶¹ The current staff of OFCC members is 43.²⁶² In addition, 22 employees are assigned to the function of area coordinator. They report to OFCC but are paid from other Department of Labor funds.²⁶³

b. OFCC Goals

The basic goal of OFCC as indicated in the Executive order and in its regulations is to

²⁶⁰ OFCC Office of Program Review Project Plan for Fiscal Year 1971 (undated but in effect as of Aug. 20, 1970).

²⁶¹ OFCC Organization Chart, Feb. 6, 1970, and OFCC Staffing Plans as reported in memorandum from Robert R. Hobson, Director OPO, OFCC to George Travers, Economist, OFCC, Aug. 25, 1970.

²⁶² OFCC is also programed for a small management information system unit with a staff of six responsible for developing, refining, and assisting in the implementation of the information system, see p. 59 infra.

²⁶³ The Area Coordinator Program will be combined with the Technical Assistance Program in the fiscal year 1972 budget.

As a result of the reorganization of the Workplace Standards Administration, certain staff functions previously performed by each bureau will be performed by the Administration. Consequently, the OFCC Office of Plans and Programs has been abolished. The new Office of Management Information Systems is responsible for systems evaluation, data analysis and research, and the direction of the OFCC management information system.

OFCC future staffing plans

Office	Fiscal year 1972	Fiscal years 1973-76
Director	17	17
Operations and conciliation..	30	45
Program review	18	26
Management information system	6	8
Technical assistance	47	77
Total, OFCC	118	173

Memorandum from Robert R. Hobson, Director, OPO, OFCC to George Travers, Economist, OFCC, Aug. 25, 1970, at 4.

promote and insure equal employment opportunity for all persons, without regard to race, creed, color, sex, or national origin, by Government contractors or contractors performing under federally assisted construction contracts.²⁶⁴ An analysis of the regulations, recent OFCC actions, and statements issued by ranking Department of Labor officials, however, suggests that, in fact, the goal is more specific and far-reaching than the one cited in the regulation: i.e., to insure that minority employees are proportionately represented at all levels of the work forces of Federal contractors.²⁶⁵ OFCC strongly denies this or any implication that quotas or goals are, in fact, required for contractors to be in compliance. OFCC's stated requirement is that the contractor make an "honest and good faith effort" to achieve a goal.²⁶⁶

²⁶⁴ Executive Order 11246 (1965); 41 C.F.R. 60-1.1.

²⁶⁵ 41 C.F.R. 60-1.4 and 60-2 of the regulations. The revised Philadelphia and other "home town solution" plans anticipate proportional representation.

Excerpts from recent speeches and statements of senior Department of Labor officials appear to bear out this point.

"Affirmative action means that Government contractors must pledge themselves to establish goals and timetables for employing minority personnel. They must make an honest and good faith effort to hire a percentage or number of qualified workers. Percentages or numbers are used because industrial progress itself is measured in numerical standards. Address by Assistant Secretary of Labor Arthur A. Fletcher, before the West Coast Regional Meeting of the NAACP, Asilomar, Calif., Sept. 20, 1969.

"Mr. Fletcher was also quoted in *The Washington Post*, Apr. 16, 1970, as saying: 'We're going to play the numbers game . . . [in hiring Negroes for federally funded construction jobs in the Washington area] because numbers is what its all about.'

"Affirmative action was once limited only to improving techniques and achieving 'progress' toward equality in a general sense. This is no longer the case. It is no longer limited to the mere improvement of techniques or the achievement of 'progress.' The affirmative action concept now includes the accomplishment of full equality through the use of specific goals and within a specific—and prompt—time frame . . . Remarks by John L. Wilks, Director, Office of Federal Contract Compliance, Before the Interstate Conference of Employment Security Agencies, Kiamesha Lake, N.Y., Oct. 1, 1969."

²⁶⁶ Memorandum attached to letter of Arthur A. Fletcher, Assistant Secretary of Labor to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, July 30, 1970, at 3-4.

c. OFCC Priorities and Policies

Three major priorities are currently operative within OFCC: first, to provide substance to the affirmative action requirement; second, to develop OFCC capability to monitor the compliance operation of all agencies assigned compliance responsibility; and third, to revitalize the national construction compliance program.²⁶⁷

An important effort to organize, systematize, and assist in the implementation of these priorities has been initiated through OFCC's Management Information System (MIS) unit. Of five elements of the MIS program, three have just begun operation, and thus their effectiveness cannot be evaluated; one is being developed and one is being planned. The three in operation are: The program/budget system, the target selection system, and the coordinated agency system. These systems are intended to concentrate Federal compliance resources on the most serious conditions and to direct efforts to achieve the most employment opportunities for minorities.²⁶⁸

²⁶⁷ The nature of these three priorities has been developed from discussion with OFCC staff and review of OFCC documents.

²⁶⁸ Briefly, the purposes of the three systems as described by OFCC, are:

"(1) The Program/Budget System. The purpose of this system is to identify all available resources in all agencies so that we can set and monitor program goals in terms of new jobs and promotions for minorities, and recommend budget levels needed to achieve those goals.

"(2) Target Selection System. This system will enable the compliance agencies to concentrate their limited resources on reviewing those establishments with the most opportunities [for minorities].

"(3) Coordinated Agency System. This effort will coordinate the OFCC system with systems developed by the agencies and will help agencies and contractors in their use of appropriate data. OFCC will help the Compliance Agencies in the development of their own information systems so that we will have relevant and compatible information. . . ."

The Operating Information System is being developed.

"This system will retrieve information from 25,000 onsite reviews to enable OFCC to review and evaluate the operating program. This part of the management information system represents the largest part of our effort. This system, along with EEO-1 data, will become the basic source data for our program Evaluation and operating reports resulting from the system will include the following, for example: Deficiencies found and resolved by type (e.g., in affirma-

In a program guidance memorandum draft to the compliance agencies, OFCC admitted a "failure to provide proper leadership in the past."²⁶⁹ The MIS programs, noted above, the revised Philadelphia plan, and "hometown" solution adjunct (see pp. ——— for a detailed discussion) and Order No. 4 are recent steps taken by OFCC to meet leadership requirements. These steps, plus OFCC's internal reorganization and a planned staff expansion, are considered by OFCC as significant responses to earlier criticism by the U.S. Commission on Civil Rights.²⁷⁰ The success of these efforts is yet to be determined but the potential of the policy decisions already taken is extremely important.

ative action plan, in seniority, in segregated facilities, etc.).

"Establishments reviewed by minority opportunities.

"Establishments reviewed by affirmative action criteria."

OFCC, *The OFCC Management Information System*, (undated—but in effect as of Aug. 25, 1970).

²⁶⁹ Draft memorandum from John L. Wilks, Director, OFCC to heads of all agencies, "Draft for Comment-Contract Compliance Program Guidance Memorandum Workload," July 6, 1970, at 4.

²⁷⁰ Id. On Feb. 2, 1969, in a letter to Secretary of Labor George P. Shultz, this Commission pointed out a series of shortcomings in OFCC's implementation of Executive Order 11246. These included:

"The inadequacy of the contract compliance operations of the individual contracting agencies must be attributed, in significant part, to the failure of OFCC to set minimum standards for the agencies' programs with respect to staffing, enforcement procedures, and substantive requirements It is the responsibility of OFCC to exercise its leadership by making clear its position on minimum staffing needs for effective agency compliance programs to contracting agencies and to follow up on this matter with the Bureau of the Budget. . . ."

"Neither the Department of Defense nor the General Services Administration had any system in general use for monitoring current compliance through special periodic current activity reports from contractors. . . . If the Department of Labor is adequately to discharge its supervisory responsibilities, it should make clear its view of these deficiencies, and establish procedural standards for the agencies to follow. . . ."

"The failure of OFCC to provide guidance on the substance of affirmative action requirements has given rise to the use of vague or otherwise ineffectual standards by the contracting agencies. . . . Requirements for compliance in federally assisted construction should be standardized along the lines of the developing programs in Cleveland and Philadelphia."

(1) Affirmative Action

Development of detailed affirmative action requirements for Federal contractors by OFCC is the core concept of its compliance program. Neutrality on the part of a contractor, even open espousal of equal opportunity, will not overcome the years of job discrimination to which minorities have been subjected. Where no affirmative action is taken by employers, as was the prevailing situation prior to 1969, recruitment and upgrading of minority individuals proceeds at an extremely slow pace. It was this lack of specific OFCC requirements which brought criticism of the compliance program by this Commission and other concerned bodies.²⁷¹

Therefore, the OFCC Regulations issued May 1, 1968,²⁷² marked a first step in explaining OFCC's meaning of "affirmative action" and its new hard look at contract compliance. Supplementing these basic regulations was a new section issued on February 5, 1970,²⁷³ which amended and clarified these rules and for the first time provided extensive affirmative action guidance. The three basic requirements and eight additional guidelines provided a concrete blueprint for affirmative action programs.²⁷⁴ The three new basic obliga-

²⁷¹ See R. Nathan. *Jobs and Civil Rights* (prepared for the U.S. Commission on Civil Rights by the Brookings Institution), ch. 4 (1969). Also see, *Hearings on Equal Employment Opportunity Before the Subcommittee on Employment and Manpower of the Senate Commission on Labor and Public Welfare*, 88th Cong., 1st sess. 409, July 24, to Aug. 20, 1968; and *Hearings on S. Rep. 39 before the Subcommittee on Administrative Practice and Procedure of the Senate Commission on the Judiciary*, 91st Cong., 1st sess., 311-24, Mar. 27 and 28, 1969.

²⁷² 41 C.F.R. 60-1.40(a). See discussion in note 243 for a summary of the requirements.

²⁷³ 41 C.F.R. 60.2.

²⁷⁴ The eight additional guidelines are:

- I. Development or Reaffirmation of Company Policy of Nondiscrimination of all Personnel Actions.
- II. Formal Internal and External Dissemination of Company Policy.
- III. Establishment of Clear-Cut Responsibilities-Line/Staff Relationship.
- IV. Identification of Problem Areas by Division, Department, Location, and Job Classification.
- V. Establishment of Company Goals and Objectives by Division, Department, Lo-

tions imposed on the contractors are: (1) to perform an analysis of minority utilization in all job categories; (2) establish goals and timetables to correct deficiencies; and (3) develop data collection systems and reporting plans documenting progress in achieving affirmative action goals.

Although the supplemental regulation is somewhat weaker as promulgated than it was in draft,²⁷⁵ it nevertheless represents a significant forward step in guidance. It is too early to determine how important Order No. 4 will become since, to a large degree, its success depends upon implementation by the compliance agencies and the ability of OFCC to monitor that effort.²⁷⁶

cation, and Job Classification, Including Target Completion Dates.

- VI. Development and Execution of Action Oriented Programs Designed to Eliminate Problems and Further Designed to Attain Established Goals and Objectives.
- VII. Design and Implementation of Internal Audit and Reporting Systems to Measure Effectiveness of Total Program.
- VIII. Active Support of Local and National Community Action Programs.

The order also includes a procedure for the compliance agencies to follow when noncompliance is indicated.

²⁷⁵ On Nov. 20, 1969, Order No. 4 was sent by OFCC to the heads of all agencies, but not published in the Federal Register. After some congressional criticism, the order was called back with the explanation that its release was unauthorized and that, at present, it represented merely a draft.

Order No. 4, as finally revised and promulgated in February 1970, differed in two important ways from the November 20 draft. In the final version the contracting officer, as opposed to the compliance officer, could find a contractor-bidder in compliance without requiring concurrence of the compliance officer in this determination. Also, the final order assures the contractor that his acceptability as a Government contractor is not dependent upon whether he meets the targets he sets forth in his affirmative action plans and states that the detailed criteria represent only guidelines for action, whereas the November draft indicated that the contractor was expected to meet his goals to be found in compliance. In addition, in several places, the terms "shall" and "must" of the November draft became "should" in the final version.

²⁷⁶ One of the technical improvements in the final version of Order No. 4 from the draft is the extensive detail regarding agency action (sec. 60-2.2) to be taken against noncompliance contractors. OFCC is currently concerned about the enforcement of Order No. 4 because no agency other than the Department of Defense has taken any enforcement action as a result of it. Defense

(2) Monitoring Compliance

The second priority—developing an OFCC capacity to monitor, evaluate, guide, and assist the contracting agencies with their compliance responsibilities—is critical to effective implementation of the first priority. Although, monitoring has always been a responsibility of OFCC, until 1969 no real attempt was made to become deeply involved in this process. No effective system for reviewing agency efforts on a systematic basis was developed nor was any determination made of what information was required to do so.²⁷⁷

Order No 1, issued on October 24, 1969, reduced the number of compliance agencies from 26 to 15, and assigned the compliance responsibility for Federal supply contractor facilities to agencies on the basis of industry classification.²⁷⁸

has issued "show cause" orders to more than 66 contractors. OFCC has called a meeting for June 29, 1970, with agency contract compliance officials to discuss this lack of enforcement activity on the part of the agencies. Interview with Robert Hobson, Director, Office of Program Operations, OFCC, June 9, 1970.

²⁷⁷ Interview with Leonard Bierman and Robert Hobson, Senior Compliance Officers, OFCC, Nov. 27, 1969, and Apr. 15, 1970; interview with Alexander I. Estrin, Senior Compliance Officer, OFCC, Dec. 3, 1969. This has been true in spite of the fact that the regulations have required contracting agencies to furnish complaint investigations, compliance review reports, schedules of compliance reviews and any other information requested by the Director of OFCC, 41 C.F.R. 60-1.6. The regulations also provide: "The Director may from time to time evaluate the programs, procedures, and policies of agencies in order to assure their compliance with the order and the regulation in this part. . . ." 60-1.6(e).

In the past, OFCC required each agency to develop an annual program plan describing how it would perform its compliance function. The annual program plans did not prove to be a successful monitoring or planning device; for example, OFCC did not receive plans from all agencies and was unable to review all it received. OFCC no longer requests such plans. Interview with Nathaniel Pierson, Deputy Assistant Director for Construction, OFCC, Nov. 27, 1968; interview with Robert R. Hobson, Senior Compliance Officer, Apr. 15, 1970.

²⁷⁸ OFCC Order No. 1, to Heads of All Agencies, Oct. 24, 1969. The assignment for supply contracts is based on the Standard Industrial Code (SIC) classification used by the Bureau of the Census. It organizes similar industries into industry groups. Below is a consolidated list of compliance agencies and the industries and industry groups for which they have contract compliance responsibility.

Previously, compliance responsibility had been assigned on a "predominant interest agency basis," which meant that the Federal agency with the most significant contract at the time of assignment became permanently responsible for that contractor in all future compliance activities. The old system, involving a large number of agencies, made it difficult for OFCC staff to maintain adequate com-

<i>Agency</i>	<i>Type of industry</i>
Aid for International Development.	Miscellaneous and other services (consulting and research firms).
Agriculture	Agriculture based industries.
Atomic Energy Commission.	Chemicals, stone and clay products, instruments.
Commerce (Maritime Administration).	Shipbuilding (coastal), water transport (coastal).
Defense	Ordnance, textiles, leathers, primary metals, machinery, motor vehicles, printing, and miscellaneous manufacturing.
General Services Administration.	Forestry and wood, paper, communications, electric, gas and sanitary services, trade, real estate, amusements.
Health, Education, and Welfare.	Insurance, medical, legal and educational services, museums, and nonprofit organizations.
Interior	Fisheries, mining, petroleum, rubber, plastics, pipelines, hotels.
National Aeronautics and Space Administration.*	Aircraft and parts, business services.
Post Office	Rails, mass transit, motor freight, transportation services.
Transportation	Shipbuilding (interior), water transport (interior), air transportation.
Treasury	Banking, credit, and securities.
Veterans Administration.	Biologicals and pharmaceuticals.

* These assignments were reassigned from NASA to DOD. NASA still remains responsible for all of its own contractors, Order No. 9, Mar. 16, 1970.

munication with the individual agencies or evaluate their compliance effectiveness.²⁷⁹ The current operation provides both a rational basis for contractor facility assignment and a more manageable system for OFCC to oversee.²⁸⁰

The second part of Order No. 1 requires agencies to complete reviews of at least 50 percent of all contractor facilities assigned to them in a year's time. They also are to submit budget requests for fiscal year 1971 permitting them to accomplish this.²⁸¹ In the past, most compliance agencies had been unable to review more than 10 percent of their compliance responsibility in a year.²⁸²

The recent OFCC reorganization provided for units with specific responsibility to review the adequacy of agency compliance operations and recommend policies and procedures to improve them.²⁸³ This monitoring function is to be performed by the Office of Program Operations in Washington and by the Office of Technical Assistance through the 11 newly established regional offices. Thus, not only should OFCC be able to determine how the contracting agency's central office is fulfilling its policy role, but it will also be able to review policy implementation by regional agency staff.

In an effort to improve agency performance and simplify its own monitoring function, OFCC also has begun to develop a comprehensive Contract Compliance Manual, defining in detail interagency relationships and responsibilities. The proposed Manual will include sections on compliance agency organization and administration, OFCC policies and standards, compliance agency reporting requirements, on-

site review procedures, followup procedures, legal matters, an OFCC operations section, and sections on the use of and coordination with other Federal, State, and local compliance resources.²⁸⁴ Latest reports indicate, however, that the manual is still not near completion.²⁸⁵

OFCC is also considering development of a self-evaluation mechanism, by which compliance agencies will report their activities in such a manner as to simplify the monitoring function.²⁸⁶

A uniform relationship has been established between OFCC and most compliance agencies. Compliance agencies have requested OFCC assistance in training compliance officers, preparation of review guidelines, and, in a few cases, in conciliations with contractors.²⁸⁷ Compliance agencies have been in contact with OFCC for clarification of regulations and administrative rulings which affect compliance programs or contracting operations. OFCC, however, has not always been able to provide the requested assistance. For example, in 1968, the Department of the Treasury compliance staff attempted to get OFCC assistance in developing guidelines for the banking industry. Its requests went unanswered and Treasury, with limited experience in these matters, was forced to go ahead on its own.²⁸⁸

In the past OFCC has arranged meetings on an irregular basis with agencies responsible for compliance of supply contractors for spe-

²⁸⁴ Outline of planned OFCC Manual, as of Aug. 25, 1970.

²⁸⁵ Hobson interview, supra note 277.

²⁸⁶ Id. While the new organization is now functional, the responsibilities for procurement compliance of Senior Compliance Officers will continue until their responsibilities can be turned over to new staff. Hobson and Bierman interviews, supra note 277. These duties include: Monitoring agency implementation of the Executive order and OFCC regulations by reviewing selected complaints, preaward compliance review and followup investigations, assuring that uniform standards of compliance are being applied, assisting agencies in negotiations and on other compliance problems, and coordinating activities with other Federal agencies, such as EEOC and the Department of Justice.

²⁸⁷ Questionnaire responses from most of the 15 compliance agencies.

²⁸⁸ Questionnaire response from the Department of the Treasury.

²⁷⁹ Hobson interview, supra note 277.

²⁸⁰ Id. Prior to Order No. 1, agencies were assigned responsibility for contractors on the basis of which had the largest dollar volume of contracts with the company at the time of the assignment. Often, agencies and companies were confused as to their responsibilities and, in fact, some large contracts were just not assigned for preaward review.

²⁸¹ Order No. 1, supra note 278. Most of the agencies needing staff increases in this regard received at least partial approval from the Bureau of the Budget.

²⁸² Hobson interview, supra note 276.

²⁸³ The Office of Technical Assistance will work the field operation, and the Operations Support Division of the Office of Program Operations will work on the Washington level. See pp. 57-58 supra.

cial purposes.²⁸⁹ In some cases, these have been to discuss pending policy changes, such as the new industry compliance responsibility assignments; to report proposed new programs; to announce administrative adjustments; or to plan a special compliance operation, such as the one involving the textile industry.²⁹⁰ Now a major concern to the agencies and OFCC is how a general rule like Order No. 4, which establishes universal guidelines for supply contractor affirmative action, can be applied under compliance programs for industries with dissimilar characteristics and contracting procedures.²⁹¹

For example, the Post Office Department, in dealing with the motor transport industry, must be concerned with the fact that bills of lading²⁹² used by the industry rarely exceed \$10,000 and never reach \$50,000;²⁹³ while the Treasury Department has to deal with banks and credit institutions which do not have Federal contracts but hold Federal funds and often employ less than 50 people.²⁹⁴ The Defense Department has to procure weapons for the national defense and may exempt any contract from the regulations for national security reasons.²⁹⁵ It has been contended by OFCC senior staff that current staff levels have made it impossible to monitor and help the agencies adequately.²⁹⁶ Sizable staff increases

would seem an immediate need if the new organization and approach permit OFCC to begin to fulfill its functions.

(3) Construction Compliance Program

Redevelopment of a national construction compliance program became a necessary third priority when the initial Philadelphia Plan "area" approach was invalidated by the Comptroller General's ruling in November 1968.²⁹⁷ OFCC made it clear that the area construction concept would not die, but, rather, would be expanded.

A new Philadelphia Plan, issued June 27, 1969, applied to all invitations for bids for construction contracts of \$500,000 or more after July 18, 1969.²⁹⁸ Implementation of the plan's requirements of goals and timetables to correct deficiencies was included in bid invitations through the use of percentage ranges of minority group participation. The percentages were established by the OFCC area coordinator for seven specific building trades.²⁹⁹ The Comptroller General again ruled that the plan violated Federal law,³⁰⁰ but on September 22, 1969, the Attorney General issued a formal opinion that the Philadelphia Plan was legal and that his opinion should be the basis of future action by OFCC and the contracting agencies.³⁰¹ The Philadelphia Plan, reissued on September 23, 1969, affirmed the June 1969

²⁸⁹ Bierman interview, supra note 277. Questionnaire response from the Treasury and the Post Office Departments.

²⁹⁰ See discussion under the Defense Department for an explanation of the Textile Case, pp. 73-74 infra.

²⁹¹ Questionnaire responses from the 15 compliance agencies. Interview with Ward McCreedy, Assistant Director for Contract Compliance, OFCC, Dec. 2, 1969.

²⁹² A bill of lading is a written acknowledgment of goods received for transportation. A separate bill is written for each truck and each trip, arguably making each a separate contract.

²⁹³ Contracts must exceed \$50,000 to require an affirmative action plan and thus affirmative action agreements are not developed.

²⁹⁴ Questionnaire response from the Department of the Treasury. An employer with less than 50 employees need not file an affirmative action plan. Order No. 4 is directed to large industrial employers, and agencies such as Treasury are having difficulty applying it to their contractors.

²⁹⁵ For reasons of national security a contractor may be exempted from the regulations. 41 C.F.R. 60-1.5(c).

²⁹⁶ Interview with Robert R. Hobson, Senior Compliance Officer, Dec. 4, 1969. Interview with Nathaniel

Pierson, Deputy Director of Construction Compliance, Nov. 27, 1969. OFCC estimated in 1968 that there were over 100,000 Federal contractor facilities and over 12,000 contractor reviews were conducted in 1969 making the monitoring task unmanageable.

²⁹⁷ See p. 55, supra.

²⁹⁸ OFCC Order, Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction to the Heads of All Agencies, June 27, 1969, at 1. The order covers construction in five Pennsylvania counties in the Philadelphia area: Bucks, Chester, Delaware, Montgomery, and Philadelphia.

²⁹⁹ Id., at 2. The seven trades were: ironworkers, plumbers and pipefitters, steamfitters, and sheetmetal workers, electrical workers, roofers and waterprooferers, elevator construction workers.

³⁰⁰ The Comptroller General ruled that the revised Philadelphia Plan violated Title VI and Title VII of the Civil Rights Act of 1964 because it provided a preference for a racial group thus discriminating against another racial group. Letter from Elmer B. Staats, Comptroller General to George Shultz, Secretary of Labor, Aug. 5, 1969. 49 Comp. Gen. B.163026, 1969.

³⁰¹ 42 Op. Atty. Gen. 37 (1969).

plan, while amending it in certain respects.³⁰² Congressional criticism of the plan continued and on October 27-28, 1969, hearings on a bill to abolish the Executive order were held although no legislation resulted.³⁰³

OFCC followed up its Philadelphia effort with two additional but related steps calculated to broaden its construction compliance program and make it more effective. First, in late 1969, it embarked on a program of encouraging and assisting local representatives of minority groups, unions, and contractors to develop their own minority group employment plan in lieu of a federally imposed plan.³⁰⁴ Second, in early 1970, it announced that if a "hometown solution" approach to the problem of minority underutilization in the construction industry was not reached in 18 selected cities, it was prepared to install a Federal

"Philadelphia-type" plan in each of the cities.³⁰⁵

The "hometown solution" represents an attempt by OFCC to augment Federal authority by making use of the negotiating power of local community minority groups. This approach permits development of a plan covering all metropolitan area construction extending beyond that which is federally assisted, thus broadening the effort to meet employment needs of the area's minority group workers. Negotiations between local minority coalition leaders, unions, and contractors to develop local area employment agreements have taken place in a number of cities³⁰⁶ but were first

³⁰² The principal amendment was to establish minority group employment ranges for the next 4 years. The September 23 order made findings that minority group participation in the trade unions ranged from a high of 1.76 percent (electricians) to a low of 0.51 percent (plumbers and pipefitters) and that minority craftsmen were available, but not admitted into the unions. OFCC order, "Establishment of Ranges for the Implementation of the Revised Philadelphia Plan for Compliance With Equal Opportunity Requirements of Executive Order 11246 for Federally Involved Construction," to the heads of all agencies, Sept. 23, 1969.

³⁰³ Hearings on S.931 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 91st Cong., 1st sess., 154-55 (1969). A continuing resolution (to allow the executive branch to spend funds at the rate of the previous fiscal year, for a period of 30 days) was amended to grant the Comptroller General the power to disallow certain Federal expenditures (including contract funds) if he determines that they contravened Federal statutes. This move would have killed the Philadelphia Plan since the Comptroller General had already concluded it was illegal. Because of the status of the amendment, it still required an additional vote for inclusion in the legislative report. On December 22, the President indicated that he might have to veto legislation containing such a restriction of his executive authority, and a successful motion was made to table the amendment. 115 Cong. Rec. S.17, 624-17-636 (Dec. 22, 1969).

³⁰⁴ These agreements, called "hometown solutions", may not have the power of a contract. Although the Federal Government is not a party, representatives of the Department of Labor and OFCC have assisted in their negotiation. Interviews with Nathaniel Pierson, Deputy Director for Construction, OFCC, Nov. 27, 1969; and Robert Hobson, Senior Compliance Officer, OFCC, Apr. 15, 1970.

³⁰⁵ The 18 Cities Program was announced the week of Feb. 16, 1970. It is national program for equal employment opportunity in federally funded construction work where underutilization of minority group members has become a widespread problem. OFCC contemplates the possible installation of Philadelphia-type plans in those communities unable to develop acceptable areawide agreements on their own initiative. Secretary of Labor Shultz said: "We have made it quite clear that in solving these problems of the cities we favor voluntary, areawide agreements to the imposition of specific requirements by the Government." The 18 cities are: Atlanta, Boston, Buffalo, Cincinnati, Denver, Detroit, Houston, Indianapolis, Kansas City, Los Angeles, Miami, Milwaukee, Newark, New Orleans, New York, San Francisco, Seattle, and St. Louis. Because of limited resources, OFCC will first focus attention on six priority cities: Boston, Detroit, Atlanta, Los Angeles, Seattle, and Newark. Department of Labor News Release, 11-027, Feb. 9, 1970.

³⁰⁶ Negotiations are underway in a number of cities throughout the country and have resulted in voluntary plans in St. Louis, Mo.; Chicago, Ill.; Pittsburgh, Pa.; Indianapolis, Ind.; Boston, Mass.; Denver, Colo.; Los Angeles, Calif.; and Rochester, N.Y. Memo from Robert R. Hobson, Director, OPO, OFCC, to George Travers, Economist, OFCC, Aug. 25, 1970.

A Washington Plan was issued by the Department of Labor on June 7, 1970 because local parties—a minority group coalition, unions, and contractors—had been unable to develop their own plan. The Washington Plan applies to the metropolitan area, covers 12 trades, and establishes percentage ranges of minority employment for 4 years. The distinctive features of the plan include: (1) the opportunity for the local parties to develop a plan to replace the Federal plan in whole or in part; (2) the commitment of the Department of Labor to provision of training funds; (3) the commitment by the contractor not to limit his participation to Government contracts but to extend it to all his work. Thus, for the first time, a construction contractor's compliance requirement will now be in line with those of supply contractors.

successfully concluded in Chicago and Pittsburgh.³⁰⁷

On July 9, 1970, the Department of Labor announced a significant expansion of the area construction program. Seventy-three additional cities were designated for OFCC assistance in developing voluntary area construction plans. Every opportunity was to be given local communities to work out agreements covering all construction activity in metropolitan areas. Secretary Hodgson noted, however: "Where an areawide agreement is not possible, the Labor Department will continue its policy of imposing solutions, such as the Philadelphia Plan and the Washington Plan."³⁰⁸

This "intensive summer program" will use an additional complement of compliance officers to assist the cities. At the time of the July 9 announcement, seven "newly-trained officials" were in the field and 23 more were in training to provide assistance to groups in the communities.³⁰⁹

In Chicago, where the first voluntary plan was instituted, a coalition of minority group organizations was created early in 1969, and for many months unsuccessfully attempted to negotiate with contractors and unions. When negotiations failed, mass disruptive actions were taken to stop construction. HUD began compliance reviews in September 1969 and, later in the month, Assistant Secretary of Labor Fletcher held hearings in Chicago to determine the extent of the employment discrimination and the need for a federally developed plan. Findings of discrimination were made, and on October 29, 1969, OFCC issued Order No. 2 to all contracting agencies, requiring consultation with OFCC prior to construction contract awards to 17 Chicago-based contractors.³¹⁰ This Federal pressure, plus the activities of the minority group coalition, resulted in the first successfully concluded "hometown solution" in the OFCC area construction program.

The Chicago Plan, which was signed January 12, 1970, is very brief and appears to be

³⁰⁷ The Chicago Plan, Jan. 12, 1970; the Pittsburgh Plan, Jan. 28, 1970.

³⁰⁸ Department of Labor News Release 11-320, July 9, 1970.

³⁰⁹ Id.

³¹⁰ OFCC Order No. 2, to Heads of All Agencies, Oct. 29, 1969.

a 1-year action program. The general goal of the plan is to increase minority participation in the industry "proportionate to their percent in the community" in 5 years. It covers all construction in the Chicago area; establishes an overall planning committee representing the three parties (the minority coalition, contractors, and unions); and lays the foundation for subcommittees to be established for each participating construction craft union to develop actual details of the plan.³¹¹ OFCC plans to consider those construction contractors that participate fully in the plan to be in compliance together with those craft unions which sign agreements developed under it.³¹² The Secretary of Labor hailed the plan³¹³ and the presidents of both the AFL-CIO and its building and construction trades department have commended the Chicago agreement and urged its adoption by union locals. At the same time, these officials vigorously attacked the Philadelphia Plan.³¹⁴

³¹¹ The plan establishes an administrative committee of seven members, with the mayor's representatives as one. The committee is free to use public or private funds to accomplish its goals (such as recruitment, staffing, etcetera). There are also established operations committees for each "participating individual affiliate (union)." Each operations committee will develop a plan to accomplish the goals, and the administrative committee is "to implement the program agreed upon by each operations committee." The agreement also contains guidelines for the operations committees which permit them to "endeavor to obtain employment at once for 1,000 qualified journeymen The coalition would be responsible for the recruitment of 1,000 applicants . . ." provided that the necessary funding for training can be obtained. The coalition would also be responsible for recruitment of "at least 1,000 applicants" for the existing apprenticeship program. The entire agreement was conditioned by "if general business conditions permit . . ." This agreement is to be reviewed in 6 months. The Chicago Plan, Jan. 12, 1970.

³¹² Interview with Robert Hobson, Senior Compliance Officer, OFCC, Apr. 15, 1970.

³¹³ Secretary Shultz said: "I am delighted with the Chicago agreement. It is my hope that areawide plans will now spread to other cities having similar problems While the Chicago agreement may not cover every desirable point, we are pleased with the results it should achieve." Department of Labor News Release, week of Jan. 26, 1970.

³¹⁴ The AFL-CIO issued copies of "The Chicago Plan" including letters from C. J. Haggerty, president, Building and Construction Trades Department, AFL-CIO, to Thomas J. Murray, president, Chicago and Cook County Building and Construction Trades Coun-

In several respects, however, the Chicago Plan, while applying to all construction, offers weaker protections than the Philadelphia Plan.³¹⁵ The Philadelphia Plan establishes percentage ranges for each trade on an escalating scale for a 4-year period, while the Chicago Plan merely sets fixed numbers for a 1-year period. Further, the Chicago Plan depends upon availability of Federal training money and minority group action to provide suitable trainees, while the Philadelphia Plan places the burden of achieving minority employment goals set forth in the bid specifications entirely on the contractor. Most significant is the difference in available enforcement mechanisms. Unlike the Philadelphia Plan's specific procedures and sanctions for enforcement the Chicago Plan will depend entirely on the ability of the local minority group coalition to exert pressure. Ultimately, it must rely on Federal action. If a union or a contractor refuses to live up to the agreement, there will, of necessity, be a timelag before Federal enforcement mechanisms can be brought into play.³¹⁶

Shortly after the Chicago Plan was developed, OFCC issued a model areawide agreement for the guidance of communities seeking to develop local plans.³¹⁷ Of particular concern under "hometown solution" plans, such as

cil, Jan. 13, 1970, and George Meany, president, AFL-CIO, to C. J. Haggerty, Jan. 14, 1970. The letters warmly praised the Chicago Plan and attacked the Philadelphia-type plan as Federal meddling.

³¹⁵ As mentioned previously, the Chicago agreement has one distinct advantage over the Philadelphia Plan. The Philadelphia Plan deals only with Federal construction projects and is further limited to those construction trades which have the worst minority group employment record in that city. The Chicago Plan, by contrast, applies to all construction employment.

³¹⁶ The Federal government will have to allow the local groups to conclude their negotiations before it enters the picture and will then proceed to start negotiations anew. Comprehensive compliance reviews and probably public hearings will also precede imposition of Federal sanctions. These preliminary Federal procedures may well take 6 months or longer to complete.

³¹⁷ The model plan requires a statement of numerical or percentage goals of minority employment for the first year and estimates for future years; classification of minority job applicants by skill and experience; plans for recruitment, training, and counseling; grievance procedure; and provision for duration, extension, and modification of the agreement. There is no provision for enforcement in the model plan. Department of Labor News Release, 11-027, Feb. 9, 1970.

Chicago's, is that the model areawide agreement be applied with flexibility. The model plan should be pliant enough to reflect special circumstances unique to each city's problems, but firm enough to produce results similar to those specified under the Philadelphia Plan. The danger in "hometown solution" plans is that without guidelines to set minimum standards for local community solutions, contractors and unions may seek agreements less demanding than the Philadelphia-type plan which lack automatic sanctions clauses.³¹⁸

The implementation of the Chicago and Philadelphia plans has not been adequate. It has been reported that violation of the Philadelphia Plan is very widespread. Assistant Secretary of Labor Fletcher said: "A major problem was the lack of enforcement . . ." by the compliance agency.³¹⁹ Fletcher noted that seven firms in Philadelphia had been ordered to answer violation charges.³²⁰

In Chicago, after 8 months, only 75 minority group members are in any training program.³²¹ Achievement on the other Chicago goals is not available. While the Federal Government has been working to improve the plan,³²² no other action has been taken to expedite minority employment. "Today, Chicago's black community is divided and riddled with suspicion . . . (which) has its origins in the disarray of the Chicago Plan."³²³

The provision of Federal training money is one of the more important factors in the success of area construction plans. The Federal Government has been able to commit training funds rapidly but cannot compel their use.³²⁴

³¹⁸ Both the Chicago and Pittsburgh plans were developed prior to the issuance of the OFCC Model Area-wide Plan. These early plans do not contain comprehensive grievance procedures, and are less detailed in other respects than the model plan recommendations.

³¹⁹ Quoted in New York Times, July 20, 1970, at 17.

³²⁰ Id. One of the contractors has been notified of intent to debar from future Federal work.

³²¹ The Washington Post, Aug. 10, 1970, sec. A, at 1.

³²² Memorandum from Robert Brauer, construction compliance official, OFCC, to George Travers, Economist, OFCC, "Status of Philadelphia and Chicago Plans", Aug. 25, 1970, at 1.

³²³ The Washington Post, supra note 321. "Herbert Hill, Labor Director of the NAACP and one of the architects of the Chicago Plan, has flatly called it a 'failure'." Id.

³²⁴ 29 C.F.R. 20.21.

The attitude of local building trades union leaders is a key element in the development of a hometown solution, says Arthur Fletcher, Assistant Labor Secretary. . . . He says Government procurement procedures, in effect, give unions a veto over the use of Federal funds for the training programs built into most minority hiring plans.³²⁵

This union training veto may explain that part of the delay which is directly related to training programs, but there has also been a reluctance to enforce the Executive order by the compliance agencies and finally OFCC has been too patient in its efforts to insure that the agencies fulfill their responsibility.

The construction compliance program is still being handled by OFCC separately from procurement compliance. Under the new organization, responsibility lies with the Office of Technical Assistance, with overall guidance from the Operations Support Division of the Office of Program Operations. The area coordinators spend almost all of their time working with the 18-Cities Program developing area plans to establish uniform standards of affirmative action for construction contractors in each metropolitan area.³²⁶ The relationship between OFCC and the compliance agencies with construction responsibility has been dominated by this effort to devise an areawide compliance approach which is responsive to the distinctive features of the construction industry.

The kind of cooperation required and the degree of OFCC direction involved is demonstrated by a March 1970 memorandum requesting a coordinated compliance approach in Washington, D.C.³²⁷ The memorandum noted that in February, six agencies³²⁸ had conducted compliance reviews of construction projects in Newark, N.J., and had found many problems. This coordinated approach was to be the model

³²⁵ *Wall Street Journal*, July 6, 1970, at 6. See also, 29 C.F.R. 20.21.

³²⁶ Statement by Secretary of Labor George P. Schultz, Feb. 9, 1970. See discussion in note 305, supra. The addition of 73 cities to the area construction program caused a special task force of 30 additional field compliance officers to be assigned to the construction program for assistance and monitoring.

³²⁷ Memorandum from John L. Wilks, Director, OFCC, to Contract Compliance Investigators, Mar. 20, 1970.

³²⁸ The agencies were: HUD, HEW, DOT, GSA, Interior, and the Post Office Department.

for construction compliance enforcement in Washington. Each agency with ongoing construction in the Washington metropolitan area³²⁹ was requested to undertake compliance evaluations of its projects. The importance of the memorandum lies in the detailed schedule and timetable that OFCC presented the agencies. For example, the plan included an investigation orientation meeting scheduled for March 25, a written report of review findings due April 3, and testimony to be prepared for a public hearing on April 13.³³⁰

It is not yet possible to evaluate OFCC's increased efforts in the construction area since programs capable of replication have only begun to be developed in many places. Furthermore, there have been virtually no data collected³³¹ nor released by which to evaluate compliance efforts.

d. Complaints and Sanctions

Two related areas in which OFCC has played a relatively active role are complaint processing and application of sanctions.³³² Complaint processing by the compliance agencies³³³ is to be more closely supervised by

³²⁹ The metropolitan area includes Washington, D.C., and the following counties: Maryland (Montgomery, Prince Georges), Virginia (Alexandria City, Falls Church City, Arlington County, Fairfax County).

³³⁰ Wilks Memorandum, supra note 327.

³³¹ A potentially important step was taken when OFCC established a reporting system for the Philadelphia Plan. Three reports are required: (1) Identification of contract bidders and those selected; (2) preparation of detailed monthly implementation reports; and (3) preparation of areawide construction employment reports. The second report requires the monthly calculation of the minority percentage of man-hours per craft, by contract. If this proportion is less than the minimum of the range for the craft, a show cause notice must be sent. Such a reporting plan would have to be substantially modified for voluntary plans because commitments there have been made in numbers for training purposes and not by craft. OFCC Memorandum to All Contract Compliance Officers, Evaluating Contractors' Performance Under the Philadelphia Plan, June 26, 1970.

³³² For a more detailed discussion of complaint processing and sanctions see pp. 52-53 supra, dealing with the role of contracting agencies.

³³³ Complaints may be filed by any employee working for a private firm which is performing on a Government contract valued in excess of \$10,000 per year. The charging party cannot be a party to any solution of his complaint and has no right to reject a solution agreed to by the Federal Government and the contractor.

OFCC than other activities. It requires the agencies to conduct complaint investigations as soon as they are received.³³⁴ It should be noted that contract compliance complaint processing is distinct from other Federal complaint procedures in that the complainant, while he initiates the process, is not party to its resolution. Further, the complainant has no standing to institute litigation on his own behalf in the event the resolution is unsatisfactory to him.³³⁵ Rather, in many respects, the process is similar to compliance reviews. The nature of required evidence to support a complaint allegation is virtually the same as that needed to support a finding of noncompliance with the Executive order.³³⁶ The sanction [or remedy] under the Executive order is the same in individual complaints as for the failure to comply with the order's general nondiscrimination affirmative action clauses; namely, withdrawal of contract and/or debarment from future contracts, or referral to the Department of Justice for suit.³³⁷

OFCC requests and receives a report on all complaints and complaint investigations conducted by the compliance agencies, but it has not had the staff to review them. In fact, OFCC has not even been able to keep track of the number, type, and disposition of complaints.³³⁸ To an extent, this reflects the fact

³³⁴ Interview with Leonard Bierman, Senior Compliance Officer, OFCC, Nov. 27, 1969.

³³⁵ *E.g.*, *Farkas v. Texas Investment, Inc.*, 375 F. 2d 629 (6th Cir. 1967); *Farmer v. Philadelphia Co.*, 329 F. 2d 3 (3rd Cir. 1964). It appears, however, that a party may be able to bring suit to enjoin the Federal Government from letting a contract to a contractor who is engaging in discriminatory employment practices. See, *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967). In February 1970 a suit was filed in the Federal District Court of the District of Columbia seeking to stop the Federal Government from dealing with 12 paper product companies alleged to discriminate against black employees. The suit is based on the due process clause of the fifth amendment to the Constitution. In addition, in April 1970 the Legal Defense Fund of the NAACP sued the Secretary of the Defense and other Government officials claiming they violated Executive Order 11246 by giving \$9 million in contracts to three Southern textile firms accused of job discrimination. The cases have yet to be heard. See pp. 51-58 for a discussion of the Defense Department, *infra*.

³³⁶ Hobson interview, *supra* note 312.

³³⁷ Executive Order 11246 (1965), pt. II, subpt. D, §209.

³³⁸ Hobson interview, *supra* note 312.

that OFCC staff believes the complaint mechanism is a poor tool to effect basic changes in industrial employment practices and has assigned complaints a low priority³³⁹ in its overall program.

Application of sanctions under the Executive order in either the construction or supply contract compliance program has been extremely limited.³⁴⁰ The Executive order and the OFCC regulations contemplate such action primarily by the compliance agencies, with OFCC approval required to withdraw a contract or debar a contractor. In fact, few compliance agencies have imposed any sanctions, and debarment actions have been initiated by OFCC against only seven companies—Bethlehem Steel Corp., Timken Roller Bearing Co., Allen-Bradley, B & P Motor Express, Pullman Inc., Hennis Freight Lines Inc., and Bemis Co., Inc.³⁴¹

The Executive order provides that sanctions may be imposed on Federal contractors only after they have been afforded an opportunity for a hearing to show cause why they should not be penalized.³⁴² Only three of the seven

³³⁹ Bierman interview, *supra* note 334; interview with Ward McCreedy Assistant Director for Contract Compliance, OFCC, Dec. 2, 1969. On May 20, 1970, OFCC and EEOC signed an agreement which may eventually result in nearly all OFCC discrimination complaint investigations being conducted by EEOC. In those cases where EEOC is unable to obtain adequate redress by conciliation, the compliance agency will issue a notice to the contractor granting him 30 days to show why sanctions should not be imposed. Memorandum of Understanding Between U.S. Department of Labor, Office of Federal Contract Compliance and Equal Employment Opportunity Commission, Concerning the Processing of Complaints of Employment Discrimination as Between the Two Agencies, May 20, 1970.

³⁴⁰ See p. 52, *supra*, for figures of debarment hearings and other actions.

³⁴¹ *Id.* Hobson interview, *supra* note 312. Memorandum from Edward Sylvester, Jr., Director, OFCC, to the Secretary of Labor, May 24, 1968. Interview with Gresham Smith, Office of the Solicitor, Department of Labor, June 9, 1970. As of August 1970, there have been 15 show cause notices issued independently of Order No. 4. More important, seven notices of intent to impose sanctions have been sent in 1970: OFCC—5, DOD—1, and HEW—1. Four low bidders have been passed over: DOD—1, VA—1, and Treasury—2. Memorandum from Robert R. Hobson, Director, OPO, OFCC, to George Travers, Economist, OFCC, Aug. 25, 1970. Although a step in the right direction, this effort appears inadequate after years of inaction.

³⁴² *Id.* Compliance agencies have imposed few sanc-

cases cited for hearing actually have gone to a formal hearing: Allen-Bradley, Timken Roller Bearing, and Bethlehem Steel. The Allen-Bradley case was never adequately settled and the Department of Justice has filed suit to obtain compliance. In the Timken Roller Bearing case, an agreement was reached without the imposition of sanctions. The Bethlehem Steel hearing took more than a year because the three-man hearing panel could not get together more than 1 or 2 days a month.³⁴³ As of August 1970 a decision had not been reached. Although OFCC and the compliance agencies are ill-equipped to make use of the hearing mechanism, no arrangements have been made for services of professional hearing examiners, nor have hearing regulations been adopted.³⁴⁴

E. Compliance Agency Enforcement

Of the 15 agencies responsible for securing compliance with Executive Order 11246 for supply contracts and Federal and federally assisted construction contracts, the Department of Defense is by far the major compliance agency. It has responsibility for about 75 percent worth more than \$41 billion of all Federal contracts.³⁴⁵

Of the 14 other compliance agencies, 12 have procurement compliance responsibility³⁴⁶

tions, though DOD has held one hearing which was recessed pending an agreement and the Post Office has passed over the low bidders on Federal construction contracts for noncompliance with the Executive order. OFCC maintains no data on such agency enforcement actions.

³⁴³ Interview with Robert R. Hobson, Senior Compliance Officer, OFCC, Dec. 4, 1969. A single hearing examiner may be used in future cases, thus overcoming one of the problems which impeded the final decision in the Bethlehem case.

³⁴⁴ Interview with Robert R. Hobson, Director, OPO, OFCC, June 9, 1970.

³⁴⁵ Interview with C. Stuart Broad, Director of Equal Employment Opportunity Policy, Department of Defense, Feb. 24, 1970. Department of Defense, Military Prime Contract Awards (by Service Category and Federal Supply Classification, fiscal years 1966, 1967, 1968, 1969) Oct. 31, 1969, at 11. The Department of Defense will be treated separately from the other agencies because of its enormous share of Federal contracting activity.

³⁴⁶ Department of Health, Education, and Welfare, Department of Transportation, Department of the Interior, Post Office Department, Department of Commerce, Veterans Administration, Agency for International Development, National Aeronautics and Space

and 10 have construction compliance responsibility.³⁴⁷ The Departments of Housing and Urban Development and Transportation, which are principally concerned with construction, operate next to DOD the most important compliance programs in the Government. In fiscal year 1969 they awarded contracts in amounts of more than \$3 billion and \$4.5 billion, respectively.³⁴⁸ All other compliance agencies, however, are responsible for significant industries with job-creating potential.³⁴⁹ The inadequate size and structure of the compliance units, the effectiveness of the compliance procedures, and the reluctance to apply sanctions has resulted in a program not calculated to produce a significant overall improvement in minority job utilization.

1. DEPARTMENT OF DEFENSE

a. Responsibility

The Department of Defense has been assigned the largest contract compliance task by OFCC. Its responsibility includes the industrial backbone of the Nation's economy: Ordnance, textile mills, primary metal industries, all machinery, motor vehicles, aircraft parts, printing, publishing, and business services.³⁵⁰ OFCC estimates that these industries represent at least 28,583 establishments and employ more than 10,100,000 persons.³⁵¹ Defense

Administration, Atomic Energy Commission, Department of the Treasury, Department of Agriculture, General Services Administration.

³⁴⁷ Department of Housing and Urban Development, Department of Agriculture, Department of Health, Education, and Welfare, Department of Transportation, General Services Administration, Department of the Interior, Post Office Department, Department of Commerce, Tennessee Valley Authority, Veterans Administration.

³⁴⁸ DOD, HUD and DOT responses to a questionnaire from the U.S. Commission on Civil Rights, Dec. 22, 1969. [Hereinafter all responses to this questionnaire will be cited as questionnaire response of (agency)].

³⁴⁹ It will be recalled that agency procurement compliance responsibilities are assigned on the basis of specific industries. See discussion in note 278 supra.

³⁵⁰ OFCC Order No. 1, Consolidation and Reassignment of Compliance Agency Responsibility, To Heads of All Agencies, Oct. 24, 1969. OFCC Order No. 9, Reassignment of Certain Compliance Agency Responsibility, To Heads of All Agencies, Mar. 16, 1970.

³⁵¹ See Order No. 1 discussed in note 278 supra. The Department of Defense, however, estimates that it is now responsible for between 35,000 and 50,000 establishments. Questionnaire response of the Department of Defense.

contracts in force during fiscal year 1968 in excess of \$10,000 amounted to \$39.8 billion, and in fiscal year 1969, to \$38.1 billion.³⁵² During fiscal year 1969, 10,344,000 contractual actions were recorded within the Department.³⁵³

b. Organization and Staffing

Organization of the Department of Defense contract compliance program separates policy direction from compliance operations.³⁵⁴ Policy direction is performed by two professionals plus one clerical employee. Their mission, while not well defined, seems to be to assure that OFCC policy is disseminated to compliance operations units and to serve as adviser to the Assistant Secretary of Manpower and Reserve Affairs, the designated Contract Compliance Officer for the Department of Defense. They are also usually involved in sensitive conciliation negotiations.³⁵⁵

The Office of Contract Compliance (OCC) of the Defense Contract Administration Service (DCAS) is the operations arm of the Defense Department's contract compliance effort. The OCC headquarters consists of three supervisory personnel, 13 compliance officer specialists, and six clerical employees, with staff evenly split between a programs and systems division and a field operations division.³⁵⁶ The staff assists the OCC Director in his supervision of compliance operations by developing and administering the required planning, scheduling, and reporting systems, as well as by supervising program execution by regional compliance personnel.³⁵⁷

The contract compliance staff in the 11 Defense Contract Administration Regions (DCASR's) actually conduct all compliance reviews. The regional Chief, Office of Contract Compliance, is responsible to the regional mili-

tary commander, although he receives directions from headquarters OCC. The 11 DCASR's have a total of 140 compliance personnel: 11 supervisory, 89 compliance officers, and 40 clerical assistants.³⁵⁸

The Department of Defense is establishing approximately 171 new compliance positions for fiscal year 1971 by transfer of slots within the Defense Contract Administration Service.³⁵⁹ Even with this staff, DOD will not be able to fulfill OFCC's Order No. 1 to conduct compliance reviews of 50 percent of its assigned contractors. Indeed, judging from past performance, it will be difficult to meet half that goal,³⁶⁰ as one DOD compliance official practically conceded.³⁶¹

The compliance function in DOD is intricately structured and a finding of noncompliance requires five internal reviews before the DOD Contract Compliance Officer receives a recommendation for the imposition of sanctions.³⁶² At all levels of review, additional attempts are frequently made to conciliate with the contractor.³⁶³ This slows down the procedure still more.

c. Compliance Mechanism and Process

It is common for DOD Contract Compliance Specialists to find deficiencies during a compliance review.³⁶⁴ When this occurs, the re-

³⁵² Shafer interview, supra note 357; Questionnaire response of DOD.

³⁵³ Interview with C. Stuart Broad, Director, Equal Employment Opportunity Policy, DOD, Sept. 1, 1970.

³⁵⁴ Questionnaire Response of DOD. At this Commission's St. Louis hearing, the Chief of Compliance in the St. Louis region stated that he currently had nine professional Contract Relation Specialists and would need 30 to do the job required by Order No. 1, i.e., review 50 percent of assigned facilities in a year. *Hearing before the U.S. Commission on Civil Rights* held in St. Louis, Mo., Jan. 15-17, 1970 (Unedited transcript). [Hereinafter cited as the *St. Louis Hearing*.] A DOD official indicated in late 1969 that by using the OFCC estimate of 40 hours needed for a review plus about 30 hours to analyze data, write a report and negotiate problems, DOD would require additionally, to existing staff, 344 professional and 112 clerical staff to review 50 percent of its compliance responsibility. Speech by Burleigh B. Drummond, Chief, Programs and Systems Division, Office of Contract Compliance, DOD, to Commanders Conference, Dallas, Tex., Nov. 18, 1969.

³⁵⁵ Shafer interview, supra note 357.

³⁵⁶ See chart on p. 71 infra.

³⁵⁷ Questionnaire response of DOD.

³⁵⁸ *Id.* For example, some DOD compliance officials estimated that noncompliance is found in 85 percent of

³⁵² Department of Defense, military prime contract awards, supra note 308. These figures are only for contracts in excess of \$10,000. Those below that figure amount to between \$3 and \$4 billion a year. *Id.*

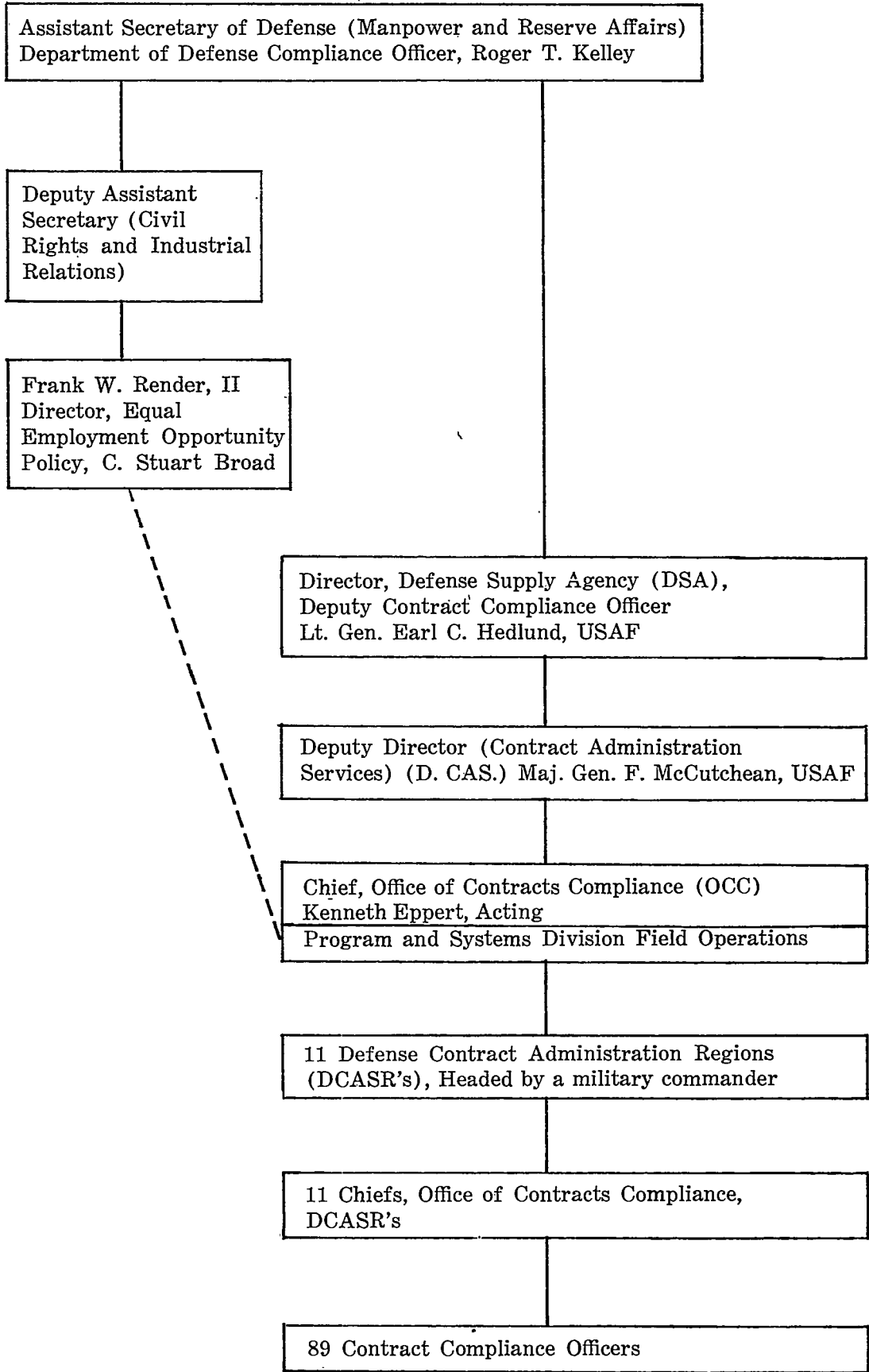
³⁵³ Questionnaire response of DOD. Contractual actions are all actions taken to modify terms, increase or extend, award, or cancel contracts.

³⁵⁴ Broad interview, supra note 345.

³⁵⁵ *Id.*

³⁵⁶ Questionnaire response of DOD.

³⁵⁷ DOD Headquarters Manual, sec. 5100. Interview with M. R. Shafer, Director, Office of Contract Compliance, Defense Contract Administration Service, Jan. 29, 1970; Broad interview, supra note 345.



viewer must notify his Chief, Office of Contract Compliance, DCASR (OCC-DCASR), who, in turn, advises the Commander, DCASR, that noncompliance has been found.³⁶⁵ The Commander's role is crucial because he controls the disposition of the case. He may conciliate the case to his satisfaction and, if he does so, that ends the matter. Under DOD regulations, the Commander is not even obligated to inform OCC, Washington on the disposition of a case if a compliance agreement is achieved.³⁶⁶ Defense Department officials attribute distinct advantages to this procedure since nearly all recalcitrant contractors agree to take necessary action to come into compliance when a case goes to a Commander.³⁶⁷ Nonetheless, imposition of the Commander between the OCC-DCAS Chief and OCC headquarters, by giving an other-than-compliance official a key role in compliance determination, represents a meaningful structural weakness in the overall process.³⁶⁸

The current compliance mechanism is the result of a February 1967 reorganization, which shifted responsibility for contract compliance from a centralized and independent compliance office, reporting directly to the Assistant Secretary of Defense (Manpower), to the Office of Contract Compliance within the Defense Supply Agency (DSA).³⁶⁹ Critics charged that

compliance visits made in the Southeast region. Interview with Kenneth W. Eppert, Chief, Office of Contract Compliance, Atlanta Region, Defense Supply Agency, Mar. 17, 1968.

³⁶⁵ Shafer interview, supra note 357; Questionnaire Response of DOD.

³⁶⁶ DOD Regulations, DSAM 8705.1, chapter IV, sec. I, II, Negotiations and Conciliation Procedures, para. 3 and 4.

³⁶⁷ Shafer interview, supra note 357.

³⁶⁸ The Department of Defense contends that this is not really a problem because the Commander, for all intents and purposes, is a disinterested objective reviewer of this situation. Final disposition of compliance reviews are periodically spot checked when OCC staff visit the DCASR's. Shafer interview, supra note 357. While the procedure may be theoretically adequate, there is no reason to expect a Commander to become vigorous in this field. His record is not dependent upon strong contract compliance enforcement but on securing satisfaction from the contractors of the substantive requirements of the procurement contracts.

³⁶⁹ Defense Contracts Compliance Programs, memorandum from Deputy Secretary of Defense Cyrus R. Vance, Mar. 21, 1967. See R. Nathan, *Jobs and Civil*

the purpose of the reorganization was to avoid possible embarrassment resulting from actions by an office independent of that doing the contracting.³⁷⁰ DOD responded that involvement of the contracting officers would make the new compliance operation more effective.³⁷¹ Yet, it is this involvement of other-than-compliance personnel in the decision process which remains a major source of criticism of the DOD compliance system.³⁷²

In fact, there are suggestions that DOD compliance activity is less than forceful. For example, despite the Department's past failure to implement the Executive order effectively, the Director of DSA has cautioned compliance officials against allowing compliance activities to become too didactic or abrasive, or reviews to become too detailed.³⁷³ These warnings are

Rights (Prepared for the U.S. Commission on Civil Rights by the Brookings Institution) 116-18 (1969). The Assistant Secretary's Office maintains responsibility for policy direction and guidance.

³⁷⁰ See remarks of Rep. William F. Ryan, 114 Cong. Rec. 4732 (1968). See also Statement of Girard Clark, former Director, Contract Compliance Office, DOD, in the Washington Post, June 11, 1967, A-5.

³⁷¹ Ad Hoc Hearing before Congressman William F. Ryan, Dec. 4-5, 1968.

³⁷² Interviews with Leonard Bierman and Robert Hobson, Senior Compliance Officers, OFCC, Nov. 27, 1969, and Apr. 15, 1970.

³⁷³ Defense Supply Agency, OCC Bulletin, March 1969, at 11. General Hedlund, the Commander of the DSA, was quoted in the March issue as indicating to regional officials "[the] contracts compliance function is of national interest and importance. It must, therefore, be pursued vigorously. However, it must be conducted in a *reasonable way* to avoid *didactic* or *abrasive* implementation which in the long run can result in impediments to compliance." (italic added). The April 1969 issue mentioned congressional criticism of Federal contract compliance reviews. The response in the DOD bulletin stated "In view of the increased interest in the Equal Employment Opportunity program and the critical congressional scrutiny to which the program is subjected, OCC Chiefs should insure that only the minimum information required to conduct the review is requested from the contractor, and that the information which is required be enumerated in the body of the letter and not attached as a checklist." Defense Supply Agency, OCC Bulletin, April 1969 at 14. The Report of the Blue Ribbon Defense Panel to the Secretary of Defense included recommendations which appear to recognize the problem created by having procurement officials involved in contract compliance activities. Recommendation V-8, removes compliance operations from the procurement unit and assigns them to a proposed Defense Contract Audit Agency (DCAA). The implication is

not calculated to produce a vigorous program, respected either by contractors or by the minority groups whose rights DOD is obligated to protect. In addition, the Department delayed establishment of a construction compliance program until after the Philadelphia Plan was found legally valid by the Attorney General in late 1969.³⁷⁴ Earlier, DOD had made it clear that it would not act in such matters until OFCC issued "procedural guidelines to enable this agency to establish a nationwide compliance program for construction without undue delay."³⁷⁵ DOD is now participating in the 18 cities program,³⁷⁶ and has established its own safeguard missile site construction compliance program.³⁷⁷

d. DOD Compliance Performance

Two recent cases involving DOD compliance activities point up severe weaknesses in its review and investigation activities. One case concerned the compliance posture of the textile industry³⁷⁸ and the other involved procedures utilized in evaluating the compliance status of a single, large DOD contractor, the McDonnell Douglas Corp.³⁷⁹

clear that procurement officials, including regional commanders, would no longer have a role in compliance and would be expected not to impede the program. *Report to the President and the Secretary of Defense on the Department of Defense by the Blue Ribbon Defense Panel 163-64, July 1, 1970.*

³⁷⁴ Interview with C. Stuart Broad, Director of Equal Employment Opportunity Policy, DOD, Feb. 24, 1970. The construction compliance contract clause for Philadelphia was approved by the Armed Services Procurement Regulations (ASPR) Committee on Dec. 19, 1969.

³⁷⁵ OCC Bulletin, Mar. 1969, supra note 373.

³⁷⁶ See OFCC Memorandum to Contract Compliance Officers, "Construction Compliance Investigations," Mar. 20, 1970.

³⁷⁷ A special set of guidelines was established by OFCC for DOD for its ABM construction site in North Dakota. A range of 6 to 10 percent for each job classification, including crafts, was set as the goal for the contract. Memorandum from John L. Wilks, Director, OFCC to Roger T. Kelly, Assistant Secretary of Defense, DOD, Technical Assistance Guidance for Affirmative Action Plan—ABM Site Construction, N.Dak., Feb. 19, 1970.

³⁷⁸ The most complete discussion of the Textile Case was in the Mar. 27, 28, 1969, *Hearings on S. Res. 39 Before the Subcomm. on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 91st Cong. 1st Sess., at pp. 25-103, 127-158, 222-226, hereinafter cited as *Textile Hearing*.

³⁷⁹ See *St. Louis Hearing*, supra note 163.

(1) Textile Case

In 1967, a joint effort involving EEOC, OFCC, and DOD was initiated to assure compliance in textile plants in parts of the South—areas where textiles are the largest manufacturing industry. The effort focused particularly on discrimination against blacks in jobs which paid relatively well and which were traditionally reserved for whites.³⁸⁰ After a series of meetings between OFCC, EEOC, and the Defense Supply Agency of DOD to assure that the same general policies were being followed by the Federal Government, compliance reviews were conducted between January 1968 and August 1968 by OCC personnel.

Between April and September 1968, three major textile firms, Dan River Mills, Burlington Industries, and J. P. Stevens & Co., Inc., were notified by DOD that they were not in compliance with the Executive order.³⁸¹ After a good many efforts at conciliation, DOD and OFCC officials concluded on January 7, 1969, that the Government's position in the conciliations was correct and that one final attempt would be made before OFCC and DOD would "institute the kinds of proceedings that would lead toward the enforcement of the order."³⁸² On February 3, after failure of the final conciliation effort, David Packard, Deputy Secretary of Defense, having received recommendations for imposition of sanctions under the order, conferred with the contractors and, contrary to OFCC regulations,³⁸³ accepted their verbal commitments for change.³⁸⁴

The required written agreements, finally secured from the three firms in March and April of 1969,³⁸⁵ were not comprehensive and a reporting requirement was not added until

³⁸⁰ See *Textile Hearing*, supra note 378.

³⁸¹ The four major areas of noncompliance were discriminatory promotions, failure to recruit minorities, significant underutilization of Negro females due to the use of nonjob related qualification standards, and racially segregated company maintained housing. *Textile Hearing*, supra note 378 at 39.

³⁸² Statement by Leonard J. Bierman at the *Textile Hearing*, supra note 378, at 40.

³⁸³ 41 C.F.R. 60-1.40(a). Requires affirmative action commitments to be made in writing.

³⁸⁴ *Textile Hearing*, supra note 378, at 40.

³⁸⁵ Burlington Industries, Mar. 26, 1969; Dan River Mills, Apr. 4, 1969; J. P. Stevens, Apr. 24, 1969.

later.³⁸⁶ On January 6, 1970, responding to questions about the effect of the agreement, the Secretary of Labor noted that some progress had been made. He added, however, that only 5 percent of those minorities in "dead end jobs" had been upgraded, which was not "as much as we would like to see." He also expressed "some confidence" in the proper disposition of company-owned segregated housing.³⁸⁷

Reverberations from these actions, including interagency disagreements and Senate Hearings, continued for many months.³⁸⁸ The entire

³⁸⁶ Other than a variety of reports which do not adequately detail many aspects of the employment situation, e.g., the nature of the promotions made, the only firm commitment made by the three companies was to dispose of the employee housing, which was owned and operated in a discriminatory manner by the companies. Whether or not the disposition of the housing will benefit or hurt the minority employees is not clear from the agreements.

What is clear is that the agreements in no way comply with the affirmative action requirements of OFCC regulations effective since July 1, 1968. (See discussion on pp. 37-38). They are even less adequate when measured against the mandates of OFCC Order No. 4 (See discussion on pp. 41-42). The plans do not set goals and timetables of actions within the meaning of the regulations nor do they detail the steps to be taken to improve minority utilization. Training commitments are non-existent, and in the Burlington agreement coverage for reporting purposes is to include all employees except those in management above first line supervisors, an exception which seems discriminatory on its face.

³⁸⁷ See News Conference of George P. Schultz, Secretary of Labor, Jan. 6, 1970. Later data provided by DOD indicate a slow but constant increase in minority group hiring, with minority female employment increasing rather sharply. The increase in minority female employment from 1968 to 1970 was 95 percent for the three firms. However, underutilization remains in the employment pattern; 8,620 individuals are employed in the four top level occupations with minorities constituting only 1.7 percent of all managers and officials, professionals, technicians, and sales jobs. In 1968 minorities held 41 of these four positions and by 1970 they held 148, a negligible improvement.

³⁸⁸ Upon being informed of Deputy Secretary Packard's action of awarding contracts to the three textile firms, Secretary Schultz requested a full report from Mr. Packard. It is highly unusual for the Secretary of Labor to write to a ranking official of another department demanding a written explanation of actions taken. This was a clear indication of Secretary Schultz's displeasure with the procedures followed by Mr. Packard. Mr. Packard's response to the Secretary's letter noted:

"The department has engaged in lengthy discussions

episode, together with the resulting undistinguished agreements, has not added to the credibility of DOD's contract compliance program.

(2) McDonnell Douglas Case

The second case concerned a major aircraft contract with McDonnell Douglas Corp. Although compliance reviews conducted prior to the award of \$7.7 billion in contracts showed significant deficiencies, the award was made.³⁸⁹ It appeared that there were some attempts to require the company to develop an adequate, effective affirmative action plan; however, these required efforts were not concluded prior to the contract award. Thus, the action was consummated while the McDonnell Douglas Corp. was in violation of the Executive order and had not agreed to take steps to bring itself into compliance in a reasonable time.³⁹⁰ This, again, was clearly contrary to OFCC regulations.³⁹¹

about procedures which the contractors should be required to use in increasing minority employment and providing better advancement opportunities for minority groups within the company and in certain questions involving company-owned housing. These discussions have bogged down on the basis of semantics. The contractors involved have assured me that they will take further actions in connection with the problems involved. One of the firms has provided a detailed plan, and the others have provided information of specific things they expect to do . . . the department is expected to have continuing business with these firms and is in a position to resort to other procedures at any time their progress is not acceptable." *Textile Hearing*, supra note 379, at 45-46.

The Secretary of Labor noted in the Hearing that the procedures used were not traditional, i.e., not in accordance with the regulations, but defended them because they had resulted in an effective agreement. He added, however, that:

"At the same time, and I wish to emphasize this point, we regard this procedure as exceptional and in no way a precedent for preaward negotiations." *Textile Hearings*, supra note 378, at 223.

³⁸⁹ See letter with attached memorandum from John A. Hannah, Chairman, U.S. Commission on Civil Rights, to Melvin R. Laird, Secretary of Defense, Jan 24, 1970.

³⁹⁰ However, the McDonnell Douglas Corp. had submitted a plan that it claimed met the requirements of the regulations. At the time of the contract award, Defense Department compliance officials had found the McDonnell Douglas plan unacceptable.

³⁹¹ The OFCC regulations require the development of an acceptable written program—based upon an analysis of problem areas, minority underutilization, hiring, recruitment, and other personnel policies regarding up-

The U.S. Commission on Civil Rights, having documented these facts in a public hearing, sent letters on January 24, 1970, to the Secretary of Defense and the Secretary of Labor, requesting immediate action to enforce the Executive order. Defense Secretary Melvin R. Laird and Air Force Secretary Robert C. Seamans both expressed shock and deep concern at the failure of their staff to handle the McDonnell Douglas contract according to regulations.³⁹² The Secretary of the Air Force and Department of Defense and OFCC compliance officials engaged in intensive negotiations with McDonnell Douglas to develop an acceptable affirmative action plan. On February 10, 1970, DOD announced that such a plan containing goals and timetables had been developed by McDonnell Douglas and accepted by the Department of Defense and OFCC.³⁹³ This marked the first time that the guidelines of OFCC Order No. 4 had been used in assisting a firm to develop an adequate affirmative action plan.³⁹⁴

Department of Defense officials consider this plan a landmark in effective contract compliance.³⁹⁵ It will be used, they say, in conjunction with order No. 4 itself, as a guide in assisting other corporations to formulate their affirmative action plans.³⁹⁶ The plan agreed to

grading and promotion—which will correct deficiencies and set specific goals for improvement. 41 C.F.R. 60-1.40(a).

³⁹² Secretary of Defense memorandum for the Secretaries of the Military Departments and Assistant Secretaries of Defense, Jan. 30, 1970. Secretary Laird indicated: "I am shocked by the apparent situation in which we find ourselves vis à vis compliance with moral legal equal opportunity provisions and procedures on defense contracts. We must take immediate and vigorous corrective action." Secretary Seamans was portrayed as deeply concerned that the precontract audit of McDonnell Douglas had not been conducted. News Release of Robert Seamans, Secretary of Air Force, Jan. 27, 1970.

³⁹³ DOD Press Release, Feb. 10, 1970. Although this Commission has reviewed the McDonnell Douglas Plan and forwarded its comments, criticism, and suggestions to DOD, it is not at liberty to publish its full evaluation at this time because the plan has been classified as confidential by the Defense Department. An abbreviated version of the critique was released to the press on Aug. 26, 1970. See discussion on pp. 75-76 *infra*.

³⁹⁴ Id. Broad interview, *supra* note 374.

³⁹⁵ Id.

³⁹⁶ Id.

by McDonnell Douglas, however, does not contain a detailed reporting requirement.³⁹⁷

The Department of Defense has notified all contractors that existing affirmative action plans must be updated as required by OFCC Order No. 4. Regional offices have been authorized to discuss the McDonnell Douglas plan commitments in general terms with other contractors.³⁹⁸ The exact nature of some aspects of the McDonnell Douglas plan, such as its hiring goals, however, is considered by DOD to be confidential material. Since all other existing affirmative action plans submitted to the Department will be reevaluated on the basis of McDonnell Douglas, it is important for the plan to be subjected to public examination, analysis, and criticism before it is used as the DOD model. Yet DOD claims that confidentiality prevents this action.

Although respecting the confidentiality of certain aspects of the McDonnell Douglas plan, the Commission on Civil Rights has recently criticized the plan³⁹⁹ although it concedes that it "represents a significant step forward—principally in its minority hiring goals and upgrading program."⁴⁰⁰ There remain a num-

³⁹⁷ Id. The reporting plan was established in a separate letter to McDonnell Douglas in which DOD indicated the type of information that was to be reported periodically. Letter from R. S. Sullivan, captain, USN Commander, Defense Contract Administration Services Region V, to Robert C. Krone, corporate vice president, personnel, McDonnell Douglas Corp., Mar. 20, 1970. The summary reports from McDonnell Douglas for February, March, and April show commendable achievement in excess of stated goals and timetables in hiring, but no action in the establishment of training programs.

³⁹⁸ Id. It should be noted that shortly after the issuance of order No. 4, DOD was found to have granted a multibillion dollar contract to a contractor not in compliance with the Executive order. Public pressure resulting from this incident may have prompted DOD to take the aggressive actions noted above.

³⁹⁹ In a different context, the McDonnell Douglas Corp.'s effort was praised by Chairman Charles H. Wilson of a special House Subcommittee of the Armed Services Committee. In seeking to find "whether toughened Federal insistence on nondiscrimination hiring in defense plants is hurting the military effort through higher costs . . .," he concluded that: "They are accepting the Government program, and they want to comply. They recognize we have reached a time when past practices must be changed." *St. Louis Globe Democrat*, Aug. 6, 1970 at A6.

⁴⁰⁰ U.S. Commission on Civil Rights, Staff Memorandum

ber of problems relating to inadequate information and imprecise commitment. Briefly, the deficiencies are: current racial employment by job is not shown, thus making evaluation of the hiring goal impossible; this is only a 1-year plan, thus committing the firm only to review, not to future improvement; the plan provides no information on evaluation of upgrading goals; it does not provide a program to modify impact of layoffs which are usually most harmful to minorities; its training commitments are inadequate; and they are also indefinite.⁴⁰¹

e. Reviews and Investigations

In fiscal year 1969, DOD conducted almost 5,000 contractor reviews and investigations, of which only 2,703 were compliance reviews.⁴⁰² Of the remainder, 1,347 were followup reviews, 587 were preaward reviews, and 342 were complaint investigations.⁴⁰³ Since DOD has responsibility for a minimum of 36,000 contractor facilities,⁴⁰⁴ it thus reviewed fewer than 10 percent of its assigned compliance quota. Further, there are no data available suggesting that these reviews resulted in development of acceptable affirmative action plans.⁴⁰⁵

dum: Critique of the McDonnell Douglas Corp. Affirmative Action Plan of Feb. 9, 1970, (released to the press, with confidential sections deleted, on Aug. 26, 1970).

⁴⁰¹ Id. One problem, however, has been corrected since this analysis was made; i.e., current data by job have been secured by DOD. Some of the other problems have been dealt with in affirmative action plans since obtained from other companies. Interview with C. Stuart Broad, Director, Equal Employment Opportunity Policy, DOD, Sept. 1, 1970.

⁴⁰² Questionnaire response of DOD. The comparable figures for fiscal year 1968 were 3,629 total reviews and investigations and 1,578 compliance reviews.

⁴⁰³ Id. The comparable figures for fiscal year 1968 were 1,189 followup reviews, 507 preaward reviews, and 355 complaint investigations.

⁴⁰⁴ Defense Supply Agency, DSA Program Plan for Contracts Compliance (1969), January 1969, at 1.

⁴⁰⁵ Neither interviews nor the DOD questionnaire response was able to connect the development of acceptable plans to compliance reviews. DOD noted in its response that the affirmative action program requirement has been in its procurement regulation only since Jan. 31, 1969, and has been a part of compliance reviews since that date. Questionnaire response of DOD. A memorandum attached to the DOD response noted that DOD had not uniformly required affirmative action plans which met the standards of Sec. 60-1.40 of the regulations, as interpreted by OFCC, and that if they did it would result in "mass findings of non-compliance." Memorandum from W. R. Senter, Assist-

Compliance reviews of known contractor facilities are scheduled by DCAS regions through the application of selection criteria. Under these criteria, facilities are selected which: (a) Have more than 150 employees, (b) are engaged in work on an active Government contract or subcontract, and (c) are in a metropolitan area with at least 3 percent minority group population. In practice, facilities with the largest employment are scheduled first.⁴⁰⁶ The OFCC official having the chief liaison responsibility with DOD strongly criticized the strict application of these criteria as too narrow. The main reason for OFCC concern is that a decisive factor in determining the location of a compliance review is whether a contract is actually being performed at the facility.⁴⁰⁷ Under OFCC rulings, all of the firm's facilities are subject to the Executive order, regardless of whether each one is currently performing work on a Government contract.⁴⁰⁸ The necessary consequence of the DOD procedure for limiting reviews is to prevent the agency from determining whether agreed to policies for the reviewed facilities are being applied corporatewide.

The Office of Contract Compliance of DSA has shown dissatisfaction with the quality of compliance reviews.⁴⁰⁹ Affirmative action plans,

ant Deputy Director, Defense Supply Agency (Contract Administration Services) to Acting Deputy Assistant Secretaries of Defense (Civil Rights and Industrial Relations), Sept. 15, 1969.

⁴⁰⁶ These criteria may be circumvented "only when the total circumstances underlying the selection are clearly of so serious a nature as to warrant departure . . . and reports of reviews which do not meet the criteria will be subject to review. . . ." Defense Supply Agency, Office of Contract Compliance Manual, ch. 2, sec. 1, at 9.

⁴⁰⁷ Interview with Leonard Bierman, Senior Compliance Officer, OFCC, Nov. 27, 1969.

⁴⁰⁸ In the February 1969 issue of the OCC Bulletin it was reported that an Oct. 24, 1968 letter from the Acting Director, OFCC to Director Equal Employment Policy, Office of Assistant Secretary of Defense (Manpower and Reserve Affairs) restates that all division of a corporation are covered by the Executive order if any one has a Federal contract, and adds that subsidiaries may also be covered, depending upon the degree of independence of the subsidiary. See also Bierman interview, supra 407, DSA, OCC Bulletin, Vol. 1, No. 2, Feb. 1969, at 4.

⁴⁰⁹ OCC has reported that the narrative reports of compliance reviews too often contain conclusions not

initially required within 120 days after the date of the contract, have not, in past instances, always been filed on time. In fact, OCC reviewers have even permitted contractors an additional 120 days from the time of the review to come up with a plan.⁴¹⁰

Implementation of the preaward procedures⁴¹¹ has also created additional problems because most DOD contracts in excess of \$1 million are negotiated.⁴¹² Originally, under OFCC regulation, preaward procedures were applied by DOD only to contracts let under bids, not to those negotiated. For such contracts, OFCC had instituted a preaward check procedure.⁴¹³ OCC interpreted the preaward check procedures, however, as not requiring review if no deficiencies had previously been noted.⁴¹⁴

The compliance review process, as described in these examples, appears to show qualitative and quantitative deficiencies involving questionable practices which suggest the need for a thorough investigation and audit of DOD implementation of the Executive order.

Since January 1970, the Department of Defense has taken actions which indicate a more aggressive program will be implemented in the future. The Department has begun to conduct

supported by the facts, and resulted in unrelated recommendations. DSA, OCC Bulletin, vol. 1, No. 7, November 1969, at 33. It was further noted that OCC had been embarrassed by the quality and accuracy of reviews forwarded to the Office of the Secretary of Defense or OFCC.

⁴¹⁰ DSA, OCC Bulletin, vol. 1, No. 5, June 1969, at 18.

⁴¹¹ A compliance review must be conducted on any contractor receiving a bid contract award of more than \$1 million prior to the actual award. 41 C.F.R. 60-1.20(d).

⁴¹² Interview with C. Stuart Broad, Director of Equal Employment Opportunity Policy, DOD, Feb. 24, 1970.

⁴¹³ The "check" procedures required that the contracting offices of DOD notify the compliance unit of anticipated negotiated awards of more than \$1 million; prior contract status; and whether any previous compliance reports have been filed. The compliance unit then reviewed the contractor's file and if any deficiencies were noted the contracting office would be notified of what action the office should take. DSA OCC Bulletin, supra note 410, at 19-20.

⁴¹⁴ The contracting office which will make the award need only notify the proper OCC regional office of the pending award; no review will be required unless OCC has a record of contractor deficiencies. DSA, OCC Bulletin, supra note 410, at 19-20.

preaward reviews of all contracts, negotiated or bid, of a value of \$1 million or more.⁴¹⁵ Procurement officers have been informed of requirements of Order No. 4 and instructed to apply its guidelines to all contractors they review. This action has resulted in more than 60 "show cause" notices to contractors between April 1 and September 1, 1970,⁴¹⁶ though all but one of these cases have been settled at the regional level, usually by the military commander.⁴¹⁷ It is still too early, however, to determine the extent to which the Department will follow through on these recent progressive actions.

F. Racial and Ethnic Data Collection

The Department of Defense has collected no reliable data on which to base an evaluation of its program. It has, however, collected incomplete data on the racial and ethnic composition of some contractor facilities subjected to DOD review. Minority employment data have been gathered for 2,683 facilities, covering changes during the period July 1, 1967 through December 31, 1968. The facilities had a total December 1968 work force of 3,391,913. In the 1½-year period, minority employment had increased 90,499. By ethnic breakdown this figure indicates 63,255 Negroes, 21,556 Spanish-speaking Americans, 3,856 Oriental Americans, and 1,832 American Indians.⁴¹⁸

⁴¹⁵ On Aug. 25, 1970, procurement regulations were finally amended to require negotiated as well as bid contracts over \$1 million be subject to full preaward procedures. DOD, however, had been doing this for some months. DOD, Defense Procurement Circular, No. 82, Aug. 25, 1970.

⁴¹⁶ Interviews with C. Stuart Broad, Director, Equal Employment Opportunity Policy, June 12, 1970, and Sept. 1, 1970. Initially, DOD was alone among the 15 compliance agencies in taking such action under order No. 4. Note: A "show cause" notice is issued to a contractor found not in compliance as a result of a review. The notice gives the contractor 30 days to show why he should be considered in compliance. At the end of 30 days, if he is still not in compliance, a 10-day notice of the imposition of sanctions is to be sent; this offers the contractor a hearing to establish his compliance if he chooses.

⁴¹⁷ Id.

⁴¹⁸ This is the first report and it was based on reports submitted by the DCAS regions on the minority em-

Minority employment increases in 1,623 facilities were measured for the period January 1, 1969 through June 30, 1969. Employment at the end of the period was 1,727,887. The total minority increase for the 6-month period was 53,566, of whom 36,439 were Negroes, 13,980 Spanish-speaking Americans, 1,880 Oriental Americans, and 1,267 American Indians.⁴¹⁹

While the data show an increase in minority hirings, they are seriously lacking in detail. For example, they do not indicate: (a) the total percentage of minority employment at the initiation or close of the covered periods; (b) whether the rate of increase is greater or less than that for all employment; (c) what the job levels were; (d) the number and rate of promotions; and (e) whether the surveyed facilities were typical of DOD contractors. DOD has indicated no plans to seek these additional data.

2. OTHER COMPLIANCE AGENCIES

Under Order No. 1, 12 agencies, in addition to DOD, have responsibility for procurement contract compliance and 10 for construction contract compliance.⁴²⁰ Staff resources and the manner in which the compliance agencies have organized their activities have had an important influence on their programs' effectiveness.

In 1969, excluding DOD, the agencies awarded contracts amounting to more than \$16,250 million, affecting more than 60,000 business establishments which employ more than 10 million persons.

a. Staffing and Organization

Provisions of Order No. 1⁴²¹ require agencies to prepare a budget request for sufficient additional compliance staff to enable them to conduct an annual review of 50 percent of the firms assigned them. At the time the order was

employment records resulting from their compliance reviews. The detailed data remain in the regions. DSA, OCC Bulletin, vol. 1, No. 4, April 1969, Attachment—"Accomplishment Report."

⁴¹⁹This is the second report. DSA, OCC Bulletin, vol. 1, No. 7, November 1969. Attachment—"Accomplishment Report."

⁴²⁰See discussion at pp. 193-95, supra.

⁴²¹OFCC Order No. 1, to heads of all agencies, Oct. 24, 1969. Prior to October, OFCC exerted no meaningful influence on agency staffing determinations. Interview with Robert Hobson, Senior Compliance Officer, OFCC, Apr. 15, 1970.

issued, all agencies were understaffed, some hopelessly so.⁴²² The staffing pattern required by the OFCC order attempted to bring all agencies to a minimum level of enforcement capability. The President's fiscal year 1971 budget request for these contract compliance agencies would result in an overall increase of 100 percent in their compliance personnel. For two principal reasons, however, the goal of uniform compliance enforcement capability is not likely to be achieved: First, even with the increases proposed by the President, staff resources still will be insufficient; second, some organizational structures present obstacles to effective contract compliance enforcement.

(1) Staff Resources

Insufficient staff is a problem of overriding importance in contract compliance, as in other areas of civil rights enforcement. In some cases, this results both from congressional unwillingness to appropriate sufficient funds and the failure of the executive branch to request them. For example, in connection with the 1971 budget request, the HEW Office for Civil Rights asked for an additional 118 contract compliance positions.⁴²³ The Department reduced this request to 95 in its full agency transmittal to the Bureau of the Budget. The Bureau of the Budget cut the new positions to 59, one-half the original Office for Civil Rights request. This was the number included in the budget submitted to Congress.⁴²⁴

Some agencies have run into special problems as a result of reductions of budget requests. The Department of Agriculture, for example, had its compliance responsibilities increased by 600 percent as a result of order No. 1 and planned to reorganize its compliance program to handle the added workload effectively. The Bureau of the Budget, however, re-

⁴²²The Treasury Department had responsibility for approximately 12,000 banks but had only three staff people assigned to contract compliance. HUD was responsible for more than \$3 billion in contracts in 1969 and had only 41 persons assigned to compliance work.

⁴²³The 118 positions requested were based upon the requirements of compliance activity as contained in OFCC Order No. 1.

⁴²⁴Questionnaire response of HEW. The Office for Civil Rights is responsible for the compliance of educational institutions, nonprofit organizations, and industries with approximately 5,000 establishments. It now has a compliance staff of 24.

duced the Agriculture 1971 budget request to such a level that the reorganization has been postponed until more funds become available.⁴²⁵ A similar reduction in the General Services Administration request may also have influenced its decision not to decentralize its compliance activity in the unit responsible for supply contracts.⁴²⁶

Compliance review staffs of the Department of the Treasury and the Agency for International Development (AID), however, were dramatically increased. Prior to the reassignment, each had only two professionals on their compliance review staffs. The President's fiscal year 1971 budget request calls for an increase of 10 for each of these agencies.⁴²⁷

The problem of coping with the additional responsibilities imposed by Order No. 1⁴²⁸ is compounded by the fact that some agencies assign staff to contract compliance duties on less than a full-time basis. For example, compliance personnel of the Economic Develop-

ment Administration of the Department of Commerce spends 20 percent of its time on this activity and the remaining time on other civil rights duties.⁴²⁹ In some agencies, contract compliance staff also have noncivil rights duties. For example, the Department of Transportation, which has assigned compliance responsibility to independent program units, has four constituent agencies with identifiable contract compliance programs: Coast Guard, Federal Aviation Administration, Federal Highway Administration, and the Urban Mass Transit Administration. All have professional compliance officers working less than full-time on contract compliance or other civil rights work. These percentages range from 50 percent in the Coast Guard to 80 percent in the Federal Highway Administration.⁴³⁰ The Department of the Interior has a total of 15 units with some contract compliance responsibility, six of which have no individual devoting as much as 50 percent of his time to contract compliance.⁴³¹

The actual value of staff members whose jobs are divided between contract compliance and other functions has not been judged by the agencies and is open to question. For example, there is no way of knowing which staff duty takes priority or whether the distribution of time is evenly allocated throughout the year. Thus, it is frequently impossible to determine, from simple manpower calculations, the extent of staff resources devoted to contract compliance.

(2) Organization and Decentralization

Aside from numbers of staff, the other important determinant of contract compliance effectiveness is the manner in which agencies organize and direct their programs.⁴³² Compli-

⁴²⁵ Questionnaire Response of the Department of Agriculture. The Department now has a compliance staff of 15. It requested 104 new positions to cope with the responsibility of reviewing approximately 4,000 contractors. The Bureau of the Budget approved only 17 new positions.

⁴²⁶ Questionnaire Response of GSA. The supply contracts compliance headquarters staff now numbers five professionals and two clericals responsible for 5,000 contractors. Seventeen man-years of additional investigative effort are supplied for compliance reviews by the Office of Audits and Compliance. GSA requested 125 new positions. The Bureau of the Budget granted approval for 51, but the House Appropriations Committee allowed only 39 new positions.

⁴²⁷ Questionnaire Response of the Department of the Treasury and AID. Both of these increases were desperately needed. Treasury has responsibility for 12,000 banks and AID is responsible for more than 1,000 facilities. At the Commission's San Antonio hearing, Robert Wallace, then Assistant to the Secretary of the Treasury, testified that the staff has always been less than what was needed: "We felt that for the banks, we needed to start with 15 professional employees to make compliance reviews and to work with the banks all over the United States to help them implement the requirements of this Executive order." *San Antonio Hearing*, supra note 161, at 572.

⁴²⁸ All agencies currently with compliance responsibilities, except NASA, the Post Office Department, and the Social Security Administration of HEW, are now responsible for more contractors than prior to the order. For example, the Atomic Energy Commission, previously responsible for 1,115 facilities, is now compliance agency for about 3,900 establishments.

⁴²⁹ Questionnaire Response of the Department of Commerce.

⁴³⁰ Questionnaire Response of the Department of Transportation.

⁴³¹ Questionnaire Response of the Department of the Interior. Part-time compliance staff, which invariably works out of regional offices, is not directly responsible to contract compliance officials in the central office; rather, it is responsible to the regional director who may not be interested or committed to implementing the compliance program aggressively.

⁴³² In some cases, such as in the Department of the Treasury and AID, all compliance review personnel are in the central office and make reviews from that office with no regional intervention. At HUD, all contract

ance activities may be concentrated in a central office, with all compliance reviewers reporting to it, or they may be decentralized into smaller, more specialized units. Decentralization may be transferred from central offices to program bureaus or units, or the responsibility may be delegated from the Washington level to regional offices. The most significant decentralization was that of the Department of Defense.⁴³³ There, the rationale for delegating compliance responsibility to the Department's contracting arm was declared to be increased efficiency resulting from specific knowledge of the workings of the contractor's business. It was charged, however, that previous centralized operations had produced a more forceful program in which compliance determinations were made independently of other contract administration considerations.⁴³⁴

Other Federal departments, such as the Departments of the Interior, Transportation, Health, Education, and Welfare, and Commerce, also decentralized operational control of compliance programs to their program bureaus. They usually maintain a small central office for administrative coordination, but each program bureau develops its own compliance program, organization, and staff commitments.⁴³⁵

For example, HEW has two supply contract compliance programs and one for construction, each relatively independent of the other.⁴³⁶ The two supply elements have vastly differing com-

pliance personnel are on the staff of the Assistant Secretary for Equal Opportunity although they work out of field offices. For a discussion of agency practices, see R. Nathan, *Jobs and Civil Rights*, (Prepared for the U.S. Commission on Civil Rights by the Brookings Institution), pp. 116-28 (1969).

⁴³³ See discussion and notes on pp. 70-72 supra.

⁴³⁴ Id.

⁴³⁵ The Department of the Interior has 15 units with compliance responsibility. Transportation has four, HEW has three, and Commerce has two. Questionnaire Responses of Interior, Transportation, HEW, Commerce. The Interior program is so fragmented that the Department has not even been able to come up with a reorganization plan which would enable it to implement its new responsibilities effectively. The Post Office Department has decentralized responsibility for contract compliance, with review examiners administratively responsible to their local postmasters, while operationally responsible to the central office. The degree to which local postmasters influence compliance decisions is, however, unknown.

⁴³⁶ Questionnaire Response of HEW.

pliance capabilities. The contract compliance division, responsible for all supply contracts other than insurance, estimates it was able to perform reviews on only 2 percent of its assigned contractors, while the unit responsible for the insurance industry covered virtually every contractor in a year's time.⁴³⁷

Not only have compliance responsibilities been decentralized in many cases to program units, but they have been further delegated to reviewers in regional offices of the program bureau. Like their central office counterparts, these reviewers often have responsibilities beyond contract compliance. Thus the problems resulting from fragmentation of responsibilities are compounded. As noted, the Department of Transportation has three constituent units with sizable compliance staffs.⁴³⁸ Some of the field staffs of these units are spending less than full-time on contract compliance, for instance, from 50 to 80 percent.⁴³⁹ This diffusion of responsibility is even more apparent in the Bureau of Land Management of the Department of the Interior, whose field personnel work on a variety of civil rights assignments including contract compliance, Title VI, and Federal employment, in addition to program tasks. All civil rights activities account for 55 to 90 percent of their time.⁴⁴⁰ The GSA Office of Audits and Compliance, which conducts all GSA supply contract compliance reviews, has assigned responsibility for this effort to 38 field staff members who spend from 5 to 90 percent of their time on this activity.⁴⁴¹

GSA is an example of an agency within which centralized and decentralized contract compliance coexist. The Federal Supply Service has retained a large degree of centralized control of supply contract compliance, while the Public Building Service, responsible for construction, has completely delegated the

⁴³⁷ Id.

⁴³⁸ The three important units are: The Coast Guard, Federal Aviation Administration, and the Federal Highway Administration.

⁴³⁹ Questionnaire Response of the Department of Transportation.

⁴⁴⁰ Questionnaire Response of the Department of the Interior. The contract compliance function absorbed from 50 to 85 percent of their time.

⁴⁴¹ Questionnaire Response of the General Services Administration.

compliance function to regional office personnel.⁴⁴² The two units offer sharp contrasts in approach. An internal study by GSA suggests, however, that after further study the Federal Supply Service's compliance functions may also be transferred to regional offices.⁴⁴³

While the general trend appears toward more delegation and decentralization,⁴⁴⁴ the benefits appear open to question. Interposing program officials in supervisory and/or decisionmaking positions between the compliance reviewer and the designated contract compliance officer increases the chances for cautious or timid enforcement. Program audit and contracting officials are concerned with securing goods and services from contractors; and this is the principal basis on which their work is judged. Equal employment is looked upon by these officials as an additional and often unwanted burden.⁴⁴⁵

b. The Review Process

Contract compliance agencies conduct various types of investigations regarding contract compliance:

1. The regular compliance review is a thorough investigation of employment practices of a selected number of the total contractor facilities assigned to an agency.

2. The preaward compliance review is a comprehensive inquiry into the compliance status of an indicated low bidder, conducted immediately prior to the award of a contract of more than \$1 million.⁴⁴⁶

⁴⁴² Questionnaire response of GSA. The Office of Audits and Compliance, (OAC) a general investigatory body for GSA, actually performs compliance reviews for the Federal Supply Service. Most OAC reviews concern the propriety of the expenditures. John Brosnahan, Deputy Director for Compliance of OAC, said that most OAC investigators consider contract compliance work an interference with their own professional development. The practice of part-time investigators undoubtedly hinders effective compliance reviews. Interview with John Brosnahan, Deputy Director for Compliance, OAC, GSA, Feb. 3, 1970.

⁴⁴³ Office of Administration Management Systems staff, GSA, *A Study of the GSA Equal Employment Opportunity Program*, at 2-8, December 1969; Questionnaire Response of GSA.

⁴⁴⁴ OFCC has taken no position on this important question. Hobson interview, *supra* note 421.

⁴⁴⁵ See statement in note 442 *supra*.

⁴⁴⁶ The regulations require such reviews. 41 C.F.R.

3. The followup review is conducted in order to verify any positive actions a contractor had agreed to take after having been found in noncompliance.

4. The corporatewide review involves conferences between central office compliance staff and corporate officials to develop an affirmative action plan for all corporate facilities.

5. The complaint investigation is a review of allegations of discrimination made against a contractor.

The 15 compliance agencies reported that in fiscal year 1969 they conducted 12,348 regular, followup, preaward, and corporate reviews. The comparable figure for fiscal year 1968 was 8,683.⁴⁴⁷ The 1969 figure includes several visits to a single establishment,⁴⁴⁸ with followup reviews constituting a third of the total, as it does for the Department of Defense. Thus, of the more than 100,000 contractor facilities, fewer than 10 percent were reviewed in 1969.

Many initial compliance reviews find some deficiency⁴⁴⁹ and each of these is supposed to result in at least one followup review. In fact, however, few reviews of this type are con-

60-1.20(d). Preaward compliance reviews are now being conducted on negotiated contracts of more than \$1 million by DOD.

⁴⁴⁷ Compliance reviews completed:*

Agency	Fiscal year 1968, compliance reviews	Fiscal year 1969, compliance reviews
Department of Defense	3,274	4,637
General Services Administration	---	768
Housing and Urban Development	---	457
Health, Education, and Welfare	616	621
Department of Transportation	493	650
Department of the Interior	423	402
Department of Commerce	200	200
Post Office	2,250	4,000
Department of Agriculture	312	267
Department of the Treasury	75	75
Veterans Administration	407	664
National Aeronautics and Space Administration	41	146
Agency for International Development	---	---
Atomic Energy Commission	592	459
Total	8,683	12,348

* Source: Questionnaire response of the 15 compliance agencies.

⁴⁴⁸ These reviews include all initial compliance reviews, followup reviews, corporate reviews (of an entire firm rather than a single establishment), and preaward reviews. Complaint investigations are not included as data were not available.

⁴⁴⁹ Questionnaire response of the 15 compliance agencies.

⁴⁵⁰ For example, HEW reported that 90 percent of initial reviews found deficiencies. Questionnaire response of HEW.

ducted.⁴⁵⁰ Thus, correction of the deficiencies is left largely to the contractor's good faith. In addition, the number of corporate reviews conducted is relatively small⁴⁵¹ and, since the results are not systematically checked by OFCC,⁴⁵² their adequacy is not known.

In construction compliance, ordinary reviews are of less value than in supply contracts, since construction contractors change their work force and location with each job. The OFCC effort to develop area plans, such as the Philadelphia Plan, appears to be a more significant vehicle than compliance reviews to increase minority employment in the construction trades. All agencies having construction compliance responsibility are participating in the plans.⁴⁵³

HUD, with OFCC's approval, is planning its own "59 cities" program as an extension of the "18 cities program" of OFCC.⁴⁵⁴ Elements of the program are still subject to change, but the basic outlines have been settled. It contemplates assignment of a full-time "Cities Officer" to each of the 59 cities who will become an expert on compliance in that area. The cities will be selected with reference to HUD regional and area offices and large HUD-financed projects.⁴⁵⁵ Participation of other Federal agencies will be encouraged but, in any event, HUD intends to inaugurate the program.⁴⁵⁶

⁴⁵⁰ In DOD's southeastern region, 95 percent of reviews conducted from January 1966 to April 1968, contained recommendations for recontact reviews; only 10 percent were followed up. Alabama Hearing, *supra* note 155, at 460. Also see, questionnaire response of DOD. The questionnaire response of the Department of Agriculture, AEC and other agencies, indicated that most reviews found noncompliance.

⁴⁵¹ The total number of corporate reviews reported was 16.

⁴⁵² Hobson and Bierman interviews, *supra* notes 421 and 407.

⁴⁵³ See list of agencies with construction responsibility, *supra* note 347.

⁴⁵⁴ Interview with Thomas Jenkins, Director, Contract Compliance Division, Office of Contract Compliance and Employment Opportunity, HUD, Jan. 20, 1970.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* Although the goal of the plan is admirable, HUD would require additional staff to carry it out. It now has only 41 people in contract compliance work and estimated it would need another 31 to do reviews of half of its contractors. Yet its budget request asks only for 21 new positions. Even if HUD had the staff to operate

c. Imposition of Sanctions by Compliance Agencies

The Executive order and OFCC regulations contemplate that compliance agencies will play the major role in the application of sanctions. Yet, to date, OFCC alone has brought the formal hearings necessary before contract withdrawal or contractor debarment. Where formal action has been contemplated by compliance agencies, the cases have been transferred to OFCC.

Two related factors are primarily responsible for this procedure. First, OFCC has not established or required any specific guidelines for compliance agency action other than the general procedures contained in the May 1968 regulations.⁴⁵⁷ Much more is needed—for example, guidelines aimed at preventing protracted negotiations, measures to insure that agencies have necessary legal and hearing examiner support, and directives requiring adoption of agency regulations.

The second factor has been OFCC's acquiescence to the contracting agencies' reluctance to impose sanctions on their own. Neither the Secretary of Labor, Assistant Secretary, nor the OFCC Director has communicated to the agencies the importance of bringing prompt enforcement actions in appropriate cases.⁴⁵⁸ Further, while Department of Labor officials have made a number of public statements and speeches stressing the value of mechanisms such as the Philadelphia Plan, they have been relatively silent on the requirement of strict compliance enforcement.⁴⁵⁹

the program it would then have no staff for compliance activities outside the 59 cities. In any case, experience has shown that one "cities officer" will not be able to effectively develop and implement a program of this nature without help from other agencies.

⁴⁵⁷ The regulations merely indicate that OFCC may issue a 30-day show cause notice to a contractor believed in noncompliance, giving him a chance to show why sanctions should not be applied. At the end of 30 days, if an agreement has not been reached, or if the company has not responded in a way to convince OFCC that no action is indicated, OFCC will issue a debarment notice. A contractor has 10 days to request a hearing before OFCC or the compliance agency (with the approval of OFCC) under OFCC hearing regulations. 41 C.F.R. 60-1.26(b)(2), 60-1.28.

⁴⁵⁸ *Id.* Prior to order No. 4, no record was found of any effort by Department of Labor or OFCC officials to direct the compliance agencies to apply sanctions.

⁴⁵⁹ *Id.*

Available sanctions, other than the ultimate ones of contract debarment or termination, have been applied by agencies to encourage Executive order compliance. Compliance agencies have reported instances in which lesser, but significant, sanctions have been imposed. If utilized systematically and consistently, these could be developed into effective compliance tools.⁴⁶⁰ The Post Office and the Department of Agriculture have both utilized such sanctions against noncomplying contractors. A 1969 Commission study reported that the Post Office passed over apparent low bidders in construction projects because of their noncompliance with the Executive order.⁴⁶¹ Agriculture has indicated that in several instances contractors' eligibility was administratively suspended until acceptable compliance agreements were negotiated.⁴⁶²

In Chicago, where HUD found 17 construction contractors in noncompliance, further OFCC approval was required before awarding future contracts.⁴⁶³ Similar action has been taken by HEW's Office of Construction Services.⁴⁶⁴ The Social Security Administration of HEW, upon noncompliance findings for insurance companies, has called top company officials to its central office for discussion as to why enforcement actions should not be initiated. According to the Social Security Administration this negotiation approach has

⁴⁶⁰ Examples of these actions were reported by all compliance agencies except the following five: Commerce, AID (here, the program and responsibility are so new that no example could be expected), NASA, TVA, and the VA. Questionnaire responses of the 15 compliance agencies.

In some cases, these actions were taken only in cases where noncompliance was so blatant, and publicity so great that the agency had no recourse, e.g., where an employer refused to file an annual racial data report with the Federal Government. Questionnaire response of HEW.

⁴⁶¹ Jobs and Civil Rights, *supra* note 432, at 121-22. Interview with Barney Sellers, principal author of *The Reluctant Guardians*, June 8, 1970. A later report from the Post Office indicated that several companies were found in noncompliance and were referred to OFCC for action in 1966. Questionnaire response of the Post Office Department.

⁴⁶² Questionnaire response of the Department of Agriculture.

⁴⁶³ Questionnaire response of HUD.

⁴⁶⁴ Questionnaire response of HEW.

been very successful in obtaining necessary compliance actions.⁴⁶⁵

The Department of the Interior has also taken some enforcement action on its own. The Office of Civil Rights, the Department's coordinating body, recently withdrew four cases from its program bureaus' jurisdiction for more intensive negotiation. According to Interior, two of these cases have been satisfactorily conciliated and the other two are still pending final disposition.⁴⁶⁶ No contract, however, has ever been delayed or otherwise put into jeopardy.⁴⁶⁷

Most agencies, however, have been reluctant to take any action on their own by way of imposing sanctions. In testimony before this Commission at its 1968 Montgomery, Ala. hearing, the General Services Administration representative noted that it had threatened to terminate Federal contracts many times. The testimony of the GSA official later indicated that the threats were merely requests made to contractors for affirmative action plans or progress reports.⁴⁶⁸ Additional testimony at the hearing related to the Alabama Power Co., where GSA showed a distinct hesitation to enforce the Executive order despite the fact that its compliance reviewer had recommended action.⁴⁶⁹ A year and a half after the hearing, GSA reports it still has never applied sanctions to any contractor.⁴⁷⁰

In most cases where an agency has determined noncompliance, it forwards the case to OFCC. For example, the AEC, which never has imposed sanctions by itself, has passed along several cases to OFCC for enforcement action.⁴⁷¹

Treasury's compliance program for banks which are Federal depositories has avoided the use of sanctions. The Department has used

⁴⁶⁵ *Id.*

⁴⁶⁶ Questionnaire response of the Department of the Interior.

⁴⁶⁷ *Id.*

⁴⁶⁸ Alabama Hearing, *supra* note 155, at 442.

⁴⁶⁹ *Id.*, at 439-40, GSA officials responded that it would be difficult to terminate the contract since the Alabama Power Co. was the area's sole source of electric power.

⁴⁷⁰ Questionnaire response of GSA. The agency indicated, however, that it had held up contract awards until acceptable affirmative action programs were received.

⁴⁷¹ Questionnaire response of AEC.

compliance reviews as a means of educating its staff on the nature of problems in the banking industry relating to minority utilization, rather than to enforce the order against individual banks.⁴⁷² Under this type of program, Treasury has never initiated any action to withdraw Federal deposits from noncomplying banks, nor have any other sanctions been imposed.⁴⁷³ Treasury operates its compliance program mainly through conferences, by personal dealings with bank representatives or banking associations, and by providing educational information to the bankers.⁴⁷⁴

These types of enforcement actions by compliance agencies are insufficient to convince contractors of the Government's determination to eliminate employment discrimination. Informal enforcement measures, while of some value, would be more effective if they were used systematically and buttressed by imposition of formal sanctions. The possibility of enforcement by court suit, through referral by OFCC to the Department of Justice, is not a viable alternative to the swift application of agency sanctions. The Civil Rights Division of Justice is only capable of litigating less than 20 employment discrimination suits each year and the timelag between noncompliance and the ultimate court decision presents a formidable barrier to effective enforcement of the order. Unless there is much greater use of sanctions by compliance agencies, the widespread skepticism that already exists concerning the Federal Government's commitment to enforce its contract compliance program will increase.

Noncompliance abounds and yet no contract has ever been canceled; only seven debarment actions have been brought. Thus, the tradition of voluntarism, which permeated and immobilized all previous Federal contract compliance efforts, appears to remain an active ingredient of the current effort.

⁴⁷² San Antonio Hearing, *supra* note 161, at 573-75.

⁴⁷³ Questionnaire response of the Department of the Treasury.

⁴⁷⁴ San Antonio Hearing, *supra* note 161, at 1071. At the time of the Commission hearing in San Antonio, Tex., December 1968, four banks had indicated to the Treasury Department they did not wish to be Federal depositories if they had to comply with the Executive order and the Federal deposits were accordingly withdrawn. *Id.*, at 577.

d. Contract Compliance Impact

Precise data are not available on changes resulting from reviews. The rather uniform neglect of data collection on the contractors' total and minority employment makes it difficult to determine whether there has been a significant improvement in minority group employment by Government contractors. Fragmentary evidence seems to indicate that serious problems still exist, especially in white-collar and technical occupations.⁴⁷⁵ The agencies did report, however, what they considered to be the results of their contract compliance effort.⁴⁷⁶ Even here there were inconsistencies; some agencies provided relatively insignificant examples of change but included no overall statistics and gave no indication of how representative these examples were. For instance, the Department of the Interior made many general statements concerning contractor improvement and then specifically identified one "situation" in Texas where new seniority rights and training opportunities were being negotiated for 358 Negroes, 35 of whom were to receive pay increases.⁴⁷⁷ Whether this change is part of a pattern or an isolated case was not specified, nor was any evaluation made of the program's total impact.

The HEW Office for Civil Rights report on a followup study of 50 contractors showed increased minority employment of 3,909.⁴⁷⁸ However, since the total employment of these contractors before and after the increases was not provided nor the job categories in which the increases occurred specified no accurate measure of progress can be made nor,

⁴⁷⁵ See discussion, pp. 45, *supra*.

⁴⁷⁶ No compliance agencies reported changes in minority group employment in the context of other factors which would affect employment opportunities. For example, some evidence indicates that minority group employment in North Carolina textile industries has been affected by the increasing difficulty of hiring white workers who have been moving into higher paying, newer industries. Hearing on S. Res. 39 before the Subcommittee on Administrative Practice and Procedure of the Senate Commission on the Judiciary, 91st Cong., 1st Sess., at 94 (1969).

⁴⁷⁷ Questionnaire response of the Department of the Interior. Other examples provided by Interior were not specific and included its own evaluation without data.

⁴⁷⁸ Questionnaire response of HEW.

IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

A. Introduction

indeed, is it possible to ascertain if there has been progress. Again, the Department of Agriculture indicated that one contractor has increased minority employment by 196 while the overall work force declined from 7,872 to 7,794.⁴⁷⁹ But additional detail revealed that only 11 of the new minority employees were in the four top white-collar occupational categories: managerial, professional, technical, and sales. The increases had only raised total minority group employment in those categories to a token 1.9 percent.⁴⁸⁰

The problem of white-collar minority employment also is shown in data gathered on the shipbuilding industry by the Maritime Administration of the Department of Commerce. In early 1969, total employment in major shipyards stood at 84,912 persons, of whom 14,430 or 17 percent were comprised of minorities.⁴⁸¹ They constituted 15.7 percent of the skilled employment, but only 3.3 percent of the 26,861 white-collar employees.⁴⁸²

Lack of significant data indicates that OFCC and the compliance agencies have been derelict in developing evaluation measures of their efforts. Such comprehensive information not only would direct compliance agency and OFCC attention to the remaining critical problems, but would also permit public disclosure of the hard facts that could conceivably result in a more credible posture for the entire contract compliance program.⁴⁸³

⁴⁷⁹ Questionnaire response of the Department of Agriculture.

⁴⁸⁰ Id.

⁴⁸¹ Questionnaire response of the Department of Commerce.

⁴⁸² Id. The problem of white-collar employment recurred in another compliance agency report. AEC reported a consolidated employment change for minorities—in an industry which grew from 360,363 to 370,034—of an increase from 0.4 percent to 0.5 percent in the officials and managers occupational class. Overall minority group employment was only 6.5 percent at the end of the period. Questionnaire response of the AEC.

⁴⁸³ To comprehend the full meaning of minority employment changes, facts must be gathered on occupational employment; upgrading; promotions; transfers; seniority systems; effects of automation; whether the industry is a declining one—nationally or in a particular region; immigration and outmigration by race; and other economic changes in regional or metropolitan areas.

Title VII of the historic Civil Rights Act of 1964 makes most employment discrimination illegal on a nationwide basis. To enforce the title, the law established a five-member, bipartisan agency—the Equal Employment Opportunity Commission (EEOC)—as a national counterpart to State and local fair employment practice commissions, some of which had existed for more than 20 years.⁴⁸⁴

The EEOC jurisdiction under Title VII is broad. The statute is specific on groups covered and the kinds of practices prohibited, such as employment discrimination by employers, labor organizations, and employment agencies.

An employer is defined as “. . . a person engaged in an industry affecting commerce who has 25 or more employees.”⁴⁸⁵ Employees of Federal, State, or local governments, however, are excluded from coverage.⁴⁸⁶ An exemption is also provided for bona fide private membership clubs;⁴⁸⁷ Indian tribes;⁴⁸⁸ for employees of religious corporations performing work connected with the organizations' religious activities;⁴⁸⁹ and employees of educational institutions engaged in the institution's educational activities.⁴⁹⁰

EEOC estimates that only 328,000 of the Nation's private employers employ 25 or more people, thereby falling within the ambit of Title VII.⁴⁹¹ But they account for approximately 75 percent of the Nation's labor force not including the self-employed.⁴⁹²

⁴⁸⁴ Passage of Title VII came after a period of two decades during which more than 200 fair employment measures had been proposed in the Congress. *History of the Equal Employment Opportunity Commission* (Prepared for the Lyndon Baines Johnson Library) 5 (unpublished).

⁴⁸⁵ Sec. 701(b).

⁴⁸⁶ Sec. 701(b)(1).

⁴⁸⁷ Sec. 701(b)(2).

⁴⁸⁸ Sec. 701(b)(1).

⁴⁸⁹ Sec. 702.

⁴⁹⁰ Sec. 702.

⁴⁹¹ *Hearings on EEOC and Related Agencies 1970 Appropriations Before a Subcommittee of the House Commission on Appropriations*, 91st. Cong., 1st Sess., pt. 4 at 383 (1969) [hereinafter cited as *EEOC 1970 Appropriation Hearings*].

⁴⁹² Id. Many of the employers not covered are in cen-

Title VII coverage extends to labor organizations which operate hiring halls or in any other manner procure employees for an employer;⁴⁹³ or which have a membership of 25 or more and are the certified or recognized bargaining agent for a group of employees, or are seeking such recognition.⁴⁹⁴

Discrimination by employment agencies is also made illegal by Title VII.⁴⁹⁵ Not only private employment agencies are affected but the U.S. Employment Service and the system of State and local employment services receiving Federal financial assistance fall under the title's authority.⁴⁹⁶

Title VII also gives wide powers with respect to the basis on which discrimination is outlawed, i.e., race, color, religion, sex, and national origin. Moreover, specific prohibited activities are delineated. Thus, section 703 prohibits an employer from considering an individual's race, color, religion, sex, or national origin as a basis for hiring, firing, or paying him. It also makes it illegal to vary the terms, conditions, and privileges of employment for any of the enumerated reasons or to classify or segregate an employee in such a way as to deprive him of employment opportunity.

Title VII provides a catchall prohibition which makes illegal any employer practice which would ". . . otherwise adversely affect [the individual's] status as an employee, because of . . . [his] race, color, religion, sex, or national origin."⁴⁹⁷

Only the provisions on *bona fide* occupational qualifications inherent in the job are allowed as exceptions.⁴⁹⁸ Most court cases involving such qualifications have been concerned with sex qualifications.⁴⁹⁹ The law prohibits race from

tral cities and engage in the type of wholesale and retail trade that could serve as a fruitful source of employment for minority group individuals.

⁴⁹³ Sec. 701(e)(1).

⁴⁹⁴ Sec. 701(e)(2).

⁴⁹⁵ An employment agency is defined by the statute as any person who regularly undertakes to secure employees for an employer. sec. 701(c).

⁴⁹⁶ Sec. 701(c).

⁴⁹⁷ Sec. 703(a)(2).

⁴⁹⁸ Sec. 703(e)(1).

⁴⁹⁹ *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968); *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967); *Gudbrandson v. Genuine Parts Co.*, 297 F. Supp. 134 (D. Minn. 1968).

being used as a bona fide occupational qualification, nor can community prejudices be so used.⁵⁰⁰

Specific labor union activities are also made illegal. A covered labor organization cannot exclude or expel from its membership an individual because of race, color, sex, or national origin.⁵⁰¹ Limiting, segregating, or classifying union membership on the basis of these criteria also is prohibited.⁵⁰² Any action on the part of a labor organization which deprives or limits an individual's employment opportunities based on the prohibited grounds constitutes a violation of Title VII.⁵⁰³ Additionally, a labor organization may not cause an employer to discriminate.⁵⁰⁴

Similarly, covered employment agencies may not fail or refuse to refer for employment; classify or refer for employment; or, in any other way, discriminate against any individual because of his race, color, religion, sex, or national origin.⁵⁰⁵

In contrast to the wide jurisdiction assigned EEOC by the Civil Rights Act of 1964, it is provided only limited means to enforce the statute. The agency may attempt to eliminate job discrimination through the "informal methods of conference, conciliation, and persuasion"⁵⁰⁶ but it has no enforcement powers with which to penalize those who violate the law. Of the various procedures provided EEOC to eliminate employment discrimination, the most important is the processing of a complaint of discrimination. Under section 706, when an individual or a Commission member charges that a violation of the title has occurred, the Commission shall investigate the charge. "If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁵⁰⁷ If the charge

⁵⁰⁰ See debates on the Civil Rights Act of 1964 at 110 Cong. Rec. 13825-26 (1964).

⁵⁰¹ Sec. 703(c)(1).

⁵⁰² Sec. 703(c)(1).

⁵⁰³ Sec. 703(c)(2).

⁵⁰⁴ Sec. 703(c)(3).

⁵⁰⁵ Sec. 703(b).

⁵⁰⁶ Sec. 706(a).

⁵⁰⁷ Sec. 706(a).

alleges an act of discrimination in a State which has a law prohibiting such an act, the EEOC must defer processing of the complaint to the State for a 60-day period.⁵⁰⁸ In the event the Commission is unable to secure relief through conciliation, the individual complainant may institute private civil action against the respondent in Federal court.⁵⁰⁹ And in those instances where a pattern or practice of discrimination is revealed, EEOC may recommend that the Attorney General bring suit against the respondent pursuant to section 707 of the title.⁵¹⁰

In addition to these compliance mechanisms, Title VII empowers the Commission to use certain affirmative action methods to reduce employment discrimination. These include cooperating with State and local fair employment practice commissions; ⁵¹¹ offering technical assistance to those subject to the title; ⁵¹² conducting educational and promotional activities, e.g., hearings; ⁵¹³ collecting employment data; ⁵¹⁴ and publication of studies regarding job bias.⁵¹⁵

The Equal Employment Opportunity Commission's lack of enforcement powers is compounded by its meager budget and staff given it during the first 3 years of its 5-year-old history. Through fiscal year 1968, EEOC operated with fewer than 400 authorized positions. In fiscal year 1969, this was increased to 570. Sizable as this number may appear, it is inadequate to carry out the Commission's work effectively, particularly in the face of the enormous number of discrimination charges filed with it. As of August 1970 EEOC has received 52,085 complaints alleging job discrimination, of which 35,445 have required investigation. The combination of scant staff resources and the overwhelming number of complaints has prevented the Commission from utilizing to any great extent the other weapons provided by Title VII to combat employment discrimination.

Within the limitations of absence of enforce-

⁵⁰⁸ Sec. 706(b).

⁵⁰⁹ Sec. 706(e).

⁵¹⁰ Sec. 705(g)(6).

⁵¹¹ Sec. 705(g)(1).

⁵¹² Sec. 705(g)(3).

⁵¹³ Sec. 705(i).

⁵¹⁴ Sec. 709(c).

⁵¹⁵ Sec. 705(g)(5).

ment power and inadequate financial and staff resources, EEOC has, in its 5 years of life, implemented its mandate as follows:

B. Organization and Staffing

In establishing the Equal Employment Opportunity Commission,⁵¹⁶ Congress invested it with authority to establish regional or State offices as required to fulfill its mandate.⁵¹⁷ At the present time, the Commission's operations are divided between the central organization in Washington, D.C., and 13 field offices throughout the country.⁵¹⁸ While the conduct of a large part of the enforcement function has been decentralized, decisionmaking authority, policy determination, and overall responsibility for coordination remain the prerogative of the Washington headquarters. Other Commission activities, such as technical assistance and liaison with State and local fair employment practice agencies also are central office responsibilities.⁵¹⁹

Since its inception, the Equal Employment Opportunity Commission has been plagued by organizational and personnel problems which have impaired its ability to operate at maximum effectiveness. The agency opened its doors on July 2, 1965, under inauspicious circumstances. Since the implementing provisions of Title VII, passed on July 2, 1964, were not to become effective until 1 year later, it was anticipated that the interim year would be used to organize and staff the new agency and to establish procedures for its operation. President Johnson, however, did not appoint a Chairman and Commissioners until May 10, 1965. Sworn in on June 1, 1965, they had only a month to make the Commission operational. Consequently, on the date Title VII became effective, EEOC had only a skeletal organiza-

⁵¹⁶ Sec. 705(a).

⁵¹⁷ Sec. 705(f).

⁵¹⁸ The 13 offices are located in the following cities: Albuquerque, Atlanta, Austin, Birmingham, Chicago, Cleveland, District of Columbia, Kansas City, Los Angeles, Memphis, New Orleans, New York, and San Francisco. In addition to the 13 field offices, the Commission is in the process of establishing small district offices responsible to their respective field offices.

⁵¹⁹ The Commission's organization is currently being studied by a task force and a reorganization is pending. As of Aug. 17, 1970, however, announcement of a reorganization had not been made.

tion and staff and no operational procedures. In addition to the difficulties attendant on the establishment of a new organization, problems peculiar to decentralization, such as lack of uniformity, communication, and supervision, also have prevented the Commission from utilizing its limited resources in the most efficacious manner.

Structural deficiencies have been compounded by acute staffing problems, most notably long vacancies in key positions, and high rates of turnover at all levels, including major policymaking and supervisory positions, and, as a result of small appropriations, an insufficient personnel. Consequently, the Commission has suffered from a critical lack of continuity and direction whereby its ability to operate efficiently and to fulfill its mandate under Title VII have been seriously impaired.

1. Central Office ⁵²⁰

The headquarters organization ⁵²¹ consists of the Chairman, Vice Chairman, and the three other Commissioners, with four supportive units responsible directly to the Chairman, ⁵²² and five operational units reporting to the Executive Director. ⁵²³

a. The Commissioners

The five Commissioners are appointed by the President with the advice and consent of the Senate for staggered 5-year terms. No more than three of the appointees may be of the same political party. The President designates one member as Chairman and one as Vice Chairman. ⁵²⁴

(1) Chairman

Title VII vests responsibility for EEOC's administration in the Chairman, ⁵²⁵ and also grants him the power to appoint key staff. ⁵²⁶

⁵²⁰ Three units—Administration, Public Affairs, and Congressional Relations—are omitted from the following discussion because their functions are not peculiar to the enforcement of Title VII.

⁵²¹ This is the official structure as delineated in the EEOC functional chart.

⁵²² Executive Director (to which is attached the Plans and Programs Staff), Office of the General Counsel, congressional liaison staff, and public affairs staff.

⁵²³ Offices of administration, compliance, research, State and community affairs, and technical assistance.

⁵²⁴ Sec. 705(a).

⁵²⁵ Sec. 705(a).

⁵²⁶ Sec. 705(a). The following office heads serve at the pleasure of Chairman: Executive Director, General

Armed with these dual powers, the Chairman is in a formidable position in relation to the other Commissioners to set the Commission's course. Basically he establishes the Commission's goals and direction, although a majority vote of the Commission is required on major policy issues.

In 5 years of operation, the EEOC has been directed by four chairmen, ⁵²⁷ not one of whom has served as long as 2 years. Moreover, a hiatus of 5 months occurred between the resignation of the first Chairman and the qualification of his successor. ⁵²⁸ Thus there has been a lack of continuity in Commission leadership during its 5-year existence, particularly since the rapid succession of Chairmen has been paralleled by an equally rapid turnover of high-level staff.

The position of Chairman is currently held by William H. Brown, III. Originally appointed as a Commissioner by President Johnson in October 1968, he was designated as Chairman by President Nixon in May 1969.

(2) Vice Chairman

The Vice Chairman's only responsibility, apart from his function as a member, is to act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office. ⁵²⁹

The office has been held, since the Commission's inception, by Dr. Luther Holcomb, who is white. Originally appointed by President Johnson, he was reappointed in July 1969 for a full term by President Nixon.

(3) Commissioners

As the Commission is now constituted, the members (with the exception of the Chairman) play a limited role ⁵³⁰ featured by no specific statutory administrative duties. Their major function is in the decision stage of the

Counsel, Public Affairs Director, Congressional Liaison Director, and Plans and Programs Director.

⁵²⁷ The four Chairmen, and their terms, have been: Franklin D. Roosevelt, Jr., July 1965–May 1966; Stephen N. Shulman, September 1966–July 1967; Clifford L. Alexander, Jr., August 1967–April 1969; William H. Brown, III, May 1969–present. The first two chairmen were white; the latter two black.

⁵²⁸ Mr. Roosevelt resigned in early May 1966; Mr. Shulman was not sworn in until Sept. 21, 1966.

⁵²⁹ Sec. 705(a).

⁵³⁰ Interview with Clifford L. Alexander, Jr., former Chairman and Commissioner, EEOC, Mar. 5, 1970.

complaint process: they are charged with determining whether "there is reasonable cause to believe that a charge is true".⁵³¹ Initially, this function occupied a considerable amount of the members' time; the Commissioners, with assistance from their small staffs (Commissioners have no more than two special assistants; some have only one), actually wrote the decisions.⁵³² Since establishment of a Decisions and Interpretations Division during the 1967 fiscal year, the Commissioners' function has been primarily a passive one of reviewing draft decisions and acting only on those on which there is disagreement.

Given the Commission's lack of enforcement or adjudicative powers, there is strong argument for discontinuing its present form of organization in favor of replacing it with a single administrator. Critics of the present structure argue that the single administrator form would make for more efficient operation.⁵³³ If, however, the Commission is granted cease and desist order power, thus giving its members an adjudicative role, a strong rationale would exist for continuing the Commission in its present form.⁵³⁴

As with the position of Chairman, there has been a rapid turnover of the other Commissioners,⁵³⁵ thus contributing to the lack of leadership continuity. This situation has been further exacerbated by long delays in filling Commissioner positions, leaving EEOC to

⁵³¹ Sec. 706(a).

⁵³² R. Nathan, *Jobs and Civil Rights* (prepared for U.S. Commission on Civil Rights by the Brookings Institution) 21 (1969).

⁵³³ *Id.*, at 20. This argument discounts the importance that Commissioners may serve as voices of various interest groups. For example, many consider Commissioner Vicente Ximenes as the spokesman for Spanish surnamed American groups; Commissioner Elizabeth Kuck, for women's organizations.

⁵³⁴ *Id.*; see also, Alexander interview, *supra* note 530.

⁵³⁵ Richard A. Graham was not reappointed when his 1-year term expired in June 1966; Vicente T. Ximenes replaced him in June 1967. Aileen C. Hernandez resigned in November 1966; Elizabeth J. Kuck was sworn in March 1968 to finish the unexpired term. Samuel C. Jackson was not reappointed upon completion of his term in June 1968; William H. Brown III was chosen to replace him October 1968 and became Chairman in May 1969. Although resigning as Chairman in April 1969, Mr. Alexander retained his position as a Commission member until June 1969 when he resigned.

function for undue periods with only four and, at times, with only three members.⁵³⁶

Currently serving are Vicente T. Ximenes, who was appointed for a 5-year term in June 1967 and Elizabeth J. Kuck, sworn in in March 1968 to fill an unexpired term. A third position was vacant from the time of Clifford Alexander's resignation in June 1969 until Senate confirmation of Colton Lewis on July 24, 1970.⁵³⁷

b. Executive Director

The Executive Director, who is responsible directly to the Chairman,⁵³⁸ is the Commission's top manager, whose office has four major functions: administration of the headquarters operation; program planning and evaluation, including budget; supervision of field directors; and liaison with other Federal agencies.⁵³⁹

Management of the central office and the field offices has suffered because of frequent changes in Executive Directors and Deputy Directors and lengthy vacancies in the latter position. In the Commission's short history there have been six Executive Directors (of whom two were designated "Acting").⁵⁴⁰

⁵³⁶ There have been three vacancies of more than a year's duration: one from June 1966 to June 1967; one from November 1966 to March 1968; one from June 1969 to July 1970. From November 1966 until June 1967 the Commission had only three members.

⁵³⁷ Equal Employment Opportunity Commission—Functional Chart.

⁵³⁸ Mr. Lewis was nominated by President Nixon on Feb. 20, 1970.

⁵³⁹ Interview with George Draper, Deputy Director, Nov. 18, 1969. At the time of the interview Mr. Draper was also Acting Executive Director. The Executive Director has line authority over the operational units; the actual direction and supervision of the field offices are the responsibility of the Deputy Director; the program planning and evaluation functions are discharged by the plans and programs staff, an arm of the Executive Director's office.

⁵⁴⁰ The position has been held by N. Thompson Powers, Herman Edelsberg, Gordon Chase, Daniel Steiner (Acting), George Draper (Acting), and Joseph Fagan. The four Directors and one of the two Acting Directors have been white. A second Acting Director was black. The longest tenure of any one Director was the 1 year, 10 month-period of Gordon Chase. Only one other person, Herman Edelsberg, has held the post for as long as 1 year. Moreover, from February 1969, to January 1970, the position was filled by persons serving in acting capacities. Letter from Joseph C. Fagan, Executive Director, EEOC, to Lawrence B. Glick, Deputy

The same situation has prevailed with regard to the Deputy Director. Four persons have held the position to date, though one appointment was unofficial;⁵⁴¹ at one time it was vacant for an entire year.⁵⁴² Partly as a result of this situation, resolution of who actually runs the field operation has not yet been made and for a long period the locus of day-to-day liaison with the field offices was not established.⁵⁴³

Lack of designation of continuing responsibility has taken its toll in coordinating the agency's program with that of other Federal agencies. Formerly lodged in an office of liaison,⁵⁴⁴ since fall of 1966 the function has been alternately exercised by the Chairman's office and the Executive Director on an ad hoc basis. The location of responsibility for coordinating the various operating offices' liaison with other agencies has not been determined.⁵⁴⁵ At the present time, the Chairman's office is assuming responsibility for major liaison with other agencies.⁵⁴⁶

The plans and programs staff, operating as an extension of the Executive Director's office, is responsible for the analysis of the Commission's basic policies and major operational plans and programs.⁵⁴⁷ The general purpose of this function is to determine how EEOC can

make most effective use of its limited resources to improve equal employment opportunity. Fulfillment of this function, through such means as the formulation of 2 or 5-year plans or through the establishment of a Programming, Planning, and Budgeting System (PPBS), has been impeded by the staff's small size and the pressure of other demands.⁵⁴⁸ The Office's role has also been hampered by failure of the Commission to appoint a permanent Director;⁵⁴⁹ the incumbent, James Robinson, has served in an acting capacity throughout the 1970 fiscal year. As of May 1970, an appointment did not appear to be imminent.⁵⁵⁰

c. Office of General Counsel

Like the Executive Director, the General Counsel is a supportive arm of the Chairman. In addition to the usual functions of a general counsel, his office has special responsibility for three activities directly related to Title VII enforcement. These are: recommendation to the Attorney General for institution of pattern or practice of discrimination suits under section 707; participation as amicus curiae in private suits brought under section 706(c); and the filing of demand notices in Federal district court when necessary to secure documentation pursuant to a charge of discrimination.

To date, the Commission has had six General Counsels (including three acting);⁵⁵¹ during one 14-month period the position was either unfilled or filled by an Acting General Counsel.⁵⁵² Moreover, the position of Deputy General Counsel was unoccupied from May 1967 until December 1969.

d. Office of Compliance

The central operating section of EEOC is the Office of Compliance which is responsible to the Executive Director. In this office resides

⁵⁴⁸ Id. Not only is the staff size small—six professionals—but at the time of the interview only half of the slots were filled. At a later interview with Mr. Robinson on Apr. 8, 1970, five of the six positions had been filled.

⁵⁴⁹ Id.

⁵⁵⁰ King, Oldaker interview, supra note 546.

⁵⁵¹ The General Counsels have been Charles Duncan, Richard Berg (acting), Kenneth Holbert (acting), Daniel Steiner, Russell Specter (acting), and Stanley Hebert.

⁵⁵² The position was vacant from October 1966 until November 1967. During that time, the office was directed by persons serving in an acting capacity.

General Counsel, U.S. Commission on Civil Rights, Aug. 18, 1970.

⁵⁴¹ The position has been held by Walter Davis, William Williams (unofficially), Robert Randolph, and George Draper. All four have been black.

⁵⁴² June 1968 to June 1969.

⁵⁴³ Interview with John Rayburn, Acting Director, Office of Compliance, Apr. 29, 1970. See pp. 92-94 infra for further discussion.

⁵⁴⁴ The office of liaison was formally discontinued in May 1968. However, the function of Federal liaison had been assumed by Mr. Shulman when he took office in fall 1966. *History of the Equal Employment Opportunity Commission*, (Prepared for the Lyndon Baines Johnson Library) 226, 227 (unpublished).

⁵⁴⁵ For example, at the present time OFCC relates to the office of research on the matter of employment reporting by employers; to the office of compliance on discrimination charges against Government contractors; to the Chairman's office on policy matters. It is not clear who has responsibility for overall coordination of these activities.

⁵⁴⁶ Interview with Patricia King and William Oldaker, Special Assistants to the Chairman, May 11, 1970.

⁵⁴⁷ Interview with James Robinson, Acting Director, Plans and Programs Staff, Oct. 31, 1969.

responsibility for overall coordination and supervision of all the enforcement process except the litigation function. The Office consists of a Director and his staff, and three operating divisions: Conciliation, Decisions and Interpretations, and Control.

The Conciliation Division serves in an advisory and review capacity to field conciliation personnel and is responsible for establishing general guidelines for the conduct of conciliations. In addition, the unit conducts or guides those conciliations which it determines are of national import or scope, or involve highly complex issues.

The Decisions and Interpretations Division (D & I) is responsible for the drafting of Commission decisions. As this function becomes partly decentralized,⁵⁵³ the Division will come to assume an advisory and review role. The unit has been variously located as an extension of the Commission's staffs, as part of the General Counsel's Office, and, finally, in the Office of Compliance.

The Control Division has responsibility for monitoring the location and progress of all charges and for compiling statistical data based on the complaints received by the Commission.

The Office of Compliance also has suffered from leadership changeovers, and from insufficient staff. During 5 years of operation, it has had seven Directors (including three who were only acting).⁵⁵⁴ Moreover, the Office has lacked a permanent Director for the entire 1970 fiscal year.⁵⁵⁵

It now takes the Commission approximately 2 years to process a charge of discrimination. The greatest time lag is currently in the Decisions and Interpretations Division where a completed investigation often waits 16 to 18

⁵⁵³ Partial decentralization of the decision drafting function was begun in February 1970. Field office personnel hereafter will draft decisions for Commission approval in specified types of cases. See discussion at p. 105 *infra*.

⁵⁵⁴ The seven directors have been George Holland, Kenneth Holbert (acting), Eric Springer, Robert Randolph, Vincent Cohen (acting), John Rayburn (acting), and Andrew C. Muse.

⁵⁵⁵ Robert Randolph resigned effective July 1969. Andrew C. Muse was appointed as Director effective July 13, 1970.

months for a draft decision to be prepared.⁵⁵⁶ A chain of major causes is responsible for this delay: insufficient staff caused by inadequate budget allocations; a disproportionate number of positions assigned to other headquarters offices [according to those responsible for the compliance function]; and assignment of four or five D & I slots to other functions within the Compliance Office.⁵⁵⁷ Staffing has also been inadequate in the Conciliation Division.⁵⁵⁸

Moreover, for fiscal year 1970, the immediate office of the Director of Compliance operated at much less than full strength.⁵⁵⁹ Increased staffing has been provided by the 1970 budget; but the units are just completing the process of filling these positions. Nearly half of them have been allocated to the Decisions and Interpretations Division.⁵⁶⁰ The unit director felt that it was too early to tell whether the number of positions was adequate, even though it represented a substantial improvement over the past allocation.⁵⁶¹

e. Office of Technical Assistance

The Office of Technical Assistance, also serving the Executive Director, is a bipartite organization consisting of the Technical Assistance Division and the Education Programs Division. The former is responsible for promoting development and acceptance of affirmative action programs by those subject to Title VII. However, the Division has dealt essentially with corporations to the exclusion of labor unions and employment agencies, and even that aspect of its activity has been limited, primarily because of insufficient staff.⁵⁶²

⁵⁵⁶ See pp. 98-104 *infra* for a more detailed discussion.

⁵⁵⁷ Interview with John Rayburn, Acting Director, Office of Compliance and Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 29, 1970.

⁵⁵⁸ Interview with Charles Wilson, Deputy Chief, Conciliations Division, May 1, 1970.

⁵⁵⁹ At the time of the first interview with the Acting Director of Compliance on Jan. 28, 1970, the office was functioning with only three of its five professional slots filled; at the time of the second interview on Apr. 29, 1970, only one of the five professional positions was filled.

⁵⁶⁰ The 1970 budget provides for 22 professional slots for D&I; 10 for Conciliation; eight for Control; and five for the Director's Office. Rayburn and Gordon interview, *supra* note 557.

⁵⁶¹ *Id.*

⁵⁶² Interview with George Butler, Acting Director, Office of Technical Assistance, Jan. 28, 1970. At the

Plans for establishing a labor unit have never materialized, even though the Office has one staff member who spends most of his time dealing with unions.

The Education Programs Division, responsible for informing firms, union, and others affected by Title VII, has operated as part of the public affairs staff for more than 2 years although it is officially lodged in the Office of Technical Assistance. The unit lacked a chief from June 1967 until May 31, 1970.⁵⁶³ Currently, the two positions allocated to the Office have been detailed to Public Affairs.⁵⁶⁴

Compounding these organizational and staffing problems is the absence of a permanent Director for the Office. Initially the position was not filled until February 1967; since April 1968 it has been held by two different persons serving only in acting capacities.⁵⁶⁵

f. Office of State and Community Affairs

Created in May 1968, this Office, which reports to the Executive Director, has primary liaison responsibility with State and local fair employment practice agencies. Major areas of contact involve deferral of charges to State agencies, data sharing, and awarding and monitoring of grants to State and local FEPC's to improve their operating mechanisms. This Office is the one in headquarters that has not had a change of leadership, although the staff changes have been relatively numerous. In November 1969, three of eight professional positions were vacant;⁵⁶⁶ however, as of June 21, 1970, there was only one vacancy.⁵⁶⁷

time of the interview, Mr. Butler indicated that he had only five Technical Assistance Officers of whom one was on detail.

⁵⁶³ In a press release of Dec. 8, 1969, the Chairman, William H. Brown, III, mentioned this office when he singled out those positions that had been vacant for a year or longer prior to his assumption of the Chairmanship in May 1969. EEOC Press Release, Dec. 8, 1969, at 2. Chris Roggeron was appointed to the position on May 21, 1970.

⁵⁶⁴ Butler interview, supra note 562.

⁵⁶⁵ George W. Draper served as Acting Director until June 1969; George Butler, from June 1969 to May 1970. King, Oldaker Interview, supra note 546.

⁵⁶⁶ Interview with Peter Robertson, Director, Office of State and Community Affairs, Nov. 13, 1969.

⁵⁶⁷ Letter from William H. Brown III, Chairman, EEOC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 11, 1970.

g. Office of Research

The Office of Research, which also functions under the Executive Director, is responsible for gathering, analyzing, and disseminating information on employment discrimination. These functions are performed by the Reports, Technical Studies, and Technical Information Divisions, respectively.

The Reports Division develops and collects reports and/or recordkeeping devices from firms subject to Title VII. The unit functions on behalf of the Joint Reporting Committee, made up of EEOC, OFCC, and, until its dissolution, Plans for Progress. Inadequate staffing has been cited as one of the major causes of the unit's inability to process EEOC reports rapidly.⁵⁶⁸

The Technical Studies Division utilizes data collected by reports, as well as other sources, to produce studies in support of Commission activities. One of the Division's responsibilities has been the conduct of research preparatory to Commission hearings.

Dissemination of information from EEOC reports to other Federal agencies, State and local antidiscrimination commissions, and university personnel doing research, is the function of the Technical Information Division.⁵⁶⁹

The Office of Research has functioned without a permanent Director since October 1968 and without a Chief of Technical Studies since May 1969. As of May 1970, these two positions still had not been filled and there were no plans to fill the former position before the end of the 1970 fiscal year.⁵⁷⁰

2. FIELD OFFICES

Beginning with the Atlanta Office in February 1966, the Commission has established 13 regional and area offices.⁵⁷¹ Beginning with

⁵⁶⁸ EEOC 1970 Appropriations Hearing, supra note 491, at 359-60.

⁵⁶⁹ Id. The Division, though formed in March 1968 has never been formally recognized in the Budget or on the EEOC Functional Statement.

⁵⁷⁰ King, Oldaker interview, supra note 546.

⁵⁷¹ The offices in order of establishment are: Atlanta,* February 1966; Chicago,* June 1966; Cleveland,* June 1966; Los Angeles, July 1966; New Orleans, July 1966; New York,* July 1966; San Francisco,* July 1966; Albuquerque, Aug. 1966; Kansas City(Mo.), Aug. 1966; Austin,* Oct. 1966; Washington, D.C., May 1967; Birmingham, Oct. 1967; and Memphis, Jan. 1969. Asterisks denote the six regional offices; the other

the delegation of analysis and investigation of complaints in mid-1967, EEOC has continued to decentralize the enforcement process. Responsibility for conducting conciliations was transferred to the field offices later in 1967; in February 1970 a further step was taken by partly decentralizing the decision-writing part of the compliance function. Additionally, field offices were recently assigned a substantive role in the litigation area of the enforcement procedure with the appointment of regional attorneys who are active in this role. Other Commission activities, such as technical assistance and liaison with State and local FEPCs have not been put on a regional basis.

In addition to the 13 area and regional offices, EEOC is now establishing district offices⁵⁷² in cities with heavy caseloads, such as Seattle and Indianapolis, which have large concentrations of black groups, Denver with its Mexican American population and Phoenix which houses large Indian and Mexican American Communities.⁵⁷³

Organizational and staffing problems have attended decentralization of the compliance process to field offices, and account in part for EEOC's failure to operate a timely or efficient enforcement system. Among the significant problems have been lack of supervision or direction resulting in poor lines of communication and lack of uniformity of organization and operation; insufficient staff; and frequent changes in field personnel involved in investigation and conciliation.

As previously indicated,⁵⁷⁴ the Deputy Executive Director has responsibility for field office direction. Long vacancies in this position, as well as a high rate of turnover,⁵⁷⁵ have been detrimental to field office operation and, there-

seven are area offices. Area offices are under the jurisdiction of the regional office within whose geographical boundary they lie. No differentiation in terms of duties or responsibilities has been made, however.

⁵⁷² At the present time EEOC has or expects to establish district offices in Dallas, Denver, Houston, Indianapolis, Jackson, Philadelphia, Phoenix, and Seattle. District offices will be responsible to their respective area offices.

⁵⁷³ King, Oldaker interview, supra note 546.

⁵⁷⁴ See discussion of the Executive Director position, at pp. 89-90 supra.

⁵⁷⁵ Id.

fore, to the compliance process.⁵⁷⁶ Moreover, clear delineation of the roles of the Deputy Director and the Director of Compliance in field direction still has not been made.⁵⁷⁷ Liaison has been conducted on an ad hoc basis with field offices contacting various headquarters offices, e.g., Compliance, General Counsel, Executive Director, or one of the Commissioners, at their own discretion.⁵⁷⁸ An attempt to alleviate this confusion has been made with the institution in March 1970 of a contact system, in which specific personnel in the Conciliation and D & I Divisions are responsible for monitoring inquiries from field offices.⁵⁷⁹ Such a system is expected to afford some degree of continuity in the field-headquarters relationship.⁵⁸⁰

Failure to direct the decentralization process adequately has resulted in lack of uniformity among the structures or operations of the 13 regional and area offices. As Mr. Brown has put it: "The field offices, in effect, had become 13 different Equal Employment Opportunity Commissions."⁵⁸¹ The Chairman, who favors uniformity of operation, is working toward improvement of this situation.⁵⁸²

Compounding these organizational problems have been several serious staffing problems, most notably an inadequate number of personnel and a high attrition rate. Both the immediate former Chairman and the current Chairman have emphasized the difficulties created by understaffing, which is attributed to meager congressional appropriations. This has had a deleterious effect on the functioning of the entire compliance process.⁵⁸³

The effects of insufficient manning are most

⁵⁷⁶ See Rayburn, Gordon, interview, supra note 557.

⁵⁷⁷ Id.

⁵⁷⁸ Id.

⁵⁷⁹ It should be noted that such a system was made essential by the adoption of new compliance procedures. See pp. 98-104 infra.

⁵⁸⁰ Wilson interview, supra note 558.

⁵⁸¹ Statement by William H. Brown, III, Chairman, supra note 563.

⁵⁸² Letter from William H. Brown, III, Chairman, supra note 567.

⁵⁸³ Interview with Clifford L. Alexander, Jr., former Chairman and Commissioner, Mar. 5, 1970. "EEOC's problems are directly related to its meager budgets in each of the past four years . . ." Statement by William H. Brown, III, Chairman, EEOC News Release No. 69-39 Aug. 29, 1969, at 3.

obvious in field offices, which have the major enforcement responsibility. As the Commission stated in its fiscal 1971 budget submission:

"Since the beginning of the Commission in fiscal year 1965, budget and staff resources have proven inadequate to deal with the inflow of complaints. . . . As a result, the enforcement backlog . . . has grown steadily. [T]he Commission has not been able to satisfy its most basic responsibility—that to distressed charging parties."⁵⁸⁴

Because of high attrition rates, the Commission has been unable to develop a core of field experts in investigation and conciliation. As Mr. Brown pointed out: "In the field, the high rate of turnover among young investigators seriously hampered the effectiveness of these offices."⁵⁸⁵ Moreover, similar experience among conciliation personnel is one of the reasons offered for the increasing rate of conciliation failures.⁵⁸⁶

3. TRAINING

The absence of a systematic training program has been another serious problem in the Commission's overall operation.⁵⁸⁷ It has been particularly acute in the case of field investigators and conciliators, and was cited by Mr. Brown as a central cause of the Commission's past failure to develop an effective enforcement procedure.⁵⁸⁸

Although never officially authorized, a small training unit has existed at various times as part of the compliance office. Its main function, however, has been preparation and updating of an instructional manual for field personnel. No uniform or systematic training program has been developed either for new employees or for older employees moving to move advanced positions.

A new training unit, the Employee Development and Training Division, was established in January 1970 as part of the Office of Ad-

ministration. The Division plans intensive training for compliance personnel, particularly those in the field. The unit's creation is too recent to permit evaluation. However, it does not have sufficient time or staffing now to train all the field compliance personnel hired just prior to the close of the fiscal year.⁵⁸⁹ For example, while newly hired investigators have been exposed to an orientation program prior to assuming their positions, specific investigative training has not yet been programmed.⁵⁹⁰ Thus, new investigators begin their jobs with little more than on-the-job training provided by the already over-taxed field offices.⁵⁹¹

C. Goals and Priorities

1. GOALS

As charged by Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission has one basic program goal—the elimination of employment discrimination in the private sector.⁵⁹² EEOC has described its function as follows:

"The mission of the Equal Employment Opportunity Commission is to obtain the highest possible degree of compliance with Title VII of the Civil Rights Act of 1964, which eliminates all employment discrimination based on race, color, religion, sex or national origin in all industries affecting interstate commerce."⁵⁹³

Achievement of this goal, 6 years after enactment of Title VII, still lies in the future. In a recent speech, William H. Brown, III, the Commission's Chairman, charged continuing employment discrimination:

"It is 5 years after the passage of the Civil Rights Act of 1964, and yet the Equal Employment Opportunity Commission has found that job discrimination is still so prevalent that it must expand and enlarge.

"The reality is that minority group persons, although substantially advanced in employment compared to 5 years ago, are still concentrated in the lowest level and lowest paying positions."⁵⁹⁴

⁵⁸⁹ Interview with James Robinson, Acting Director, Plans and Programs Staff, Apr. 8, 1970.

⁵⁹⁰ Rayburn, Gordon interview, *supra* note 557.

⁵⁹¹ The problem caused by the small size of the training division is alleviated, according to EEOC, by the extensive use of regular staff to train employees under the guidance of the training division. Letter from William H. Brown, III, Chairman, *supra* note 567.

⁵⁹² EEOC 1971 *Appropriations Hearing*, *supra* note 584.

⁵⁹³ EEOC mission statement and organization chart (undated).

⁵⁹⁴ Speech by William H. Brown, III, Chairman Albuquerque, N. Mex., Apr. 23, 1970, at p. 1.

⁵⁸⁴ Hearings on EEOC and Related Agencies 1971 Appropriations Before a Subcommittee of the House Commission on Appropriations, 91st Cong., 2d Sess., pt. 4 at 581 (1970) [hereinafter cited as EEOC 1971 *Appropriations Hearing*.]

⁵⁸⁵ Statement of William H. Brown, III, Chairman *supra* note 563.

⁵⁸⁶ Wilson interview, *supra* note 558.

⁵⁸⁷ Interview with Patricia King and William Oldaker, Special Assistants to the Chairman, May 11, 1970.

⁵⁸⁸ Statement of William H. Brown, III, Chairman *supra* note 563, at 2.

2. PRIORITIES

Because of staff and financial limitations, the Commission has been forced to assign priorities in three different areas: first, in determining the most effective vehicles of implementation; second, in choosing the categories of respondents⁵⁹⁵ against which to direct its resources; and, finally, in selecting among classes of aggrieved persons⁵⁹⁶ to concentrate its efforts.

It is difficult to identify precisely the priorities the Commission has adopted, nor has there been any definitive Commission statement in this regard. Rather, they must be inferred from public addresses of those who have served as Chairmen, from printed statements, from budget and staff allocations, and the actual conduct of Commission activities. Moreover, the priorities that have been established have been subject to change with modifications resulting from decisions of the various Chairmen as well as the pressure of events.⁵⁹⁷

a. Mechanisms of Implementation

The most important question for the Commission in allocating priorities has been determining which of its available mechanisms can be most effective in reducing employment discrimination. At issue has been the delineation of the Commission's basic role. Should EEOC adopt a primarily reactive approach, responding on a case-by-case basis to filed charges, or should it assume an initiatory posture, emphasizing self-starting activities in both enforcement (e.g., Commissioner charges) and affirmative action (e.g., public hearings, technical assistance)? Those favoring a reactive approach have contended that this was Congress' intention and was necessary to build a body of

⁵⁹⁵ Respondents are those against whom charges are lodged, i.e., private employers, labor unions, private and public employment agencies, and joint labor-management apprenticeship groups.

⁵⁹⁶ Aggrieved persons are those who file complaints on one or more of the following bases: race, color, religion, sex, and national origin.

⁵⁹⁷ For example, a growing case backlog, hostile political reaction to public hearings, and increasing politicization of the Mexican American community have contributed to alterations in Commission priorities.

law.⁵⁹⁸ Those involved in the enforcement process at EEOC still favor this stance,⁵⁹⁹ but there has not always been uniformity of the opinion on the subject.⁶⁰⁰

During most of its history, the Commission has given priority to the handling of individual discrimination complaints. Hearings, technical assistance, and a broad use of Commissioner charges have been relegated lower priority in relation to complaint handling. Thus in its *First Annual Report*, the EEOC described itself as a "complaint-centered agency" with "specific statutory responsibility . . . to handle complaints."⁶⁰¹ Two years later, in its *Third Annual Report*, the Commission asserted that its "primary resource has been and continues to be its authority to investigate and conciliate reported violations of Title VII."⁶⁰²

In addition, many of the Commission's resources have been allocated to the compliance function, a trend accelerated under the present Chairman. In fiscal year 1969, enforcement accounted for almost 50 percent of total program costs; for fiscal year 1970, it will be more than half; and the fiscal year 1971 estimate is for enforcement activity to require more than 63 percent of total program costs.⁶⁰³

⁵⁹⁸ Views cited in Richard Nathan, *Jobs and Civil Rights* (Prepared for U.S. Commission on Civil Rights by the Brookings Institution) 21, 22 (1969). Nathan does not agree with this opinion.

⁵⁹⁹ Interview with John Rayburn, Acting Director, Office of Compliance, and Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 29, 1970; interview with Charles Wilson, Deputy Chief, Conciliations Division, May 1, 1970.

⁶⁰⁰ Alexander interview, *supra* note 583. The need for EEOC to devote more resources to initiatory activities was also adopted by Richard Nathan in a published study done for the U.S. Commission on Civil Rights. Mr. Nathan concludes:

"The Commission's greatest promise for the future lies in . . . 'self-starting' activities. The EEOC could increase its effectiveness appreciably by moving further away from the case-by-case or reactive approach and giving more emphasis to broader self-starting activities, such as the 1967 and 1968 textile and white collar hearings. Another promising technique for the future is the development of an EEOC-initiated enforcement program." Nathan, *supra* note 598, at 67, 68.

⁶⁰¹ EEOC *First Annual Report*, fiscal year 1966, at 7.

⁶⁰² EEOC *Third Annual Report*, fiscal year 1968, at 1.

⁶⁰³ EEOC 1971 Appropriations Hearing, *supra* note 584, at 584. These figures do not include legal program

This emphasis has been given the complaint process despite the Commission's recognition that the complaint mechanism is an inadequate vehicle for eliminating job discrimination. Speaking in January 1970, the EEOC Chairman Mr. Brown, questioned the adequacy of the complaint process as a means of opening up new and broader opportunities. "Millions of people," he stated, ". . . will not complain because they have 'no evidence' of discrimination—only a suspicion—when turned away from a job; they cannot complain if they are unaware of the opportunities in the first place."⁶⁰⁴

The immediate former Chairman, Clifford L. Alexander, Jr., viewed priorities somewhat differently, and placed greater emphasis on the holding of hearings. Mr. Alexander considered public hearings, in particular, an important means of uncovering patterns of discrimination. During his less than 2 years as Chairman, Alexander presided over four of the six Commission hearings that have been held to date.⁶⁰⁵ His successor has placed high priority on the compliance function, particularly on eliminating the backlog of cases. Almost all the new positions he has requested, if granted, will be allocated to the compliance function.⁶⁰⁶ However, he has not discounted the importance of initiatory activities. Under his direction, EEOC held a public hearing in Houston in June 1970. Further, several Commissioner charges have been filed against employers in

support, most of which is complementary to enforcement activities.

⁶⁰⁴ EEOC News Release No. 70-3, Jan. 29, 1970, at 1. This view is not peculiar to the present Chairman; nor is it of recent origin. In a series of Government-industry symposiums held in 1968, EEOC responded in the following manner to an inquiry about the adequacy of the complaint process to handle legitimate questions of employment discrimination:

"Experience has shown that in many cases people who have legitimate complaints of discrimination do not file charges. . . . Frequently an individual feels that he has much to lose if he files a complaint. . . . In some companies the individuals who file complaints are branded as troublemakers. This is particularly true in connection with executive or white collar positions." See T. Powers, *Equal Opportunity: Compliance and Affirmative Action* 16 (published by NAM and PFP, 1969).

⁶⁰⁵ Alexander interview, supra note 583.

⁶⁰⁶ EEOC 1971 *Appropriations Hearing*, supra note 584, at 584.

Wisconsin and in the New Mexico-Arizona-Utah region.⁶⁰⁷

b. Respondents

Because Title VII coverage includes private employers, labor unions, public and private employment agencies, and joint labor-management apprenticeship groups, EEOC has had to determine where to direct its major efforts in eliminating job discrimination. Priority clearly has been assigned to employers; labor unions come next; and almost no attention has been given to employment agencies or apprenticeship programs.

Two major considerations helped shape these decisions. First, EEOC has sole responsibility for compliance by private employers, other than Federal Government contractors; it shares enforcement responsibility for labor with the National Labor Relations Board and for apprenticeship programs and public employment agencies with the Department of Labor.⁶⁰⁸ Second, the overwhelming majority of charges have been lodged against private employers, with labor unions a distant second; only a handful of complaints have concerned employment agencies and apprenticeship programs.⁶⁰⁹

In addition to the complaint processing, these priorities are reflected in various other EEOC activities. The Commission in five hearings has focused almost entirely on the role of employers. Only in the Los Angeles hearing, were labor practices considered; the role of employment agencies was alluded to only in the New York City white-collar hearing. Similarly, technical assistance activities have been largely directed toward generating affirmative actions by private employers in the hiring of minorities.⁶¹⁰

The same set of priorities also has prevailed in the collection and publication of data. Thus, a reporting system for employees was insti-

⁶⁰⁷ EEOC News Releases No. 70-11, Apr. 1, 1970 and No. 70-12, Apr. 7, 1970.

⁶⁰⁸ Nathan, supra note 598, at 63-66.

⁶⁰⁹ In fiscal year 1968, 9,339 complaints were filed against employer practices; 1,535 against union practices; 159 against employment agency practices; and 69 against labor-management apprenticeship practices. The comparable figures for fiscal year 1969 were 12,456, 1,495, 140, and 202.

⁶¹⁰ Interview with George Butler, Acting Director, Office of Technical Assistance, Jan. 28, 1970.

tuted a year prior to one for unions; a similar system for employment agencies has still not been established, nor is it programmed for fiscal year 1971.⁶¹¹ A three-volume statistical report based on 1966 employers' employment data has been released by EEOC; a similar report for 1967 is forthcoming. There have been no corresponding publications on unions and apprenticeship groups.

No early change is anticipated in this ordering of priorities. The Houston hearing, for example, held on June 2, 3, and 4, 1970, focused on practices of employers; a reporting system for employment agencies is not programed in the next fiscal year; and no activity is now being planned for joint labor-management apprenticeship groups.⁶¹²

c. *Aggrieved Classes*

Although Title VII prohibits job discrimination on the basis of race, color, religion, sex, or national origin, EEOC has insufficient resources to launch an effective attack on behalf of all the potentially aggrieved classes. Priorities have been assigned on the basis of a variety of factors, including number of incoming charges, prevailing patterns of discrimination as evidenced by EEOC reports, lobbying by concerned pressure groups, and determination of Congressional intent. Consequently, the Commission's three priority antidiscrimination activities have been concerned with blacks, and Spanish Americans and women, in descending order of priority.

Generally little attention has been devoted to job discrimination based on religion, and there have been relatively few religious complaints⁶¹³ and pressure from religious groups.⁶¹⁴ Nevertheless, guidelines on discrimination on the basis of religion were put out in July 1967.

⁶¹¹ King, Oldaker interview, *supra* note 587.

⁶¹² *Id.*

⁶¹³ In fiscal year 1967, there were 169 religious complaints; 291 in fiscal year 1968; and 330 in fiscal year 1969. See EEOC, *Second Annual Report*, fiscal year 1967, at 52; EEOC, *Third Annual Report*, fiscal year 1968, at 33; and EEOC, *Complaint Statistics: July 1, 1968-June 30, 1969*, at 2.

⁶¹⁴ The employment reports required by EEOC do not solicit information on employees' identification by religion. EEOC recommends a visual survey to determine minority identification. Information on religious affiliation would require self-identification which is against EEOC policy.

This was done in response to several complaints which raised the issue of whether it was discriminatory to discharge or refuse to hire employees whose observance of a Sabbath other than Sunday or certain special religious holidays prevented them from working on such days. The Commission ruled employers must make reasonable accommodations to employees' religious needs where it can be done without undue hardship to their business.⁶¹⁵ Similarly, little attention has been given to employment discrimination against American Indians or Orientals.

Highest Commission priority has gone to attacking racial discrimination. As a result, EEOC has been criticized by Spanish American and women's groups and, in fact, has been accused of being black-oriented. At the EEOC-sponsored Albuquerque Conference on Job Discrimination held on March 28, 1966, groups representing the Mexican/American community withdrew, claiming lack of sensitivity and knowledge of Mexican American problems by EEOC representatives. At the March 1969 Los Angeles hearing, chicano groups picketed the Commission for its alleged black-orientation. Similarly, women's organizations have complained that too little attention has been given to sex discrimination. The National Organization of Women (NOW), for example, noted "a reluctance among some of its [by EEOC] male members to combat sex discrimination as vigorously as they seek to combat racial discrimination."⁶¹⁶

These claims are an accurate reflection of the Commission's priorities during its early years; particularly justified were the grievances of the Spanish surnamed community. The Commission's initial black-orientation and apparent insensitivity to Spanish Americans were evident in numerous ways. A Spanish American Commissioner was not sworn in until 2 years after EEOC began to function.⁶¹⁷ While Negroes occupied many top staff positions, no Spanish American held a supergrade job and no headquarters office was directed by a Puerto Rican or Mexican American, a situa-

⁶¹⁵ 29 C.F.R. 1605.1.

⁶¹⁶ Cited by Nathan, *supra* note 598, at 52. Letter from National Organization of Women (NOW) to President Lyndon B. Johnson, Nov. 11, 1966.

⁶¹⁷ Vicente T. Ximenes was sworn in June 1967.

tion which still prevails.⁶¹⁸ The first Commission hearing was held in an area where there are many blacks, but relatively few Spanish-speaking Americans.⁶¹⁹ The Commission's publications have evinced the same concentration on the problems of black Americans. Thus, the *First Annual Report* stated: "The chief thrust of the statute was, of course, aimed at discrimination against the Negro."⁶²⁰

In the past 2 years, however, increasing awareness has been shown the problems of Spanish Americans. The last three public hearings have been held in New York, Los Angeles, and Houston with their respective heavy Puerto Rican and chicano concentrations. Commission instruction booklets and charge forms, as well as many of its press releases, are published in Spanish, and a major report of Mexican American employment in the Southwest was released in early 1970.⁶²¹ Moreover, a special post, Special Assistant to the Chairman for the Spanish surnamed and American Indian communities, was created and filled by Mr. Brown in January 1970.⁶²² Finally, because of the relatively small number of charges filed by Spanish Americans,⁶²³ the Commission is opening district offices in areas of high Spanish American concentration, e.g., Denver and Phoenix, and recruiting investigative personnel fluent in Spanish.⁶²⁴

Similarly, the Commission has become more sensitive to the problems of sex discrimination. After long delays, it has taken action to protect the rights of women in several areas, including State protective laws,⁶²⁵ classified advertise-

ments,⁶²⁶ and bona fide occupational qualifications.⁶²⁷ Considering that almost a fourth of its complaints have concerned sex discrimination,⁶²⁸ however, the Commission's resources have not been directed proportionately to this issue. Also, its efforts to deal with sex discrimination continue to be on a complaint-oriented basis.⁶²⁹ Moreover, EEOC employs no women at the supergrade level; and only the Office of Administration and one of the 13 field offices are directed by women.⁶³⁰

D. Implementation

The Commission considers the various means to end job discrimination delegated by Title VI as falling into two broad categories. These are: (a) enforcement, the process by which complaints are investigated, conciliated, and possibly recommended for litigation; and (b) affirmative action, programs designed to effect broad-scale change in discriminatory employment practices and result in increased hiring and promotion of minority group persons.⁶³¹ The effectiveness with which EEOC utilizes the various available means to reduce employment discrimination is the focus of this section.

cause of sex, amended on Aug. 15, 1969, provide that State legislation which restricts the occupations women may hold, the hours they may work, and the weights they may lift, do not justify limiting work opportunities for women. See EEOC News Release No. 69-37, Aug. 26, 1969.

⁶²⁵ The Commission's guidelines concerning sex discrimination in job advertising state that the placement of job advertisements under separate male and female column headings violates the law unless sex is a bona fide occupational qualification for the position advertised. See EEOC News Release No. 69-3, Feb. 3, 1969.

⁶²⁷ The Commission has held that as a general rule all jobs must be open to both men and women. The burden of proof that sex is a bona fide occupational qualification—a term being narrowly defined by the EEOC—for a job falls on the employer. See EEOC pamphlet, "Toward Job Equality for Women," at 5.

⁶²⁸ Of 8,512 charges filed in fiscal year 1967, which were recommended for investigation or other action, 2,003 alleged sex discrimination. 2,410 of 11,172 in fiscal year 1968; and 2,689 of 14,471 in fiscal year 1969 also alleged sex discrimination.

⁶²⁹ King, Oldaker interview, supra note 618.

⁶³⁰ Id.

⁶³¹ Report of news conference held by William H. Brown III, Chairman, EEOC News Release No. 69-39, Aug. 29, 1969, at 1.

⁶¹⁸ Interview with Patricia King and William Oldaker, special assistants to the Chairman, May 11, 1970.

⁶¹⁹ *Textile Hearings*, Charlotte, N.C.

⁶²⁰ EEOC *First Annual Report*, fiscal year 1966, at 5.

⁶²¹ F. H. Schmidt, *Spanish Surnamed American Employment in the Southwest* (a study prepared for the Colorado Civil Rights Commission under the auspices of the Equal Employment Opportunity Commission) 1970.

⁶²² EEOC New Release No. 69-60, Jan. 9, 1970. Eliseo Carrasco was appointed Special Assistant to the Chairman to monitor Mexican American problems.

⁶²³ In fiscal year 1967 a total of 478 complaints based on national origin were filed; 721 in fiscal year 1968; 1,093 in fiscal year 1969. Presumably, not all of these complaints were filed by Mexican Americans or Puerto Ricans.

⁶²⁴ King, Oldaker interview, supra note 618.

⁶²⁵ The Commission's guidelines on discrimination be-

1. ENFORCEMENT MECHANISM

Four enforcement techniques exist to implement Title VII: The complaint process; the Commissioner charge; the 706 or private litigant's suit; and the 707 or pattern or practice suit filed by the Attorney General.⁶³²

a. Complaint Processing

The complaint process is the procedure by which job discrimination complaints are investigated and conciliated.⁶³³ It has been the primary weapon used by the Commission to combat employment discrimination.⁶³⁴ The processing of a valid charge (i.e., one which is current when filed and over which the Commission has jurisdiction) is made mandatory by Title VII, while resort to other mechanisms—enforcement or affirmative action—is discretionary.

To date, EEOC has received 52,085 complaints of discrimination, of which 35,445 have been recommended for investigation. Of those complaints which completed the decision process the Commission found reasonable cause to believe that a violation of Title VII had occurred in 63 percent of the cases. "[I]n less than half of these cases were we able to achieve either a partially or totally successful conciliation."⁶³⁵ The Commission relates this serious deficiency directly to its lack of enforcement powers.⁶³⁶

Although the highest priority has been given the processing of charges of employment discrimination, this function has not been carried out in a timely or efficient manner. EEOC now

takes a minimum of 18 months to 2 years to process a job discrimination complaint from receipt through attempted conciliation.⁶³⁷ In fact, in some cases the timelag has risen to nearly 2 years prior to the conciliation stage,⁶³⁸ although EEOC's regulations anticipate a 60-day period for case processing.⁶³⁹ The current backlog has reached almost unmanageable proportions: more than 4,000 investigated cases are awaiting decision;⁶⁴⁰ the number requiring investigation is approaching 2,600.⁶⁴¹

Beyond this, however the Commission has not fully utilized its limited potential for reducing discrimination through the individual complaint process.⁶⁴² For example, although many complaints involve more than a single instance of discrimination against an individual, investigations are not generally directed toward uncovering instances of class or institutional discrimination.⁶⁴³ Further, conciliation agreements are not usually followed up to ascertain compliance.⁶⁴⁴

(1) Stages of the Complaint Process

The complaint process, as it has evolved during 5 years of operation, has four major stages: preinvestigation, investigation, decisionwriting, and conciliation. New procedures, instituted in February 1970, will attempt to eliminate the decisionwriting step. This discussion focuses on the operating procedures through February 1970. The revised process, which, as of May 1970, was being implemented, will be considered later.

The complaint process has gradually been decentralized, but only part of it has been delegated to the field offices. Thus, preinvestigation and investigation are solely field re-

⁶³² Additionally, EEOC will now investigate complaints filed with OFCC pursuant to an EEOC-OFCC agreement of May 20, 1970. See section VI, Coordination, *supra* for further discussion of this agreement.

⁶³³ The process followed by EEOC is prescribed in section 706(a)(e) of the statute. See discussion, p. 86, *supra*.

⁶³⁴ The complaint process is the major program activity engaged in by EEOC. In fiscal year 1969, for example, 365 of the Commission's 579 staff members were assigned solely to this activity; in fiscal year 1970, 544 of 780 slots were assigned to compliance. The Commission has requested 1,175 personnel for fiscal year 1971 of whom 853 would be assigned to this compliance activity.

⁶³⁵ *Hearings on S. 2453 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 91st Cong., 1st Sess., Statement by EEOC Chairman, William H. Brown, III, at 39 (1969).

⁶³⁶ *Id.*, at 40-42.

⁶³⁷ *EEOC 1970 Appropriations Hearings*, *supra* note 491, at 384. (Testimony by, then, chairman, Clifford L. Alexander, Jr.).

⁶³⁸ Interview with James Robinson, Acting Director, Plans and Programs Staff, Oct. 31, 1969.

⁶³⁹ 35 F.R. 3163 (1970).

⁶⁴⁰ *EEOC 1971 Appropriations Hearing*, *supra* note 584, at 591.

⁶⁴¹ *Id.*

⁶⁴² For a detailed discussion, see pp. 110-12, *infra*.

⁶⁴³ Interview with John Rayburn, Acting Director, Office of Compliance and Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 20, 1970. See pp. 101-02 *infra* for further discussion.

⁶⁴⁴ Interview with Charles Wilson, Deputy Chief, Conciliation Division, May 1, 1970. See pp. 104-05, *infra* for further discussion.

sponsibilities; decision-writing is a headquarters function; conciliation is divided, with field offices conducting the bulk of this work.

(A) **Preinvestigation.** Preinvestigation involves two important aspects of the complaint process: analysis of the complaint to determine EEOC jurisdiction and timeliness, and deferral to State fair employment practice agencies in cases required by the statute. Preinvestigation was the first stage of the complaint process to be assigned to the field; prior to mid-1967, initial disposition of complaints was made by the Washington compliance office.⁶⁴⁵

During the preinvestigation analysis, issues of timeliness and jurisdiction are resolved. A valid complaint must be filed within 90 days of the alleged illegal act⁶⁴⁶ and must fall within EEOC's jurisdiction.

A recent EEOC audit of administrative closures revealed that in a given 1-month period accounting for approximately 400 closures, seven complaints were closed for nonjurisdiction when, in fact, EEOC did have jurisdiction. In addition, instances of questionable procedures were revealed, such as acceptance of a withdrawal from a complainant's father rather than from the charging party himself.⁶⁴⁷ According to the Acting Director of Compliance, these kinds of analysis problems have resulted in part from assignment of this function to untrained, nonprofessional personnel.⁶⁴⁸ As a reaction to the audit, the Office of Compliance has recommended to the Commission that analysts be professional rather than clerical personnel.⁶⁴⁹ It also advocated that final approval of administrative closures be made by the Deputy Director of the field office.⁶⁵⁰ As of May 1970, both suggestions were under advisement.

Deficiencies revealed by the audit—lack of uniformity or procedure and wrongful determination of nonjurisdiction—are also due to inadequate guidelines on such matters as de-

termining jurisdiction, referral of matters outside EEOC's jurisdiction to appropriate agencies, and broadening charges to encompass a class complaint. For example, on referring matters to other agencies, the EEOC Manual⁶⁵¹ states only that if EEOC does not have jurisdiction, "Whenever possible the complaint should be referred by letter to the appropriate Federal, State, local, or private agency."⁶⁵² No further guidance is given.

Partly in response to these deficiencies, a new appeals procedure was effected as of February 19, 1970, permitting the charging party to submit written objections to a charge dismissal within 20 days after receipt of notice.⁶⁵³

The other aspect of preinvestigation is the deferral process. Section 706(b) of Title VII requires EEOC to defer processing of a complaint of discrimination for 60 days (120 days for a State agency in its first year of operation) if a State agency has jurisdiction over the alleged type of discrimination and is authorized to secure relief from such practice. EEOC's policy is not to defer a complaint if the agency has only partial jurisdiction⁶⁵⁴ or if a complaint alleges discrimination on a nationwide scale in which case a State agency could not provide complete relief.⁶⁵⁵ It is also Commission policy to assume jurisdiction even though a State agency has denied relief.⁶⁵⁶

At the present time, EEOC defers⁶⁵⁷ to 35 jurisdictions on charges of racial or ethnic dis-

⁶⁵¹ The EEOC Manual is the instruction book, prepared primarily for field personnel, detailing procedures to be followed for the compliance process and other enforcement mechanisms. It has been the major source through which the field offices have received guidance from headquarters.

⁶⁵² EEOC Manual, 516, IIA (1), at 3.

⁶⁵³ 35 Fed. Reg. 3163 (1970).

⁶⁵⁴ EEOC Manual, sec. 231, A.4, at 8, 9. "Partial jurisdiction" refers to a situation in which an agency has jurisdiction over one part of a charge, e.g., race, but not over another, e.g., sex.

⁶⁵⁵ Id. at sec. 231, A. 10, at 14.

⁶⁵⁶ Id. at sec. 231, A. 10, at 12.

⁶⁵⁷ EEOC defers to State Commissions pursuant to sec. 706(b) if the agency has budget and staff and is prepared to discharge its statutory duties; if the State law provides a meaningful remedy; and if the agency has full jurisdiction over the charge. See EEOC Manual, sec. 231, at 7-9.

⁶⁴⁵ R. Nathan, *Jobs and Civil Rights* (prepared for U.S. Commission on Civil Rights by the Brookings Institution) 23 (1969).

⁶⁴⁶ Sec. 706(d).

⁶⁴⁷ Rayburn, Gordon interview, *supra* note 643.

⁶⁴⁸ Id.

⁶⁴⁹ Id.

⁶⁵⁰ Id.

crimination⁶⁵⁸ and to 18 on cases involving sex discrimination.⁶⁵⁹ However, this is merely a paper procedure since EEOC automatically asserts jurisdiction at the end of the deferral period "unless notified to the contrary by the charging party."⁶⁶⁰ In fact, EEOC estimates that it assumes jurisdiction in 86 percent of the cases it defers.⁶⁶¹ By deferring a charge it receives to the State agency and then automatically asserting jurisdiction at the expiration of the statutory time limit, EEOC has simplified the procedure for the complaining party and eliminated the burden of duplicate filing.⁶⁶²

It appears that the deferral process has had only negative results. It involves "delay for charging parties, two investigations for the respondent, and duplication of the Federal Government [effort]."⁶⁶³ It has also placed constrictions on EEOC's ability to amend or broaden charges during an investigation since an amended charge would require redeferral. Nor has the deferral process alleviated EEOC's caseload, since many State Commissions are limited and/or ineffective. As stated by the Commission Chairman, "Many [State agencies] do not adequately protect the rights of charging parties."⁶⁶⁴

Concurrent with its deferral obligation, EEOC is authorized to enter into written agreements with State agencies whereby EEOC refrains from processing a complaint within that

State's jurisdiction.⁶⁶⁵ To date EEOC has not done this because the State agencies have not exhibited sufficient effectiveness to justify such a delegation of responsibility.⁶⁶⁶

(B) Investigation. During the investigation phase of the complaint process, "information is gathered and analyzed" to enable a Commission determination of whether there is reasonable cause to believe a Title VII violation has occurred.⁶⁶⁷

Initially, all investigations were conducted by a small unit of 16 persons operating out of the central office,⁶⁶⁸ but by the end of fiscal year 1967, the function had been transferred to the field.⁶⁶⁹ The responsibility has been so completely delegated to the field that there is no investigative counterpart in the central office (as there is for the conciliation function).⁶⁷⁰ Consequently, no one appears to be responsible for formulating or altering investigation policy for coordinating investigations of a national scope. However, under the pending reorganization plan, an investigations division will be established.⁶⁷¹

Through fiscal 1969, the Commission had received a total of 40,785 complaints; each year of its operation has seen an increase in the number of complaints.⁶⁷² Of these, 24,065, or 60 percent, have been recommended for investigation.⁶⁷³ By the end of fiscal year 1969, the Commission had completed investigation of 18,119 cases.⁶⁷⁴

⁶⁵⁸ Sec. 709(b).

⁶⁵⁹ Interview with Peter Robertson, Director, Office of State and Community Affairs, Apr. 13, 1970.

⁶⁶⁰ EEOC Manual, sec. 551.11, at 1, 2.

⁶⁶¹ Rayburn, Gordon interview, supra note 643.

⁶⁶² EEOC *Second Annual Report*, fiscal year 1967, at 16.

⁶⁶³ Rayburn, Gordon interview, supra note 643.

⁶⁶⁴ Letter from William H. Brown III, Chairman, EEOC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 11, 1970.

⁶⁶⁵ The number of new complaints received in fiscal year 1966 was 8,854; fiscal year 1967, 9,688; fiscal year 1968, 10,095; and fiscal year 1969, 12,148.

⁶⁶⁶ The number of charges recommended for investigation in fiscal year 1966 was 3,773; fiscal year 1967, 5,084; fiscal year 1968, 6,056; and fiscal year 1969, 9,152.

⁶⁶⁷ In fiscal year 1966, 1,659 cases were investigated; fiscal year 1967, 3,549; fiscal year 1968, 5,368; and fiscal year 1969, 7,543. Not all cases initially recommended for investigation are actually investigated. Some are administratively closed for lack of jurisdiction.

⁶⁵⁸ The 35 jurisdictions are: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Utah, Virgin Islands, Washington, West Virginia, Wisconsin, and Wyoming.

⁶⁵⁹ The 18 include: Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Utah, Wisconsin, and Wyoming.

⁶⁶⁰ EEOC Manual, sec. 520, III A., at 3.

⁶⁶¹ Interview with Peter Robertson, Director, Office of State and Community Affairs, Nov. 13, 1969.

⁶⁶² A. Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Commission* 20, 21 (unpublished manuscript).

⁶⁶³ 1971 Appropriations Hearing, supra note 584, at 602.

⁶⁶⁴ Statement by William H. Brown, III, Chairman EEOC News Release No. 69-24, Aug. 1, 1969, at 1.

The backlog of cases, which spans the entire compliance process, has been a problem in the investigation stage since the day the Commission began operation.⁶⁷⁵ Although the initial budget and staff were predicated on annual receipt of 2,000 complaints, nearly 9,000 came in the first year.⁶⁷⁶ Budget and staff have remained inadequate to handle the growing investigation backlog,⁶⁷⁷ which, at the beginning of fiscal year 1971, is expected to number 3,731 cases.⁶⁷⁸ As of January 1970, the last date for which figures are available, the investigation backlog was 3,851 cases. An additional 1,451 were in preinvestigation status.⁶⁷⁹ The number of cases awaiting investigation in field offices ranged from a low of 127 to a high of 486.⁶⁸⁰

Inadequate staff and low budget are not the only explanation for the accumulation of cases awaiting investigation. The factors of untrained staff⁶⁸¹ and high rate of turnover among investigators⁶⁸² have also contributed. Incompetent investigators have also been cited as a major drawback which has increased the time it takes to produce draft decisions.⁶⁸³ Production has been substantially reduced by the requirement that each investigation be recorded in an elaborate field investigator's report; the average investigator spent approximately 50 percent of his time compiling his

tion; in others, the charging party withdraws; in still others the aggrieved party exercises his right to bring suit pursuant to sec. 706(e) of the statute.

⁶⁷⁵ The timelag, however, is not nearly so acute as that which has occurred in the decisionwriting stage. See section on "Decisionwriting," *infra*.

⁶⁷⁶ EEOC *First Annual Report*, fiscal year 1966, at 5.

⁶⁷⁷ Rayburn, Gordon interview, *supra* note 643.

⁶⁷⁸ EEOC 1971 *Appropriations Hearing*, *supra* note 584, at 590.

⁶⁷⁹ EEOC Monthly Case Handling Report, January 1970.

⁶⁸⁰ *Id.* The number of cases backlogged by office was: Albuquerque, 183; Atlanta, 432; Austin, 360; Birmingham, 151; Chicago, 337; Cleveland, 466; District of Columbia, 367; Kansas City, 215; Los Angeles, 285; Memphis, 127; New Orleans, 202; New York, 240; and San Francisco, 486.

⁶⁸¹ Interview with John Rayburn, Acting Director, Office of Compliance, and Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 20, 1970.

⁶⁸² Statement by Chairman Brown, EEOC News Release, Dec. 8, 1969, at 1.

⁶⁸³ Interview with Charles Wilson, Deputy Chief, Conciliation Division, May 1, 1970.

report.⁶⁸⁴ This procedure was curtailed as of February 2, 1970.⁶⁸⁵

The Commission has attempted to deal with the investigation backlog in various ways. A production point system was instituted in 1967, under which investigators were awarded three points per completed investigation and were expected to earn 12 points per month.⁶⁸⁶ Based only on quantity and giving no consideration to quality or case complexity, it proved to be a counterproductive plan, causing, among other confusions, poor quality of performance, administrative closures, the inhibition of broadened charges, and resistance to pursuit of non-alleged violations.⁶⁸⁷ The system was finally abandoned at the close of the 1969 fiscal year, but no substitute system for evaluating or monitoring field investigation work has yet been devised.⁶⁸⁸

Another remedial device intended only as a stopgap measure, has been the use of investigative task forces in reducing backlogs in specific geographic areas. The last such task force was used in January of 1969 in Memphis, Tenn. Subsequently, Commission attention was focused on the buildup of cases in the decisionwriting stage.⁶⁸⁹

Other measures have included staff increases as budget permitted; detail of other Commission staff to compliance functions; and revision of regional boundary lines for more equitable caseload allocations, along with the opening of additional area and district offices.

(C) **Decisionwriting.** The decisionwriting function is the third step in the complaint process. During this stage the Commission, using information compiled by the investigator, renders a decision as to whether or not there is "reasonable cause" to believe that Title VII has been violated. Through fiscal year 1969 the Commission had decided 4,793 cases of which 2,492 (or 52 percent) have been "reasonable cause" decisions.

Decisiondrafting has been the responsibility of the decisions and interpretations unit within

⁶⁸⁴ Rayburn, Gordon interview, *supra* note 681.

⁶⁸⁵ See discussion of new procedures, pp. 105-06 *infra*.

⁶⁸⁶ Rayburn, Gordon interview, *supra* note 681.

⁶⁸⁷ *Id.*

⁶⁸⁸ Interview with Patricia King and William Oldaker, Special Assistants to the Chairman, May 11, 1970.

⁶⁸⁹ Rayburn, Gordon interview, *supra* note 681.

the Office of Compliance. Initially decisions were written in the Commissioners' offices, but it soon became apparent that EEOC's heavy caseload would make such a system untenable and the Decisions and Interpretations Division was established during the 1967 fiscal year. The Commissioners still retain ultimate responsibility for approving decisions before they become final, a responsibility they can exercise only negatively. Draft decisions are circulated to the Commissioners for a 72-hour period; if no "hold" is placed during that time, the draft becomes an official Commission decision. "Holds" are placed very infrequently.⁶⁹⁰

Until the present time, the "cause" or "no cause" decision has been a formal document stating: the charge, findings of fact, Commission decision, and generally the legal justification. The Commission has in the past argued that a "reasonable cause" decision is essential to effecting conciliation and is important, as well, to the success of private suits brought under section 706.⁶⁹¹

The written decision also insures separation of the investigation and conciliation stages, which the Commission believes is necessary to a serious attempt to secure an adequate remedy for the complainant.⁶⁹² This procedure has been one of the causes of the acute timelag in the complaint process. Another approach has been suggested: "Some relaxation of the sharp break between investigations and conciliations would appear to be in order on selected cases at the discretion of EEOC regional directors."⁶⁹³

The Commission's new procedures⁶⁹⁴ will attempt to do away with formal decisionwriting

in many cases. However, they do not eliminate the separation between the investigative and conciliative stages. As of May 1970 such a departure from past Commission procedure was not being actively considered.⁶⁹⁵

In the past, the compliance process backlog was most acute in the decisionwriting stage. The rendering of a decision, after the investigation has been completed, had been delayed approximately 18 to 20 months, with the number of cases awaiting decision approaching 4,000 by the beginning of the 1970 fiscal year.⁶⁹⁶ This situation had adversely affected the Commission's credibility in minority communities.⁶⁹⁷ The untimeliness with which decisions are rendered also hinders EEOC's ability to obtain successful conciliations, and moots many Commission recommendations that the Attorney General institute a pattern or practice suit.⁶⁹⁸

The unmanageable backlog in the decisionwriting phase has resulted primarily from a shortage of manpower and, according to EEOC staff, lack of attention to the problem by the Executive Director's Office.⁶⁹⁹ Low productivity also appears to have been a factor.⁷⁰⁰

The staff assigned to decisionwriting has been grossly inadequate even to keep abreast of cases received, without processing the backlog of 4,000.⁷⁰¹ As of October 1, 1969, for example, there were only 13 full-time professional staff employed to draft decisions, including the Division Chief and three supervisory personnel.⁷⁰² The problem was compounded by allotting an additional four or five decision and interpretation slots to other Office of Compli-

⁶⁹⁰ Id.

⁶⁹¹ Nathan, *supra* note 645 at 24. The Deputy Chief of Conciliations believes that the fact that a decision exists is important in the attempt to bring about successful conciliation. Wilson interview, *supra* note 683.

⁶⁹² Nathan, *supra* note 645 at 23, 24.

⁶⁹³ Id., at 68. Mr. Nathan suggests that this could be done:

" . . . by having the Commission delegate authority to its investigators or regional directors under certain circumstances to act as mediators and work out an agreement on the scene between the complainant and the respondent. Allowing discretion in this way would cut down on the time required to handle routine complaints. It would thus permit the Commission to allocate more resources to pattern cases with wholesale, as opposed to, retail payoffs." Id., at 23, 24.

⁶⁹⁴ See pp. 105-06, *infra*.

⁶⁹⁵ Rayburn, Gordon interview, *supra* note 681.

⁶⁹⁶ Statement by Mr. Brown, EEOC News Release No. 69-39, Aug. 29, 1969, at 1.

⁶⁹⁷ See p. 111, *infra*.

⁶⁹⁸ Interview with David A. Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, Nov. 12, 1969, See below, 707 suit, for further discussion.

⁶⁹⁹ Rayburn, Gordon interview, *supra* note 681.

⁷⁰⁰ Only 25 decisions were being produced per week, meaning that each draft writer was averaging only about 2.5 cases per week. Expected productivity was four cases per week. The low productivity was attributed partly to the poor quality of investigation reports. Rayburn, Gordon interview, *supra* note 681.

⁷⁰¹ Rayburn, Gordon interview, *supra* note 681.

⁷⁰² EEOC listing of Washington Operating Staff as of Oct. 1, 1969, at 2.

ance divisions.⁷⁰³ Action has been taken to remedy the situation. By the end of the 1970 fiscal year, the professional staff is expected to total 22. Since the unit's function under the new procedures will be primarily to review and audit, the Division Chief believes the increased staffing will be sufficient to handle the workload.⁷⁰⁴

On August 29, 1969, the EEOC Chairman announced new procedures to eliminate the backlog. These included decentralization of decisionwriting. The immediate goal was 100 to 200 decisions per week, compared to the approximately 25 that were then being rendered. At the same time, Mr. Brown promised a restructuring of the overall complaint process to insure speedy case completions.⁷⁰⁵

It was not until November 13, 1969 that the Commission adopted the procedures, to become effective February 2, 1970.⁷⁰⁶ In short, the revised process seeks to bypass the decisionwriting stage by securing predecision settlement.⁷⁰⁷ This represents a basic departure from past EEOC policy which has emphasized the importance of a written "cause" decision in attaining productive conciliation and supporting the aggrieved party's right-to-sue prerogative.

(D) Conciliation. The final phase of the complaint process is conciliation. On determination of "reasonable cause",⁷⁰⁸ the Commission is authorized to endeavor to eliminate the alleged unlawful employment act by methods of "conference, conciliation and persuasion".⁷⁰⁹ As indicated, the lack of enforcement authority has hindered EEOC's ability to secure relief through the conciliation process. However, the Commission has attempted to augment the limited potency of the conciliation process by incorporating within the mechanism the individual's right to sue under section 706(e) of the statute. As one commentator has pointed out:

⁷⁰³ Rayburn, Gordon interview, supra note 681.

⁷⁰⁴ Id.

⁷⁰⁵ EEOC News Release No. 69-39, Aug. 29, 1969, at 1.

⁷⁰⁶ At the same time the Commission also adopted new permanent procedures to hasten the overall processing of a complaint. See pp. 105-06, infra.

⁷⁰⁷ EEOC Minutes, Nov. 13, 1969, as amended.

⁷⁰⁸ In the event of a "no cause" decision, the respondent and charging parties are so notified and the latter is issued a right-to-sue notice.

⁷⁰⁹ Sec. 706(a).

The EEOC's conciliation system was designed from the start to give as much thrust as possible to the operations of the new agency. Most importantly, the conciliation process was structured to absorb the power of the charging party to go to court. This is done by having the charging party, if conciliation is successful, waive his right to file suit under Title VII in exchange for "enforceable" promises by the respondent to end discriminatory practices.⁷¹⁰

In addition to the threat of a private suit, the conciliation process receives leverage from the Commission's "reasonable cause" decision. Conciliation personnel believe a decision gives support to the conciliator in his negotiations with the respondent.⁷¹¹

EEOC has tried to use the "reasonable cause" decision and the potential 706(e) suit as leverage to broaden the conciliation negotiation from an attempt to secure individual relief to an endeavor to produce a class remedy. More specifically:

The goals of the Commission in conciliation are to obtain *specific relief* for the charging party; to *remedy the practice* of the respondent which led to unlawful discrimination against the charging party; and, where necessary, to *modify other employment practices* to achieve compliance with Title VII.⁷¹² (Emphasis added.) To date, there has been only marginal success in achieving these goals.

The conciliation function was partly decentralized by region during the latter part of fiscal year 1967; previously, it had been conducted by a small Washington-based staff.⁷¹³ The central office's Division of Conciliation retains considerable responsibility for the process, including standardization of procedures, training of field conciliators, and review of agreements involving novel or unusual cases.⁷¹⁴

By the end of fiscal year 1969, the Commission had attempted conciliation in 3,360 cases. Of these, 683 were successful conciliations with respondents, and direct relief was secured for 14,304 charging parties; 276 conciliations were denoted as partly successful for the charging parties; 2,027 attempts failed to secure any relief.⁷¹⁵

⁷¹⁰ R. Nathan, *Jobs and Civil Rights* (Prepared for the U.S. Commission on Civil Rights by the Brookings Institution) 34, 35 (1969).

⁷¹¹ Wilson Interview, supra note 683.

⁷¹² EEOC *Third Annual Report*, fiscal year 1968, at 7.

⁷¹³ Nathan, supra note 710, at 34.

⁷¹⁴ Wilson interview, supra note 683.

⁷¹⁵ A successful agreement is one in which EEOC, the respondent and the charging party are all signatories.

Although the number of successful and partly successful conciliations of respondents has increased greatly, the rate of success has decreased. Thus, in fiscal year 1966, 56 of 68 conciliations, or 82 percent, were successful or partly successful; in fiscal year 1967, 88 of 174 or 51 percent; in fiscal year 1968, 306 of 640 or 48 percent; and in fiscal year 1969, 376 of 774 or 49 percent.

(2) New Permanent Procedures

When the Commission voted to adopt special procedures to eliminate the decisionwriting backlog of 4,000 cases,⁷¹⁶ it also accepted new compliance procedures to be instituted on a permanent basis.⁷¹⁷ Modeled after those used by the National Labor Relations Board,⁷¹⁸ they represent extensive changes in practices that had evolved during EEOC's 5-year history.⁷¹⁹ The procedures, adopted as a "compromise matter",⁷²⁰ were to take effect on February 2, 1970, but did not actually become operational until the beginning of April 1970.

The Commission's aim is to cut in half the time it currently takes, about 2 years, to process a case.⁷²¹ There is no realistic hope a case can be processed in the 60 days as the regulations provide,⁷²² even with the revised system.⁷²³

The new permanent conciliation procedures are directed toward securing predecision settlements, thus eliminating the decisionwriting phase of the compliance process. In brief, they will operate as follows:

(1) At the conclusion of an investigation, the investigator will write findings of fact, stated in such a manner that most involved parties can anticipate the Commission's action

In a partially successful conciliation, the respondent does not sign an agreement but does agree to eliminate the discrimination identified in the decision. If no relief is secured the conciliation is considered a failure.

⁷¹⁶ See section on "Decisionwriting", at pp. 102-04, supra.

⁷¹⁷ EEOC Minutes, supra note 707.

⁷¹⁸ Interview with Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 28, 1970.

⁷¹⁹ King, Oldaker interview, supra note 689

⁷²⁰ Gordon interview, supra note 718.

⁷²¹ King, Oldaker interview, supra note 689.

⁷²² EEOC's regulations state: "The time for processing all cases is extended to sixty days. . . ." 35 Fed. Reg. 3163 (1970).

⁷²³ King, Oldaker interview, supra note 689.

if the case proceeds to the decisionwriting stage.⁷²⁴

(2) The findings of fact, signed by the Field Director, will be forwarded to the charging party and respondent, who will have 15 days in which to file exceptions. A regional attorney will be available in each field office to aid the charging party or respondent.

(3) On the basis of the findings of fact (which may be altered to reflect valid exceptions filed), the parties will be invited to discuss a predecision settlement. In "nonguideline cases",⁷²⁵ settlement proposals formulated by conciliators must be approved by the headquarters Conciliation Division prior to negotiation.

(4) Settlement agreements in guideline cases⁷²⁶ will be forwarded to the Commissioners for approval; nonguideline cases to the Conciliation Division for review before circulation to the Commissioners.

(5) If settlement talks fails or are not desired, either party requests a written decision (at that point the charging party could request his right-to-sue notice), one of the following will occur: (a) The field office will compose a short-form decision and forward it to the Commissioners for approval; (b) if objections have been filed in a guideline case, the field office will draft a formal, long-form Commission decision and forward it for approval; or (c) if substantial legal objections have been filed in a nonguideline case, the investigator's file will be transmitted to the Decisions and Interpretations Division where a long-form decision will be drafted and then forwarded to the Commissioners.

(6) The decision will be returned to the field for conciliation or right-to-sue notification.

On the surface, the new procedures appear more cumbersome and complex than the present ones. Those responsible for their draft-

⁷²⁴ Interview with John Rayburn, Acting Director, Office of Compliance, and Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 20, 1970.

⁷²⁵ A nonguideline case is defined as a case "where the Commission's position on law and scope of remedy has not been settled." EEOC Minutes, supra note 707, at sec. 2, p. 2.

⁷²⁶ A guideline case is defined in the Commission minutes as a case "where Commission position on law and scope of remedy has been settled." Id.

ing, however, contend that they will streamline the process in numerous ways. First, the investigative phase will be shortened because the investigator will not have to prepare an elaborate field investigator's report.⁷²⁷ Second, and most important, in cases where predecision settlement is obtained, the need for a written decision will have been eliminated, a procedure which the Commission believes most charging parties and respondents will welcome for its expediency. If the respondent entertains negotiation at that point but refuses to come to an agreement, the Commission anticipates that many charging parties will request their right-to-sue notice.⁷²⁸ The Commission, in fact, expects that there will be many 706 actions instituted.⁷²⁹ Third, when written decisions are necessitated, the issuance of the short-form will be merely a perfunctory step. Where long-form decisions are required, the job of the decision writer will be shortened since he will not have to cull through the investigator's file; he can base his decision on the findings of fact and the exceptions and and legal objections raised.⁷³⁰

In addition to streamlining the process, the Commission anticipates two further advantages will accrue. First, because of the exceptions process, the quality of investigations is likely to improve. Poor investigators will be identified if valid exceptions are continuously filed against their findings of fact.⁷³¹ And the filing of exceptions will permit closing the record since both the charging party and respondent will have an opportunity to object to the findings, raise legal objections, and/or submit additional documentation.⁷³²

The streamlining of the compliance process depends partly on the willingness of respondents to participate in predecision settlement discussions.⁷³³ It is not evident that this will be the case. Some Commission staff members believe that many respondents will not settle

without a written decision.⁷³⁴ In one office where the procedures have already been made operational, predecision attempts have been unsuccessful because respondents have not been interested in negotiating prior to a Commission finding.⁷³⁵

Another problem will arise if many exceptions are filed. Objections raised by respondents, coupled with unwillingness to negotiate prior to a decision could, in fact, lengthen the process.⁷³⁶

Most important, the process could work to the substantial disadvantage of the charging party. The new procedures assume much greater litigation activity by charging parties. Yet, while corporations and their legal staffs have begun to develop competence in the technicalities and complexities of such litigation, the legal profession generally has not specialized sufficiently in Title VII matters to provide equal representation to complainants.⁷³⁷

b. Commissioner Charge

Processing individual complaints of discrimination is a mandatory Commission function, but EEOC is not, by law, relegated to assuming a mere passive posture in enforcing Title VII; it also has discretionary authority to initiate enforcement proceedings.

Section 706(a) of the title states that a charge may be filed "by a member of the Commission where he has reasonable cause to believe a violation has occurred." The potential impact of section 706(a) is greatly enhanced by section 706(e) which permits the initiation of a private suit, in a case where a charge was filed by a Commissioner, "by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

Little has been done to implement the potential effectiveness of the Commissioner charge as an enforcement mechanism. No uniform procedures for initiating a Commissioner charge have been adopted,⁷³⁸ nor has a policy been developed to utilize the Commissioner charge to attack pattern or industrywide dis-

⁷²⁷ Rayburn, Gordon interview, supra note 724.

⁷²⁸ Id.

⁷²⁹ Interview with Patricia King and William Oldaker, Special Assistants to the Chairman, May 11, 1970.

⁷³⁰ Rayburn, Gordon interview, supra note 724.

⁷³¹ King, Oldaker, interview supra note 729, Rayburn, Gordon interview, supra note 724.

⁷³² Rayburn, Gordon interview, supra note 724.

⁷³³ King, Oldaker interview, supra note 729.

⁷³⁴ Interview with Charles Wilson, Deputy Chief, Conciliation Division, May 1, 1970.

⁷³⁵ Gordon interview, supra note 718.

⁷³⁶ Wilson interview, supra note 734.

⁷³⁷ Id. There is also the problem of the cost if private litigation. See discussion on litigation at pp. 107-08, infra.

⁷³⁸ Rayburn, Gordon interview, supra note 724.

crimination.⁷³⁹ Rather, most Commissioner charges have resulted from routine individual complaints, such as nonalleged violations uncovered during investigations and complaints from charging parties who wished to remain anonymous. Moreover, with the exception of the Houston hearings, where it was used extensively, the Commissioner charge has not been used as a followup tool to Commission hearings, despite indications at those hearings that substantial job discrimination was being practiced by major nationwide companies.⁷⁴⁰ There are no present plans to place more emphasis on the Commissioner charge, at least prior to eliminating the case backlog.⁷⁴¹

Any impact EEOC might have had through those Commissioner charges that have been processed has been vitiated by nonutilization of section 706(e). Upon failure of conciliation attempts in a Commissioner charge, EEOC has rarely notified members of the aggrieved class of their right-to-sue.⁷⁴² This has adversely affected the Commission's ability to conciliate a Commissioner charge successfully.⁷⁴³ The Office of the General Counsel is now formulating procedures to notify members of a class of their 706(e) rights in an effort to make the Commissioner charge more effective than it now is.⁷⁴⁴

c. Litigation

Although the Commission's formal enforcement proceedings terminate at the conclusion of the conciliation stage, its ability to influence

implementation of Title VII continues through the litigation process. Two types of suits are sanctioned by Title VII: private suit under section 706(e) and action by the Attorney General pursuant to section 707.

(1) 706 Suits

The aggrieved party may institute civil action against the respondent named in the complaint at any point after EEOC has had jurisdiction of the case for 60 days.⁷⁴⁵ Normal procedure, however, is for the charging party to wait until receipt of right-to-sue notification transmitted upon Commission determination of a "no cause" decision or upon failure to secure relief in the event of a "cause" decision. The charging party must exercise his option to sue within 30 days of receipt of notice.

To date, charging parties have been cautious about bringing suit under section 706(e). Action has been initiated in less than 10 percent of those cases in which the Commission has found cause but has been unable to secure settlement.⁷⁴⁶ The reason: the charging party cannot afford the expense and time involved in private litigation.⁷⁴⁷

Section 706(e) assigns no role to the Commission in the private litigant's action beyond recommending to the Attorney General that he intervene in certain cases.⁷⁴⁸ The Commission, however, has been able to make an impact on the 706 remedy in two ways: by par-

⁷⁴⁵ The complainant need not wait until the Commission has rendered a decision to institute suit. He may bring an action at any point, after the end of the 60-day period; regardless of the stage of EEOC proceedings. The various issues of when a charging party may file suit are rather complex and are outside the scope of this report.

⁷⁴⁶ Hearings on S.2453 Before the Subcommittee on Labor of the Senate Commission on Labor and Public Welfare, 91st Cong., 1st Sess., Statement by William H. Brown, III, EEOC Chairman at 40 (1969).

⁷⁴⁷ Id. Also, Wilson and Cashdan interviews, supra notes 734 and 744. Sec. 706(e) of the statute, however, does provide for court appointment of an attorney and commencement of action without the payment of court costs "in such circumstances as the court may deem just."

⁷⁴⁸ EEOC's authority to recommend intervention by the Attorney General has been exercised infrequently. The Department of Justice has indicated to EEOC that it will not as a rule intervene in private suits. There have been exceptions, such as the *Crown Zellerbach* and *Asbestos Workers* cases. Cashdan interview, supra note 744.

⁷³⁹ Id.

⁷⁴⁰ For example, Commissioner charges were not issued against utilities companies following the utility hearing.

⁷⁴¹ Rayburn, Gordon interview, supra note 724. The current status of Commissioner charges filed during last 3 fiscal years does not reflect any special emphasis or priority to be attached to them. In Fiscal Year 1968 there were 110 cases and only 65 have been decided (40 cause and 25 no cause). In fiscal year 1969 there were 146 cases and only three have been decided (two cause and one no cause). In fiscal year 1970 there were 67 cases with zero decisions. Of 323 cases in all there have been only 68 decisions. Letter and attachments from Joseph C. Fagan, Executive Director, EEOC to Lawrence B. Glick, Deputy General Counsel, U.S. Commission on Civil Rights, Oct. 26, 1970.

⁷⁴² Wilson interview, supra note 734.

⁷⁴³ Id.

⁷⁴⁴ Interview with David Cashdan, senior attorney, Office of General Counsel, Apr. 29, 1970.

ticipating in the suit as amicus curiae⁷⁴⁹ and by aiding the charging party in processing an action.

As of July 1969, the Commission has filed amicus curiae briefs in 121 section 706 suits before the courts. In its early years, EEOC engaged in almost no amicus activity. In fiscal year 1968, for example, only 22 amicus briefs were filed.⁷⁵⁰ Subsequently activity was increased and 90 briefs were entered in the 1969 fiscal year.⁷⁵¹ EEOC becomes involved when important issues bearing on development of equal employment law are involved and substantial procedural issues are in question. Other criteria considered include the novelty of the issue, the situs of the case (EEOC will file amicus in geographical areas where there has been little previous activity in order to involve local attorneys in 706 proceedings), and the stage of the proceedings (EEOC generally enters at the appellate level).⁷⁵²

The Commission has had noteworthy success in its amicus activity in persuading the courts to adopt its position, particularly in the areas of formulating adequate remedies, determining issues of "standing to sue", and in developing procedures designed to benefit the charging party.⁷⁵³

The Commission has been less successful, however, in assisting the charging party in seeking to exercise his rights under section 706(e). As indicated, there is almost no experienced 706 bar available for charging parties.⁷⁵⁴ Moreover, unless the court appoints an attorney, litigation costs are prohibitive for

most charging parties.⁷⁵⁵ In only one city to date—Los Angeles—has the Commission developed a list of attorneys willing to serve as court appointed attorneys on behalf of 706 litigants. With the placement of regional attorneys in all field offices by the end of the current fiscal year, the Commission hopes to develop Title VII legal expertise in other major cities.⁷⁵⁶

(2) 707 Suits

Title VII empowers the Commission to:

Refer matters to the Attorney General with recommendations . . . for the institution of a civil action by the Attorney General under sec. 707, and to advise, consult, and assist the Attorney General on such matters.⁷⁵⁷

Section 707 in turn permits the Attorney General to institute civil action when he has "reasonable cause to believe that . . . [there is] a pattern or practice of resistance to . . . the rights secured by [Title VII]" ⁷⁵⁸

According to EEOC's General Counsel, the guiding question in determining which cases to refer to the Attorney General is: "Would the elimination of this particular practice have an appreciable impact on the elimination of employment discrimination?" ⁷⁵⁹ Thus, such factors as number of employees, percentage of minority group members in the given area, nature of the unlawful practice, number of complaints against the company, and the priority aims of the Department of Justice are weighed in determining referrals.⁷⁶⁰

The referral procedure is an informal one. Cases identified by EEOC as potential vehicles for 707 action are discussed informally with Department of Justice attorneys. Files for those cases in which Justice expresses interest are then transmitted by EEOC.⁷⁶¹

The Commission's involvement terminates at the point of referral. According to EEOC, "to date [it] has not played an active role in 707 litigation except to the extent of supplying

⁷⁴⁹ An amicus curiae is an individual or organization with special expertise or interest in the case or a single issue in the case, who, although not a party to the case, is granted permission by the court to file or otherwise participate in the case.

⁷⁵⁰ EEOC *Third Annual Report*, fiscal year 1968, at 10, 11.

⁷⁵¹ EEOC 1971 Appropriations Hearing, *supra* note 584, at 606.

⁷⁵² Cashdan interview, *supra* note 744.

⁷⁵³ Notable examples include *Jenkins vs. United Gas Corp.*, 400 F.2d 28 (1968); *Bowe vs. Colgate Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967); *King vs. Georgia Power Co.*, 295 F. Supp. 943 N.D. Ga. 1968); and *Quarles vs. Phillip Morris*, 279 F. Supp. 505 (E.D. Va. 1968).

⁷⁵⁴ Wilson interview, *supra* note 734.

⁷⁵⁵ Senate hearings on S.2453, statement by EEOC Chairman William H. Brown, III, at 40, *supra* note 746.

⁷⁵⁶ King, Oldaker interview, *supra* note 729.

⁷⁵⁷ Sec. 705(g)(6).

⁷⁵⁸ Sec. 707(a).

⁷⁵⁹ Letter from Stanley P. Hebert, general counsel, to Linda Blumenfeld, program analyst, U.S. Commission on Civil Rights, May 20, 1970.

⁷⁶⁰ *Id.*

⁷⁶¹ *Id.*

additional information and charges and rendering informal advice infrequently.”⁷⁶²

Although potentially one of the strongest weapons granted by Title VII to combat employment discrimination, the 707 suit has been infrequently used.⁷⁶³ Failure to institute more actions has had an adverse effect on EEOC's ability to obtain voluntary compliance through conciliation,⁷⁶⁴ and has limited the impact 707 could have in the area of employment discrimination.⁷⁶⁵

EEOC must bear part of the blame for the Justice Department's failure to bring more 707 actions. The Commission has recommended a relatively small number of cases to the Attorney General for suit: 35 in fiscal year 1967, 26 in fiscal year 1968, and 51 in fiscal year 1969.⁷⁶⁶ In fiscal year 1970, the Commission estimated that it would recommend 170 cases⁷⁶⁷ but as of May 1970, only 38 had been cleared for referral.⁷⁶⁸

Moreover, of the cases recommended by EEOC, only 12 have resulted in institution of suit by the Department of Justice.⁷⁶⁹ A major reason for this is the timelag which occurs before they are submitted to Justice. EEOC referrals must be entirely reinvestigated since the files forwarded to Justice are several years old.⁷⁷⁰ The different standards used by EEOC and the Justice Department further complicate the matter. According to Mr. Brown: “The Justice Department and the Equal Employment Opportunity Commission have had and will continue to have difficulties in the amount of evidence needed to fulfill differing legal responsibilities.”⁷⁷¹

To date EEOC enforcement activity has been largely ineffective as a remedy for employment

discrimination. The Commission has operated under “the twin handicaps of restricted powers and a limited budget.”⁷⁷² The damaging effects of lack of enforcement powers⁷⁷³ on EEOC's complaint handling procedures have been generally acknowledged. One authority has referred to the Commission as “a poor, enfeebled thing . . . [with the power to conciliate but not to compel.”⁷⁷⁴ A former Chairman stated: “We're out to kill an elephant with a fly gun.”⁷⁷⁵ The present Chairman has predicted that: “Neither minorities nor employees would regard the title [Title VII of the Civil Rights Act of 1964] with the respect due to law until realistic avenues of enforcement are made available.”⁷⁷⁶ According to the Commission, it is “currently the only regulatory agency in the Federal structure that must function without such [enforcement] power.”⁷⁷⁷

The Commission believes that its lack of enforcement power is the principal reason its attempts at conciliation have been frustrated. As evidence it cites the fact that conciliation has been achieved in less than half the cases in which reasonable cause has been found.⁷⁷⁸ The Commission contends that both the rate and the strength of successful conciliations would increase if Congress were to grant en-

⁷⁷² These were the words used by Chairman Brown to describe the limitations placed on the Commission. See EEOC News Release No. 70-13, concerning a speech he gave in Albuquerque, N.M. on Apr. 23, 1969, at 3.

⁷⁷³ Sec. 706(a) specified that the Commission shall use the “informal methods of conference, conciliation, and persuasion” to eliminate discriminatory practices prohibited by Title VII.

⁷⁷⁴ M. Sovern, *Legal Restraints on Racial Discrimination in Employment* 205 (1966).

⁷⁷⁵ Statement by then Chairman Stephen N. Shulman as quoted by *The Wall Street Journal*, May 14, 1967, at 1.

⁷⁷⁶ Testimony of EEOC Chairman William H. Brown before the House General Subcommittee on Labor, EEOC News Release No. 69-55, Dec. 21, 1969, at 1.

⁷⁷⁷ EEOC News Release No. 69-19, June 3, 1969, at 2. It should be noted that the Department of Housing and Urban Development also does not have enforcement powers vis-à-vis Title VIII of the 1968 Fair Housing Act. The Department is not, however, actually a regulatory agency. See ch. III.

⁷⁷⁸ Testimony of William H. Brown, III, EEOC Chairman before the House General Subcommittee on Labor, EEOC News Release No. 69-55, Dec. 2, 1969, at 2.

⁷⁶² Id.

⁷⁶³ See sec. V, *infra*.

⁷⁶⁴ Wilson interview, *supra* note 734.

⁷⁶⁵ Interview with Russell Spector, Deputy General Counsel, Dec. 23, 1969.

⁷⁶⁶ EEOC 1971 Appropriations Hearing, *supra* note 584, at 607.

⁷⁶⁷ Id.

⁷⁶⁸ Letter from Stanley P. Hebert, *supra* note 759.

⁷⁶⁹ Id.

⁷⁷⁰ Interview with David Rose, Chief, Employment Section Civil Rights Division, Department of Justice, Nov. 12, 1969.

⁷⁷¹ Letter from William H. Brown, III, Chairman, EEOC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 11, 1970.

forcement powers.⁷⁷⁹ At the 1967 Senate hearings on a bill to grant EEOC cease and desist authority, the Commission testified:

The success rate of EEOC conciliations would increase if persuasion could be backed up by the power of enforcement. By providing enforcement power, the Congress would enhance . . . the Commission's conciliation role. It would produce more, not fewer, conciliation agreements.⁷⁸⁰

The Commission has argued further that the charging party's right to file a civil suit, though it must be retained, is not an effective alternative to Commission enforcement authority, particularly since such actions have been brought in less than 10 percent of the cases in which conciliation attempts were unsuccessful. The Commission blames their infrequency primarily on the onerous cost of private litigation.⁷⁸¹

A major proposal, currently before Congress, would grant enforcement powers to the Equal Employment Opportunity Commission. The bill which passed the Senate would provide cease and desist authority to EEOC to enforce its findings of discrimination. The current Chairman had taken a position in support of EEOC receiving court suit power; three other Commissioners—Alexander,⁷⁸² Kuck, and Ximenes—have testified in favor of cease and desist power, and the Commission on Civil Rights has endorsed this proposal.⁷⁸³

Insufficient funds have severely hampered EEOC's activities. Past and present Chairmen have decried the impediments imposed by in-

⁷⁷⁹ Wilson interview, *supra* note 734.

⁷⁸⁰ Hearings on Equal Employment Opportunity before the Subcommittee on Employment, Manpower, and Poverty of the Senate Commission on Labor and Public Welfare, 90th Cong., 1st Sess., at 68 (1967).

⁷⁸¹ Testimony of William H. Brown, III, EEOC Chairman before the House General Subcommittee on Labor, EEOC News Release No. 69-55, Dec. 21, 1969, at 2. Not all Commission staff agree with this opinion on the effectiveness of the 706(e) remedy. Russell Spector, Deputy General Counsel, believes that the right of private action via the 706 suit has proven to be much more effective than any cease and desist power which could be granted to EEOC. Spector interview, *supra* note 765.

⁷⁸² Mr. Alexander, a former Chairman, was a Commissioner at the time he testified. He has since resigned.

⁷⁸³ The U.S. Commission on Civil Rights has testified before the Senate in favor of cease and desist authority for the EEOC. Hearings on S.2453, *supra* note 746, at 163-67.

adequate Congressional appropriations.⁷⁸⁴ They make this specific in the Commission's budget request for fiscal year 1971:

Since the beginning of the Commission in fiscal year 1965, budget and staff resources have proven inadequate to deal with the inflow of complaints from citizens under Title VII. . . . As a result, the enforcement backlog of investigations and conciliations and decisions to be written has grown steadily. . . . This backlog is indeed shocking when one considers the statutory deadlines established by Title VII for the Commission's enforcement work.

Sufficient resources have not been available for improving the processing and analysis of statistical data collected through the Commission's annual surveys of employers, unions, and apprenticeship programs. . . . The results of these programs provide decision-making data for action programs at the Federal, State, and local levels to eliminate employment discrimination.⁷⁸⁵

Despite clear need, Congress has consistently refused to give EEOC the full amount requested by the President. In fiscal year 1968, Congress reduced EEOC's request from \$7.17 million to \$6.65 million;⁷⁸⁶ in fiscal year 1969 from \$13.1 million to \$8.75 million and in fiscal year 1970 from \$15.9 to \$12.3 million.⁷⁸⁷ For fiscal year 1971, the President has recommended that Congress appropriate \$19 million for EEOC. If Congress follows its past pattern, EEOC again will be left with insufficient operating funds.

Lack of enforcement powers and inadequate budget, however, only partly explain the ineffectiveness of EEOC enforcement activity. Inability to handle cases efficiently and speedily, and failure to utilize its maximum potential in reducing discrimination through the individual complaint process or the Commissioner charge also contribute to the program's weakness.

As a consequence of the timelag between filing a charge and the conciliation attempt, many cases are moot when the Commission finally renders a decision. This not only weakens the conciliation process but also prejudices

⁷⁸⁴ Interview with Clifford L. Alexander, Jr., former Chairman and Commissioner, EEOC, Mar. 5, 1970, EEOC News Release No. 69-36, Aug. 25, 1969, at 1.

⁷⁸⁵ EEOC 1971 Appropriations Hearing, *supra* note 584, at 581.

⁷⁸⁶ EEOC *Third Annual Report*, Fiscal year 1968, at 31.

⁷⁸⁷ EEOC 1970 Appropriations Hearing, *supra* note 491, at 397.

the charging party in exercising his right to institute civil action pursuant to section 706(e). It also means that most cases recommended for 707 action are outdated by the time they reach the Department of Justice. In addition, EEOC's credibility among minority groups has suffered because of the inordinate delays in the complaint process. The following criticisms, for example, have been leveled against EEOC by civil rights leaders:

Present procedures of the EEOC are too slow, causing complainants to lose faith in the Commission.

I filed 27 complaints 2 years ago, and some 30 this past year and we haven't heard from them yet.

I would hazard the guess that the backlog of cases would deter meaningful case settlements.⁷⁸⁸

More importantly, EEOC has not yet formulated a system of priority of complaints⁷⁸⁹ and cases are still assigned on a "first come-first served" basis⁷⁹⁰ irrespective of whether they appear to deal with individual or systemic discrimination. Indeed, EEOC makes no secret of its lack of priorities. In response to the question, "with a case backlog of approximately 18 months, how does the EEOC establish a priority for investigating charges?", the Commission stated:

The EEOC does not have a priority system. It does not believe it would be appropriate to say to one charging party that his charge is not as important as the charge of another person. Charges are processed in the order in which they are filed.⁷⁹¹

EEOC does not systematically try to broaden complaints into class action complaints where this is possible, or broaden investigations to encompass nonalleged violations or "pattern" situations.⁷⁹² Cases are generally "narrowly couched" despite court rulings that would permit their broadening.⁷⁹³ The EEOC Manual,

⁷⁸⁸ Quoted by R. Nathan, *Jobs and Civil Rights* (prepared for the U.S. Commission on Civil Rights by the Brookings Institution) 46 (1969).

⁷⁸⁹ Interview with James Robinson, Acting Director, Plans and Programs Staff, Oct. 31, 1969.

⁷⁹⁰ Interview with John Rayburn, Acting Director, Office of Compliance, and Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 20, 1970.

⁷⁹¹ T. Powers, *Equal Employment Opportunity: Compliance and Affirmative Action* (published by NAM and PFP, 1969).

⁷⁹² Robinson interview, supra note 789.

⁷⁹³ E.g., *King vs. Georgia Power Co.*, 295 F.Supp. 943 (N.D. Ga. 1968); statement by Jules Gordon, during interview with John Rayburn, Acting Director, Office

which contains detailed instructions on almost every aspect of conducting an investigation (e.g., how to locate complaining parties, what to say on the initial telephone contact with the charging party, how to take interview notes), is singularly uncommunicative on the issues of broadening investigations or consolidating charges into class complaints.⁷⁹⁴ Nor are instructions found elsewhere on the broadening of investigations.⁷⁹⁵ The backlog of cases, lack of resources, the production point system and failure to deal with issues at the policymaking level appear to be factors inhibiting the broadening of investigations and formulation of class complaints.⁷⁹⁶

Nor has the Commission been able to obtain broad relief through conciliation. EEOC staff maintained that the number of charging parties receiving direct relief does not accurately measure the impact of conciliation efforts. This is so because other persons are indirectly benefited through institutional changes or class remedies resulting from some agreements. For example, for fiscal 1967, the Commission estimates that 8,500 persons were indirect beneficiaries of conciliation; 28,600 in fiscal year 1968; and 50,000 in fiscal year 1969. In some instances the Commission has been able to secure wide and tangible relief through the conciliation process. Examples of conciliation agreements exist that have afforded wide class benefits through such means as merging seniority lines, elimination of non-job-related employment tests, and adoption of an "affirmative action file"⁷⁹⁷ of qualified minority applicants. Generally, however, little remedy has been obtained for the class.⁷⁹⁸

of Compliance, and Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 20, 1970.

⁷⁹⁴ See EEOC Manual, sec. 500, which deals with investigations.

⁷⁹⁵ Rayburn, Gordon interview, supra note 793. However, according to William Brown, III, Chairman, "EEOC has always had a policy of broadening complaints, and in fact does broaden complaints in a great number of cases." Chairman William H. Brown, III, letter, supra note 771.

⁷⁹⁶ Id.

⁷⁹⁷ This is a file of qualified minority applicants for whom positions are not available at the time of their application. The employer agrees to refer to the file when filling positions that become vacant.

⁷⁹⁸ Interview with Jules Gordon, Chief, Decisions and Interpretations Division, Apr. 28, 1970.

EEOC's ability to obtain class relief in the matter of back pay has improved somewhat in the past 6 months because of recent favorable court decisions.⁷⁹⁹

A number of factors are responsible for the generally limited gains achieved through the conciliation mechanism, particularly as reflected by the increasing rate of unsuccessful attempts. The principal ones are clearly the lack of enforcement powers and manpower shortages. But EEOC staff members have suggested other deficiencies that are relevant. Respondents appear to be less concerned than formerly about the prospect of a lawsuit by the Department of Justice, particularly since Justice has concentrated on actions that establish law rather than suits to secure individual rights; and, to date, Justice has initiated very few suits. Thus, the leverage afforded by the threat of a Department of Justice lawsuit has diminished. A high rate of attrition of conciliation personnel has hampered that function⁸⁰⁰ which is additionally weakened because the Commissioners play no role in the conciliation process.⁸⁰¹ Even in cases of unsuccessful conciliation efforts with nationwide employers, the prestige of the individual Commissioner has not been evoked to improve the success ratio or to bring about broader remedies. Finally, as has been said, many cases are moot by the time they reach the conciliation stage because of the 2-year processing timelag.

Moreover, the Commission's effectiveness in successfully conciliated cases has been lessened by lack of a solid, uniform followup system to determine compliance with the agreement.⁸⁰² The few conducted compliance reviews are made to determine if the individual remedy has been granted; rarely do the reviews encompass class relief.⁸⁰³

Compliance reviews of conciliation agreements are exercises in futility unless such agreements are enforceable, and this issue has

not yet been resolved, although two cases are currently before the courts. In a Texas case, yet to be decided, the Commission, having determined that the conciliation agreement had been breached, is seeking court enforcement.⁸⁰⁴ If successful, the suit will establish that such agreements are legally binding. It will then be incumbent upon EEOC to institute an effective compliance review program. However, an affirmative decision may prove to be a costly victory; fewer respondents may be willing to sign conciliation agreements, particularly ones broad in scope or including class remedy.⁸⁰⁵

2. AFFIRMATIVE ACTION

In addition to enforcement responsibilities, the Equal Employment Opportunity Commission has discretionary authority under Title VII to sponsor affirmative action programs to hasten the elimination of job discrimination. Measured by its announced priorities and allocation of resources, there is little question that the Commission has relegated affirmative action programs to a secondary position. By the same token, the effectiveness of those programs which have been undertaken has been weakened by the generally low priority assigned them and lack of staff and financial resources allocated them. They have suffered particularly because of failure to utilize them in conjunction with the enforcement mechanisms.

Affirmative action programs initiated by EEOC fall into four broad categories: aid to State and local fair employment practice commissions, technical assistance, educational and promotional activities [primarily hearings], and collection and dissemination of data and reports regarding employment discrimination.

a. Aid to State and Local Fair Employment Practice Agencies

In addition to the deferral mandate in Title VII, two other sections define EEOC's relationship to State and local fair employment practice commissions. Section 705(g) (1) empowers the Commission: "to cooperate with and, with their consent, utilize regional, State,

⁷⁹⁹ E.g., *Bowe v. Colgate Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967); interview with Charles Wilson, Deputy Chief, Conciliation Division, May 1, 1970.

⁸⁰⁰ Wilson interview, supra note 799.

⁸⁰¹ See Nathan, supra note 788, at 39-40.

⁸⁰² Wilson interview, supra note 799; interview with James Robinson, Acting Director, Plans and Programs Staff, Apr. 8, 1970.

⁸⁰³ Wilson interview, supra note 799.

⁸⁰⁴ Interview with David Cashdan, senior attorney, Office of the General Counsel, Apr. 29, 1970.

⁸⁰⁵ Id., Wilson interview, supra note 799.

local, and other agencies, both public and private, and individuals. . . .

Section 709(b) delineates the forms this cooperation may take:

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title.

The Commission now administers two programs designed to aid State and local fair employment practice agencies: a data sharing program and an affirmative action grant program.

The data sharing program, much the minor of the two, involves agreements with a total of 84 State and local FEP agencies entitling them to receive, at no cost, employer, union, and apprenticeship data collected by EEOC. In exchange for the data, the agencies agree not to require duplicate reporting, thus enabling EEOC to collect data without violating section 709(d) of Title VII.⁸⁰⁶

Although the EEOC grant program, designed to provide resources to State and local agencies, is potentially more significant, it has floundered during 4 years of development. For instance, in the effort to define its goals, the program's direction has changed three times since its initiation in fiscal year 1966.

The first State and local grant EEOC funding was research-oriented. The Commission provided \$165,000 to Wayne State University and to 11 State and local fair employment practice agencies in fiscal year 1966 to study employment discrimination patterns in specific industries.

In fiscal year 1967, new direction was given the effort because of the Commission's belief that funds could be better used for an action-oriented program. A total of 39 "affirmative action" contracts costing \$548,000 was funded to State and local antidiscrimination agencies. The program's primary goal was to obtain jobs for minorities. At the conclusion of the

⁸⁰⁶Sec. 709(d) prohibits EEOC from requiring duplicate reporting from those subject to Title VII.

annual program, only 7,548 additional minority group employees had been hired through the efforts of the State and local agencies. The Commission's own evaluation concluded that the effort did not alter institutional employment and was too narrowly construed to have significant impact.⁸⁰⁷

The focus changed for a third time beginning in fiscal year 1968 and was retained for the fiscal year 1969 program.⁸⁰⁸ The grants are now directed at exploring ways of identifying and eliminating "institutional discrimination" on a "systematic, affirmative basis".⁸⁰⁹ The Commission hopes to achieve this goal by improving and strengthening the compliance procedures of the State and local agencies. A second but tangential goal is to secure jobs for minority group members. To carry out this work, the Commission awarded \$700,000 to 41 agencies in fiscal year 1968 and \$700,000 to 40 agencies in fiscal year 1969. The agencies use these funds to identify underutilizers of minority labor; if investigation then indicates discrimination on the part of the underutilizer, the agency's enforcement mechanisms are activated.

For several reasons, the effectiveness of fiscal year 1968 and fiscal year 1969 programs has been limited. First, only 17 of the agencies funded have power to initiate investigations. The others may act only on receipt of complaints.⁸¹⁰ Second, some of the agencies funded have no enforcement powers; they are limited to persuasion in their efforts to eliminate discrimination, a means which is incapable of producing significant results.⁸¹¹ Third, the programs have been staffed and funded⁸¹² on a small scale.

As a consequence of these limitations, the 1968 program resulted in 323 charges of

⁸⁰⁷ Interview with Peter Robertson, Director, Office of State and Community Affairs, Nov. 13, 1969.

⁸⁰⁸ Grants are made at the conclusion of the fiscal year and thus 1970 grants have not yet been announced. As a consequence of the end of the year funding, results for the 1969 fiscal year program are not yet available.

⁸⁰⁹ Statement by William H. Brown, III, Chairman, EEOC News Release No. 69-47, Oct. 15, 1969, at 1.

⁸¹⁰ Robertson interview, *supra* note 807.

⁸¹¹ See F. R. Cousens, *Public Civil Rights Agencies and Fair Employment* 17 (1969).

⁸¹² See pp. 87-94 *supra*.

patterns of discrimination by the funded agencies⁸¹³ and only approximately 9,000 jobs for minority group members.⁸¹⁴ Moreover, the primary goal of the program, as stated by EEOC Chairman William Brown, of enhancing "the effectiveness of State and local fair employment practice agencies" in order to reduce "duplication of Federal and State effort"⁸¹⁵ has not been approached. The Commission, however, investigates de novo all charges deferred to State agencies, over which it ultimately assumes jurisdiction in order to protect the complainant. Nor does it believe that the FEPC's operations are adequate for it to effect section 709(b) under which the Commission may refrain from processing specified classes of charges pursuant to an agreement with a State or local FEP agency.

The programs to aid State and local agencies also suffer because they have not been coordinated with other Commission activities. The compliance activity has not been used to synchronize remedies sought by EEOC conciliators with those sought by State agencies⁸¹⁶ nor has there been coordination between the field directors who work on a day-to-day basis and the State and local bodies.

b. Technical Assistance

The Commission's mandate to administer a technical assistance program derives from section 705(g)(3), empowering it: "to furnish persons⁸¹⁷ subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder; . . .

The objective of EEOC's technical assistance program has been to promote equal employment opportunity through "affirmative action" by those subject to the statute.⁸¹⁸ This goal has generally been translated into devising programs which result in more and im-

proved employment opportunities for minorities.⁸¹⁹ In short, the technical assistance program is result-oriented and its success is measured by EEOC in terms of new jobs secured for minorities.

The Commission has experimented with various types of technical assistance programs over the past 4 years; many have only been of an ad hoc nature, with limited results. For example, one program, initiated with the trucking industry and the Illinois FEPC, resulted in fewer than 100 jobs for minorities.⁸²⁰

These are additional examples of major, ongoing technical assistance programs operated by the Commission:

A "new plant and expansion" program, started in fiscal year 1967, has been the most successful of such programs. EEOC efforts with companies building new plants or expanding old ones have resulted in jobs for approximately 5,000 minority employees.⁸²¹

A second program, involving followup to Commission hearings by EEOC staff visits to companies, has been used for only three of the Commission's first five hearings—the textile forum, the private drug hearing, and the utility hearing. Subsequent to the EEOC visits, black employment in the textile industry increased from 8.6 percent in 1966 to 13.1 percent in 1968; in the pharmaceutical industry from 7.4 percent to 8.7 percent; and in 67 gas and electric companies, from 3.7 percent to 7.7 percent.⁸²²

A third program is "Operation Outreach" under which EEOC is coordinating the efforts of other Government agencies and private groups to place minority youth in apprenticeship programs. Under this program, instituted

⁸¹⁹ EEOC Second Annual Report, Fiscal year 1967, at 37.

⁸²⁰ *History of the Equal Employment Opportunity Commission* (prepared for the Lyndon Baines Johnson Library) 193 (unpublished).

⁸²¹ EEOC 1971 Appropriation Hearing, supra note 584, at 597.

⁸²² Id. It should be noted, however, that many factors combined to increase minority employment. In the textile industry, for example, a large exodus of white employees to higher paying jobs in new industries in North and South Carolina was one of the major reasons for the large black influx into the textile industry. Moreover, the inroads made by blacks in textiles have been in the lowest paying blue-collar jobs.

⁸¹³ Robertson interview, supra note 807. However, in the prior 10 years, only 100 pattern complaints were initiated by State FEPC's.

⁸¹⁴ Figures are not yet available for the fiscal year 1969 program.

⁸¹⁵ Statement by William H. Brown, III, Chairman EEOC News Release No. 69-47, Oct. 15, 1969, at 2.

⁸¹⁶ Wilson interview, supra note 799.

⁸¹⁷ The term "persons" refers to employers, labor unions, employment agencies, and apprenticeship programs.

⁸¹⁸ EEOC First Annual Report, Fiscal year 1969, at 22.

late in the 1967 fiscal year, training is provided annually to approximately 2,000 minority young people.⁸²³

These efforts have been characterized by limited scope and lack of systematic follow-through. Although its mandate covers "any person" subject to Title VII, its work has been essentially limited to corporations.⁸²⁴ Little has been done to formulate affirmative action programs for labor unions or employment agencies although EEOC did participate in a minimal program with the Association of Personnel Agencies of New York.⁸²⁵

Hearing followups have been sporadic and uncoordinated.⁸²⁶ No organized technical assistance followed the New York hearing held in January 1968 nor the Los Angeles hearing held in March 1969 to secure jobs or to offer assistance to employers or unions cited for underutilization. The Houston hearings presented a notable departure in that a detailed followup was prepared prior to the hearings.

Underdevelopment of technical assistance, lack of direction⁸²⁷ and staff,⁸²⁸ and, especially, this program's isolation from other EEOC's activities have diluted its potential as an auxiliary to the enforcement function. Two field offices currently have a person assigned to the technical assistance function.⁸²⁹

More important, the technical assistance program has operated in isolation from other EEOC activities. Its potential for use as an auxiliary to the enforcement function has not been utilized,⁸³⁰ nor is there any coordination with the conciliation function.⁸³¹

c. Educational and Promotional Activities

Public hearings, the Commission's affirmative action efforts in educational and promo-

⁸²³ EEOC Third Annual Report, Fiscal year 1968, at 30.

⁸²⁴ Interview with George Butler, Acting Director, Office of Technical Assistance, Jan. 28, 1970.

⁸²⁵ Union activity has been limited to EEOC participation at trade union conferences and in the "Operation Outreach" program in which EEOC is just one of many participants.

⁸²⁶ Interview with Patricia King and William Oldaker, Special Assistants to the Chairman, May 11, 1970.

⁸²⁷ The Office of Technical Assistance has not had a permanent director since April 1968.

⁸²⁸ Butler interview, supra note 824.

⁸²⁹ King, Oldaker interview, supra note 826.

⁸³⁰ Butler interview, supra note 824.

⁸³¹ Wilson interview, supra note 799.

tional fields, have aroused the most controversy. Its authority to conduct such activities is referred to in section 705(i) of the title which states that: "The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities."⁸³²

During its 5 years in operation, the Commission has conducted many activities of this nature. Numerous pamphlets have been distributed, such as "Equal Employment Opportunity is Good Business", "Towards Job Equality for Women", and "Help Wanted—Or Is It?"; films have been produced, including "Even Chances", showing EEOC's attempts to aid a person subjected to job discrimination; conferences have been held with minority groups and community organizations, e.g., a series of conferences arranged through the Chambers of Commerce of Atlanta, New Orleans, Memphis, and Charlotte, N.C., and a "Conference on Job Discrimination" has been held with Mexican American groups in Albuquerque.

The Commission's educational and promotional hearings, both public and private, have involved major industries throughout the country. Opinion within the Commission has been divided on the desirability of the hearings. Those in opposition have felt that Commission resources should not be diverted from the enforcement process, or, at least, not until the backlog has been diminished.⁸³³ Those in favor have asserted that hearings focus attention on the magnitude of job discrimination; publicize the Commission's existence and procedures; stimulate employers to institute affirmative action programs; and help reveal patterns of discrimination which can lay the

⁸³² The Commission believes that this section plus section 705(g)(5) which empowers it "to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public," when considered with relevant administrative law, are sufficient authority to enable it to conduct public hearings. Title VII contains no specific grant of authority for the holding of hearings. Interview with David Copus, Attorney, Office of General Counsel, May 28, 1970. EEOC does not, however, have the authority to subpoena witnesses to attend the hearings it conducts.

⁸³³ Rayburn, Gordon interview, supra note 793.

basis for future action.⁸³⁴ Former Chairman Clifford L. Alexander, an advocate of the hearing concept, believes that they are of particular value in exposing the prevailing discriminatory practices of industry.⁸³⁵ Four of the six hearings held to date by EEOC were conducted during Alexander's 1-year, 9-month tenure as Chairman. Under the present Chairman, a hearing was conducted in Houston in June 1970.

The first Commission hearing, which was open to the public, was conducted in Charlotte, N.C., on January 12 and 13, 1967, and was devoted to the textile industry. This was followed by a private hearing with the drug industry on October 6, 1967, in Washington, D.C., sponsored jointly by EEOC and the Food and Drug Administration. The same format was used on June 12, 1968, when EEOC and the Federal Power Commission met with the utility industry, also in the Nation's Capital.

The most widely publicized hearings were held in New York and Los Angeles. A 4-day "white-collar" hearing held in New York on January 1-4, 1968, involved major white-collar industries with headquarters in New York, viz., the financial establishment (banking, insurance, brokerage firms) and communications (advertising, television and radio, publishing). The Los Angeles hearing on March 12-14, 1969, covered the aerospace, motion picture, and TV-radio industries, as well as selected large white-collar employers.

The results of these five hearings have been mixed. One of the problems in determining their effectiveness has been EEOC's own failure to devise a system for evaluating results achieved by a hearing. In the past, followup procedures have been an afterthought rather than an integral part of the hearing planning.⁸³⁶

The textile industry hearing was followed by EEOC staff visitations, by the involvement of several local groups, and consultation with OFCC and the Department of Defense. Although this activity resulted in numerous advances in minority employment, improve-

ment was noticeable only in the lower-paying jobs; white-collar employment was not appreciably changed. Similarly, the drug industry hearing, which was followed by joint EEOC-FDA visits, also resulted in improved employment opportunities for minorities. But advances were not uniform and, in fact, some firms evidenced noticeable absence of change.⁸³⁷

The results of the utilities hearing have been even less encouraging. A year after the private hearing, Mr. Brown described the electric utilities industry "as one of the poorest performers" in the field of minority employment and cited the "continuing failure of the electric power industry" to comply with the law.⁸³⁸

Neither the New York nor Los Angeles hearing was followed by concerted action. After the New York white-collar hearing, data on banking employment were transmitted to the Department of the Treasury and 10 Commissioner charges were filed. Since that time, however, there has been no further action,⁸³⁹ other than the collection of employment statistics. A followup hearing, planned for a year later to check on delivery of affirmative action promises, never materialized.⁸⁴⁰

After the Los Angeles hearing, the Commission did recommend to the Attorney General that he institute a 707 suit against the movie industry employers and unions for operating a closed system and perpetuating past practices of discrimination. After a 4-month investigation by the Department of Justice, with EEOC participation, an agreement was negotiated with the motion picture and television industries which became effective April 1, 1970. The most significant part of the agreement, one of the most comprehensive ever negotiated, calls for 20 to 25 percent of the craft referrals to be filled by minority workers.⁸⁴¹ This agreement indicates the kind of broad industry action that can be generated by a public hearing. It also points up, however,

⁸³⁷ Statement by Clifford L. Alexander, Chairman, EEOC News Release, No. 68-78, Dec. 30, 1968, at 1.

⁸³⁸ Statement of William H. Brown III, Chairman, EEOC News Release, No. 69-44, May 15, 1969, at 1.

⁸³⁹ Interview with George Draper, Deputy Staff Director, Nov. 18, 1969.

⁸⁴⁰ King, Oldaker interview, supra note 826.

⁸⁴¹ Department of Justice News Release, Mar. 31, 1970.

⁸³⁴ *A History of the Equal Employment Opportunity Commission*, supra note 335.

⁸³⁵ Interview with Clifford L. Alexander, Jr., former Chairman and Commissioner, EEOC, Mar. 5, 1970.

⁸³⁶ King, Oldaker interview, supra note 826.

the need for EEOC to plan a coordinated effort with other agencies, such as OFCC or Justice, whose enforcement powers are stronger than its own, if significant results are to be achieved.

The Houston hearing, held in June 1970, reviewed employment practices of the 30 largest companies in the metropolitan area, of which approximately one-third are in the petro-chemical industries. According to the Chairman, the hearing attempted to correct past deficiencies by building in a followup procedure⁸⁴² which included two steps. First, on the last day of the hearing, Commissioner charges were filed against four major Houston employers, 13 related unions, and two major referral unions. Second, EEOC staff remained in Houston for more than 60 days after the hearing concluded to receive and investigate further charges of discrimination and to provide technical assistance to companies and unions.⁸⁴³

Although most of the representatives of major firms were Government contractors, the EEOC did not ask OFCC to sponsor the proceedings jointly.⁸⁴⁴ However, OFCC was used as a continuous source of information.⁸⁴⁵

d. Data Collection Utilization

Section 709(e) of Title VII provides for the filing of reports by employers, labor organizations, employment agencies, and sponsors of apprenticeship programs, as prescribed by the Commission after a public hearing.

The Commission currently has three reporting systems. The EEO-1 system involves receipt of annual reports from all employers of 100 or more employees, giving a breakdown of employment by numbers of minority employees and job category.

Under the EEO-2 system, joint labor-management apprenticeship programs⁸⁴⁶ with five or more apprentices are required to file annual reports giving minority breakdowns of appren-

tices for each trade and craft, as well as information on selection procedures.

The labor union reporting system, EEO-3, requires membership and referral data only from those local unions which impinge in one of several delineated ways on the hiring process.

Further, pursuant to the New York white-collar hearings, during which it was revealed that many private employment agencies respond to discriminatory job orders, the Commission, in June 1968, announced its intention of developing reporting and recordkeeping regulations for employment services. Two years later, however, the EEO-4 system, as it has been denoted, had not yet been instituted, nor does the 1971 Budget Request include provision for it.⁸⁴⁷

Data collected by these reporting systems have been an essential tool in many Commission activities. The most significant use has been in industry and geographical target selection for Commission hearings and in the preparation of background papers for those hearings. The data are also an important part of the State grant program in that they are used to identify underutilizers. Data on specific unions and companies are also used as supporting material for the compliance process and for technical assistance efforts. Moreover, almost all of the Commission's technical publications and studies, including the exhaustive three volume "Equal Employment Opportunity Report No. 1," have been based on data collected through the reporting systems.

Although significant utilization has been made of the data provided by the reporting systems, operational problems have precluded even more effective use. As a result of retrieval problems, employment data have not been obtained in a timely manner.⁸⁴⁸ For example, EEO-1 data, though available for specific employers for 1969, are not available beyond 1967 on an industrywide or geographic basis. Data on minority apprentices are available only for 1967; on labor unions, only for 1967 and 1968. In addition to the problem of timeliness, processing difficulties have resulted

⁸⁴² Statement by William H. Brown, III, Chairman, EEOC News Release, Dec. 8, 1969, at 2.

⁸⁴³ EEOC News Release No. 70-20, June 4, 1970.

⁸⁴⁴ King, Oldaker interview, supra note 826.

⁸⁴⁵ Letter from William H. Brown, III, Chairman, EEOC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 11, 1970.

⁸⁴⁶ These programs are cosponsored by employers and labor unions to train apprentices in skilled crafts.

⁸⁴⁷ King, Oldaker interview, supra note 826.

⁸⁴⁸ Interview with Ruby Weinbrecht, Chief, Technical Information Division, Oct. 31, 1969.

in inaccurate or incomplete information and failure to locate submitted data.⁸⁴⁹

Other factors which have curtailed maximum effective use of the information collected include failure to adopt an integrated data system combining compliance information with employer and union information and minimum use of the EEO-2 and EEO-3 information gathered to date.

Above all, the creative use of EEO-1 and EEO-3 data as a compliance tool on a routine basis has yet to be explored. For example, examination of EEO-1 and EEO-3 reports to identify gross underutilizers for the purpose of instituting Commissioner charges or procedures leading to such charges has not yet been undertaken.

Finally, EEOC is precluded by section 709(e) of the statute, the so-called "confidentiality" provision, from releasing data in such a manner as to identify an individual employer or union or other "person" subject to Title VII. This reduces the effectiveness of the information, per se, in that public exposure is unavailable as a means of stimulating companies, particularly those concerned with their "image", to take positive action to comply with the law.

V. THE DEPARTMENT OF JUSTICE

The Department of Justice plays a crucial role in the enforcement of Title VII and Executive Order 11246. EEOC is basically limited to methods of "conference, conciliation and persuasion" in enforcing Title VII and the agencies responsible for enforcing the Executive order have demonstrated a reluctance to utilize the sanctions available under it.

The Department of Justice, however, can and has instituted lawsuits when a "pattern or practice" of discrimination exists, and has intervened in privately instituted lawsuits where the cases are of general public importance.⁸⁵⁰ Thus, Department of Justice litigation provides the most effective remedy available against discrimination by private employers. In addition, the Department's lawsuits, by de-

veloping important legal principles under Title VII, have provided strong support to the activities of EEOC and OFCC.

The Department of Justice was late in recognizing the importance of its role in attacking employment discrimination⁸⁵¹ and has not yet developed the capacity to fill the void created by the ineffectiveness of other Federal agencies.

A. Staffing and Organization

Responsibility for enforcing the laws prohibiting employment discrimination within the Department of Justice lies with the Employment Section of the Civil Rights Division.⁸⁵² Its Chief is David Rose and his staff allocation is 32 attorneys and 10 research analysts.⁸⁵³ For fiscal year 1969 this amounted to an allotment of 27 percent of the Division's manpower resources.⁸⁵⁴

B. Objectives and Priorities

Employment cases have required large amounts of Division manpower because of the voluminous records that must be analyzed, the extremely technical factual and legal questions involved in determining and proving the exist-

⁸⁴⁹ Interview with Ramsey Clark, former U.S. Attorney General, Mar. 30, 1970. Employment discrimination did not become a Division priority until late 1967.

⁸⁵⁰ Until a reorganization of the Civil Rights Division in September 1969 the Division was organized along geographic, rather than subject matter lines, with each unit handling all matters within its jurisdiction. See, Department of Justice, Civil Rights Division Memorandum No. 69-4 to all personnel Re: Reorganization of the Civil Rights Division, Sept. 4, 1969.

⁸⁵¹ Until June of 1970, K. William O'Connor was Special Assistant for Litigation to the Division and worked exclusively on employment matters. With assistance from the employment section he handled large cases, such as the negotiations with representatives of the movie industry, which led to a landmark written agreement in April, 1970 (See p. 121-22 infra). He was recently made Chief of the Criminal Section of the Civil Rights Division and his former position is not expected to be filled.

⁸⁵² U.S. Department of Justice, Civil Rights Division, Program Memorandum, fiscal year 1968. The employment section is the largest of the Division's five substantive sections (Employment, Education, Criminal, Housing and Voting and Public Accommodations). Education was the priority issue for the Division from 1965 to 1967. Prior to that time the priority issue was voting discrimination.

⁸⁴⁹ Id.

⁸⁵⁰ Section 707 and 706(e) of the Civil Rights Act of 1964. See also sec. 209(a)(2) and (3) of Executive Order 11246.

ence of discrimination in hiring, testing, seniority lines, and other employment practices, and the fact that many of the hard issues under Title VII have not yet been decided. The large number of man-hours required to prosecute a Title VII action, compounded by the small number of attorneys available to the section, severely limits the number of employment cases which the Civil Rights Division can bring.⁸⁵⁵

In attempting to allocate its resources most effectively the Division has established three broad objectives in the employment area: to bring suits in large metropolitan areas with heavy black or Spanish-speaking concentration; to develop legal principles under Title VII; to assist other Federal agencies having equal employment opportunity responsibility [notably EEOC and OFCC] in order to develop a uniform governmental approach to the problem.⁸⁵⁶

Priorities to secure these objectives have been determined in terms of two categories—geographic and substantive. The geographic priorities are not regional, but consist of certain cities on which the Division will concentrate its efforts. The first area of concentration is the 41 cities with populations of more than

100,000 persons which are more than 10 percent Negro and which are large manufacturing centers. Next, the Division focuses on those cities with populations of more than 100,000 persons with Negro populations of more than 10 percent, which are not manufacturing centers. The third geographic priority focuses on cities where State and large private employment agencies are located. This priority is based on the theory that these agencies can be a major source of employment referral for Negroes. The final priority is to give attention to other cities of 100,000 with other identifiable minorities of more than 10 percent.⁸⁵⁷

The Civil Rights Division does not appear to adhere closely to the geographic priorities. Although most of the employment actions have been brought in large cities, almost half (23 of a total of 50) have been in the South.⁸⁵⁸ Only one action has been filed against a State employment agency, and two others were filed against private employment agencies.⁸⁵⁹ As of August 1970, there have been few employment cases in which the prime victims of discrimination have been minority group members other than Negroes.⁸⁶⁰

The substantive priorities of the Civil Rights Division's employment program focus on those unions, companies, and employment agencies which are the most serious violators of Title VII and present the broadest spectrum of discriminatory practices. The rationale be-

⁸⁵⁵ Interview with David L. Rose, Chief, Employment Section, Civil Rights Division, Nov. 12, 1969. For example, the first employment case filed by the Department, *U.S. v. Sheet Metal Workers International Association, Local Union 36*, was filed on Feb. 2, 1966, and was not decided by the Circuit Court of Appeals until Sept. 16, 1969. Furthermore, the Eighth Circuit reversed and remanded the case to the district court, making further litigation necessary. However, the parties settled the case at this point without further judicial hearings.

⁸⁵⁶ U.S. Department of Justice, Civil Rights Division, Program Memorandum, fiscal year 1969. The 1970 program memorandum had not been completed at the time of the Commission investigation. An example of the type of litigative support the employment section provides other agencies is the suit filed on June 2, 1970 against a construction union in East St. Louis, Ill. The union was the most vocal of the several local unions which did not agree to State administered area equal employment opportunity plan. (Ogilvie plan) The Department of Transportation requested the Department to investigate the practices of the union and if they were discriminatory to file suit. The suit, thus, encourages the growth of the area plan concept. Interview with Robert T. Moore, Deputy Chief, Employment Section, Civil Rights Division, June 3, 1970.

⁸⁵⁷ Id.

⁸⁵⁸ Civil Rights Division memorandum, Title VII of the Civil Rights Act of 1964, Status of Cases as of May 11, 1970.

⁸⁵⁹ Id. A complaint was filed against the Ohio Bureau of Employment Services on Dec. 12, 1968. A complaint was filed on Apr. 4, 1970, against the Ideal Employment Co. in Chicago, Ill. On July 3, 1968, a complaint was filed against the Metro Personnel System, Inc., in Tex. and a consent decree was issued on August 1, 1969. In a related case, the Division, in *U.S. v. Frazer*, 297 F. Supp. 319 (M.D. Ala. 1968) sued various officials of the State of Alabama to enjoin racial discrimination in the administration of the Alabama Merit System as a condition to the receipt of Federal grants-in-aid.

⁸⁶⁰ Rose interview, supra note 855. The Employment Section has no Spanish surnamed Americans, Orientals, or American Indians on their 33-man professional staff. The Justice Department's first suit in which the prime victims of discrimination were Spanish surnamed and American Indians was filed on June 24, 1970 against Inspiration Consolidated Copper Co., 13 unions and a trades council. Its first suit in which women

hind this approach is that it is the most efficient way of developing the law, so that Federal agencies, companies, and unions will understand the "full range of Title VII requirement".⁸⁶¹

The Division also believes that lesser violations of the law can be remedied by private suits.

Furthermore, to derive the greatest impact from each case, the Section intends to increase the number of suits it has filed against employers with multiple facilities.⁸⁶² Generally, only one of the employer's facilities will be sued, on the assumption that an action against one of the employer's plants will generate voluntary reform in all of its plants.⁸⁶³ On the other hand, the Division has also brought suits charging discrimination in all of the plants of a particular employer. This approach was followed in the April 1969 suit against Cannon Mills, Inc., which has 14 plants and 23,000 employees in North and South Carolina. Other methods specified by the Division for increasing the impact of employment cases include suing unions on a nationwide basis, suing all employers in a limited geographic area who discriminate,⁸⁶⁴ and litigating cases against selected employers within an industry. The rationale here is that once a legal precedent is established, OFCC, through the use of its sanctions, can enforce the law nationally on an industrywide basis.⁸⁶⁵

were the prime victims of discrimination was filed on July 20, 1970 against Libby-Owens-Ford Co., Inc., and the United Glass and Ceramic Workers of North America, AFL-CIO.

⁸⁶¹ Program Memorandum, *supra* note 856. Defendants in Justice suits include, but are not limited to, a power company, textile manufacturers, trucking companies, a furniture company, a hospital, an oil company, a railroad, a pharmaceutical company, a steel corporation and unions of electrical workers, building trade workers, auto workers, mine workers, longshoremen and teamsters. A wide variety of issues, such as hiring, upgrading, testing, and seniority, have been covered by these suits.

⁸⁶² Rose interview, *supra* note 855.

⁸⁶³ For example, in January 1969, suit was brought against one of the facilities of Owens-Corning Fiberglass Corp.

⁸⁶⁴ A Department suit, filed on Oct. 31, 1969, against five trade unions in Seattle, Wash., was an attempt to reach all of the worst discriminators in an industry in a specific area.

⁸⁶⁵ Interview with Frank M. Dunbaugh, Deputy Assistant Attorney General, Dec. 4, 1969.

C. Litigation

Although Title VII became effective in July 1965, the Department of Justice did not file a Title VII complaint until February 2, 1966.⁸⁶⁶ Prior to late 1967, when employment discrimination became the Division's priority issue,⁸⁶⁷ only eight Title VII actions had been initiated.⁸⁶⁸ In the 2 years between September 1967 and September 1969, 38 more cases were filed.⁸⁶⁹ Since the Employment Section was formed in October 1969, only four cases have been brought as of June 1970. The reason given by Justice officials for their failure to file a larger number of new cases during this period is that the manpower of the Employment Section is almost totally committed to litigating the cases filed in late 1968 and early 1969.⁸⁷⁰

It was for this same reason that the Employment Section Chief estimated in November 1969 that the section would file no more than 20 to 25 new cases in the next year.⁸⁷¹ It is unlikely, however, that the Division will file as many as 10 cases during that period.⁸⁷²

It is the hope of senior officials in the Civil Rights Division that, once sufficient legal precedents are established, most employers will reform their practices voluntarily or through the action of OFCC. It is further hoped that those sued by the Department of Justice will settle without a trial and that in the small number of cases that do come to trial, judgments will be handed down within a few months after the Department files its complaint.⁸⁷³ Three recent circuit court of appeals'

⁸⁶⁶ Status of Cases Memorandum, *supra* note 858.

⁸⁶⁷ *Id.*

⁸⁶⁸ *Id.*

⁸⁶⁹ *Id.* Moore interview, *supra* note 856.

⁸⁷⁰ Rose interview, *supra* note 855.

⁸⁷¹ *Id.*

⁸⁷² From the time of the interview with Mr. Rose in November 1969, until late August 1970, Justice has filed only five additional employment discrimination suits and there are only a handful of matters which are in the later stages of investigation.

⁸⁷³ Rose and Dunbaugh interviews, *supra* notes 855 and 865. The feeling is that whereas a public body, such as a school board or a county board of voting registrars would litigate an issue even though they were aware of the fact that they would lose the case, a private party would not do this because of attorney costs and the bad public relations effect protracted litigation

decisions are cited by Justice officials as the types of precedents which suggest that the Division's hope will be realized.⁸⁷⁴ The issue in *U.S. v. Local 189, United Papermakers and Paperworkers*,⁸⁷⁵ was the legality of the seniority system in effect at Crown Zellerbach's Bogulusa, La., papermill. The court held that: "where a seniority system has the effect of perpetuating discrimination, and concentrating or telescoping the effect of past years of discrimination against Negro employees into present placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system."⁸⁷⁶

An important precedent for job referrals by unions was established in *U.S. v. Sheet Metal Workers International Association, Local 36*, a suit stemming from the labor disputes which arose over the construction of the St. Louis Arch. In that case, the Eighth Circuit Court of Appeals held that employment referral systems established under collective bargaining agreements which gave priority to those with work experience prior to the effective date of the Civil Rights Act were unlawful, since Negroes had not been able to obtain the experience. Consequently, the referral systems were held to have perpetuated past employment discrimination in violation of Title VII.⁸⁷⁷

Justice officials expect that these two cases, defining what the law prohibits, will discourage employers from engaging in those practices and thereby reduce the number of suits it must bring. Furthermore, trial court judges are required to follow these precedents, thus eliminating the need for detailed arguments on these points at the lower court level.⁸⁷⁸

might produce. It should be noted, however, that many companies retain house counsel to handle litigation and that opposing a Title VII law suit might not be an unpopular course of action on a local level.

⁸⁷⁴ Id.

⁸⁷⁵ 282 F. Supp. 39 (E.D. La. 1968), affirmed, 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

⁸⁷⁶ 282 F. Supp. 39, 44.

⁸⁷⁷ 280 F. Supp. 719 (E.D. Mo. 1968), revised and remanded, 416 F. 2d 123 (8th Cir. 1969).

⁸⁷⁸ Rose and Dunbaugh interviews, supra notes 855 and 865.

The third decision was a procedural ruling of great importance to all future Title VII cases made by the Fifth Circuit Court of Appeals in *U.S. v. Hayes International Corp.* The court held that in a Title VII case, when the facts show that the employer has engaged in a pattern and practice of discrimination on account of race, "affirmative and mandatory preliminary relief is required."⁸⁷⁹ The court ruled, further, that irreparable injury need not be proved in seeking a preliminary injunction in a Title VII action. This prerequisite is assumed from the fact that the statute appears to have been violated. As a result of this decision, it is felt that the Department can now move for a preliminary injunction in almost all situations, and that many of the district courts will grant the motion.⁸⁸⁰ In effect, a large part of the relief is secured once a preliminary injunction is granted, since the discriminatory practices then cease for the duration of the litigation.

An important nonjudicial precedent handled by the Division is the April 1, 1970 agreement signed by 73 motion picture producers, three major television networks, and the 13 craft unions which service these industries. The Department of Justice was originally asked by EEOC to bring suit in the Los Angeles area against a large number of employers and unions in the motion picture industry.⁸⁸¹ It investigated the allegations and, although its own staff originally recommended suit, it reached an agreement with the potential defendants after long negotiations but without resort to the courts.⁸⁸² The agreement provides, in part, that 20 to 25 percent of all craft daily employment will be made available to minority group members and that selections for permanent craft jobs will be based on a 20 percent ratio of minority to white members. The agreement also requires submission of a series of reports to the Department and EEOC so that compliance with the agreement can be

⁸⁷⁹ 295 F. Supp. 803 (N.D. Ala. 1968), revised and remanded, 415 F. 2d 1038, 1045 (5th Cir. 1969).

⁸⁸⁰ Interview with David L. Rose, Chief, Employment Section, Civil Rights Division, Nov. 12, 1969.

⁸⁸¹ Interview with Clifford Alexander, former Chairman, EEOC, Mar. 5, 1970. The initial information in this matter was made public at hearings held by EEOC in Los Angeles, Calif., on Mar. 12-14, 1969.

⁸⁸² Id.

monitored.⁸⁸³ Justice hopes to be able to replicate agreements of this nature in other industries.⁸⁸⁴

D. Liaison with Other Departments

For the most part, matters of coordination (except those which arise in the course of a lawsuit) are handled by the Civil Rights Division's Coordination and Special Appeals Section, rather than by the Employment Section.⁸⁸⁵ Prior to the October 1969 reorganization, the former Office of the Special Assistant to the Attorney General for Title VI handled all inter-agency coordination, including that which was related to Title VII and other employment issues. For example, that unit wrote a memorandum recommending the centralization of the equal employment opportunity responsibilities of the Civil Service Commission.⁸⁸⁶ The unit also worked with the Department of Labor, notably the Bureau of Apprenticeship and Training and the Bureau of Employment Security. Representatives of the Title VI unit

⁸⁸³ News release Department of Justice, Mar. 31, 1970. One of the significant provisions in the agreement is a waiver by all the private parties, in any enforcement action, of the right to deny violations of Title VII that occurred prior to the agreement.

⁸⁸⁴ Interview with Robert T. Moore, Deputy Chief, Employment Section, Civil Rights Division, June 3, 1970. It should be noted that in the future the Department would prefer to file suit and submit the agreement to the court for approval. In that case future noncompliance would not require the Department to initiate a new cause of action. Rather it would request the court to find the defendant guilty of contempt of court. Id.

⁸⁸⁵ Interview with J. Harold Flannery, Chief, Coordination and Special Appeals Section, Civil Rights Division, Nov. 14, 1969. Mr. Flannery and his Deputy, Benjamin Mintz, both resigned in June 1970 and the Coordination and Special Appeals Section was divided into three separate units: Legislation and Special Projects, Planning and Special Appeals, and Title VI. The Title VI unit assumed responsibility for coordination of employment matters. However, it is anticipated that the Employment Section will take an increasing role in the coordination area. Department of Justice, Civil Rights Division Memorandum No. 70-2 to all Personnel, Re: New Appointments and Personnel Changes, May 27, 1970; interview with Benjamin W. Mintz, Special Assistant to the Assistant Attorney General, June 3, 1970.

⁸⁸⁶ Interview with Benjamin W. Mintz, Deputy Chief, Office of the Special Assistant to the Attorney General for Title VI, Civil Rights Division, Feb. 5, 1969.

conducted joint investigations with the Department of Labor personnel of the Texas and Ohio State Employment Services.⁸⁸⁷ It also reviewed the apprenticeship programs sponsored by DOD and NASA in the Norfolk and Hampton Roads area of Virginia, and tried a case against six agencies of the State of Alabama involving failure to comply with the nondiscrimination requirements of the Federal merit standards agreement.⁸⁸⁸

The two agencies with which the Civil Rights Division has the most frequent dealings regarding Title VII matters are EEOC and OFCC.⁸⁸⁹ Cooperation with these agencies arises both within and beyond the context of litigation.⁸⁹⁰ The Employment Section has only ad hoc dealings with them in connection with court actions, whereas the Coordination and Special Appeals Section works with the EEOC and OFCC on a more continuous basis.

Section 705(g)(6) of the Civil Rights Act of 1964 gives the Equal Employment Opportunity Commission the power: "to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under Section 706, or for the institution of a civil action by the Attorney General under 707, and to advise, consult, and assist the Attorney General on such matters."⁸⁹¹

In practice, the referral of cases from EEOC

⁸⁸⁷ Id. The Ohio investigation led to the filing of a law suit against the State agency (supra, note 859). The suit was handled by the Employment Section. The Texas Employment Commission refused to sign a written agreement with the Department of Labor, guaranteeing certain reforms. The Texas Commission has been reinvestigated, and the matter was under study at Justice and Labor at the time this report was written.

⁸⁸⁸ Interviews with David L. Rose, former Special Assistant to the Attorney General for Title VI and present Chief, Employment Section, Civil Rights Division, Feb. 3, and 11, 1969. See, D. Rose, Special Assistant to the Attorney General, Memorandum to Jerris Leonard, Assistant Attorney General, Civil Rights Division, "Pending Matters of Significance in the Title VI Office," Jan. 28, 1969.

⁸⁸⁹ For a more detailed discussion of the relationship between Justice and EEOC and OFCC see sec. VI of this chapter—"Coordination."

⁸⁹⁰ The Civil Rights Division has been involved in drafting proposed legislature amendments of Title VII.

⁸⁹¹ The Civil Rights Act of 1964, sec. 705(g)(6). The comparable section of Executive Order 11246 is sec. 209(a) (2), (3).

to the Department has been done on an informal basis and in a manner which was described by the Chief of the Employment Section as "hit or miss".⁸⁹² Since it has taken EEOC more than 2 years to process most of the complaints it receives, by the time a file is turned over to the Department of Justice for action the investigative report may be several years old. It is, of course, still of some value, but the Civil Rights Division experience has been that it must instigate a new investigation before proceeding with the case. At present, there are no formal criteria for referral of cases by the EEOC, although guidelines are scheduled to be drawn up in the near future.⁸⁹³

Coordination with the OFCC has been stronger than with EEOC, particularly in non-litigative areas. The former Title VI unit worked closely with OFCC on several matters, such as agreements negotiated between the OFCC and various employers, the issuance of OFCC regulations, and the question of what OFCC should do with respect to Federal contracts of employers who are being sued by the Department.⁸⁹⁴

In the summer of 1969, a committee was set up by the three agencies which meets weekly to discuss problems and policies in the employment area. Prior to this, there had been informal biweekly luncheon meetings of representatives from EEOC, OFCC, and the Department of Justice. The Deputy Chief of the Coordination and Special Appeals Section usu-

⁸⁹² Rose interview, *supra* note 880. The referrals are done informally and depend to a great extent on the availability of department attorneys and the types of cases EEOC has when attorneys are free to deal with new cases. *Id.*

⁸⁹³ *Id.* The Department of Justice reports that it has: "advised EEOC of our criteria for bringing lawsuits. We understand that EEOC will attempt to develop with us a certain criteria which will be mutually satisfactory, so that its referral criteria are the same as our criteria for filing lawsuits." Letter from Jerris Leonard, Assistant Attorney General, Civil Rights Division, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Attachment, Aug. 25, 1970.

⁸⁹⁴ Mintz interview, *supra* note 886. The policy that evolved is that OFCC is to suspend any noncompliance proceedings against such an employer. The reason for this is that it is considered pointless to cut off Federal contracts while the issue of discrimination is being settled by the courts.

ally represented the Division at the luncheons. Currently, he represents Justice at the weekly meetings.⁸⁹⁵ Besides serving as a forum for the exchange of information, the Interagency Committee is intended to develop solutions for substantive questions which arise under Title VII and Executive Order 11246. For example, the Committee has served as a forum for bringing three agencies together to write new uniform testing guidelines.⁸⁹⁶

As of June 1970, the Employment Section was not sending a representative to the Interagency Committee meetings regularly because it did not have enough attorneys to spare on a regular basis for this purpose.⁸⁹⁷ The Deputy Chief of the Coordination and Special Appeals Section, Benjamin Mintz, was the only person working on coordination with EEOC and OFCC until he left Justice in June 1970. His position, however, gave him many other responsibilities. The fact that the only attorney who was intended to assist him in this work was detailed, full-time, to a housing case, is a reflection of the priority given nonlitigative matters by the Division.

VI. COORDINATION

A. Past Practices

Three agencies—EEOC, OFCC (with the 15 compliance agencies), and the Department of Justice—carry the Federal responsibility for eradicating job discrimination in the private employment area. Although the laws under which they operate afford different sanctions with which to carry out their responsibilities, the three agencies are basically charged with achieving the same ends and essentially deal

⁸⁹⁵ Interview with Benjamin W. Mintz, Deputy Chief, Coordination and Special Appeals Section, Civil Rights Division, Nov., 18, 1969.

⁸⁹⁶ *Id.* See sec. VI, *infra* for a full discussion of the operation of the Interagency Committee.

⁸⁹⁷ Rose interview, *supra* note 880. The Justice Department has indicated that a lawyer from the Employment Section was not sent ". . . to the Interagency Committee when Ben Mintz was available because we thought it would be duplicative and his representation was adequate for the entire Division. If he had not been available, we would have sent someone to attend." Letter from Jerris Leonard, *supra* note 893.

with the same employers.⁸⁹⁸ A reasonable assumption, therefore, is that the agencies would, at a minimum, coordinate their activities to insure the overall effectiveness of the Government's program. In this regard, the steps that should be taken appear evident:

Joint development of consistent goals, policies, and procedures; compliance reviews; and compliant investigations;

Utilization of joint reviews, investigations, and conciliations;

Development of guidelines to determine most effective use of the various sanctions available;

Undertaking of joint annual evaluations of the entire Federal effort with emphasis on determining how to resolve outstanding problems.

Despite the need for such a program of coordination, one has not been developed. Only ad hoc coordination measures have been initiated.

The agencies have adopted their own program goals, priorities, and mechanisms on an independent basis. Furthermore, each has developed criteria for initiating action and implementing their findings in isolation from the other agencies. The lack of coordination has existed at both Washington and field levels. This failure to join forces has resulted in a critical misuse of limited staff resources and the dissipation of enforcement potential.

The lack of coordination which generally has existed among the three agencies has resulted in such strange occurrences as the refusal of one agency to share investigatory materials with another. For example, the Post Office Department noted that EEOC has not always shared requested information, usually justifying its refusal on grounds that Title VII requires that complaint information be kept confidential.⁸⁹⁹

One of the problems generated by the failure

⁸⁹⁸ Nearly all the employers involved in job bias suits instituted by the Justice Department also are Federal contractors. Interview with Benjamin Mintz, Deputy Chief, Coordinator and Special Appeals Section, Civil Rights Division, Department of Justice, June 9, 1970.

⁸⁹⁹ Questionnaire response of Post Office Department. In fact, the confidentiality requirement of Title VII does not apply to other Federal agencies, other than to require that they do not release the information to the public.

of the agencies to relate regularly to one another has been overlapping investigations and the resultant inconsistency in the demands made by the agencies. The Department of the Treasury—the compliance agency for banks—has reported that in one instance, its efforts to obtain an adequate affirmative action plan from a bank were inhibited by the nature of the conciliation agreement that EEOC was negotiating with that same bank. Treasury had only accidentally learned of EEOC's involvement.⁹⁰⁰

Another example is provided by the unfortunate history of the Federal attempt to secure compliance with equal employment opportunity laws from the Newport News Shipbuilding and Dry Dock Company. The efforts of the compliance agencies, DOD, OFCC, and EEOC, began more than 5 years ago and initially resulted in an April 1966 conciliation agreement. When the agreement was not honored, none of the agencies took effective steps to enforce its provisions. Finally, in 1968, responsibility for the matter was transferred from DOD to the Maritime Administration of the Department of Commerce. When it requested copies of the reports DOD had filed with EEOC, DOD could not locate them.⁹⁰¹

At the time, EEOC also was investigating charges against the shipyard, and the Maritime Administration did not know whether to begin compliance reviews. Offers by the Maritime Administration to cooperate with EEOC in the conciliations were not accepted.⁹⁰² OFCC finally informed the administration that EEOC activities and agreements were not a bar to contract compliance reviews.⁹⁰³ In February 1969 EEOC handed down the first of a series of decisions which held that Newport News had violated the original conciliation

⁹⁰⁰ Questionnaire response of the Department of the Treasury.

⁹⁰¹ Memorandum from J. M. Heneghan, Special Assistant for Equal Opportunity, Maritime Administration, to the Special Assistant for Equal Opportunity, Department of Commerce, Apr. 17, 1969.

⁹⁰² Id. The Maritime Administration took more than a year and a half to determine if it should conduct compliance reviews on the shipyard's facilities.

⁹⁰³ Memorandum from Peter M. Silva, Senior Compliance Officer, OFCC, to Luther C. Steward, Jr., Special Assistant for Equal Opportunity, Department of Commerce, July 2, 1969.

agreement and Title VII. The Maritime Administration finally negotiated an agreement with the shipyard and submitted it to OFCC for review. In April 1970 OFCC rejected the affirmative action plan.⁹⁰⁴

The most famous example concerning overlapping reviews and inconsistent demands is the Crown Zellerbach case.⁹⁰⁵ In that matter, EEOC had investigated the company's practices in late 1965 and agreed to accept a certain type of seniority plan. In February 1967 OFCC attacked the plan EEOC had approved and, finally in January 1968 the Department of Justice, in a suit, urged the court to reject the seniority plan that OFCC had requested and adopt an entirely new test. In commenting on this lack of Federal coordination, the U.S. Court of Appeals said: "We cannot help sharing Crown Zellerbach's bewilderment at the twists and turn indulged in by Government agencies in this case."⁹⁰⁶

As a result of incidents such as these, employers have publicly charged that they have been harassed by the civil rights agencies concerned with equal employment opportunities. In 1969, in hearings before the Senate Subcommittee on Administrative Practice and Procedure, the late Senator Everett M. Dirksen said that he was receiving complaints on this matter every day. One large corporation, he said, advised that it "spent a million dollars just to go to hearings, answer questions, have investigators around the place, until they do not precisely know what to do."⁹⁰⁷

⁹⁰⁴ The Washington Post, Apr. 10, 1970, (sec. 24.). Acting Secretary of Labor James D. Hodgson indicated on June 10, 1970 that an oral agreement had been reached with the shipbuilding company and that a final written agreement would soon be signed. The Washington Post, June 11, 1970, A2.

⁹⁰⁵ *Local 189, United Papermakers and Paperworkers v. United States* 416 F. 2d 980, 984, 985 (5th Cir. 1969).

⁹⁰⁶ *Id.*, at 997.

⁹⁰⁷ Hearings on S. Res. 39 before the Subcommittee on Administrative Practice and Procedure of the Senate Commission on the Judiciary, 91st Cong., 1st sess., at 22 (1969).

In hearings before the Senate Subcommittee on Separation of Powers, which inquired into the propriety of the Philadelphia Plan, Senator Samuel J. Ervin, Jr., asked the representative of the Association of General Contractors of America: "Have you known of any instances when after the Office of Federal Contract Compliance had investigated a company, the Equal Employment Opportunities Commission would

Agency officials contend that the worst examples (e.g., Crown Zellerbach) of duplication of effort occurred in the early stages of their implementation of the nondiscrimination requirements. Although admitting that there was overlap in investigations and conciliations, they deny that the problem ever was of sizable proportions.⁹⁰⁸ In addition, they express the hope that steps taken by the agencies in the last year will reduce the possibility of recurrences.⁹⁰⁹

Joint reviews and joint conciliations by EEOC and OFCC provide one way to cope with overlapping investigatory assignments. This appears to be necessary since, although the OFCC complaint rate is relatively small compared to that of the EEOC, many complaints have been filed with both agencies. Some complaints even involve triple filing and are sent to the OFCC, EEOC, and the relevant State or local FEPC. Yet DOD, the compliance agency with more than 75 percent of all contract compliance responsibility, has been involved in only one joint complaint investigation and conciliation with EEOC.⁹¹⁰ It resulted

then investigate the company and sometimes the State agency would conduct a third investigation?"

The response was in the affirmative. In addition, the witness, William Naumann, indicated that one of his project managers was going to be subjected to two compliance reviews in one day; one by representatives of the Bureau of Reclamation of the Department of the Interior and one from the compliance staff of the State Highway Department. Hearings on S. 391 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 89 (1969).

⁹⁰⁸ Interviews with Robert Hobson, Senior Compliance Officer, OFCC, Apr. 15, and June 9, 1970; interview with William Draper, Acting Staff Director, EEOC, Nov. 18, 1969; interview with George Butler, Acting Director of Technical Assistance, EEOC, Oct. 29, 1969. A Justice Department official indicated that the problems of poor coordination had been indeed significant and had probably resulted in considerable investigatory duplication. Interview with Benjamin W. Mintz, Deputy Chief, Coordination and Special Appeals Section, Civil Rights Division, Department of Justice, Mar. 12, and June 9, 1970.

⁹⁰⁹ Hobson (June 9, 1970) and Mintz (June 9, 1970) interviews, *supra* note 908. For a discussion of the recent steps taken to improve coordination, see pp. 130-32, *infra*.

⁹¹⁰ Questionnaire response of the Department of Defense. Only one other joint investigation was noted in the questionnaire responses of the other agencies. The

in a successful conciliation with the International Harvester Co. in California. The joint OFCC-EEOC effort (with assistance from the Department of Justice) to cope with discrimination in the textile industry in North and South Carolina, which began in 1966, was a failure and ended in an OFCC-DOD dispute over proper enforcement procedures.⁹¹¹

B. Present Attempts at Coordination

Efforts have begun to improve coordination among the agencies as is shown by the increasing network of interactions growing among them. At present two types of coordination efforts⁹¹² are being used by the three agencies concerned with employment discrimination. These are coordination efforts of a bilateral nature, i.e., affecting or between two agencies, usually for a specific purpose, and multilateral efforts involving more than two agencies.⁹¹³

review involved the Department of Interior, EEOC, OFCC, and the Department of Justice in an attempt to secure compliance from two major oil companies in Texas. If successful, the agencies will conclude the first multiagency agreement with an employer covering all noted deficiencies.

⁹¹¹ For a discussion of the textile case, see sec. II, *supra*.

⁹¹² In certain respects the record of these efforts is incomplete since much of what took place among these agencies is handled informally. Documentary evidence is usually the result of much informal discussion and several drafts. Even interviews with involved agency officials did not completely fill in the inevitable gaps in the documentary evidence.

⁹¹³ A number of agencies with contract compliance responsibilities have been included in the multilateral efforts. This is because they were specifically involved in a special project, such as the Department of Defense in the textile project, or because their program was of particular interest to the three agencies.

Relationships between OFCC and other Federal departments and units implementing Executive Order 11246 and the regulations pursuant to it, are different in that the regulations specifically require the relationships and to some extent define their nature. For a discussion of these relationships, see sec. II, of the ch. *supra*.

One factor affecting coordination of agencies is the importance of the question of employment discrimination to each agency. When difficulties arise, the views of the Department of Justice and the Department of Labor carry more weight than those of EEOC because they have the power to impose sanctions; thus EEOC is to some extent dependent on them. In addition, they are Cabinet level agencies and potentially command far greater resources than EEOC. OFCC is but one unit of the Workplace Standards Administration, which is

Bilateral relationships exist between EEOC and OFCC, EEOC and the Department of Justice, and Office of Federal Contract Compliance and the Department of Justice. Most other contacts of these three principal policy agencies also are conducted on a bilateral basis. For example, each has relationships with the NLRB, the Bureau of the Budget, and White House staff. The multilateral interagency coordination efforts have been principally restricted to the three policymaking agencies—EEOC, OFCC, and the Department of Justice.

I. BILATERAL COORDINATION

a. EEOC and OFCC (including Contract Compliance Agencies)

These agencies must coordinate their efforts at two levels: the Washington central office policy level and the field operations level. The Washington office is not only responsible for coordination of major decisions but sets the guidelines under which the regional staff operates.⁹¹⁴

Important policy decisions and compliance actions are still being initiated by EEOC and OFCC on a unilateral basis. For example, in the development of its two most important recent policies—the issuance of Order No. 4 and the restructuring of the “area construction plans”—OFCC had no discussions with EEOC. OFCC felt that EEOC had no role to play in those matters,⁹¹⁵ despite the fact that its jurisdiction covers the very same employers and unions that are being required to adhere to the standards set down in order No. 4 and the area plans. In addition to the possible

one of seven divisions of the Department of Labor and the Civil Rights Division of the Department of Justice is one of its smaller Divisions and has responsibility for all civil rights laws. Decisions from the Secretary of Labor and the Attorney General are sometimes difficult to obtain promptly because of the large number of their other responsibilities.

⁹¹⁴ For example, most EEOC complaint files are in field offices and in the absence of directions from Washington, each EEOC regional office decides for itself the conditions under which it will release the file to compliance agencies.

⁹¹⁵ Interview with Nathaniel Pierson, Deputy Assistant Director for Construction, OFCC, Nov. 27, 1969. It is anticipated by OFCC officials that once an area plan is in effect the local minority coalition will utilize EEOC in its effort to require adherence to the agreement by contractors and unions. Hobson interview (June 9, 1970), *supra* note 908.

contribution EEOC could have made, joint announcement with EEOC of these OFCC innovations would have strengthened the Government's position.⁹¹⁶

By the same token, important EEOC activities, such as hearings, have generally been conducted without the active and open assistance of OFCC representatives.⁹¹⁷ Important progress has been made, however, in coordinating OFCC's sanction power with EEOC's findings of noncompliance.⁹¹⁸

The most important area of day-to-day coordination takes place in the field. These efforts are complicated by the fact that EEOC has to deal with a large number of different contract compliance agencies.⁹¹⁹ The regional offices of the compliance agencies and EEOC maintain investigative files on many employers and the information contained in them is continuously being increased. The need to share this information is clear, but problems in making maximum joint use of the information persist. Formal procedures for obtaining the information have not been devised; the materials are often unavailable; and, because investigative criteria of EEOC and the various compliance agencies differ, the files are often of limited

use.⁹²⁰ Existing OFCC policies and directives have proved inadequate to resolve the vexations of field coordination between EEOC and the compliance agencies and much of the coordination that now exists at the field level is accomplished on a personal rather than on agency basis.

Two steps now being taken by OFCC should improve the possibility for effective coordination with EEOC at the field level. First, the OFCC area coordinators, who have spent all of their time developing area construction compliance plans, are, pursuant to the OFCC reorganization, designated directors of newly created OFCC regional offices. They will now treat a broader spectrum of compliance matters⁹²¹ including procurement. Second, OFCC is developing a comprehensive contract compliance manual which includes sections dealing with guidelines and procedures for interagency relationships in Washington and the field. In the past, the area coordinators have been largely left on their own and OFCC did not try to evaluate their effectiveness. Guidance from OFCC to the area coordinators, other than on the creation of area plans, was insignificant in terms of quantity and quality.⁹²²

b. Equal Employment Opportunity Commission and the Department of Justice

Under Title VII, the Equal Employment Opportunity Commission may refer cases to the Department of Justice when EEOC believes the case reflects a pattern or practice of employment discrimination.⁹²³ This process of case referral has formed the basis of the relation-

⁹¹⁶ It is possible that some of the recent critics of OFCC and Order No. 4 would not be as vocal or as effective if the posture adopted by OFCC were endorsed by all Federal agencies involved in preventing discrimination in employment. See the Washington Post, June 7, 1970, sec. A, p. 2, for a discussion of pending congressional hearings opposing Order No. 4. This situation is analogous to the Title VI area in which HEW took the lead in enforcement and was then subject to congressional harassment. It has been asserted that if all of the Title VI agencies had moved with the same dispatch and forcefulness as HEW, congressional pressure on HEW would have not been as effective. Interview with Ramsey Clark, former U.S. Attorney General, Mar. 30, 1970.

⁹¹⁷ See sec. IV of this chapter, *supra*.

⁹¹⁸ For a further description of recent EEOC-OFCC actions in this regard, see pp. 130-132 *infra*.

⁹¹⁹ Currently, OFCC Washington personnel are rarely in contact with either EEOC or compliance agency regional people. OFCC compliance officers assist EEOC and compliance agency field efforts in cases of unusual importance or on special projects such as the textile investigation. There are, however, no established procedures allowing for and explaining this type of OFCC activity. Therefore, most contact is between the 15 compliance agencies' regional officials and regional EEOC personnel. Pierson interview, *supra* note 915.

⁹²⁰ Interviews with John Rayburn, Acting Director of the Office of Compliance, EEOC, Apr. 29, 1970, and William Draper, Acting Staff Director, EEOC, Nov. 18, 1969.

⁹²¹ Pierson interview, *supra* note 915. See sec. II, *supra* for a discussion of the OFCC reorganization.

⁹²² *Id.*

⁹²³ When a complaint alleging employment discrimination is sent to the Department of Justice, it is referred to the Employment Section of the Civil Rights Division where it is reviewed by an attorney. If the attorney determines that the charge in a complaint reflect a pattern or practice of discrimination, he will send it to the FBI for investigation. If, on the other hand, the letter appears merely to represent an act of discrimination against a single individual, the letter is referred to EEOC and the complainant is so informed. Very few complaints are transferred by Justice to OFCC.

ship between the two agencies.⁹²⁴ Of the 115 matters referred by EEOC to Justice from July 1968 to May 1970, only eight have resulted in lawsuits filed by the Justice Department.⁹²⁵ There are three major reasons why more Department of Justice suits have not been filed as a result of EEOC referrals: (1) EEOC files may be 2 years old when they are ready for transmittal to Justice.⁹²⁶ [This delay stems from EEOC's internal procedures, but in the opinion of Justice Department officials is of crucial importance.]⁹²⁷ (2) EEOC's investigations are designed to determine if a particular charge has validity, whereas the Attorney General under section 707 must find a "pattern or practice" of violations. Thus, EEOC's investigations generally are not sufficient for Justice Department purposes and further investigation is required.⁹²⁸ Furthermore, Justice officials have suggested that the quality of the investigative work done by EEOC personnel is below departmental standards.⁹²⁹ (3) EEOC requires its investigators merely to find "reasonable cause" to believe a violation has occurred. EEOC officials contend that the Department of Justice requires sufficient evidence to prove a violation "beyond a shadow of a doubt" before it will file suit.⁹³⁰

Prior to 1968, EEOC and the Department of Justice had a formal mechanism for coordi-

nating the referral of complaints. It called for the General Counsel of EEOC, after approval of the Commission, to refer individual cases to Justice by formal memoranda.⁹³¹ That referral system, in which Justice played only a passive role, has been replaced with a new interagency procedure. This consists of a periodic review by the EEOC General Counsel of all complaints in which conciliation has failed; meetings between Justice and EEOC staff attorneys to determine which files the Justice Department is interested in; and the transmittal of only those files requested by the Justice Department.⁹³² Both agencies believe that this system is superior to the old one but that improvements need to be made in order to come to grips with the problems which still appear to limit the usefulness of the referral system.⁹³³

The contact between EEOC and Justice on matters other than complaint referrals has been on a purely ad hoc basis. For example, over the years, the agencies have cooperated in drafting new legislation, which would provide EEOC with enforcement powers.⁹³⁴ Justice also was requested to take action as a result of information produced at the New York and Los Angeles hearings held by EEOC in January 1968 and March 1969 respectively.⁹³⁵ In

⁹²⁴ Letter from Stanley P. Hebert, *supra* note 925. One of the problems with this system from the point of view of EEOC was that its personnel did not know what action to take with regard to the complaint once they had referred it to Justice. They had no way of knowing what action the Justice Department was going to pursue as a result of these unsolicited referrals.

⁹²⁵ *Id.*, Mintz interview, *supra* note 926.

⁹²⁶ Rose and Mintz interviews, *supra* notes 929 and 926. Letter from Stanley P. Hebert, *supra* note 925. The Department of Justice does not normally discuss with EEOC the relief it intends to request in cases referred by or which concern EEOC. Interview with Benjamin W. Mintz, Special Assistant to the Assistant Attorney General, Department of Justice, June 12, 1970.

⁹²⁷ Interview with J. Harold Flannery, Chief, Coordination and Special Appeals Section, Civil Rights Division, Department of Justice, Nov. 14, 1969; Mintz interview, *supra* note 926. Justice has not engaged in joint training investigations or conciliations with EEOC.

⁹²⁸ Interview with Clifford Alexander, former Chairman, EEOC, Mar. 5, 1970. Mr. Alexander indicated that he was unsuccessful in obtaining Justice Department cooperation at his hearings. After the New York white-collar hearing, Justice was requested to file "pattern

⁹²⁹ The only Division of the Department of Justice which deals with EEOC is the Civil Rights Division. The Community Relations Service of the Department of Justice does not involve itself with matters of employment discrimination. Interview with Irving Tranen, Chief, Community Development Section, Community Relations Service, Oct. 17, 1969.

⁹³⁰ Letter from Stanley P. Hebert, General Counsel, EEOC, to Linda Blumenfeld, Program Analyst, U.S. Commission on Civil Rights, May 20, 1970.

⁹³¹ Interview with Benjamin Mintz, Deputy Chief, Coordination and Special Appeals Section, Civil Rights Division, Department of Justice, Nov. 18, 1969.

⁹³² *Id.*; interview with Frank M. Dunbaugh, Deputy Assistant Attorney General, Department of Justice, Dec. 4, 1969.

⁹³³ Letter from Stanley P. Hebert, *supra* note 925.

⁹³⁴ Interview with David Rose, Chief, Employment Section, Civil Rights Division, Nov. 12, 1969. Dunbaugh and Mintz interviews, *supra* notes 927 and 926.

⁹³⁵ Interview with Russell Specter, Acting General Counsel, EEOC, Dec. 23, 1969; interview with Patricia King and William Oldaker, Special Assistants to the Chairman, EEOC, May 11, 1970. See also Mintz interview, *supra* note 926.

neither case, however, did Justice file the suits requested by EEOC. In March 1970 the Department did sign a significant compliance agreement effective April 1 with a large number of West Coast motion picture producers, television networks, and craft unions which opened the way for increased minority hiring.

c. OFCC and the Department of Justice

The Department of Justice has had more extensive dealings with OFCC (and its 15 compliance agencies) than with EEOC. Under Executive Order 11246, which authorizes OFCC to refer appropriate cases to Justice for litigation, eight matters have been referred and Justice has filed suit in each case.⁹³⁶ No formal referral procedures exist, but Justice officials do not believe they are necessary because of the small number of cases referred and the excellent coordination that exists between personnel of the two agencies.⁹³⁷

A problem which the OFCC and Justice have yet to resolve completely is what action OFCC should take when Justice is involved in a pre-suit investigation of a contractor who is not in compliance with the Executive order and who is being considered for a new Federal contract. OFCC regulations provide that all contractors with contracts in excess of \$1 million must have an approved affirmative action plan on file. If a contractor does not have such a plan, the Federal contract is to be withheld. On several occasions, the Department of Justice has requested OFCC to disregard this procedure—to allow the contracts to be awarded

or practice” suits against the 10 worst offending companies, but refused to do so. *Id.*

⁹³⁶ Hobson and Mintz interviews, *supra* notes 902 and 926. The cases were against: the St. Louis Building and Construction Trades Council, et al. (the St. Louis Arch case), Feb. 4, 1966; the Crown Zellerbach Corp., Jan. 30, 1968; East St. Louis Operating Engineers (Local 520), Jan. 17, 1969; East St. Louis Electrical Workers (Local 309), Jan. 17, 1969; East St. Louis Cement Masons (Local 90), Jan. 17, 1969; the Seattle Ironworkers (Local 86) et al., Oct. 31, 1969; National Lead Co. and (Local 1744) the Chemical Workers, Jan. 14, 1970; and the International Association of Bridge, Structural, and Ornamental Iron Workers (Local Union No. 392) (East St. Louis, Ill.), on June 2, 1970. Each of these cases represented a crisis or emergency situation for OFCC and Justice was reported to have reacted with dispatch. *Id.*

⁹³⁷ Rose and Mintz interviews, *supra* notes 929 and 926.

and to discontinue its conciliation efforts—so that the Department may develop the best possible case for its court suits.⁹³⁸ Thus far, the procedure has been to drop compliance activities and allow Justice to continue its pre-suit investigations.

A significant example of commendable coordination between OFCC and the Justice Department concerned Justice support of the legality of the “Philadelphia Plan”⁹³⁹ in 1969. The Attorney General and the Secretary of Labor jointly released legal opinions and statements supporting the procedure.⁹⁴⁰ Further, there was considerable cooperation between attorneys at Justice and the Department of Labor leading up to the Attorney General’s opinion.⁹⁴¹

Other examples of coordination between the Department of Justice and OFCC include a Justice evaluation of OFCC regulations prior to their issuance in 1968; Justice assistance in the development of significant OFCC-contractor agreements; Justice reviews of briefs and other legal papers prepared by OFCC in preparation for hearings; and Justice analysis of the compliance enforcement potential of contract compliance agencies.⁹⁴²

2. MULTI-AGENCY COORDINATION

Coordinated action by all three agencies,

⁹³⁸ Interview with Ward McCreedy, Assistant Director for Contract Compliance, OFCC, Dec. 2, 1969. Mintz interview, *supra* note 926. Memorandum from David Rose, Special Assistant to the Attorney General for Title VI to Jerris Leonard, Assistant Attorney General, Civil Rights Division, Pending Matters of Significance in the Title VI Office, 6, 7, Jan. 28, 1969.

⁹³⁹ For a discussion of the Philadelphia Plan, see sec. III of this ch., *supra*.

⁹⁴⁰ Departments of Justice and Labor News Releases, Sept. 23, 1970.

⁹⁴¹ Pierson and Mintz interviews, *supra* notes 915 and 926. In fact, the Philadelphia field representative of the Community Relations Service of the Department of Justice and the U.S. Attorney in Philadelphia were active in the committee of the Philadelphia Federal Executive Board which developed the plan. Interview with Kenneth Kugel, Director, Operational Coordination and Management Systems Staff, Bureau of the Budget, Apr. 17, 1970. Representatives of the Department’s Civil Rights Division had provided unofficial opinions supporting the legality of the Plan prior to the request for a formal opinion of the Attorney General. Rose and Mintz interviews, *supra* notes 929 and 926.

⁹⁴² Rose and Mintz interviews, *supra* notes 929 and 926.

Justice, EEOC, and OFCC, has been rare. It has been attempted in two instances. The first was a coordinated effort concerning a specific project. The second was a broader effort represented by the Interagency-Staff Coordinating Committee.

a. Textile Case

The one example of coordinated action by the three agencies on a specific project involved the effort to end discrimination in certain Southern textile mills.⁹⁴³ That example of coordination was limited in purpose and necessarily limited in result. It was done on an ad hoc basis and did not result in any agreement that similar efforts would be undertaken in the future. Although no substitute for systematic coordination, this kind of action can be of value when directed against employers in particular industries or specific geographic areas.

b. Interagency Staff Coordinating Committee

The Interagency Staff Coordinating Committee was formed in July 1969⁹⁴⁴ in response to the need for better coordination among the three agencies. Five persons representing the three policymaking agencies were designated to serve as representatives.⁹⁴⁵ The following

⁹⁴³ For a more complete discussion of the textile case, see sec. III of this ch., supra.

⁹⁴⁴ Memorandum for James D. Hodgson, then Under Secretary of Labor; Arthur A. Fletcher, Assistant Secretary of Labor; William H. Brown III, Chairman, EEOC; Jerris Leonard, Assistant Attorney General, Civil Rights Division, Justice Department; and Lawrence Silberman, Solicitor of Labor; from Benjamin Mintz, Deputy Chief, Office of the Special Assistant to the Attorney General; re: Coordination of the Federal Government Equal Employment Opportunity Program—Formation of the Interagency Civil Rights Staff Committee, July 8, 1969.

For almost 2 years prior to July, there had been informal biweekly luncheon meetings of staff members of the three agencies, at which coordination issues were discussed. Alexander and Mintz interviews, supra notes 935 and 926.

⁹⁴⁵ Memorandum on "Interagency EEO Coordinating Committee" Robert R. Hobson, Senior Compliance Officer, OFCC, to Assistant Secretary of Labor, Arthur Fletcher, July 23, 1969.

The five individuals were: Benjamin Mintz, Deputy Chief, Office of the Special Assistant to the Attorney General, Department of Justice; William Oldaker, Administrative Assistant to the Chairman, EEOC; James E. Jones, Jr., Associate Solicitor, Department of Labor; Alfred G. Albert, Deputy Associate Solicitor, Labor

broad goals were established by the committee:

1. Establishment of priorities in enforcement activity;
2. Development of exchange of information;
3. Agreement upon uniform standards for compliance;
4. More effective marshalling of enforcement procedures; and
5. Ongoing operational coordination.⁹⁴⁶

Beginning with the July meeting,⁹⁴⁷ representatives of the agencies agreed to meet on a weekly basis to devise means for accomplishing these goals. Discussions at most of the early meetings were concerned with analyzing several agency contract compliance programs and determining which were priority issues.⁹⁴⁸ In November 1969 a Chairman and Vice Chairman were chosen and more formal procedures were inaugurated.⁹⁴⁹

Department; Robert Hobson, Senior Compliance Officer, OFCC.

⁹⁴⁶ July 8 memorandum, supra note 944. This memorandum referred nine items to the committee for study. They were: (1) referral by EEOC to OFCC for enforcement action under Executive Order 11246 of cases involving Government contractors and subcontractors where EEOC conciliation efforts fail and the case is not referred to Justice for a pattern or practice suit; (2) deferral of cases to OFCC for enforcement when appropriate by Justice; (3) development of procedures under which EEOC would refer cases to Justice at the earliest possible date after completion of investigation; (4) issuance of uniform testing guidelines by OFCC and EEOC; (5) uniform standards for corrective action programs for use of EEOC, OFCC, and Justice; (6) procedures to avoid duplicative and overlapping investigations; (7) jointly sponsored programs for the training of investigators; (8) joint investigations and negotiations by EEOC, OFCC, Justice and other agencies such as FPC and FCC if appropriate; (9) jointly sponsored public hearings.

⁹⁴⁷ A member of the White House staff, Bruce Rabb, Staff Assistant to the President, attended the first few meetings of the committee, but usually did not attend subsequent meetings. Interagency EEO Coordinating Committee Memorandum, supra note 945.

⁹⁴⁸ Interview with Alfred Blumrosen, Consultant to the Assistant Secretary of Labor, Dec. 2, 1969. The priority issues were determined to be the development of a joint testing order for OFCC and EEOC, and the construction of mechanisms to reduce investigative duplication and make maximum use of OFCC's sanction authority.

⁹⁴⁹ Id. The Chairman was Professor Alfred Blumrosen, Consultant to Assistant Secretary of Labor Fletcher. The Vice Chairman was Benjamin Mintz of the Department of Justice. The new Chairman insured that

Between November 1969 and May 1970 the Interagency Staff Coordinating Committee continued to hold regular weekly meetings to discuss various problems of coordination, but no substantial progress was made in resolving them.⁹⁵⁰

On May 20, 1970, however, as a result of the committee's efforts, the OFCC and EEOC announced the signing of a potentially significant memorandum of understanding. The memorandum deals primarily with the problem of investigative coordination and overlap and is aimed at: facilitating the sharing of data; reducing investigative overlap by assigning OFCC complaints to EEOC for investigation; and employing OFCC's enforcement powers against contractors who refuse to conciliate with EEOC.⁹⁵¹ The memorandum also indicates that EEOC and OFCC are to agree on the number of cases which EEOC can refer to OFCC during the 90-day initial phase of the agreement.⁹⁵² The memorandum took effect immediately and was to operate for a 90-day trial period. At the end of that period it was

agendas were fixed for each meeting, minutes kept and discussions remained on point. Prior to the selection of a Chairman, the committee operated on a rather haphazard basis. Id.

⁹⁵⁰ E.g., see Minutes and Notes for Meetings of Interagency Staff Coordinating Committee, Nov. 25, 1969; Dec. 2, 1969; and Jan. 13, 1970.

⁹⁵¹ Memorandum of Understanding Between U.S. Department of Labor, Office of Federal Contract Compliance, and Equal Employment Opportunity Commission, concerning the Processing of Complaints of Employment Discrimination as Between the Two Agencies, May 20, 1970.

The memorandum contemplates OFCC issuing 30-day "show-cause" notices to Federal contractors who do not reach a conciliation agreement with EEOC. The "show-cause" notice gives the contractor 30 days to demonstrate why enforcement proceedings should not be begun against him by OFCC.

It should be noted that the memorandum indicates that OFCC and not the compliance agencies would issue the "show-cause" orders and impose the appropriate sanctions. Although this is merely a continuation of present policy, it is contrary to the intent of the Executive order, which states that the compliance agencies will be primarily responsible for enforcement of its provisions. For a further discussion of this point see sec. II, *supra*.

⁹⁵² Id. The exact number of referrals allowable was not a part of the memorandum, but is to be arrived at by the agencies during the first days of the agreement.

to be reevaluated and appropriate changes made.⁹⁵³

Issuance of the memorandum of understanding represents the Interagency Committee's only significant achievement.⁹⁵⁴ Several reasons contribute to the committee's lack of success. Among these is the fact that individuals representing the three agencies are not at the policymaking level; and the committee has not established deadlines for decisions on each of the issues raised. Thus, coordination is still ragged and is not a priority issue for the member agencies.⁹⁵⁵

In addition, the agencies have traditionally seen themselves as having separate and independent roles, a posture which does not easily lend itself to close coordination. The Justice Department views itself as a litigator, which should not become too closely involved in the activities of agencies it may have to defend in court.⁹⁵⁶ EEOC still operates a complaint-oriented program and OFCC, in the midst of internal reorganization, must take

⁹⁵³ Subsequent to the May 20, 1970 agreement, two additional coordinative actions have been undertaken. First, a set of procedures have been developed by OFCC and EEOC to implement the May 20 agreement. These procedures deal with: information exchange, agency actions prior to an EEOC or OFCC investigation or review, complaints filed with OFCC, and steps to be taken when there is a finding by EEOC that it has reasonable cause to believe that a contractor discriminates in his employment practices. Second, a new memorandum of understanding is being developed which fixes criteria; the roles of OFCC, EEOC, and the Justice Department; and coordination procedures regarding major employment discrimination cases. Representatives from each agency (including the responsible compliance agency) will be appointed to develop a common approach and to oversee the case to its conclusion. Memorandum from Robert R. Hobson, Director, OPO, OFCC to George Travers, Economist, OFCC, Aug. 25, 1970; "Procedures for Implementation of OFCC-EEOC Memorandum of Understanding of May 20, 1970" (Undated); (Draft) Memorandum of Understanding between EEOC and OFCC, "concerning the Processing of Employment discrimination matters of Major Public Concern" (not yet in effect as of Aug. 25, 1970).

⁹⁵⁴ The Committee has done a great deal of work on a joint EEOC-OFCC testing order which is expected to be issued shortly. Mintz interview, *supra* note 926.

⁹⁵⁵ Mintz, Hobson, and Blumrosen interviews, *supra* notes 926, 908, and 948. Interview with Leonard Bierman, Senior Compliance Officer, OFCC, Nov. 27, 1969.

⁹⁵⁶ Mintz interview, *supra* note 926.

into account the wishes and special needs of agencies in planning its enforcement program.

Thus, although some progress has been made in improving the coordinative mechanisms, the goal of a comprehensive Federal equal employment opportunity program is far from being achieved. Representatives of all three agencies have expressed doubt that this can be done under the existing governmental structure.⁹⁵⁷ Indeed, so long as responsibility is divided among three different agencies having different orientations and different priorities, their doubts seem warranted.

To the extent that problems of a coordinative nature persist, the Federal Government's ability to make its pledge of equal job opportunity a reality for all Americans is thereby significantly diminished. (There is need for a rethinking and reorganization of the Federal effort to secure equal employment opportunity.)⁹⁵⁸

VII. SUMMARY

Equal employment opportunity is an unquestioned right of every American, protected by actions of the three branches of the Federal Government. Executive orders require nondiscrimination in employment by the Federal Government itself, and by those who contract with the Federal Government. Judicial decisions have interpreted post-Civil War civil rights laws and the National Labor Relations Act to require nondiscrimination in private employment. And Congress, through Title VII of the Civil Rights Act of 1964, has established as organic law equal employment opportunity in private employment.

Although the legal right to equal employment opportunity is broadly protected, one of the major means of securing it in fact, through enforcement, is frequently lacking. Indeed, the mechanisms established by Federal agencies charged with responsibility for administering

and enforcing fair employment laws have been patently neglected.

Federal Employment

In many respects, the Federal Government, as the largest employer in the Nation, serves as the standard bearer in the employment field for the entire country. History shows that in the past, the Government has been seriously remiss in safeguarding each citizen's right to equal employment opportunity. In recent years, however, a variety of actions has been initiated to improve employment and promotional opportunities for minority groups and eliminate discrimination within the Federal service.

Less than 50 years ago, Federal Government policy sanctioned racial segregation and exclusion in its own employment. Less than a generation ago, that policy changed and some of the more overt manifestations of racial and ethnic prejudice were abolished, although many discriminatory practices persisted. But only within the past decade have solid efforts been made to open opportunities in the Federal service to all persons on an equal basis. Executive orders promulgated in 1961 and 1965 called upon the Civil Service Commission to "supervise and provide leadership" in the conduct of equal employment opportunity programs of all executive departments and agencies. Until recently, however, CSC's role has been characterized by passivity and progress lagged. A November 1967 census of minority group employment in the Federal service, for example, revealed striking inequities. All agencies had disproportionately low minority group representation at middle and upper grade levels. And in some regions of the country, nonwhite employment at all grade levels ran substantially below the proportion of nonwhites within the region.

Taking cognizance of the persisting problems, President Nixon issued Executive Order 11478 in August 1969, which extended and enlarged the policy set forth in previous Executive orders. CSC responded by centralizing, elevating, and otherwise reorganizing its equal employment opportunity program. Internal coordination was facilitated and CSC's effectiveness vis-à-vis other Federal agencies was enhanced.

CSC's revitalized operation has not only con-

⁹⁵⁷ Mintz and Bierman interview, *supra* notes 926 and 955; interview with James Robinson, Acting Director, Plans and Program Staff, EEOC, Oct. 31, 1969.

⁹⁵⁸ For a discussion of the various ways in which the Federal effort to end employment discrimination might be organized, see R. Nathan, *Jobs and Civil Rights* (prepared for the U.S. Commission on Civil Rights by the Brookings Institution) 243-63 (1969).

tinued to encourage a variety of equal employment opportunity activities inaugurated before promulgation of Executive Order 11478 but has also moved vigorously in several new directions.

Efforts to recruit blacks, Spanish-speaking Americans, and members of other minority groups have been intensified.

The testing process has been brought under close scrutiny to eliminate cultural bias and develop examinations which actually assess a person's potential for job performance, rather than measure general intelligence or other abilities of little relevance to job performance.

A variety of innovative programs, designed to recruit, train, and employ thousands of disadvantaged youth has been initiated in recent years.

Efforts to eliminate discrimination in promotion practices were furthered by a revised Federal merit promotion policy in August 1968.

Closely related to promotion policy, has been increased emphasis on upward mobility, the searching out underutilized employees, as part of a Governmentwide program of maximum utilization of skills and training.

All first-line supervisors are now required to take training designed to improve their supervisory abilities and heighten their awareness of equal opportunity problems.

Agencies are being encouraged to make wider use of CSC training and non-Government resources to improve the skills of disadvantaged employees.

In its supervisory role, CSC has increased its attention to the equal employment opportunity aspects of agency programs under periodic review by CSC's Bureau of Inspections. A comprehensive set of guidelines, developed by CSC to help agencies formulate equal opportunity plans of action, was issued in December 1969 emphasizing results and suggesting various affirmative actions. They stop short, however, of requiring specific numerical or percentage goals for minority employment.

Revisions in procedures for processing complaints of discrimination in Federal employment went into effect in July 1969. Utilizing agency counselors, they encourage informal resolution of grievances wherever possible. Although indications are that the number of formal discrimination complaints has declined

in recent months, no evaluation of the new system in terms of the basic goal of eliminating discrimination in Federal employment has been undertaken. Remedies, in cases where allegations of discrimination have been substantiated, have generally been inadequate.

Efforts to identify sources of problems or even to measure the equal employment opportunity status of Federal agencies at any given point in time have been handicapped by lack of adequate data. Addressing itself to some shortcomings in this area, CSC has authorized agencies to institute automated data procedures designed, among other things, to provide current information on a variety of Federal employment practices. The new procedures were installed by a number of Federal agencies in conjunction with the November 1969 census of minority group employment in the Federal Government.

CSC has made greater efforts within the past few years to exercise its leadership role with respect to other Federal agencies, as envisioned by the 1965 and 1969 Executive orders. By such means as an Interagency Advisory Group, Federal Personnel Manual, letters, meetings, and seminars with Federal officials, private groups, and individuals, CSC has sought to disseminate its own policies widely and facilitate communication with Federal agencies as well as private groups trying to improve equal employment opportunity in the Federal Government.

Measures which have been undertaken by CSC in recent years have gone far toward attaining equal opportunity within the concept of a merit system of Federal employment. However, in the context of a society which has for generations systematically discriminated against millions of its citizens and has produced a large class of disadvantaged Americans, even an optimally functioning merit system will inevitably reflect these inequities. Therefore, it is doubtful whether continued efforts to eliminate inequity within the confines of the merit system can be entirely successful. Ultimately, it may well be necessary to specifically shape the Federal effort to attainment of equitable representation of minority groups in all agencies and at every level of Federal employment.

Contract Compliance

A 29-year-old history of unrewarding efforts to eliminate discrimination from the employment practices of Federal contractors lies behind the relative impotence of Executive Order 11246. The failure of this most recent of operative Executive orders on the subject is directly related to inadequate executive leadership by the Office of Federal Contract Compliance, which is charged with responsibility for coordinating and overseeing the entire Federal contract compliance program.

Until lately, OFCC had failed to adopt and implement policies and procedures that would produce vigorous compliance programs in the Federal agencies immediately responsible for contract compliance. Recent actions taken in meeting OFCC's three current priorities—defining the affirmative action requirement of the order, monitoring compliance programs of the agencies, and building a Governmentwide construction compliance program—give promise of leading to a more effective effort. Their implementation, however, lies in the future.

The importance of explaining in detail the meaning of affirmative action to contractors and compliance agencies has been clearly recognized. Earlier this year OFCC took the significant step of expanding its regulations to deal specifically with the nature of the affirmative action requirement. The extent to which these expanded regulations will be implemented by compliance agencies depends upon OFCC capabilities and determination. Until recently, its own activities did not offer encouragement. For example, it was unable to succeed in requiring adequate enforcement of similar affirmative action requirements.

Monitoring of agency Executive order enforcement is a key ingredient in an effective Federal contract compliance program. Establishment of uniform policies and the assurance that those policies are carried out are the chief responsibilities of OFCC. In the past OFCC monitoring has been haphazard—a series of ad hoc efforts that did not appear to have lasting effect. A recent OFCC reorganization, the new development of an industry target selection system, and the redistribution of compliance agency contractor responsibilities, seems to have improved OFCC's monitoring capability but no procedures for

monitoring have been developed. The value of these structural changes is totally dependent upon actions yet to be taken.

After several false starts, OFCC has finally established the firm basis for a Governmentwide construction compliance program and has adopted a strategy for its application. The Philadelphia Plan approach of requiring minority group percentage employment goals for specific construction trades provides the basic standard of construction compliance. OFCC has indicated that it is prepared to impose Philadelphia-type plans in 91 additional cities unless those cities devise plans of their own to increase minority utilization in the construction trades. These community-developed plans, or "hometown solutions", however, have been forthcoming in only a few cities and their viability has not yet been established, nor has provision been made for their enforcement.

Of the 15 departments and agencies assigned compliance responsibility, the Department of Defense (DOD), which, in terms of dollar amount, is responsible for more than half of Federal contracting, is the most important. The Department's performance has been disappointing. For example, in two recent contract compliance matters involving southern textile mills and a large aircraft manufacturer in St. Louis, DOD initially failed to follow its own procedures. Although some changes have been made to prevent recurrence of these failures, the compliance program of the Department still has serious structural defects. In addition, its staff is too small and its compliance review efforts have proved inadequate.

The 14 other agencies responsible for contract compliance in some important industries have failed to assign sufficiently high priority to this responsibility. These agencies have limped along with inadequate staffs and cumbersome administrative structures which have produced a variety of inadequate compliance efforts.

The use of sanctions and the collection of significant racial and ethnic data by OFCC and the compliance agencies are two essentials of a successful contract compliance program that have been missing to date. The use of sanctions is necessary to make the enforcement program credible. Yet no contract has ever been terminated nor any company de-

barred for Executive order violation. Rarely have any hearings been held concerning non-compliance.

The collection of data would permit compliance agencies and OFCC to adequately evaluate their efforts and the total effect of the entire program adequately. Currently, however, few data are collected and what exists are inadequate to inform the agencies of the extent of progress in minority employment or, indeed, whether any progress is being made. Plans for extensive data collection and analysis are only in their initial stages.

Equal Employment Opportunity Commission

At the close of fiscal year 1970, the Equal Employment Opportunity Commission, which has responsibility for administering Title VII of the Civil Rights Act of 1964, will have been in operation for 5 years. It is not much closer to the goal of the elimination of employment discrimination than it was at its inception.

Many factors account for EEOC's inability to substantially reduce employment discrimination. Foremost among them have been lack of enforcement power and grossly inadequate staff and budget resources. Unless Congress rectifies these deficiencies, the Commission will remain what one observer has called it: a "poor, enfeebled thing".

EEOC has also been crippled in its formative years by organizational and personnel problems which have resulted in an absence of continuity and direction at all levels of Commission operation. Particularly damaging have been the inordinately rapid turnover of Chairmen, Commissioners, and key supervisory personnel; long vacancies in major operational posts; an exceedingly high rate of attrition among field compliance personnel; inadequate training programs, especially for investigative and conciliation staff; insufficient coordination among the various central offices and between headquarters and the field; and failure to establish clear lines of direction for supervision of the field and for liaison with other Federal agencies.

The Commission's operations have also been hampered by haphazard programming, which is frequently on an ad hoc basis. Means of making maximum use of the agency's limited

resources have not been devised and methods to measure its overall effectiveness have not been instituted.

As a result, the Commission has assumed a primarily passive role in the implementation of Title VII of the Civil Rights Act of 1964. Priority has been placed on the case-by-case or reactive approach to employment discrimination and emphasis has been placed on processing individual complaints of job bias.

EEOC has not adopted an initiatory posture, either through broader development of enforcement mechanisms (e.g., development of class complaints, assignment of priority to cases involving patterns of discrimination), or greater use of affirmative action programs, (e.g., hearings or technical assistance).

As a consequence of these numerous deleterious factors, both enforcement and affirmative action under Title VI have been retarded. Among the more significant implementation failures are the following:

Complaint processing: the major mechanism relied upon by the Commission to combat job discrimination now takes 2 years to conclude a case and in more than 50 percent of the complaints in which the Commission finds "reasonable cause", it is not able to secure relief for the aggrieved party.

The Commissioner charge has not been utilized to secure compliance in instances of pattern or industrywide discrimination. A private lawsuit under section 706 has never been filed as a result of unsuccessful conciliation of a Commissioner charge.

Despite the increased emphasis placed by EEOC on the 706 suit as a means of implementing Title VII, sufficient legal assistance has been unavailable to charging parties in bringing such actions.

The program to improve operations of State and local antidiscrimination agencies has not resulted in a decrease in the 86 percent of cases that EEOC must process de novo. Nor has the Commission entered into agreements with any State agencies, whereby it waives its right to reassume jurisdiction, in any class of cases.

Finally, the potential effectiveness of public hearings has been greatly diluted by failure to conduct those hearings jointly with an enforcement agency—OFCC, the predominant

interest agency, or the Department of Justice—or follow them up in any meaningful way.

Department of Justice

The Department of Justice, through its litigation function, plays a key role in enforcing Title VII and the Executive order on contract compliance. The Department's impact so far, however, has been limited. The Employment Section of the Civil Rights Division, which carries out this Justice responsibility, is handicapped by its small size.

Its 32 authorized attorney positions are not sufficient to have a significant effect upon discriminatory employment practices. Even if the Employment Section were doubled, however, the widespread reform needed in the employment area cannot realistically be expected through the current practice of piecemeal litigation.

In addition, the Division has limited its activities to cases involving discrimination against Negroes. Prior to June 1970 it had brought no cases in which American Indians, Spanish surnamed Americans, or women are the major victims of employment discrimination. The Division, to date, has sought to bring lawsuits involving different types of businesses, geographic locations, and forms of the discrimination. It has not done so, however, with regard to the victims of discrimination.

Finally, the Department of Justice has not recognized the importance of cooperating with EEOC and OFCC so that its litigation becomes part of a coordinated total Government effort to eliminate employment discrimination. The Division concedes that it can litigate only a handful of the potential employment cases each year and has devoted serious consideration to make the most effective use of its meager resources. It has done this, however, almost entirely within the context of litigation and has accorded low priority to developing a coordinated Government effort.

It is important that the Civil Rights Division give equal attention to defining its role as an element of the entire Federal equal employment opportunity effort. Rather than focusing solely on internal procedures and resources, the Division must analyze the way the power to sue can be most insightfully used

in conjunction with the EEOC's conciliation power and OFCC's sanction of contract termination or debarment. It should attempt to determine the specific circumstances under which each enforcement method is most appropriate and to create ways by which the three agencies can supplement each other's enforcement activities.

Coordination

Despite overlapping legal jurisdiction, EEOC, OFCC (and the 15 contract compliance agencies) and the Department of Justice have not yet begun to coordinate their efforts effectively. Each has independently developed its own goals, policies, and procedures. Until recently, no systematic attempts were made to share data or complaint investigation and compliance review findings. Joint reviews or conciliations have rarely been conducted and, when attempted, have not proved successful examples of coordinated action. Employers occasionally have been reviewed by two or three different Federal agencies and inconsistent demands have been made upon the firms.

As a result, the entire Federal effort to end employment discrimination in the private sector has suffered. This failure of coordination is particularly unfortunate since each of the participating agencies is grossly understaffed for compliance functions.

In July 1969, an Interagency Staff Coordinating Committee was formed to develop mechanisms to cope with these problems. The results of the Committee's weekly deliberations have thus far been disappointing. Although it has issued an agreement which attempts to make maximum use of the investigative findings of EEOC by involving OFCC in the enforcement stage, it has not completed action on any of the other matters referred to it. Among the reasons for the Committee's lack of success are the low priority accorded to coordination by the three agencies involved, the fact that the agencies are not represented at Committee meetings by officials on a policymaking level, and the fact that the Committee operates without deadlines.

Formation of the Committee is salutary, but only as a stopgap measure. Until EEOC, OFCC, and the Department of Justice fully recognize the need for close cooperation and until an ef-

fective procedure is developed to assure that they act in coordination, progress in achieving

the goal of equal employment opportunity will continue to be impeded.

CHAPTER 3

HOUSING

I. INTRODUCTION

Equal housing opportunity, like equal job opportunity, is a broadly protected Federal right but one in which the breadth of coverage has not been matched by results in enforcement.

The Federal guaranty of nondiscrimination began in a limited way when, in 1962, President John F. Kennedy issued Executive Order 11063. Limited to federally assisted housing, the Executive order was followed by congressional action broadening coverage to include most of the Nation's housing, whether provided through Federal assistance or through the ordinary channels of the private housing market. In addition, the Supreme Court of the United States ruled that a Federal statute, originally enacted in 1866, prohibited discrimination on the basis of race with respect to all housing.

A. The Growth of Federal Involvement in Housing

The Federal Government has been heavily involved in housing for more than 35 years. But only within the last decade has it recognized a responsibility to assure equality of housing opportunity to all its citizens.

The Federal Government first evinced its concern with housing during the depression through such measures as creation of the Federal Home Loan Bank System in 1932 and the Home Owner's Loan Corporation in 1933. More significant Federal involvement in housing came through the 1934 National Housing Act, which created the Federal Housing Ad-

ministration (FHA) and its mortgage insurance programs. The act also established the system of insuring accounts in savings and loan associations, whose principal business is home finance.

The principal purposes underlying the Federal Government's early housing policy were the facilitation of credit and the relief of depressed economic conditions. Thus the 1934 National Housing Act was aimed primarily at revitalizing the Nation's credit machinery by stimulating greater activity in the home finance community. In establishing the low-rent public housing program in 1937, Federal housing policy took a somewhat different turn by aiming primarily at the provision of housing for lower-income families. Even here, however, a major purpose also was economic—to relieve unemployment in the construction trades.

In the years that followed, the focus of Federal housing activity changed to one of emphasis on meeting the housing needs of American families. In 1949, the goal of "a decent home and a suitable living environment for every American family" was enunciated as the national housing objective toward which Federal housing policy was to be directed. By 1968, when the landmark Housing and Urban Development Act was passed, the goal of producing housing in volume, particularly for families that could not afford housing provided through the ordinary channels of the marketplace, had become a matter of national concern and major priority.

When the Federal Government first became significantly involved in the housing field, an opportunity was presented to effect salutary changes in the existing discriminatory practices of the private housing and home finance industry. It was an opportunity that was lost.

¹The discussion of the development of Federal policy on housing and civil rights is based on material contained in this Commission's 1961 report on Housing. See 1961 *U.S. Commission on Civil Rights Report, Housing*, ch. 2. [Hereinafter cited as *1961 Commission Report*.]

Early Federal policy in the housing field accepted and even magnified the attitudes of private industry. FHA, for example, not only acquiesced in discriminatory private industry practices, but encouraged them, to the point of recommending a model racially restrictive covenant to insure against what the agency called “inharmonious racial groups”. The Federal Home Loan Bank Board and the Home Owners’ Loan Corporation openly espoused policies favoring racial residential exclusion.

In public housing the Federal Government adopted a different policy—one based on the equitable participation of minorities, not only as tenants, but also in construction and management. But equitable participation was not construed to preclude segregation and the majority of public housing projects produced during the first 25 years of the program’s operation were either all-black or all-white. Until 1962, this was regarded as a matter strictly within the discretion of local public housing authorities. This was so despite the fact that numerous Federal court decisions had made it clear that such segregation was in violation of the U.S. Constitution.² Even in newer programs, such as urban renewal, established in 1949 with the purpose of revitalizing the Nation’s cities, discriminatory housing practices by private redevelopers benefiting from Government subsidies were not deemed a matter in which Government should interfere.

By the early 1960’s, Federal policy had progressed to the point where open occupancy was considered desirable but not obligatory. No agency concerned with housing and urban development had adopted any measure to assure that this policy was carried out in fact. In 1959, it was estimated that less than 2 percent of the new houses provided in the postwar years through FHA mortgage insurance had been available to minorities.³

B. Executive Order on Equal Opportunity in Housing

On November 20, 1962, President Kennedy issued an Executive order on equal opportunity

² See e.g., *Detroit Housing Commission v. Lewis*, 226 F. 2d. 180 (6th Cir. 1955); *Heyward v. Public Housing Administration*, 238 F. 2d. 689 (5th Cir. 1956).

³ 1961 Commission Report, at 63.

in housing,⁴ directing: “all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin.”⁵

Although the order was couched in broad terms, it was, in fact, limited in scope. This was true in at least two senses. First, its command of nondiscrimination by no means affected all housing in which the Federal Government was involved. For example, in the area of home financing, the order was limited to housing “provided in whole or in part by loans . . . insured, guaranteed, or otherwise secured by the credit of the Federal Government. . . .”⁶ Thus housing provided through mortgage insurance by the Federal Housing Administration (FHA) or loan guarantees by the Veterans Administration (VA)—representing some 25 percent of the new housing market and less than 1 percent of the Nation’s entire housing inventory—was made subject to a nondiscrimination requirement. But the great bulk of housing units—those conventionally [non-FHA or VA] financed by mortgage lending institutions whose deposits or accounts are insured by the Federal Government—were excluded from coverage.⁷

Second, the principal content of the order, as set forth in section 101, related almost entirely to housing provided through Federal aid agreements executed after the order’s effective date of November 20, 1962. Thus, existing housing that previously had received Federal assistance and housing that was still receiving such assistance were unaffected by section 101 if the assistance agreement has been entered into before the order was issued. Moreover, housing not yet even built was, in many cases, unaffected by section 101 for the same reason. This was of particular significance in connec-

⁴ Executive Order No. 11063 (1962).

⁵ Sec. 101.

⁶ Sec. 101(a) (iii).

⁷ The institutions involved are commercial and mutual savings banks and savings and loan associations. For a discussion of the relationship of Federal agencies to these institutions see sec. V, *infra*.

tion with the urban renewal and public housing programs because of the long time lag between execution of the agreement for Federal financial assistance and the ultimate construction and occupancy of the housing so aided.⁸ The critical cutoff date for purposes of section 101 of the Executive order, it must be emphasized, was the date on which the financial assistance was agreed to be given, not the date on which the housing was constructed or occupied, nor even the date on which money changed hands.

Housing provided under pre-Executive order Federal aid agreements was covered by section 102 of the order, known popularly as the "good offices" section.⁹ Although it expressly authorized litigation and other appropriate action, as well as good offices, to bring an end to discrimination in pre-order housing, no enforcement action was ever taken. And experience under the Executive order made it clear that the use of "good offices" alone was inadequate to obtain compliance.¹⁰

C. Title VI of the Civil Rights Act of 1964

On July 2, 1964, the Civil Rights Act of 1964, containing Title VI, was enacted by Congress and signed into law. Title VI provides a broad guaranty of nondiscrimination with respect to federally assisted programs. It states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹¹

⁸ For example, in the urban renewal program the lapse of time between the execution of the loan and grant contract and the ultimate completion of the project may be as long as 8 years or more.

⁹ Sec. 102 directs Federal departments and agencies "to use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory practices with respect to residential property and related facilities *heretofore* provided with Federal financial assistance. . . ." (Italic added.)

¹⁰ For a discussion of the comparative ineffectiveness of the use of "good offices," and the legal basis for more forceful action under sec. 102, see Sloane, *One Year's Experience: Current and Potential Impact of the Housing Order*, 32 Geo. Wash. L. Rev. 457 (1964).

¹¹ Sec. 601.

Title VI extended nondiscrimination requirements to many of the urban renewal and public housing units left uncovered by section 101 of the Executive order. Pursuant to regulations implementing Title VI¹², all urban renewal projects that had not yet reached the land disposition stage¹³ by January 4, 1965 (the date when the regulations became effective) were subject to the nondiscrimination requirements of Title VI, regardless of the date on which the financial assistance agreement was executed. Since the time lag between execution of the assistance agreement and disposition of the urban renewal land frequently is 5 years or more, and since the urban renewal program had only begun to have a significant impact in terms of project completion by 1964, Title VI had the effect of subjecting the great bulk of urban renewal activity to the requirement of nondiscrimination.¹⁴

In public housing, all low-rent projects still receiving Federal assistance in the form of annual contributions on January 4, 1965, were made subject to the requirements of Title VI, regardless of the date on which the annual contributions contract was executed. This meant that virtually every public housing project authorized since 1937, when the program was initiated, was subject to the mandatory requirements of Title VI.

The principal programs for which section 102 of the Executive order was still a live issue after Title VI was enacted were those involving assistance solely in the form of insurance or guarantees. Section 602 of Title VI, which is the implementing provision of that law, expressly excludes from coverage, "a contract of insurance or guaranty." This meant, for example, that apartment houses built with the aid of pre-Executive order FHA insurance agreements, but still receiving the benefits of that insurance, were excluded from Title VI

¹² 29 Fed. Reg. 16280 (1964).

¹³ In the urban renewal program land typically is acquired by a local public agency, cleared, and then disposed of to private redevelopers for a fair market price.

¹⁴ For example, by the end of 1962, only 86 projects had been completed, while more than a thousand projects, already under assistance agreements, were in various stages of planning and execution. U.S. Housing and Home Financial Agency, *Annual Report*, 280 (1962).

coverage. It also meant that housing conventionally financed by federally insured mortgage lending institutions continued to be outside the scope of Federal nondiscrimination requirements.¹⁵

D. Title VIII of the Civil Rights Act of 1968

In 1968 Congress acted again, closing both coverage gaps that had existed under the Executive order and under Title VI. On April 11, 1968, Congress passed Title VIII of the Civil Rights Act of 1968, providing: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."¹⁶

The Act provided coverage in phases. The first phase, extending to the end of 1968, provided for coverage identical to that in section 101 of the Executive order on equal opportunity in housing—that is, housing provided under Federal aid agreements entered into after November 20, 1962.¹⁷ The second phase, covering the period January 1, 1969 through December 31, 1969, extended coverage generally to private, nonfederally assisted housing except single-family housing and buildings containing no more than four housing units, one of which is occupied by the owner.¹⁸ A further exception permits religious organizations to sell or rent housing to persons of the same religion and permits private clubs to limit occupancy to their members.¹⁹ The third phase, which went into effect on January 1, 1970, further broadens coverage by limiting the exception of single-family housing to such housing sold or rented without the use of a real estate broker.²⁰ In view of the fact that

¹⁵ Robert F. Kennedy, then Attorney General, in explaining the meaning of the exclusionary language of sec. 602, said:

"Section 602 would not apply to any contracts of insurance or guaranty. Among the kinds of insurance or guaranty which are excluded from section 602 by the quoted language are insurance of bank deposits by the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation." (110 Cong. Rec. 9763 (1964).)

¹⁶ Sec. 801.

¹⁷ Sec. 803(a)(1).

¹⁸ Sec. 803(b).

¹⁹ Sec. 807.

²⁰ Sec. 803(b).

the great majority of single-family housing is sold or rented through a broker, this provision has the effect of bringing most single-family housing within the coverage of Title VIII. Title VIII also expressly prohibits discrimination in financing of housing,²¹ the advertising of housing for sale or rent,²² and the provision of brokerage services.²³ Further, the practice of "blockbusting" is prohibited.²⁴

While under the Executive order on equal opportunity in housing and Title VI of the Civil Rights Act of 1964 only a small fraction of the Nation's housing inventory of some 70 million units was covered, under Title VIII nearly 80 percent is now subject to a Federal nondiscrimination requirement.

If the Executive order and Title VI are weak in coverage, however, their strength is in the sanctions available for enforcement. Both provide for enforcement through the leverage of the substantial assistance provided through Federal housing and urban development programs. Thus, if discrimination persists the "recipients,"²⁵ such as FHA-aided builders, local urban renewal agencies, and local public housing authorities, may be debarred from receiving the benefits of these programs. This is a potentially powerful enforcement weapon.

Under Title VIII, by contrast, while coverage is a strong point, enforcement is weak. In fact, enforcement is limited largely to resort to litigation, either by the person discriminated against or by the Department of Justice in the case of "pattern or practice" lawsuits. In housing, where the need for relief is frequently urgent, the time involved in litigation,

²¹ Sec. 805.

²² Sec. 804(c).

²³ Sec. 806.

²⁴ Sec. 804(e). "Blockbusting" is defined under the statute as: "For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin."

²⁵ The term "recipient" is defined in HUD's Title VI regulations to include: Any State, political subdivision of any State, any public or private agency, institution, organization, or other entity, or any individual, to whom Federal financial assistance is extended, directly or through another recipient, for any program or activity, or who otherwise participates in carrying out such program or activity. 24 C.F.R. 12(f).

as well as the cost, make it a relatively ineffective enforcement mechanism.

The Department of Housing and Urban Development is charged with the principal responsibility for enforcement and administration of the fair housing law, but the only weapons expressly at its command are "informal methods of conference, conciliation, and persuasion".²⁶

The Secretary of Housing and Urban Development also is directed to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title."²⁷ In addition, all other executive departments and agencies are directed to administer their own programs and activities relating to housing in the same manner and also to "cooperate with the Secretary (of Housing and Urban Development) to further such purposes."²⁸ The use made by HUD and other relevant departments and agencies of these two broad directives from Congress is a key determinant of the success of the fair housing law.

E. *Jones v. Mayer*

On June 17, 1968, 2 months after the Federal fair housing law had been enacted, the U.S. Supreme Court, in *Jones v. Mayer and Co.*,²⁹ held that a provision of an 1866 civil rights law "bars all racial discrimination, private as well as public, in the sale or rental of property."³⁰ The statute, which was enacted under the authority of the 13th amendment, says: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Court held that this statute represented a valid exercise of the power of Congress to enforce the 13th amendment, which outlawed slavery, and that it barred all racial discrimination in housing. The Court said: ". . . when racial discrimination herds men into ghettos and makes their ability to buy prop-

erty turn on the color of their skin, then it too is a relic of slavery."³¹

The *Jones* decision rendered all housing, with no exception, open without regard to race, at least as a matter of legal right. Again, however, the means available to secure this right in fact are limited at present to litigation by persons discriminated against.

There is, then, a full and complex array of laws which, taken together, provide broad protection against racial discrimination in housing. While the main enforcement mechanism is litigation, in many cases opportunities are afforded for assuring compliance by means other than this time-consuming and burdensome process. The laws also afford authority for a coordinated Federal effort by all departments and agencies that have programs and activities relating to housing. These would include not only the Department of Housing and Urban Development, but also agencies such as the Veterans Administration, which administers a home loan guaranty program; financial regulatory agencies, which supervise and benefit the great majority of the Nation's mortgage lending institutions; the General Services Administration, which is responsible for determining where and under what conditions most Federal installations shall be located; and the Department of Defense which, through the economic benefits generated by the presence of military installations, can be a strong influence on housing patterns in many communities throughout the Nation. Further, the Department of Justice, through its authority to bring pattern or practice suits, can play a key role. The current and potential role of each of these Federal departments and agencies will be discussed in detail.

II. The Department of Housing and Urban Development

The Department of Housing and Urban Development (HUD) is the key Federal agency in the effort to end housing discrimination and to secure an open housing market in fact as well as in legal theory. Congress, in addition to giving HUD principal fair housing responsibility, has placed in it responsibility for administering the great majority of federally as-

²⁶ Sec. 810(a).

²⁷ Sec. 808(e)(5).

²⁸ Sec. 808(d).

²⁹ 392 U.S. 409 (1968).

³⁰ *Id.*, at 413.

³¹ *Id.*, at 442.

sisted housing programs, including programs aimed at meeting the housing needs of lower-income families, a disproportionate number of whom are minority group members.

To carry out the variety of civil rights responsibilities of the Department, Congress has provided HUD with an additional Assistant Secretary.³² HUD is the only Federal department or agency apart from the Department of Justice whose chief civil rights officer is at this level in the agency hierarchy. This means that HUD's civil rights chief is of the same rank as those who administer programs and can participate on an equal footing in discussions with the secretary concerning key agency policy.

Among the responsibilities of the Assistant Secretary for Equal Opportunity are the following: Title VIII of the Civil Rights Act of 1968; Title VI of the Civil Rights Act of 1964; Executive Order 11063 (equal opportunity in housing); Executive Orders 11246 and 11375 (nondiscrimination in employment under Government contracts); and Executive Order 11478 (nondiscrimination in Federal employment).

In addition to these specific duties, the Assistant Secretary is charged with the following overall civil rights responsibility within the Department:

"[He] serves as the principal advisor to the Secretary on all matters relating to equal opportunity in housing, facilities, employment, business opportunity, and all civil rights and other matters relating to equal opportunity. He also is responsible for assuring that all Department policies, procedures, issuances, and activities effect and promote equal opportunity for all, and he exercises a special affirmative duty in this regard under Title VIII.³³

Since enactment of Title VIII in April 1968, two persons have occupied the position of Assistant Secretary for Equal Opportunity: Walter B. Lewis, who was appointed in November 1968 and served until February 1969, and Samuel J. Simmons, the incumbent.³⁴

³² Sec. 808(b).

³³ HUD Handbook No. 1160.1A, Organizations: "Assistant Secretary for Equal Opportunity," September 1969, at 1. [Hereinafter referred to as "Handbook 1160.1A".]

³⁴ Mr. Lewis previously had been Director of the Federal Programs Division of the U.S. Commission on Civil Rights. Mr. Simmons previously had been Director of the Field Services Division of the U.S. Commission on Civil Rights.

A. Organization and Staffing

To carry out the various civil rights responsibilities under the jurisdiction of the Assistant Secretary for Equal Opportunity, Congress appropriated \$6 million for fiscal year 1970.³⁵ Of this amount, more than \$5.5 million is allocated for the salaries of the 313 equal opportunity staff positions, of which 224 are devoted to fair housing activities.³⁶ Other staff members are occupied with such matters as in-house employment, contract compliance, promoting minority business entrepreneurship, and general administration. For fiscal year 1971, the President requested \$11.3 million, a substantial increase in appropriations for HUD's equal opportunity program. This would have permitted an increase in the number of positions to 407, of which 276 would have been to administer fair housing. Congress however, approved only \$8 million, \$2 million more than the previous year's appropriation, but \$3.3 million less than the President had requested.³⁷

I. CENTRAL OFFICE

As currently organized, the central office for equal opportunity consists of the immediate office of the Assistant Secretary and seven offices under his direction.³⁸ For fiscal year 1970, the Assistant Secretary's immediate office had 11 authorized positions including that of the Deputy Assistant Secretary held by Malcom Peabody, Jr.

The other seven offices under Mr. Simmon's direction were as follows:

Departmental Equal Opportunity Office
—seven positions

³⁵ The President requested \$10.5 million, nearly twice the amount Congress actually appropriated.

³⁶ Statement of Samuel J. Simmons, Assistant Secretary for Equal Opportunity, at a meeting with the members of the Committee on Compliance and Enforcement, Leadership Conference on Civil Rights, Apr. 7, 1970. As of Apr. 30, 1970, 246 of the 313 positions actually were filled. Letter from George Romney, Secretary of Housing and Urban Development, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, attachment A, Aug. 10, 1970.

³⁷ The President vetoed the fiscal year 1971 HUD appropriations bill and as of Aug. 15, 1970, the bill was still pending.

³⁸ See Organization Chart, Assistant Secretary for Equal Opportunity, August 1969.

Program Planning and Evaluation Office
—three positions

Administrative Office—nine positions

Education and Training Office—eight positions

Office of Housing Opportunity—19 positions

Office of Assisted Programs—22 positions

Office of Contract Compliance and Employment Opportunity—13 positions.³⁸

Of these seven offices, two—the Office of Housing Opportunity and the Office of Assisted Programs—have the main responsibility for carrying out programs to assure fair housing. The Office of Housing Opportunity is responsible for administering Title VIII. Its director, a GS-17, currently is Kenneth F. Holbert. The Office of Assisted Programs is responsible for insuring that the programs and activities of the Department operate affirmatively to further the goals of equal opportunity.⁴⁰ Its director, a GS-16, is Lloyd Davis.

2. REGIONAL OFFICES

HUD currently maintains six regional offices in the continental United States.⁴¹ Each regional office has an Assistant Regional Administrator for Equal Opportunity, who advises the Regional Administrator on equal opportunity matters and is responsible to him for administering and enforcing civil rights laws within the Department's jurisdiction.⁴² Just as the status of the Department's chief civil rights officer in the central office has been elevated from Director of Equal Opportunity to Assistant Secretary for Equal Opportunity, so the status of the chief civil rights officer in the field has been similarly raised from Assistant to the Regional Administrator to Assistant Regional Administrator.

The equal opportunity organization in the regional offices is as follows: A total of 30 positions is provided for the immediate staffs of the assistant regional administrators and their deputies. In addition, each of the Assistant Regional Administrators for Equal Oppor-

³⁸ HUD, Equal Opportunity, Summary of Estimated Employment (undated).

³⁹ Handbook 1160.1A, at 17.

⁴⁰ In accordance with a Presidential directive, these will be expanded to 10 regional offices later in 1970.

⁴¹ HUD Transmittal Notice 1170.1 CHG 8, par. 170, Aug. 28, 1969.

tunity maintains the following units within their offices:

Housing Opportunity Division—95 positions.

Assisted Programs Division—38 positions.

Contract Compliance and Employment Opportunity Division—50 positions.

There also are positions for eight equal opportunity representatives who act as the ARA's representatives in advising and assisting local groups and individuals.⁴³ HUD is planning to establish "area offices" in 23 cities later this year. These area offices will be manned by about 70 equal opportunity staff members,⁴⁴ in addition to program staff, who will have decisionmaking authority, leaving the regional offices with responsibility for postaudit reviews.⁴⁵

As in the case of most other departments and agencies, the Assistant Secretary does not maintain line authority over the regional equal opportunity staff.⁴⁶ The ARA is not appointed by the Assistant Secretary but by the Regional Administrator; the Assistant Secretary has only the right of veto. Further, the ARA has the power to select his own staff subject to the approval of the Regional Administrator. The Assistant Secretary has no official role in this selection process. In addition, the ARA reports formally to the Regional Administrator, not to the Assistant Secretary for Equal Opportunity. It should be made clear, however, that the status of the Assistant Secretary for Equal Opportunity is identical to program Assistant Secretaries in this regard. None maintains line responsibility over regional staff.⁴⁷

⁴³ Id., at par. 172. See Organization Chart, Regional Office, Equal Opportunity Office, August 1969. According to HUD, these positions will not be filled. Romney letter, supra note 36.

⁴⁴ There will be approximately 50 professionals and 20 clericals. Romney letter, supra note 36.

⁴⁵ Statement of Samuel J. Simmons, supra note 36. See also Romney letter, supra note 36.

⁴⁶ This is in contrast to the procedure of the Department of Health, Education, and Welfare, where the Director of the Office for Civil Rights holds the power to select all civil rights staff members, both in the field and in the central office. These staff members also report directly to him.

⁴⁷ Romney letter, supra note 36.

B. Administration and Enforcement of Federal Fair Housing Law

While organization and staffing reveal something about an agency's capacity to carry out assigned civil rights responsibilities, closer examination is necessary to determine the effectiveness of the agency's program. The relevant inquiries include what overall goals the agency has set, what enforcement priorities it has established to make most effective use of available staff and mechanisms, what use it makes of its own assistance programs to promote maximum compliance with civil rights laws, and what its activities are in areas other than enforcement to promote full compliance. In the case of HUD, answers to these questions suggest that effective administration and enforcement of the various civil rights laws relating to fair housing have not yet been achieved: that HUD has barely begun to use the variety of available enforcement techniques and strategies at its command.

1. GOALS AND POLICY

One major question that arises under Title VIII is the definition of "fair housing". Under a narrow definition of the term, HUD would attempt only to provide redress for individual homeseekers who have been discriminated against. Under a broader definition, HUD might establish as a goal opening of access to housing to minority groups throughout metropolitan areas.

If a narrow definition were adopted, HUD's major effort in implementing the law would focus on the resolution of complaints. Under the broader definition, a much wider range of enforcement activities could be undertaken.

As late as February 1970, nearly 2 years after the enactment of Title VIII, HUD's Director of the Office of Housing Opportunity conceded that this basic question had not been explicitly faced and answered.⁴⁸ Six months later, HUD informed the Commission that: "The Department has established as its goal the creation of open communities which will provide an opportunity for individuals to live within a reasonable distance of their job and

daily activities by increasing housing options for low-income and minority families."⁴⁹

An examination of the activities HUD has undertaken to implement Title VIII and the way it has carried them out suggests that as of June 1970 a narrower approach was being followed.⁵⁰

2. TITLE VIII ACTIVITIES

Principal responsibility within the Office of the Assistant Secretary for Equal Opportunity for the administration and enforcement of Title VIII lies with the Office of Housing Opportunity. As noted earlier, this office consists of 19 professional and clerical staff members in Washington and 95 staff positions in the various regional offices throughout the country. In view of the variety of responsibilities imposed by Title VIII, a nationwide staff of less than 120 is clearly inadequate. Given the paucity of staff resources a serious question arises, as to whether they have been used as well as they might have been.

The enforcement priorities that have been developed have placed primary emphasis on the processing of individual complaints.⁵¹ This, in the Commission's view, makes it unlikely that significant changes in the policies and practices of the housing industry can be brought about in the reasonably foreseeable future or that the growing trend toward racial residential segregation can be reversed.

a. Complaints

Section 810 of the Civil Rights Act of 1969 assigns HUD the responsibility for processing Title VIII complaints. The only authority given to HUD to eliminate or correct discriminatory housing practices, however, is "by informal methods of conference, conciliation, and persuasion."⁵² HUD has no authority to issue cease and desist orders, nor is it empowered to institute litigation against parties it has found to discriminate.⁵³

⁴⁸ Romney letter, *supra* note 36.

⁴⁹ HUD contends that it is following a "broader definition." *Id.*

⁵¹ As HUD told the Commission, "When the Office of Housing Opportunity was established * * * it was determined that one of the top priorities had to be development of a system for processing individual complaints." *Id.*

⁵² Sec. 810(a).

⁵³ Pursuant to sec. 813(a), lawsuits may be brought by the Attorney General in cases involving a pattern or

⁴⁸ Interview with Kenneth Holbert, Director, Office of Housing Opportunity, HUD, Feb. 18, 1970.

During the calendar year 1969, a total of 979 complaints under Title VIII were received.⁵⁴ According to HUD, as of April 1970, about 270 had been dismissed without investigation and about 100 of the 176 cases the Secretary determined to resolve had been successfully conciliated.⁵⁵ The rest were in various stages of processing.⁵⁶ One major reason for the lack of greater success in resolving complaints under Title VIII undoubtedly is the absence of strong enforcement authority in HUD. In the event that "conference, conciliation, and persuasion" do not succeed, HUD has four additional courses of action available to it: It may recommend to the Attorney General that he bring a lawsuit, refer the matter to the Attorney General for any other appropriate action, institute proceedings under Executive Order 11063 or Title VI of the Civil Rights Act of 1964, where they apply, or inform other Federal agencies which have an interest in the subject matter of the complaint.⁵⁷

It also is noteworthy that the number of complaints that have been received in the 2 years since Title VIII was passed is not impressive—fewer than 1,500.⁵⁸ One reason for

practice of resistance, or when a denial of the rights assured under Title VIII raises an issue of general public importance."

⁵⁴ In all, a total of 1,321 complaints have been received by HUD from passage of Title VIII through April 1970. Romney letter, *supra* note 36.

⁵⁵ Statement by Samuel J. Simmons, *supra* note 36. See also Romney letter, *supra* note 36.

⁵⁶ According to HUD, conciliation agreements are aimed at much more than individual relief for the complainant. They also involve institutional relief or affirmative action by the respondent to overcome the effects of his past discrimination. In addition, reporting requirements and provisions for compliance reviews are a part of almost all conciliation agreements. The result, HUD states, is that the processing of a complaint is not necessarily a "narrow" remedy but can be a means for opening an entire facility or development, or a whole complex of apartments managed by a specific firm or real estate broker to minorities protected by the law. Romney letter, *supra* note 36.

⁵⁷ 24 C.F.R. 71.36.

⁵⁸ EEOC, by contrast, received more than 8,000 employment complaints during its first year of operation. The disparity cannot be attributed to differences in complaint procedures since EEOC's are as cumbersome as HUD's. One reason may be the subject matter involved. That is, persons seeking housing generally have an immediate need and cannot afford the delays involved in the time-consuming complaint process.

this may be the cumbersome procedures that must be followed under the statute. In housing, where the need for relief is often immediate, complex and time-consuming complaint procedures are likely to stifle complaints. Pursuant to section 810(b), complaints must be verified. Under this provision HUD requires notarization.⁵⁹ Following receipt of a complaint, HUD has 30 days in which to investigate the case and give written notice to the complainant whether or not the Department intends to resolve it.⁶⁰ Within that period, a copy of the complaint is forwarded to the party who is alleged to have discriminated. He has 20 days in which to answer.⁶¹ The answer must also be verified.⁶²

Further, where a State or local fair housing law provides rights and remedies which are "substantially equivalent" to those under the Federal fair housing law, HUD is obligated to notify the appropriate State or local agency of the complaint and to take no further action if the State or local agency begins proceedings within 30 days.⁶³ If HUD determines that under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require it, the Department may proceed on its own.⁶⁴

A complainant also has the right to bring private court action if voluntary compliance has not been obtained.⁶⁵ Further, a complainant may bypass the administrative process entirely and institute litigation in the first instance.⁶⁶ The statute directs the courts, however, to "continue" such cases "if the court believes that the conciliation efforts of the Secretary or

⁵⁹ According to HUD, "The 'requirement' of notarization was adopted because of the interpretation of the Department of Justice. There is no requirement that a complaint be sworn to at the time of filing. The use of a notary public is not necessary. Most complaints are in letter form and are verified under oath subsequently by HUD investigators. In addition, the majority of complainants have filed their own complaints without the assistance of a lawyer." Romney letter, *supra* note 36.

⁶⁰ 24 C.F.R. 71.21(a).

⁶¹ 24 C.F.R. 71.17.

⁶² Sec. 810(b).

⁶³ Sec. 810(c).

⁶⁴ Sec. 810(c).

⁶⁵ Sec. 810(d).

⁶⁶ Sec. 812.

a State or local agency are likely to result in satisfactory settlement.”⁶⁷

Most complaint activities are carried out by the six regional HUD offices, not by the central office.⁶⁸ Thus, the Assistant Regional Administrator for Equal Opportunity and his staff handle the complaint process of acknowledgment, investigation, and conciliation. If a complaint involves possible violations of Title VI or of Executive Order 11063, action to bring about compliance is theoretically to be handled by the Assisted Programs Division in the regional office. But in fact, Title VIII staff handles these complaints as well, in the same manner as complaints involving nonfederally assisted housing.⁶⁹

(1) Referral to the Attorney General

In cases where it is determined that complaints cannot be conciliated, one of the courses of action available to HUD is referral to the Attorney General for litigation or other appropriate action. The decision on whether particular complaints should be referred to the Attorney General is made by the Assistant Secretary for Equal Opportunity with the concurrence of the Office of General Counsel. As of April 1970 HUD had referred 33 cases to the Attorney General. According to Mr. Simmons, 22 such referrals have resulted in lawsuits.⁷⁰

(2) Referral to State and Local Agencies

As noted earlier, where a State or local fair housing law provides “substantially equivalent” rights and remedies to those under the Federal fair housing law, HUD is required to refer complaints to the appropriate State or local agency. Key questions arise concerning the meaning of the term “substantially equivalent” and the standards by which it shall be

determined. Shortly after Title VIII was enacted, Robert C. Weaver, then Secretary of HUD, stated that the question of whether States or localities satisfy the “substantially equivalent” criterion would be answered on the basis of an evaluation of their performance, not by their statutes alone.⁷¹

In the more than 2 years since Title VIII was enacted, HUD has not developed standards with which to determine the adequacy of performance by State or local agencies. Nonetheless, as of March 1970 HUD was referring complaints to 21 of the 26 States that have fair housing laws.⁷² An examination of their statutes has been the basis for determining if these States provide “substantially equivalent” rights and remedies. No effort has yet been made to determine whether their performance is satisfactory. According to Mr. Simmons, recognition of these State laws as “substantially equivalent” is temporary. Plans have been made for more intensive examination of their operations, including such matters as budgeting, staff resources, and training.⁷³ Of the 979 Title VIII complaints received by HUD during 1969, 74 were referred to these States. Of the hundreds of cities and the District of Columbia that maintain fair housing laws, however, HUD has not referred any complaints because the Department’s Office of General Counsel has not yet completed its analysis of local ordinances.⁷⁴

⁷¹ Statement of Robert C. Weaver, Secretary, Department of Housing and Urban Development, at a meeting with representatives of private civil rights organizations, April 1968.

⁷² The States to which HUD refers complaints are as follows: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Wisconsin. In addition, referral to the States of Idaho, Iowa, Oregon, and Washington, is under study. HUD has decided not to refer complaints to Maine because it does not have an enforcement agency.

⁷³ Statement of Samuel J. Simmons, Assistant Secretary for Equal Opportunity, at a meeting with the members of the Committee on Compliance and Enforcement, Leadership Conference on Civil Rights, Apr. 7, 1970. As of August 1970, performance standards for determining equivalency were in the process of clearance. Romney letter, supra note 36.

⁷⁴ Romney letter, supra note 36.

⁶⁷ Sec. 812.

⁶⁸ The central office provides backup assistance in particularly complex cases. Romney letter, supra note 36.

⁶⁹ HUD explains this on the ground that these cases have generally involved FHA-insured housing on the private market. Id. Further, HUD states that if conciliation failed, the matter would be referred to the Assisted Programs Division for possible enforcement action. Id.

⁷⁰ Statement of Samuel J. Simmons, supra note 36. The 22 referrals are counted as three by the Department of Justice in that one case involved 16 defendants, another involved five defendants, and the third involved one defendant.

b. Noncomplaint Activities

While processing of complaints is only one of HUD's responsibilities under the fair housing law, the Office of Housing Opportunity has devoted itself to this aspect of its work almost to the exclusion of all others.

(1) Section 808(d)

Section 808(d) of the fair housing law provides:

"All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title, and shall cooperate with the Secretary to further such purposes.

This provision offers HUD an opportunity to exercise a leadership position in bringing the resources of other agencies to bear on the effort to achieve an open housing market. During the first year following enactment of Title VIII, little was done to give meaning to this broad congressional mandate. Over recent months, however, HUD has begun to make significant efforts in two areas.

In May 1968, President Lyndon B. Johnson requested all Federal departments and agencies to submit reports on their current and proposed activities to further the purposes of Title VIII. More than 72 agencies did so.⁷⁵ A summary of the reports was prepared by HUD, as well as tentative recommendations for ways in which current and proposed activities could be strengthened. The HUD report, however, remained in HUD files and was shared neither with the President nor with any of the departments and agencies whose activities were discussed.

In June 1968 HUD convened a meeting of representatives from departments and agencies which administer programs having a major impact on housing. According to HUD, the discussions at this meeting together with the information provided in the reports from departments and agencies pointed up the need to develop uniform Government policy in a number of areas common to various Federal programs. These areas were: mortgage lending by institutions that are federally benefited and

supervised; site selection for Federal installations, housing programs for Federal employees; relocation of persons displaced by Government action; site selection and other problems related to Federal programs for the financing or provision of housing; and housing concerns as a part of the Federal contract compliance program.⁷⁶

Despite HUD's recognition of need, little was done to develop the uniform Government policy that was called for. More than a year after the June 1968 meeting was held, HUD informed the Commission that the establishment of interagency committees to develop specific actions to implement Title VIII was still in the planning stage.⁷⁷

⁷⁵ *Id.*

⁷⁶ HUD reported, however, that it had worked informally with individual agencies on particular problems, such as with the Department of Defense regarding discrimination in off-base housing, the Department of Agriculture's Soil Conservation Service concerning the submission of assurances of nondiscrimination by private developers aided under that agency's program. Interview with Kenneth Holbert, Director, Office of Housing Opportunity, HUD, Feb. 18, 1970. Six months later, HUD reported the following:

"Meetings have been held with the appropriate off-base housing officers of the Department of Defense regarding problems in discrimination and processing complaints in off-base housing and also with DOD officials in charge of off-base housing programs at various bases throughout the country by regional offices. This has resulted in the expediting and the consolidation of efforts in handling such complaints. A series of meetings have been held with the Department of Agriculture (not informal) with officials of Farmers Home Administration, Soil Conservation Services, Office of their General Counsel, and the Assistant to the Secretary for Equal Opportunity at Agriculture. At the interview, representatives of the Commission were informed that Agriculture had agreed to revise their regulations in Farmers Home Administration to conform with FHA's policies regarding one and two family exemptions and racial restrictive covenants. In addition, significant progress was made in a discussion with officials of Agriculture's Soil Conservation Service by bringing to their attention the relationship of their services in soil testing in the development of watersheds, etc. to private developers who have developed lake-type communities with concurrent membership in country clubs and recreational facilities. The operation of this type of development to exclude minorities has been particularly difficult to reach because the overall contracts, while couched in words which can operate in an exclusionary manner, do not specifically use race, color, creed, or religion. The fact that these developments could be made subject to Title VI requirements in and of itself

⁷⁵ Letter from Samuel J. Simmons, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, to Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 29, 1969.

During recent months, HUD has accelerated its efforts under section 808(d). Beginning in the fall of 1968, the Department held a series of meetings with Federal financial regulatory agencies, the Department of Justice, and the Commission on Civil Rights, to develop procedures for implementing the prohibitions contained in Title VIII against discrimination in the financing of housing.⁷⁸ Among other efforts, HUD has urged the Federal financial regulatory agencies to require the lending institutions they supervise to maintain records by race and ethnic origin of all loan applicants.

Establishment of uniform site selection criteria for the location of Federal installations is another major area in which HUD has attempted to assume a leadership position among relevant Federal departments and agencies. Beginning in March 1970 it convened a series of meetings attended by the major departments and agencies having installations in the Washington Metropolitan Area, the General Services Administration, [the agency responsible for acquiring space for most Federal departments and agencies], and this Commission.⁷⁹

indicates significant progress because over the years prior to Title VIII when they openly advertised for white only, the Department could not reach them because financing was generally private and not through any of HUD's programs. In addition, HUD has been working with VA to develop a coordinated approach to mutual problems in the implementation of Title VIII." Romney letter, supra note 36.

⁷⁸ Sec. 805. The Federal financial regulatory agencies are the Federal Home Loan Bank Board, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. In June 1968, this Commission forwarded a memorandum to each of these agencies, as well as to HUD and Justice, calling attention to the fact that under the fair housing law and the Financial Institutions Supervisory Act of 1966, the Federal financial regulatory agencies had a statutory obligation to take action to assure against discrimination by the institutions they supervised. See discussion of Federal financial regulatory agencies, sec. V, infra.

⁷⁹ This Commission, in its recent report, *Federal Installations and Equal Housing Opportunity* (1970), recommended an Executive order by the President to assure that before Federal installations locate in any community, especially a suburban community, the community demonstrate that there is a sufficient supply of lower-income housing to meet the current and projected needs of the agency's employees and that the community in fact be open to all without discrimination. For a

Although there are many other areas requiring coordinated Federal policy with HUD leadership to which the Department has not yet addressed itself,⁸⁰ the actions that it has begun to take to carry out its mandate under section 808(d) show promise.

(2) Section 808(e)(5)

Section 808(e)(5) provides as follows:

The Secretary of Housing and Urban Development shall administer the programs and activities relating to housing and urban development in a manner affirmative to further the policy of this title.

If HUD has begun to take affirmative action to prod other departments and agencies to administer their programs and activities to further the purposes of Title VIII, it has been slow to do the same with respect to its own programs. For example, while urging the Federal financial regulatory agencies to require mortgage lending institutions to collect racial and ethnic data, HUD has shown reluctance to collect such data with respect to its own programs.

In August 1969, the Veterans' Administration proposed to collect data on racial and ethnic participation in a number of its programs, including the loan guaranty program which is similar in function to the Federal Housing Administration mortgage insurance program. This Commission, in response to a request from the Bureau of the Budget for comments on the Veterans Administration's proposal, strongly supported it and urged that HUD adopt similar procedures, particularly with respect to FHA mortgage insurance programs.⁸¹ The Commission pointed out that HUD had urged the Federal financial regulatory agencies to require collection of racial and ethnic data and it observed that for HUD to refuse to collect these data with respect to its own programs would place the Department in the position of urging a higher standard on other agencies than it was willing to impose upon itself.⁸²

It was not until April 1970 that the decision

fuller discussion of the issue of site selection for Federal installations, see section VI, infra.

⁸⁰ For example, uniform policy on relocation of families displaced by Government action.

⁸¹ Letter from Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, to Lawrence Bloomberg, Bureau of the Budget, Nov. 28, 1969.

⁸² Id.

was made to collect racial and ethnic data for all HUD programs.⁸³ The actual collection of these data, however, has not yet been undertaken.⁸⁴ As of August 1970 Mr. Simmons was chairing a task force within HUD to work out problems of implementation.

It will also be recalled that HUD has convened meetings aimed at establishing uniform site selection criteria governing the location of Federal installations which would promote the purposes of Title VIII. As of June 1970, while these meetings were proceeding, HUD had not yet developed uniform site selection criteria governing its own programs. Such criteria were in force only with respect to the public housing program. Other lower-income housing programs, administered by the Federal Housing Administration, such as rent supplements, section 235 (home ownership for lower-income families), section 236 (rental housing for lower-income families), and section 221(d)(3) (rental housing for moderate-income families), operated with no site selection criteria relating to equal opportunity.⁸⁵

In fact, HUD claims very little in the way of positive accomplishment in carrying out its mandate under section 808(e)(5). In August 1969 in response to a Commission questionnaire concerning changes in program operation pursuant to this statutory provision, Mr. Simmons replied as follows:

A series of Equal Opportunity task forces *will soon* commence an examination of each HUD program to determine what additional Equal Opportunity requirements should be adopted in the light of Title VIII.⁸⁶ (Italic added.)

In April 1970, the examination of HUD programs had begun, but the Assistant Secretary was still discussing program changes in terms of future steps.⁸⁷

⁸³ HUD already collects racial data concerning public housing, FHA multifamily housing, and persons being relocated by HUD-assisted programs.

⁸⁴ According to HUD, the first priority will be designing a system to collect data on FHA 203, 235, 236, and rent supplement programs. Romney letter, supra note 36.

⁸⁵ A HUD task force currently is at work on this problem. In addition, a joint committee which includes the Department of Justice, is considering problems of site selection and tenant selection.

⁸⁶ Letter from Samuel J. Simmons, supra note 75.

⁸⁷ Statement of Samuel J. Simmons, supra note 73. According to the assistant secretary, standards will be

C. Other Activities Under Title VIII

Title VIII authorizes HUD to engage in a number of nonenforcement activities, which nonetheless can further the purposes of Title VIII. For example, HUD is directed to make studies on the nature and extent of discriminatory housing practices in representative communities.⁸⁸ Because of limited funds, the Office of Equal Opportunity has undertaken no studies of its own. Funds from the Department's research and technology program, however, have been used to finance three private studies along this line.⁸⁹

HUD is also directed to publish and disseminate reports, recommendations, and information derived from its studies.⁹⁰ The only publications HUD has issued are three pamphlets explaining the rights protected by Title VIII. Although HUD intends to do so, it has not yet translated these publications or its complaint form into Spanish.

Under section 808(e)(3), HUD is directed to cooperate with and give technical assistance to public and private agencies which are conducting programs aimed at preventing housing discrimination. According to Mr. Simmons, HUD has conducted training programs for Federal Executive Boards.⁹¹ There is little indication, however, of a systematic effort to carry out the technical assistance directive.⁹²

adopted by September 1970, concerning the following subject areas: Site selection, tenant selection, citizen participation, relocation, new towns, and planning.

⁸⁸ Sec. 808(e)(1).

⁸⁹ Holbert interview, supra note 48. One study is being conducted by the Washington Center for Metropolitan Studies, in the Washington Metropolitan Area; another by the Leadership Council for Metropolitan Open Communities, in the Chicago area; and the third by the National Committee Against Discrimination in Housing, in the Bay Area of California. Id.

⁹⁰ Sec. 808(e)(2).

⁹¹ Interview with Samuel J. Simmons, Assistant Secretary for Equal Opportunity, Mar. 6, 1970.

⁹² This is true unless the term technical assistance is interpreted very broadly. For example, according to HUD, the Atlanta regional office maintains a speakers bureau which sends staff members to speak to private housing groups. Further, the Atlanta and Fort Worth offices both have discussed housing problems with private attorneys. Interview with Mrs. Laura Spencer, Deputy Director, Office of Housing Opportunity, Department of Housing and Urban Development, Feb. 18, 1970. In addition, HUD informed the Commission that data prepared for its fiscal year 1971 budget show

In fact, HUD, which previously maintained a technical assistance office under the Assistant Secretary for Equal Opportunity in Washington and a technical assistance division in each regional office, has abolished such offices as formal equal opportunity units.⁹³ Regarding cooperation with private groups, HUD informed the Commission in February 1970 that when such groups request assistance on individual projects HUD offers its advice.⁹⁴ HUD later informed the Commission that it works with these groups in planning programs and supplies HUD resources.⁹⁵

HUD also is directed to cooperate with and give technical assistance to the Community Relations Service to eliminate discriminatory housing practices.⁹⁶ As of March 1970 according to one HUD official, no formal contact

a total of 480 conferences, speeches, and joint programs with State and local fair housing commissions, as well as approximately the same number of contacts with private housing groups and private agencies and about 250 other affirmative action contacts. There were also 50 press conferences and television appearances. Romney letter, *supra* note 36. The extent to which these conferences, speeches, joint programs, and contacts represent technical assistance is not clear.

⁹³ The function of technical assistance has been transferred to the program units. Romney letter, *supra* note 36.

⁹⁴ Spencer interview, *supra* note 92.

⁹⁵ Romney letter, *supra* note 36. One recent project, according to HUD, was a fair housing conference held in Toledo, Ohio. The HUD Chicago regional office and its central office supplied the technical assistance and speakers for the program. Continued help is being furnished to this group in implementing the program adopted at the meeting. In addition, two staff members spent two days in Greensboro, N.C., at the invitation of the Greensboro Chamber of Commerce to participate in various activities of the Chamber concerned with the elimination of discrimination in housing and the development of a community approach to the problem. The Housing Opportunity Division has assisted the NAACP Housing Office in planning and conducting conferences and seminars relating to problems in housing. Speakers were supplied to the "Commitment to Build" meetings sponsored by the National Association of Home Builders, National Association of Real Estate Brokers, and other private groups at 10 meetings across the country in March and April 1970. Most regions have had discussions with and presentations for civil rights attorneys. The New York Office has conducted research on informing the Cuban population of its rights under Title VIII and has prepared a report indicating some solutions to this problem. *Id.*

⁹⁶ Sec. 808(e)(4).

between the two agencies had yet been initiated.⁹⁷

Among other nonenforcement activities of HUD is an advertising campaign undertaken by the Department early in 1969 and extending through the calendar year. This campaign included spot announcements on television, tape and radio broadcasts, and newspaper announcements of the Title VIII program and the individual's rights available under the title. A contract was let in June 1970 for a new advertising campaign based on the experience of the previous campaign.⁹⁸ In addition, in June 1969, HUD conducted training sessions for its personnel concerning investigations, conciliation, and case reporting as well as an overall presentation of the law and history of discrimination. The discussions were led by HUD personnel as well as representatives of the Department of Justice, the EEOC, and experts from the private sector. These training sessions were followed by training at the regional offices. Training activities also have begun with State civil rights commissions.⁹⁹

D. Activities Under Title VI and Executive Order 11063

In addition to the requirements of Title VIII, all HUD programs are subject either to the requirements of Title VI of the Civil Rights Act of 1964 or Executive Order 11063. Thus, FHA housing programs which provide assistance solely in the form of mortgage insurance, while excluded from coverage under Title VI, are subject to the requirements of the Executive order.¹⁰⁰ Other FHA programs, however,

⁹⁷ Spencer interview, *supra* note 92. According to Mrs. Spencer there has been some cooperation in the field between HUD and CRS. For example, CRS was present at conciliation sessions in one case in the Fort Worth region. HUD later advised this Commission that formal contact had in fact been initiated prior to March 1970, but that no meeting had yet been held because CRS was studying its responsibilities under Title VIII and wished to complete the study prior to formal conversations. Romney letter, *supra* note 36.

⁹⁸ Romney letter, *supra* note 36.

⁹⁹ *Id.*

¹⁰⁰ Section 602 of Title VI excludes from coverage "a contract of insurance or guaranty." The principal programs excluded from Title VI but included under the Executive order are its single-family, market-price

which provide assistance both through mortgage insurance and subsidies in the form of assistance payments—the lower-income housing programs administered by FHA—are included within the scope of Title VI by virtue of the subsidies provided.¹⁰¹ Other major HUD programs which provide assistance through loans and grants, such as urban renewal, public housing, model cities, and various metropolitan development programs (e.g., grants for water and sewer facilities and planning), also are covered by Title VI.¹⁰²

Both Title VI and the Executive order, through the leverage of financial assistance provided under the covered programs, can be of substantial help in overcoming the enforcement weaknesses of Title VIII. Further, the programs themselves necessarily have significant impact on the development of housing patterns throughout the country. Depending upon how they are administered and the standards governing their operation, they either contribute to eliminating patterns of racial residential segregation or to maintaining and intensifying segregated housing patterns and perpetuating a restricted housing market.

Many of these programs have been in operation for a number of years—in some cases for decades. For example, FHA programs were established in 1934, low-rent public housing in 1937, and urban renewal in 1949. The past civil rights experience under many of these programs has been unfortunate. The opportunities for utilizing them as a force for a unified society have not been taken. As previously noted, discrimination and exclusion of minority group members have been common.

For example, FHA mortgage insurance programs, through enlightened policies at a time when the agency was a major force in the private housing market, could have done much to promote open housing. Instead, FHA, in its early years, openly encouraged racial separation in housing, going so far as to recommend a model racially restrictive covenant to be used

housing program (sec. 203) and its multifamily, market-rent housing program (sec. 207).

¹⁰¹ These programs are rent supplements, section 235, section 236, and FHA 221(d)(3) (below-market-interest rate).

¹⁰² For a complete list of HUD programs covered by Title VI, see HUD Title VI regulations, 24 C.F.R. 1, Appendix A.

on property receiving the benefits of FHA mortgage insurance. Later it acquiesced willingly to the continuation of housing discrimination by builders receiving its aid.¹⁰³ Thus, FHA was a major factor in the development of the segregated housing patterns that exist today.

Over the last decade, FHA has been charged with the responsibility for administering housing programs for lower-income families, as well as for those that serve the more affluent. In the operation of these programs, decisions on site selection and tenant selection are of critical importance in determining whether they contribute to reversing the trend toward racial residential segregation or to perpetuating it.

Public housing, which for more than three decades has been the major program serving low-income families, is also of prime importance in determining patterns of racial residence. Here, too, standards and decisions on site selection and tenant selection are keys to determining the range of housing choice for minority group families. Until recent years, these decisions almost invariably had the effect of intensifying racial and poverty concentrations in central cities.

In urban renewal, which typically involves clearance of designated areas and reuse of the cleared land for purposes of revitalizing cities, the important decisions are: which areas will be selected for clearance; what reuse will be made of the cleared land; and what opportunities will be made available to families who are displaced? In the past, these decisions frequently have worked to the detriment of minority group families. In most cases, it is their homes that have been selected for razing, the new housing provided on the cleared land has often been beyond their means, and inadequate attention has been paid to provision of opportunities to relocate satisfactorily. It is with considerable justification that minority group members have viewed urban renewal with distrust and bitterness.¹⁰⁴

¹⁰³ For a description of the history of FHA policy, see *1961 Commission Report*, ch. 2.

¹⁰⁴ HUD concedes that the effect of urban renewal on minorities has obviously been harmful in the past. According to HUD, some past projects appear to have aimed at nothing more than Negro removal. Others have swept through minority neighborhoods because

In each of these important programs the key decisions are made by parties other than HUD. In FHA programs, for example, private builders and developers determine where the housing will be located and who will buy or rent it. Further, private mortgage lending institutions decide which housing they will finance and which loan applicants they will approve. In public housing, the decisions on site selection and tenant selection are made by local housing authorities which are State agencies. In urban renewal, responsibility for selecting areas for clearance and for assuring adequate relocation for displaced families rests with local urban renewal authorities [local public agencies], which also are State agencies. Local urban renewal agencies also determine the reuse of the urban renewal land after clearance. Once the land is disposed of to private redevelopers, it is they who determine who will occupy the housing provided on it.

Although the key decisions are made by parties other than HUD, the Department is not without authority to assure that these decisions serve to further and not to thwart the purposes of fair housing. HUD has responsibility under Title VIII, Title VI, and the Executive order, as well as under the statutes governing its substantive programs, to establish standards and criteria that will promote equal opportunity, and to undertake the kind of compliance reviews that will assure adherence to these standards by the parties with whom it deals (private builders and mortgage lending institutions, local housing authorities, and local urban renewal authorities).

1. OFFICE OF ASSISTED PROGRAMS

Responsibility within the Office of the Assistant Secretary for Equal Opportunity for enforcement of regulations and other requirements under Title VI and the Executive order rests with the Office of Assisted Programs.

the residents were poor and powerless and because local officials either did not care or were unable to perceive the magnitude of the changes being forced on disadvantaged citizens. Romney letter, *supra* note 36. HUD states, however, that new legislation and HUD regulations have attempted to minimize that harmful aspects of urban renewal on project area residents. Requirements for low- and moderate-income housing in residential projects, new fair housing legislation, cash payments to homeowners, and the like, have improved the lot of persons displaced. *Id.*

There is some question, however, as to the extent of Mr. Simmons' authority. According to the HUD organization, he is responsible for administering the Department's responsibilities under Title VI and the Executive order.¹⁰⁵ Under the Department's Title VI regulations, however, these responsibilities rest with the program administrators, not the Assistant Secretary for Equal Opportunity.¹⁰⁶ Indeed, Mr. Simmons confirmed to the Commission that he is not responsible for effecting compliance with Title VI.¹⁰⁷ In at least one important instance responsibility apparently is exercised neither by the Assistant Secretary for Equal Opportunity nor by the Program Assistant Secretary. William B. Ross, then Acting Assistant Secretary for Mortgage Credit, informed the Commission in August 1969 that compliance reviews are the responsibility of the Office of the Assistant Secretary for Equal Opportunity.¹⁰⁸ According to the HUD Title VI regulations, however, compliance reviews are supposed to be the responsibility of the program administrator which, in the case of FHA programs, is the Assistant Secretary for Mortgage Credit.¹⁰⁹ Mr. Simmons confirmed this and added that the Program Assistant Secretaries were not conducting compliance reviews.¹¹⁰ The confusion apparently is caused by the fact that the original HUD Title VI regulations, which assigned responsibility to Program Assistant Secretaries, have not been revised since the position of Assistant Secretary for Equal Opportunity was created. As of April 1970, the regulations were in the process of revision to transfer authority from program assistant secretaries to the Secretary himself, who, in turn, will delegate the respon-

¹⁰⁵ HUD Handbook No. 1160.1A, "Organizations: Assistant Secretary of Equal Opportunity", September 1969, at 1.

¹⁰⁶ 24 C.F.R. 1.2(c).

¹⁰⁷ Letter from Samuel J. Simmons, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, to Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 22, 1969.

¹⁰⁸ Letter from William B. Ross, Acting Assistant Secretary-FHA Commissioner, Department of Housing and Urban Development, to Howard A. Glickstein, Staff Director designate, U.S. Commission on Civil Rights, Aug. 18, 1969.

¹⁰⁹ 24 C.F.R. 1.7(a).

¹¹⁰ Letter from Samuel J. Simmons, *supra* note 107.

sibility to the Assistant Secretary for Equal Opportunity.¹¹¹

The Office of Assisted Programs was established in September 1969, but the position of Director remained unfilled until February 1970, when Lloyd Davis, the incumbent, was appointed.¹¹² The current organization of this Office, pursuant to a May 1970 reorganization, is as follows: the Office of Assisted Programs is served by a Director, a Coordinator for Central Office Operations, a Coordinator for Field Operations and two major divisions providing specific staff work.

The Central Office Coordinator offers general assistance and counsel to program staffs, including bringing program staff into contact with appropriate equal opportunity staff for such technical assistance as may be required from time to time.

The Field Operations Coordinator provides liaison with regional and area office equal opportunity staff, including handling problems of coordination and evaluating performance.

Two major divisions provide specific staff work: a division of complaints and compliance is responsible for all complaints filed pursuant to Title VI and for those relating to employment of minority group individuals

filed in connection with the administrative and/or contractual nondiscrimination requirements of HUD assisted programs. This division is also responsible for establishing procedures and meeting the training requirements for investigators.

A division of program analysis and standards is responsible for analyzing the extent to which existing HUD programs provide for equitable participation and meet the needs of minority groups and individuals; for identifying the constraints in Department regulations, requirements, and administrative organization which prevent HUD programs from meeting those needs; and for recommending specific changes in Department regulations and requirements.¹¹³

2. RELATIONS WITH PROGRAM STAFF

A key to effective enforcement of Title VI and the Executive order is the establishment of a close and cooperative relationship between the Office of Assisted Programs staff and the staff of the respective program Assistant Secretaries. Traditionally tension has existed in most Federal departments and agencies between those with program responsibilities and those with civil rights responsibilities. This has also been true at HUD.

HUD program personnel have been primarily interested in the production of housing and have tended to view civil rights considerations as an unwanted obstacle, rather than as an inherent and significant part of their responsibilities. For example, Federal public housing officials permitted local housing authorities to assign tenants on a racially segregated basis for many years after the courts had made it clear that such assignment was in violation of the Constitution.

The enactment of laws specifically prohibiting housing discrimination does not automatically change the perspective of program officials, nor necessarily make them sensitive to civil rights issues. For example, at the Commission's 1967 hearing in the bay area of California, 4½ years after Executive Order 11063 had been issued, the Deputy Director of the San Francisco Insuring Office of FHA expressed opposition to requiring FHA-aided builders to advertise that they were equal

¹¹¹ Simmons statement, supra note 73.

¹¹² HUD explains the history of responsibility for equal opportunity in assisted programs as follows:

"Prior to organization of the Office of the Assistant Secretary for Equal Opportunity in November 1968 much of the work now done by the Office of Assisted Programs was done by special assistants to program Assistant Secretaries. Some work was also done by a Special Assistant to the Secretary and an Equal Opportunity Standards and Regulations branch (which worked mainly on contract compliance matters). The latter two offices were combined into an Office of Equal Opportunity in January, 1968.

"The organization order for the Assistant Secretary for Equal Opportunity (Circular 1160.1, November 1968) provided for Directors for Equal Opportunity who were to be directly responsible to the Assistant Secretary. Several of the Directors had previously worked on the staffs of the program Assistant Secretaries.

"Because of the number of Directors reporting directly to the Assistant Secretary and the difficulties of coordinating their activities, it was decided to reshape their function into an Office of Assisted Programs headed by a Director. Accordingly, a revised organization order (which also made other changes) was approved by the Secretary in September 1969." Romney letter, supra note 36.

¹¹³ Romney letter, supra note 36.

opportunity developers on the ground that it "would tend to cause us [FHA] to lose a position in the market."¹¹⁴ The establishment of a close working relationship between civil rights and program staff is of crucial importance if program staff members are to gain an understanding of their civil rights responsibilities.

Unfortunately, little has been done to establish this relationship in actuality. For example, as of April 1970, the Program Assistant Secretaries had not yet taken the basic step of appointing liaison personnel to work with the staff of the Office of Assisted Programs.¹¹⁵

3. TRAINING

Compliance with civil rights requirements depends, in large part, on how well staff members assigned to carry out this responsibility do their job. Adequate staff training is essential for this purpose. Program personnel, for whom civil rights often is a new responsibility, must develop awareness and sensitivity regarding a different set of issues from the ones with which they traditionally have dealt. By the same token, civil rights personnel must develop program knowledge and sophistication to be in a position to monitor compliance in the many and often complex HUD programs.

As of March 1970 no systematic training program had been established at HUD for

¹¹⁴ Hearing before the U.S. Commission on Civil Rights, held in San Francisco, Calif., May 1-3, 1967 and Oakland, Calif., May 4-6, 1967, at 182.

¹¹⁵ HUD points out that previously, several employees of the Office of Assisted Programs served as equal opportunity advisers to Program Assistant Secretaries. In HUD's view, it is not desirable to revert to that kind of structure because it tends to focus all civil rights responsibility on one person rather than strengthen the idea that the responsibility rests with all operating officials. HUD states that the Office of Assisted Programs has frequent contact with almost every division head administering a HUD program. Such contact may concern how to handle a particular project where equal opportunity concerns are developing, improving present policies to make them more relevant to the needs of minorities, or corrective action indicated on the basis of a complaint or compliance review. A number of task forces reviewing equal opportunity standards have program staff, both central office and regional, participating in the deliberations with equal opportunity personnel. Romney letter, supra note 36.

Title VI compliance.¹¹⁶ Other than in a few isolated instances where the assistant regional administrator initiated a training program, field personnel dealing with civil rights complaints have not had adequate training to perform their functions with maximum effectiveness. Moreover, program personnel who administer programs having far-reaching civil rights implications have had no training to alert them to potential violations.

This omission has had the effect of perpetuating the orientation of program personnel toward housing production with civil rights responsibilities being viewed largely as an impediment. Civil rights personnel continue to be insulated from the Department's mainstream—its program activities. The lack of systematic training also has serious implications in terms of how effective a compliance review system can be.

4. COMPLIANCE STANDARDS AND PROCEDURES

Other important issues concern the standards by which compliance in the operation of HUD programs is to be judged, as well as the procedures by which compliance can be assured. Some of these issues have been resolved satisfactorily. Many more, however, remained unresolved.

a. Removal of Exemption of One- and Two-Family Owner Occupied Homes

Under regulations originally issued pursuant to Executive Order 11063, FHA exempted from coverage one- and two-family owner occupied homes. Following the enactment of Title VIII and the Supreme Court's decision in *Jones v. Mayer and Co.*, barring all racial discrimination in the sale or rental of housing, FHA reconsidered this exemption and in June 1969 removed it. Under current requirements, all FHA-aided homeowners must certify that they will not discriminate in the future sale or rental of the housing. This certification

¹¹⁶ One training session was held for regional and central office personnel in June 1969. HUD acknowledges the insufficiency of Title VI training and states that the training of equal opportunity and program personnel can be of only limited value in the absence of objective standards, many of which are in the process of being developed. Training sessions have been scheduled for the fall of 1970 for equal opportunity staff. Romney letter, supra note 36.

represents a contractual agreement which can be relied on for purposes of judicial enforcement.¹¹⁷

b. Racially Restrictive Covenants

After the Supreme Court's decision in *Shelley v. Kraemer*¹¹⁸ that racially restrictive covenants could not be judicially enforced, FHA ruled that it would not insure mortgages on property carrying such covenants filed after February 15, 1950. Following issuance of Executive Order 11063, FHA revised this requirement to permit the insurance of mortgages on property carrying such covenants if the effect would be to promote the purposes of the Executive order. The change was to permit the insurance of mortgages where the applicant was a member of a group excluded by the covenant. More recently, FHA has amended this requirement still further. It now will insure mortgages without regard to the existence of a racially restrictive covenant, but requires the mortgagor to certify that he recognizes the illegality and voidness of the covenant and will not be bound by it.

c. Site Selection

Site selection, particularly with respect to housing for lower-income families, a disproportionately high number of whom are minority group members, is an issue of critical importance. When sites are selected in ghetto areas, racial and economic separation may be perpetuated and even intensified. When sites are selected outside ghetto areas, the effect is to broaden the range of housing choice for lower-income minority group families. The public housing program for several years has maintained site selection criteria aimed at assuring a balance of sites both within and outside ghetto areas.¹¹⁹ Other lower-income housing programs, which are administered by the Federal Housing Administration (Rent Supplements, section 235, section 236 and FHA 221(d)(3) (below market interest rate)), however, do not carry such site selection criteria. Thus, despite the fact that in some cases these programs serve precisely the same groups of people, the maintenance of site selection criteria depended until recently upon the particular program under which the housing

was provided and the particular agency within HUD that administered the program.

In late 1969, pursuant to a HUD reorganization, effective February 1970,¹²⁰ all housing production was placed within the responsibility of the Assistant Secretary for Housing Production and Mortgage Credit-FHA Commissioner¹²¹ and all housing management was placed within the responsibility of the Assistant Secretary for Renewal and Housing Management.¹²² Thus, FHA, which previously had declined to adopt site selection criteria covering its lower-income housing programs, now also administers the public housing program which carries such criteria. As of April 1970, a HUD task force, with Department of Justice participation, was considering the adoption of site selection criteria which will apply uniformly to all lower-income housing programs.¹²³

d. Tenant Selection

Assignments of tenants, particularly to lower-income housing projects, is another issue of great civil rights importance. As noted above, until issuance of Executive Order 11063 in November 1962, the then Public Housing Administration, despite court decisions to the contrary, permitted local housing authorities to assign tenants in a racially segregated manner. Following the Executive order, the Public Housing Administration permitted use of a freedom-of-choice plan, which proved as ineffective in integrating housing projects as it had proved ineffective in integrating schools.¹²⁴ More recently, the Housing Assist-

¹²⁰ Handbook 1100.3, Organization of the Department of Housing and Urban Development, November 1969.

¹²¹ Handbook 1125.3 Organization: Assistant Secretary for Housing Production and Mortgage Credit-FHA Commissioner, February 1970.

¹²² Handbook 1135.1A, Organization: Assistant Secretary for Renewal and Housing Management, February 1970.

¹²³ Statement of Samuel J. Simmons, *supra* note 73.

¹²⁴ HUD, itself, provided perhaps the best explanation of why so-called freedom-of-choice plans do not work.

"Under these [freedom-of-choice] plans, the entire burden for expressing a choice of project or location was upon the individual applicants, who were to make this choice in many communities in which segregated housing patterns have been traditional. In such situations, for various reasons such as the mores of the community, fear of reprisals, types of neighborhoods, inducement by local authority staff—whether by subtle suggestion, manipulation, persuasion, or otherwise—or

¹¹⁷ Spencer interview, *supra* note 92.

¹¹⁸ 334 U.S. 1 (1948).

¹¹⁹ Low-Rent Housing Manual, sec. 205.1, August 1968.

ance Administration (successor to the Public Housing Administration) has required a form of "first-come, first-served" plan.¹²⁵ Some local housing authorities have objected to this requirement as being too inflexible.¹²⁶ As of August 1970, a HUD Assistant Secretaries Task Force, with Department of Justice participation, was in the process of revising the existing public housing tenant selection and assignment policies.¹²⁷ No other lower-income housing program administered by HUD carries tenant selection requirements other than formal nondiscrimination assurances.¹²⁸

e. Front-end Review

If compliance with civil rights requirements is to be assured, reviews often must be conducted before the funds are committed and the housing is constructed. Compliance with site

other factors or combinations, such 'freedom-of-choice' plans, in their operation, did not provide applicants with actual freedom of access to, or full availability of, housing in all projects and locations. The existence of a segregated pattern of occupancy was in itself a major obstacle to true freedom of choice, since few applicants have the courage to make a choice by which they would be the first to change the pattern. Even without inducement of local authority staff, the plans tended to perpetuate patterns of racial segregation and consequent separate treatment and other forms of discrimination prohibited in sec. 1.4(b) of the Department regulations." HUD, "Statement of the Basis for LRHM sec. 102.1, exh. 2, 'requirements for administration of low-rent housing programs under Title VI of the Civil Rights Act of 1964.'" July 1967.

¹²⁵ Under existing HUD requirements, local housing authorities may establish either (1) a plan under which the applicant must accept the vacancy offered or be moved to last place on the eligibility list, or (2) a plan providing for offers in as many as three different locations before the applicant is subject to being dropped to the bottom of the list. Further, whichever plan is used, the locations having the highest number of vacancies must be offered first. HUD, "Low-Rent Housing Manual, sec. 102.1, exh. 2, 'requirements for administration of low-rent housing programs under Title VI of the Civil Rights Act of 1964,' July 1967."

¹²⁶ See letter from Keith A. Ables, president, Texas Housing Association, to Hon. Elego De La Garza, Oct. 3, 1967.

¹²⁷ Romney letter, *supra* note 36. According to HUD, the revision will help affirmatively further the goals of title VIII. *Id.*

¹²⁸ The Assistant Secretaries Task Force also is developing new standards of tenant and purchaser selection in FHA assisted housing and affirmative marketing requirements to help achieve the goals of Title VI and Title VIII. *Id.*

selection requirements, for example, can be assured only before the housing is built. Further, in many cases, the only effective remedy may be refusal to provide financial assistance. Once the funds are committed, there may be no recourse to this remedy.

The issue at HUD concerning these front-end reviews has not been whether they should be conducted but rather who should conduct them—equal opportunity specialists or program personnel. Mr. Simmons has been reluctant to have his staff undertake this responsibility, principally because he does not feel he has sufficient manpower to carry out the responsibility effectively.¹²⁹ Moreover, he believes that his office can be more helpful by assigning staff to comprehensive compliance reviews and auditing of the front-end reviews conducted by program staff pursuant to specific equal opportunity standards after program staff has been trained in their application. As of June 1970, however, while standards were in the process of development, they had not yet been established nor was program staff receiving training. In August 1970, HUD informed the Commission that the decision had been made that responsibility for front-end review would lie with program personnel.¹³⁰ The role of equal opportunity in the review process for site and tenant selection was still under study.¹³¹

f. Complaint Procedures

No formal complaint procedures have been adopted by HUD for the investigation of complaints under Title VI or the Executive order.¹³² Although such complaints also generally fall within the scope of Title VIII and can be processed through the complaint procedures established under that law, there are distinct advantages to having separate procedures for Title VI and the Executive order. One is that the Title VIII procedures are more concerned with resolving individual complaints than with effecting widespread changes in housing patterns or in industry policies and practices.

¹²⁹ Interview with Samuel J. Simmons, Assistant Secretary for Equal Opportunity, HUD, Mar. 6, 1970.

¹³⁰ Romney letter, *supra* note 36.

¹³¹ *Id.*

¹³² Informal procedures, however, long have been in effect for investigations under the Executive order. See 24 C.F.R. sec. 200.340-200.355.

Under Title VI, by contrast, large-scale, institutional changes can be brought about through the vehicle of major Federal programs that affect entire communities, such as Urban Renewal and Public Housing. In addition, the power to withhold funds, available under Title VI and the Executive order, provides compliance leverage not available under Title VIII, where HUD's enforcement authority is limited to "conference, conciliation, and persuasion."

In March 1970, Mr. Simmons informed Commission personnel that Equal Opportunity staff was in the process of drafting procedures covering Title VI investigations.¹³³ As of June 1970, the procedures had not yet been issued. According to the Assistant Secretary, under existing Title VI regulations his authority extends only to the conduct of the initial fact finding investigation. Responsibility beyond that point rests with the appropriate Program Assistant Secretary.¹³⁴ Further, unless complaints concerning programs specifically allege racial discrimination, they are handled entirely by program officials and not referred to the Office of Equal Opportunity.¹³⁵ Beyond the question of jurisdiction, there is indication of long delays in conducting investigations. In the Chicago region, for example, of the 18 complaints still open as of February 1970, nine had been received 10 or more months earlier. In only one of the nine cases had the investigation been completed.¹³⁶

g. Sanctions for Noncompliance

Under both Executive Order 11063 and Title VI, strong sanctions, in the form of debarment from participation in HUD programs, are

¹³³ Interview with Samuel J. Simmons, *supra* note 129.

¹³⁴ Letter from Samuel J. Simmons, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, to Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 22, 1969.

¹³⁵ Interview with Lawrence Pearl, Special Assistant to the Assistant Secretary for Equal Opportunity, Feb. 19, 1970.

¹³⁶ Delays, according to HUD have resulted from equal opportunity staff shortages. HUD expects that delays will be lessened by the development of investigative guidelines and training programs for equal opportunity staff, implementation of an effective management information system, and the availability of area office equal opportunity staff to assist in complaint investigations. Romney letter, *supra* note 36.

available to assure compliance. Under the Executive order, for example, FHA may place on its ineligibility list builders or apartment house owners who violate the nondiscrimination requirements of the order. Under Title VI, recipients of HUD loans and grants, such as local public housing authorities and urban renewal agencies, may be debarred from participation in these programs for discriminatory practices. The sanction of debarment, however, rarely has been used.¹³⁷

Under the Executive order, of the 195 complaints of discrimination received by FHA between November 20, 1962 and November 1, 1968, evidence of discrimination was found in 86 cases.¹³⁸ In only 45 of the cases did the complainant actually acquire the house or rental unit.¹³⁹ In 18 cases, in which the builder or apartment house owner refused to correct the violation and make the unit available to the complainant, he was placed on the ineligible list. All but six ultimately were reinstated.¹⁴⁰

To be eligible for further participation in FHA programs, respondents found to have practiced discrimination are required to correct the original violation, if possible, and give assurance of intent to abide by the Executive order in the future. Since February 1967, respondents found in violation also have been required to establish an affirmative program that would give assurance that discrimination would not be practiced in the future. According to FHA, this affirmative program may include evidence of a number of sales or rentals to minority group members, of advertising on an open occupancy basis, and of intensive instruction to their sales force on the policy of nondiscrimination.¹⁴¹ However, in at least one city which the Commission visited,

¹³⁷ Interview with Lawrence Pearl, *supra* note 135. The HUD task forces reviewing equal opportunity standards also are studying procedures to impose sanctions more effectively. Romney letter, *supra* note 37.

¹³⁸ Letter from William B. Ross, Acting Assistant Secretary-FHA Commissioner, Department of Housing and Urban Development, to Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights, June 12, 1969.

¹³⁹ *Id.*

¹⁴⁰ *Id.* Romney letter, *supra* note 36.

¹⁴¹ Letter from William B. Ross, *supra* note 138.

St. Louis, it was found that an affirmative program had not been established.¹⁴²

Under Title VI, the sanction of debarment also is available. The only instances which HUD pointed to in which recipients have been debarred have involved cases in which local public housing authorities have failed to submit acceptable tenant selection and assignment plans.¹⁴³ As of February 1970 no debarment proceedings had taken place with respect to discriminatory practices in violation of Title VI.¹⁴⁴

h. Compliance Reviews and Reports

As noted earlier, there is confusion at HUD in determining who has responsibility for conducting Title VI compliance reviews. Mr. Simmons confirmed that, despite the fact that under HUD's organization he is responsible for administering Title VI, the Title VI regulations give the various Program Assistant Secretaries responsibility for conducting compliance reviews, adding that "they have not been conducting compliance reviews."¹⁴⁵

Equal Opportunity staff has conducted some compliance reviews, including 271 onsite investigations, more than two-thirds of which have involved low-rent public housing.¹⁴⁶ In addition, 330 compliance reviews have been conducted through reviews of applications,¹⁴⁷ contracts, or plans for aid. Altogether, 80 violations were revealed during the period November 8, 1968-August 7, 1969, for the most part most involving tenant selection and assignment to low-rent public housing units and employment by local housing authorities.¹⁴⁸

Other than in the public housing programs,

where occupancy data by race are collected, no compliance reports are required of recipients. Neither Mr. Simmons nor the program Assistant Secretaries believe it is within their province to require such reports. Once the amended Title VI regulations are issued, pursuant to which Simmons will be delegated responsibility for administering Title VI requirements, he will presumably exercise this responsibility. According to Simmons, compliance review activities will then be intensified. Later in 1970 he plans to conduct 154 compliance reviews with respect to particular programs and 26 citywide compliance reviews.¹⁴⁹

Also according to Mr. Simmons, when HUD's revised Title VI regulations are issued, his office will have full responsibility for compliance reviews, except for tenant selection. This will remain the responsibility of the program Assistant Secretaries.¹⁵⁰

i. Data Collection

The only HUD program for which racial or ethnic data currently are collected is the low-rent public housing program, which gathers data on occupancy by race.¹⁵¹ In the past, however, these data were not used either by the Housing Assistance Administration or the Equal Opportunity Office to evaluate the civil rights compliance status of the various local housing authorities.

FHA, which has assisted millions of American families to become homeowners and which collects detailed data on the characteristics of these families, such as age, family income, and family size, never has systematically

¹⁴² Hearing before the U.S. Commission on Civil Rights, St. Louis, Mo., Jan. 14-17, 1970, at 143-146 (unpublished transcript).

¹⁴³ Interview with Lawrence Pearl, *supra* note 135. Approximately 90 local public housing authorities have been debarred on this basis. In addition, the Dallas, Tex. Housing Authority has been suspended because of a pending suit by the Department of Justice. Nonetheless, public housing was approved in Dallas under the "Turnkey III" program, which involves construction by private builders and subsequent sale to local public housing authorities. Selection of tenants is by an entity other than the local housing authority.

¹⁴⁴ *Id.*

¹⁴⁵ Letter from Samuel J. Simmons, *supra* note 134.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Statement of Samuel J. Simmons, Assistant Secretary of Equal Opportunity, at a meeting with the members of the Committee on Compliance and Enforcement, Leadership Conference on Civil Rights, Apr. 7, 1970.

¹⁵⁰ *Id.* HUD later reported that Equal Opportunity will have full responsibility for all compliance reviews without exception. In addition, all standards for tenant selection will be subject to concurrence by equal opportunity staff. Further, equal opportunity staff will retain the right to examine (routinely or at random) the selection plans of local authorities and to determine whether they are, in fact, complying with their stated plans. Romney letter, *supra* note 36.

¹⁵¹ FHA started to collect racial data on multifamily housing occupancy in 1968. According to HUD, however, the reliability of these data is highly suspect. Romney letter, *supra* note 36.

sought to collect racial or ethnic data. In 1959, it was estimated that less than 2 percent of the FHA-assisted homes built since 1946 had been available to minorities.¹⁵²

In 1968, FHA conducted a one-time survey of the racial and ethnic occupancy of its insured subdivisions. The survey covered subdivision housing provided between the end of 1962 (following issuance of Executive Order 11063) and 1967. FHA found that only 3.5 percent of the housing had been sold to Negroes, 0.2 percent to American Indians, 2.0 percent to orientals, and 3.1 percent to Spanish surnamed Americans. In some communities the percentage of minority group purchasers was substantially lower than the national averages. In St. Louis, for example, fewer than 1 percent of the houses had been purchased by black families.¹⁵³ Moreover, 4,800 of the 8,500 reporting subdivisions in the Nation were all-white and 300 all-black—the latter containing 70 percent of the black purchasers.

Despite this strong indication of a lack of compliance, FHA continued to decline to collect racial and ethnic data on a systematic basis. In June 1969, the agency informed the Commission that it had no plans to repeat the survey.¹⁵⁴

In April 1970, however, Secretary Romney decided that HUD would begin collecting racial and ethnic data for all its programs.

The Assistant Secretary, Mr. Simmons, has been made chairman of a departmental task force to develop the means of carrying out the Secretary's directive.

III. DEPARTMENT OF JUSTICE

The Department of Justice plays a key role in the enforcement of Title VIII. While HUD is limited to methods of conference, conciliation, and persuasion in implementing the fair housing law, the Department of Justice may institute lawsuits in instances where a pattern or practice of discrimination exists or where the issue is of general public importance.¹⁵⁵ Thus, the Department of Justice is the single

Federal agency expressly provided with enforcement powers under Title VIII. Although the Department suffers from limitations of resources available to carry out its responsibilities, it has made strategic and effective use of those resources in enforcing the law.

A. Staffing and Organization

Responsibility within the Department of Justice for enforcing Title VIII lies with the housing section of the Civil Rights Division. Its Chief is Frank Schwelb and his staff consists of 13 attorneys and two research analysts. For workload purposes, the section has divided the country into geographical areas and the attorneys are assigned to work in various cities within each area.¹⁵⁶

B. Priorities

In light of the small number of attorneys available to the housing section, it has been essential to establish priorities so that their efforts can have maximum impact. Three broad priorities have been established: to focus on eliminating housing discrimination in metropolitan areas with large concentrations of black residents; develop case law under Title VIII and under section 1982 of title 42 of the U.S. Code;¹⁵⁷ and support the enforcement programs of other Federal agencies, especially HUD and the Department of Defense.¹⁵⁸

In 1968, the Civil Rights Division, preparing for enforcement of Title VIII when its second phase became effective on January 1, 1969, investigated more than 200 allegations of housing discrimination and began developing investigative and litigative techniques under the title. U.S. attorneys were informed

¹⁵⁶ In addition, the various U.S. attorney offices provide assistance by referring Title VIII cases to the Department.

¹⁵⁷ This is the section of the 1866 civil rights law relied upon in *Jones v. Mayer and Co.*, 392 U.S. 409 (1968).

¹⁵⁸ Civil Rights Division program memorandum for fiscal year 1969. Other matters given priority are cases involving large real estate companies and cases involving alleged restriction on the rights of minorities by the exercise of the zoning power. Letter from Jerris Leonard, Assistant Attorney General, Civil Rights Division, Department of Justice, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 25, 1970 [hereinafter cited as Justice Letter].

¹⁵² 1961 Commission Report, at 63.

¹⁵³ U.S. Commission on Civil Rights, staff report, *Housing in St. Louis* 1970.

¹⁵⁴ Ross letter, supra note 138.

¹⁵⁵ Sec. 813(a).

of the new law and the Division worked with HUD in establishing regulations, procedures, and programs to carry out its Title VIII responsibilities.¹⁵⁹ The Division foresaw a number of important legal issues that would have to be settled. Among these were: the constitutionality of Title VIII; the standard of proof necessary to establish a pattern or practice; determination of what constitutes a refusal to sell or negotiate; the kind of proof necessary to show the existence of "blockbusting," and establishment of the principle that the rights protected by Title VIII extend also to incidents of property ownership, such as full enjoyment of apartment house and subdivision facilities.¹⁶⁰

Under Mr. Schwelb the section's policy is to bring as many lawsuits as possible.¹⁶¹ The practical impossibility of filing actions in all instances of housing discrimination, however, has led the section to establish its own priorities. It has prepared a list of target cities, based on size and extent of minority group population. By concentrating on these cities and their surrounding suburbs, the section hopes to develop suits which will affect the largest number of people.¹⁶²

C. Litigation

At the time the housing section was formed, in October 1969,¹⁶³ the Civil Rights Division had filed 14 cases under Title VIII, had participated as amicus curiae in four other fair housing suits, and had intervened in one other.¹⁶⁴ In the first 10 months following its formation, the section filed 40 additional actions.¹⁶⁵ Many of the cases have several defendants. In all, 120 defendants have been sued. Twenty-two cases had been successfully completed as of August 1970, 19 by consent decrees, which usually include affirmative re-

lief as well as a prohibition against discrimination.¹⁶⁶

The section has been attempting to publicize the lawsuits it files to make certain that people are informed of their rights under Title VIII. In addition, attorneys have been encouraged to speak to local organizations when they are in the field. The section is attempting to bring a variety of Title VIII actions in order to obtain rulings on as many provisions of the law as possible. It is, however, somewhat limited in this effort by the nature of the complaints it receives.¹⁶⁷

In addition to cases involving refusals to sell or negotiate, the housing section has instituted litigation concerning the "blockbusting" provision of Title VIII,¹⁶⁸ and filed an amicus curiae brief in the Supreme Court in a case involving the effect of zoning ordinances on residential patterns.¹⁶⁹ The housing section also has achieved significant results regarding the practices of title insurance companies. The section negotiated a signed agreement with the Richmond [Virginia] title insurance company under which the company no longer will insure titles to property carrying racially restrictive covenants. The Civil Rights Division subsequently wrote to more than 17 of the Nation's largest title insurance companies advising them to cease insuring such titles.¹⁷⁰

In October 1969 a suit was filed against a recreational community under construction in Virginia.¹⁷¹ The complaint alleged, among other things, racial discrimination in soliciting purchasers for lots, in violation of Title

¹⁵⁹ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Interview with Frank Schwelb, Chief, housing section, Civil Rights Division, Nov. 13, 1969.

¹⁶² Cities with large Mexican American populations, such as San Antonio, Tex. and San Diego, Calif., although not originally among these target cities, were added in November 1969.

¹⁶³ Previously, the Division was not organized along subject area lines.

¹⁶⁴ Schwelb interview, supra note 161.

¹⁶⁵ Justice letter, supra note 158.

¹⁶⁶ Id. Mr. Schwelb acknowledges the need for initiating suits not based on complaints, but finds that the limited number of lawyers and budget preclude such extensive efforts.

¹⁶⁸ In *U.S. v. Mintzes*, 304 F. Supp. 1305 (D. Md. 1969), a Federal district court ruled that the antiblockbusting provision of Title VIII was constitutional under the 13th amendment. Other blockbusting suits may also be filed in Winston-Salem, N.C., Dallas, Tex., and Memphis, Tenn.

¹⁶⁹ *Ranjel v. City of Lansing*, 293 F. Supp. 301 (D. Mich. 1968), rev'd., 417 F. 2d 321 (6th Cir. 1969), cert denied, 397 U.S. 980 (1970).

¹⁷⁰ Interview with Frank Schwelb, Chief, housing section, Civil Rights Division, Mar. 3, 1970.

¹⁷¹ *U.S. v. Lake Caroline*, CA No. 432-69-R (E.D. Va., Oct. 13, 1969).

VIII. A consent order was entered on February 5, 1970, under which defendants, without admitting any illegal practices, agreed to undertake an affirmative program to obtain black purchasers.¹⁷² Defendants also are required to make quarterly reports to the Court detailing the action they have taken pursuant to the order.¹⁷³ The *Lake Caroline* case is particularly significant in that it sets an important precedent for affirmative action in the fair housing area.

The housing section has been placed in an awkward position in litigation against the Federal Government. Lawsuits have been brought against HUD concerning its involvement in segregated public housing in Bogalusa, La.,¹⁷⁴ and Chicago, Ill.¹⁷⁵ In both cases, the Department of Justice, as the attorney for HUD, as well as for most Government agencies, represented the Department. Initially the Bogalusa case was assigned to the Civil Rights Division, but it was later reassigned to the Civil Division. As of March 1970 a decision had not yet been made as to whether the Civil Rights Division or the Civil Division would handle the Chicago case. The housing section would much prefer to have the Civil Division handle the matter.¹⁷⁶

D. Liaison with Other Departments

The housing section has worked closely with HUD on a number of matters. Attorneys from the housing section and from the coordination and special appeals section of the Civil Rights Division are participating in joint committees with HUD to consider problems of site selection and tenant selection in public housing. Liaison with HUD is primarily with its Office of General Counsel, but Mr. Schwelb also deals with staff members of the Office of Equal Opportunity. As of March 1970, the housing

¹⁷² Defendants agreed to advertise in newspapers with predominantly black readers, to instruct subsidiaries not to discriminate, and to indicate in all advertising that it welcomes black people. Similar consent decrees have been secured against Chanita and Colony Developers. Justice letter, supra note 158.

¹⁷³ Schwelb interview, supra note 170. In the 3-month reporting period prior to August 1970, 59 of some 500 sales were to blacks. Justice letter, supra note 118.

¹⁷⁴ *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La., 1969).

¹⁷⁵ *Gautreux v. Weaver*, 296 F. Supp. 907 (N.D. Ill. 1969).

¹⁷⁶ Schwelb interview, supra note 161.

section was in process of trying to develop more systematic coordination with HUD. The two Departments exchange weekly lists of pending matters and the housing section sends copies of all major pleadings and related papers to the Title VIII office and the Office of General Counsel of HUD.

According to Mr. Schwelb, his section has had some dealings with a number of military bases concerning the Department of Defense's off-base housing program, but does not maintain direct liaison with the Department of Defense. Military bases have been requested to refer cases of discrimination in off-base housing to the Civil Rights Division. The housing section has obtained lists of housing declared "off limits" because of discriminatory practices, and has filed two lawsuits based on information derived from these lists.¹⁷⁷

IV. VETERANS ADMINISTRATION

The principal housing program administered by the Veterans Administration (VA) is the loan guaranty program, aimed at assisting veterans to purchase houses under favorable terms.¹⁷⁸ Like the FHA mortgage insurance program, the VA loan guaranty program utilizes the ordinary channels of the private housing market—private builders and private lending institutions. The program, through its Government guaranty against loss, provides an incentive for private lending institutions to participate and is of help to private builders by facilitating mortgage credit both for construction and for sales to individual home buyers.

Although VA's share of the housing market has declined substantially over recent years, it is still considerable. During 1969, for example, the agency guaranteed loans amounting to more than \$4 billion.¹⁷⁹

Housing provided through FHA and VA programs both are subject to the nondiscrimi-

¹⁷⁷ Justice letter, supra note 158.

¹⁷⁸ VA-guaranteed home loans typically are low interest, high-loan-to-value ratio (in some cases no down payment is required), and long term. In addition, VA is authorized to make direct loans to veterans in areas where private credit generally is not available.

¹⁷⁹ *Federal Reserve Bulletin*, March 1970, A53. FHA-insured mortgages amounted to more than \$9 billion during the same year.

nation requirements of Executive Order 11063 and Title VIII of the Civil Rights Act of 1968. The two agencies have worked closely together over the years and generally have adopted identical policies to carry out their equal housing opportunity responsibilities. For example, it was determined shortly after the Executive order was issued that any builder barred because of discrimination from participation in the programs of one agency would also be barred by the other agency. Similarly, both agencies originally exempted from coverage under the Executive order one- and two-family owner-occupied houses. At the same time, neither FHA nor VA requires that housing provided under its programs be advertised as "open occupancy" or that aided builders undertake marketing practices aimed at attracting minority purchasers.

The two agencies, however, do not always adopt identical or even similar policies. In some cases their policies have differed substantially.

A. Racially Restrictive Covenants

As noted above, shortly after the issuance of Executive Order 11063, FHA changed its policy of a blanket refusal to insure loans on property carrying racially restrictive covenants filed of record after February 15, 1950, to provide an exception if the loan applicant were a member of a minority group excluded by the covenant. VA also changed its policy, but somewhat differently. VA announced that it would grant an exception for any veteran if the facts warranted it. The standards for determining whether the facts warranted an exception were as follows:

1. Persons in the class prohibited by the covenant were able to purchase homes in the area; and

2. One or more of such persons have in fact bought homes in the area.¹⁸⁰

In short, VA announced it would grant an exception to its policy only if the area already was in the process of racial or ethnic change. Thus, according to VA policy, a Negro veteran who was successful in purchasing a home

¹⁸⁰ Letter from Fred B. Rhodes, Acting Administrator, Veterans Administration, to Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights, June 16, 1969.

carrying a racially restrictive covenant could not obtain VA financing unless at least one other Negro had already purchased a house in the area, presumably through a mortgage loan other than one that VA had guaranteed.

In 1969, FHA and VA made additional changes in their policies concerning racially restrictive covenants. Again, the changes adopted by the two agencies were different. According to current FHA policy, the agency will insure loans regardless of whether the property carries a racially restrictive covenant. FHA requires, however, that the purchaser certify that he will not subsequently refuse to sell the home because of the race, color, creed, or national origin of the prospective buyer. FHA also requires that the buyer expressly recognize that the racially restrictive covenant is illegal and void and that he specifically disclaim it. VA's current policy also is to grant loans regardless of whether the property carries a racially restrictive covenant. Unlike FHA, however, VA does not require certification by the buyer that he will not discriminate in any resale, nor does VA require a recognition of the illegality and voidness of the covenant or a specific disclaimer from the buyer.¹⁸¹

B. Exemption of One- and Two-Family Owner-Occupied Housing

It will be recalled that in June 1969 FHA, in light of the enactment of Title VIII of the Civil Rights Act of 1968 and the Supreme Court's decision in *Jones v. Mayer & Co.*, prohibiting racial discrimination in all housing, eliminated the exception of one- and two-family owner-occupied housing from coverage of Executive Order 11063. Under current FHA policy, homeowners are required to certify that they will not discriminate in any subsequent resale of the housing. As of April 1970 VA retained the exception of one- and two-family owner-occupied housing. Thus, while Federal laws clearly prohibit discrimination in such

¹⁸¹ According to VA, such a requirement would impose an additional condition of eligibility upon veterans, which would be unauthorized under the agency's governing statutes. Interview with Aaron English, Staff Assistant to the Director, Loan Guaranty Service, June 3, 1970.

housing, VA has not yet changed its policy to conform to those laws.

C. Collection of Racial and Ethnic Data

If in the case of racially restrictive covenants and one- and two-family owner-occupied housing, VA policy has lagged behind that of FHA, in another area of critical importance VA has moved ahead of its sister housing agency. Beginning in the fall of 1968, VA took steps to determine the extent of participation of minority groups in the sale of VA-acquired properties.¹⁸² FHA did not follow suit. In August 1969 VA proposed to the Bureau of the Budget that the agency collect data on racial and ethnic participation in the loan guaranty program. It was deemed important, however, for VA and FHA to move together on this matter and Bureau approval of forms to collect these data was held up pending concurrence by HUD.¹⁸³ It was not until April 1970 that HUD made the decision to go forward with such data collection with respect to all of its programs. The Department is currently working out problems of implementation. Thus, as of June 1970 VA, which had proposed the procedure nearly a year earlier, had not yet put its data collection system into effect.

D. Staffing and Organization

Civil rights requirements for the loan guaranty program are coordinated by a staff of two full-time professionals. In addition, the Deputy Director of the Loan Guaranty Service devotes part of his time to matters concerning equal housing opportunity. This small staff has developed procedures to facilitate compliance with nondiscrimination requirements which have been adopted by the Loan Guaranty

¹⁸² The way this was done was to record the race and ethnicity of the purchaser on the purchase application. Between December 1968 and February 1969 total offers received ranged between 3,000 and 4,000 per month. Of these, 68 percent were white, 7 percent were Spanish American, 19 percent were black, 1 percent was other, and in 5 percent of the cases the race was not available. Sale of VA properties—Racial Characteristics of Offerors and Purchasers. December 1968 to February 1969.

¹⁸³ Englisner interview, supra note 181.

Service.¹⁸⁴ Complaint investigations are handled by personnel in the VA field offices, not by civil rights specialists, although occasionally central office equal opportunity personnel participate on their own initiative.¹⁸⁵

E. Compliance Reviews

Other than requiring a nondiscrimination certification from builders, the only compliance reviews conducted by VA are through complaint investigations. For example, VA does not use the device of testing to determine compliance,¹⁸⁶ nor does it conduct any other form of onsite compliance review. Further, VA, unlike FHA, has not undertaken any racial and ethnic occupancy surveys of VA subdivisions.¹⁸⁷

Complaint investigations have not proved to be a particularly effective way of assuring compliance with VA nondiscrimination requirements. From the issuance of Executive Order 11063 in November 1962 until June 1969 a total of 75 complaints were received and investigated.¹⁸⁸ Of these only 12 resulted in a finding of discrimination and in only eight cases were complainants offered the dwellings.¹⁸⁹ Further, in those cases where builders were found to have practiced discrimination, they were reinstated into the program after only agreeing to offer the dwelling unit complained of. According to VA, in one case where discrimination was found and the builder refused to make the unit available, he was suspended from the program and remains

¹⁸⁴ For example, in the case of VA-owned properties, the race of all persons to whom the property is shown must be indicated, as well as the race of the person showing the property. Further, when VA-guaranteed loans are foreclosed, the VA appraiser is required to indicate the racial composition of the neighborhood in which the housing is located. Under consideration is a procedure to determine the race of VA property managers. *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Rhodes letter, supra note 180.

¹⁸⁷ *Id.* In addition, VA, as well as FHA, does not require builders to publicize VA-aided housing as "open occupancy," nor does it consider advice to builders regarding marketing to attract both white and black homeseekers to be within the scope of its functions. *Id.*

¹⁸⁸ *Id.* Sixty-one complaints were subject to sec. 101 of the order and 14 were subject to sec. 102.

¹⁸⁹ *Id.*

suspended.¹⁹⁰ In one other case the builder was suspended for 124 days and was reinstated after agreeing to sell to all persons without discrimination.¹⁹¹ This, of course, was precisely the agreement he originally had made and violated. Nevertheless, VA imposes no additional conditions upon builders found to have practiced racial discrimination.¹⁹²

V. FEDERAL FINANCIAL REGULATORY AGENCIES

VA and FHA were the dominant forces in the housing market during the early post-war years.¹⁹³ In the last decade, however, the share of the mortgage market held by FHA and VA has diminished considerably. Most housing is financed through conventional mortgage loans held by commercial banks, mutual savings banks, and savings and loan associations. At the end of 1968, they held in the aggregate well over \$200 billion in residential mortgage loans.¹⁹⁴ Almost all of these institutions receive substantial Federal benefits and are subject to close Federal regulation and supervision by one or more Federal agencies.

A. The Nature and Scope of Federal Supervision

Just as banks and savings and loan associations are separate in nature and organization,¹⁹⁵ so their supervision and regulation are conducted separately. The supervisory pattern in each case can be likened to a three-block pyramid.

¹⁹⁰ Id.

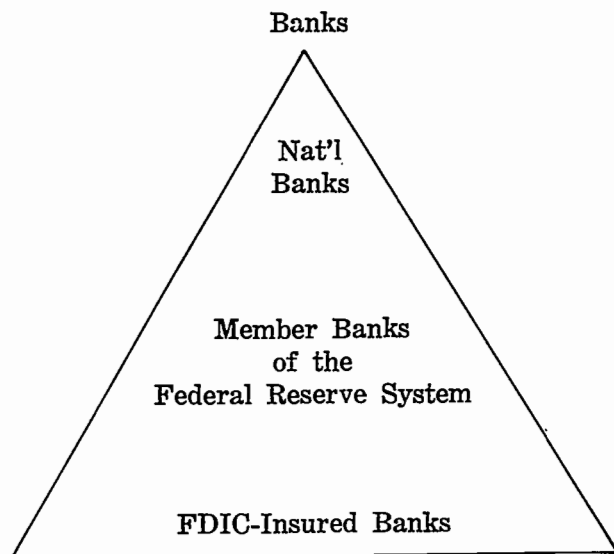
¹⁹¹ Id.

¹⁹² FHA, by contrast, requires an affirmative program that will give assurance of future nondiscrimination.

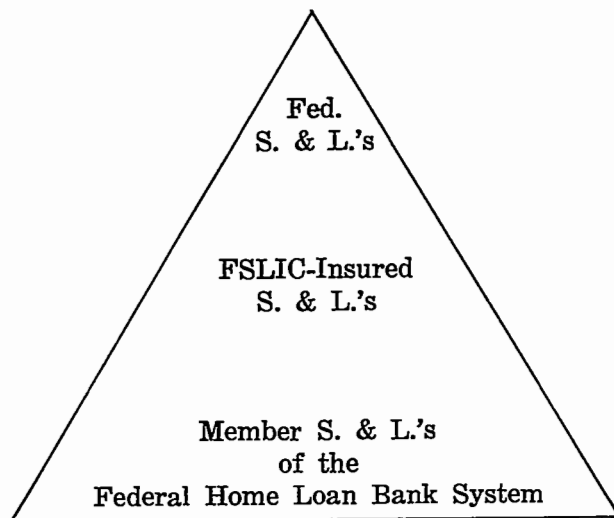
¹⁹³ For example, in 1954, the combined FHA and VA share of the market was 35.5 percent; in 1955, 41.1 percent; in 1956, 34.7 percent. Computations based on HHFA, 18 Ann. Rep. 383 (1964).

¹⁹⁴ Commercial banks held \$41 billion; mutual savings banks held \$47 billion; and savings and loan associations held \$120 billion. Data supplied by HUD.

¹⁹⁵ As this Commission has observed, savings and loan associations, unlike banks, "accept no deposits, pay no interest, and possess no independent capital structure. Their entire capital . . . consists of funds from individuals in the form of 'share accounts.' 'Share owners' receive dividends on their shares, not interest on deposits, and constitute, in effect, the associations' stockholders, not depositors." *1961 Commission Report* 32.



Savings and Loan Associations



1. COMMERCIAL AND MUTUAL SAVINGS BANKS

With respect to banks, the upper block represents national banks, chartered and supervised by the Comptroller of the Currency. The middle block represents member banks of the

Federal Reserve System, supervised by the Board of Governors of the Federal Reserve System. These are the 4,700 national banks, which are required by law to be Federal Reserve members,¹⁹⁶ and more than 1,200 of the nearly 9,000 State-chartered banks which have joined voluntarily.

The broad base of the pyramid represents banks whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). These consist of the nearly 6,000 member banks of the Federal Reserve System (both national and State-chartered), which are required by law to be FDIC-insured,¹⁹⁷ plus 7,500 State-chartered, non-Federal Reserve member commercial banks and 330 of the 500 mutual savings banks, which have voluntarily applied for and been granted the benefits of FDIC deposit insurance.¹⁹⁸

In all, 98 percent of the Nation's commercial banks are FDIC-insured. As of 1968, they held 99 percent (\$500 billion) of all commercial bank resources. In addition, the 330 FDIC-insured mutual savings banks held nearly 90 percent (\$62 billion) of all mutual savings bank resources.¹⁹⁹

Federal supervision over the banking community is thus carried on by three agencies: Comptroller of the Currency: national banks; Board of Governors of the Federal Reserve System: State-chartered member banks; Federal Deposit Insurance Corporation: State-chartered, nonmember insured commercial and mutual savings banks. FDIC, however, has jurisdiction over institutions in the first two categories, national banks and State-chartered member banks, as well as those in the third, State-chartered, nonmember insured banks.²⁰⁰ In fact, if FDIC should terminate the insurance of a bank that also is a member of the Federal Reserve System, the Board of Governors is required, in turn, to terminate that institution's membership in the Federal

Reserve.²⁰¹ If the institution also is a national bank, the Comptroller of the Currency is required to appoint a receiver.²⁰² Further, if any insured institution violates a law, rule, or regulation, the appropriate Federal banking agency may institute cease and desist order proceedings.²⁰³

While FDIC theoretically includes within its jurisdiction banks in all three categories, in fact, each of the three agencies, through the important process of bank examination, maintains close supervision over the banks within its supervisory authority. Thus national banks are examined by the Comptroller of the Currency; State-chartered member banks are examined by the Board of Governors of the Federal Reserve System; and State-chartered, nonmember insured banks are examined by the Federal Deposit Insurance Corporation.

2. SAVINGS AND LOAN ASSOCIATIONS

With respect to savings and loan associations, whose principal investments are home mortgages, the upper block represents Federal savings and loan associations, chartered and supervised by the Federal Home Loan Bank Board (FHLBB). The middle block represents savings and loan associations whose accounts are insured by the Federal Savings and Loan Insurance Corporation (FSLIC), which is operated under the direction of the FHLBB.²⁰⁴ These consist of all 2,000 Federal savings and loan associations, which are required by law to be FSLIC-insured,²⁰⁵ and 2,400 of the 3,900 State-chartered savings and loan associations, which have voluntarily applied for and been guaranteed the benefits of FSLIC insurance of accounts.

The broad base of the savings and loan pyramid represents associations which are members of the Federal Home Loan Board System (FHLBS). These consist of all 4,400 FSLIC-insured associations (Federal savings and loan associations are required by law to be members of the FHLBS;²⁰⁶ State-chartered FSLIC insured associations are not required to be FHLBS members, but all nonetheless

¹⁹⁶ 12 U.S.C. 282 (1964).

¹⁹⁷ 12 U.S.C. 1814(b) (1964).

¹⁹⁸ Letter from K. A. Randall, Chairman, FDIC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 15, 1969.

¹⁹⁹ *Id.*

²⁰⁰ This is because all national banks and State-chartered member banks are required by law to have their deposits insured by FDIC.

²⁰¹ 12 U.S.C. 1818(o) (1964).

²⁰² 12 U.S.C. 1818(o) (1964).

²⁰³ 12 U.S.C. 1818(b) (1964).

²⁰⁴ 12 U.S.C. 1725(a) (1964).

²⁰⁵ 12 U.S.C. 1726(a) (1964).

²⁰⁶ 12 U.S.C. 1464(f) (1964).

are) plus nearly 400 noninsured associations. In all, 80 percent of the Nation's savings and loan associations are FHLBS members. They hold 98 percent (\$150 billion) of all savings and loan resources.²⁰⁷

Unlike Federal supervision of the banking community, there is a concentration of Federal authority over savings and loan associations. The three functions carried out by three separate banking agencies are consolidated in a single agency—the FHLBB—with respect to savings and loan associations. As in the case of banking agencies, the FHLBB is authorized to take action, including termination of FSLIC insurance and the institution of cease and desist proceedings when a member savings and loan association violates any applicable law, regulation, or order.²⁰⁸

B. Civil Rights Roles of Mortgage Lending Institutions and Their Supervisors

Because nearly all housing is acquired through mortgage credit, mortgage lending institutions necessarily play a key role in determining the range of housing choice. Their role with respect to housing opportunities for minority group members is particularly crucial. For example, as this Commission was told some years ago: “Banks dictate where the Negroes can live.”²⁰⁹

In its 1961 Report on Housing, the Commission concluded that mortgage lending institutions “are a major factor in the denial of equal housing opportunity.”²¹⁰ There are a variety of ways in which mortgage lending institutions can prove a formidable barrier to minority group members in their search for housing. They may deny mortgage loans to minority group members, either generally or for houses in nonminority areas. Second, they may “red-line” areas in which minority group families are heavily concentrated and refuse to make loans in these areas to all house seekers, minority and majority group. Third, they may offer loans to minority group members under more stringent terms than for

members of the majority group by imposing higher down payments, higher interest rates, lower appraisal values, and higher credit standards.

All of these practices are prohibited under Title VIII of the Civil Rights Act of 1968. Many are difficult to detect, however, in that they can be rationalized on grounds of credit judgment. The agencies which supervise mortgage lending institutions traditionally have shied away from substituting their judgment for that of the lending institutions for purposes of criticizing them for loans they have chosen not to make. Rather, the agencies have confined themselves to criticizing lending institutions for loans they have made which, for credit reasons or other reasons, should not have been made.

Although individual cases of discrimination by mortgage lending institutions may be difficult to prove, patterns or practices of such discrimination are not. If the institutions are required to maintain adequate records on all mortgage loan applications, not merely those which have been approved, examiners would have little difficulty in uncovering patterns or practices of discrimination, and appropriate corrective action could be taken. Thus the supervisory agencies could play a key role in assuring that the Nation's mortgage lending community serves to promote the cause of equal housing opportunity. It is a role they have been reluctant to assume.

C. Past Civil Rights Activities

In April 1961, this Commission, in preparation for an earlier report on Federal policy concerning housing and civil rights, sent detailed letters of inquiry to each of the three banking agencies and the FHLBB to determine what activities these agencies were conducting or planned to conduct to prevent discrimination in mortgage lending by the institutions they supervise. At the time, no Federal law had been enacted dealing with discrimination in housing or mortgage financing. Executive Order 11063 was not issued until a year and a half later. Of the four agencies, the FHLBB was the only one that could point to any positive action to prevent discrimination. Joseph P. McMurray then Chairman, informed the Commission that on June 1, 1961, the

²⁰⁷ Data obtained from Federal Home Loan Bank Board.

²⁰⁸ 12 U.S.C. 1730(e)(i) (1964).

²⁰⁹ 1961 *Commission Report*, 29.

²¹⁰ *Id.*, at 141.

Federal Home Loan Bank Board had adopted the following resolution:

It is hereby resolved that the Federal Home Loan Bank Board, as a matter of policy, opposes discrimination, by financial institutions over which it has supervisory authority, against borrowers solely because of race, color, or creed.²¹¹

In response to a further inquiry from the Commission concerning the Board's plans for implementing this policy, Mr. McMurray replied:

All of the Board's examiners, who examine institutions over which the Board has supervisory authority, have also been advised of the June 1 resolution for their guidance in the examination of such institutions. If in the examination of these institutions our examiners find that there is discrimination against borrowers solely because of race, color, or creed, they will report the facts and such supervisory action as is feasible will thereupon be taken to effect a discontinuance of the practice.²¹²

None of the three banking agencies gave any indication of adopting a similar policy. Two of the three agencies (Federal Reserve and Federal Deposit Insurance Corporation) disclaimed any legal authority to promulgate a requirement against discrimination in mortgage lending, and all three expressed reservations as to the desirability of pursuing such a course of action.²¹³ Their reservations centered about two points: the nature of the regulation required to effect a policy of nondiscrimination; and the belief that race, color, or creed might affect the economic value of property.²¹⁴

In the 7 years that followed, the situation remained static. No action was taken by the three banking agencies and the policy statement of the FHLBB proved to be little more than a paper requirement. No procedures were established that would permit the Board's examiners to discover instances of discrimination, nor were member savings and loan associations required to keep records by race and ethnicity which would facilitate such discoveries by examiners.²¹⁵

²¹¹ *Id.*, at 36.

²¹² *Id.*

²¹³ *Id.*, at 39-51.

²¹⁴ *Id.*, at 52.

²¹⁵ Although Executive Order 11063 did not cover conventionally financed housing, membership on the President's Committee on Equal Opportunity in Housing, which was created to oversee enforcement of the Executive order, included the Chairman of the Federal

D. Enactment of Title VIII and Its Consequences

Section 805 of the Civil Rights Act of 1968 provided that as of January 1, 1969, discrimination in mortgage lending was prohibited. On June 11, 1968, the Commission forwarded to the four agencies a memorandum from its General Counsel pointing out that on January 1, 1969, when section 805 went into effect, the agencies no longer would be free to ignore problems of racial discrimination in mortgage lending, but would be under a legal obligation to take action to eliminate it.²¹⁶ The Commission also argued that the agencies were authorized not only to prevent discrimination by the lending institutions they supervise, but to require these institutions to impose nondiscrimination requirements on builders and developers with whom they had financial dealings.²¹⁷ In view of the enforcement weaknesses in Title VIII, such actions by the regulatory agencies would be of substantial help in assuring compliance.²¹⁸

In July 1968, the FHLBB sent a letter to all member savings and loan associations, describing the requirements of section 805 and calling attention to the sanctions that could be imposed for violation of the prohibition against discrimination in mortgage lending.²¹⁹ Thus the FHLBB again was the first of the four Federal financial regulatory agencies to act affirmatively in the cause of equal opportunity in mortgage lending.²²⁰ Nothing, however, was done with respect to the second Commission suggestion—to require the lending institutions to impose nondiscrimination requirements on builders and developers.

Beginning in August 1968, HUD initiated

Home Loan Bank Board and the Secretary of the Treasury.

²¹⁶ Memorandum from General Counsel, U.S. Commission on Civil Rights (USCCR), to William L. Taylor, Staff Director, USCCR, "Enforcement of Fair Housing Law by Means of Sanction of Termination of FDIC or FSLIC Insurance," June 11, 1968.

²¹⁷ *Id.*

²¹⁸ Copies of this memorandum also were sent to Robert C. Weaver then Secretary of HUD and Stephen J. Pollak then Assistant Attorney General.

²¹⁹ Memorandum from John E. Horne, Chairman, FHLBB, to members of the Federal Home Loan Bank System, July 1, 1968.

²²⁰ Early in 1969, the three banking agencies sent similar letters to their member institutions.

a series of meetings with representatives of the Department of Justice and this Commission to discuss both aspects of the Commission's memorandum—action to prevent discrimination by mortgage lending institutions and action to require mortgage lending institutions to impose nondiscrimination requirements on builders and developers with whom they deal. HUD also held separate meetings with representatives of the four financial regulatory agencies. The only concrete result of the meetings with the regulatory agencies was the issuance of letters by the banking agencies advising banks of the requirements of section 805.

In June 1969, HUD convened an interagency task force consisting of representatives of the Department of Justice, this Commission, and the four financial regulatory agencies. HUD prepared a list of specific recommendations for an affirmative program by the regulatory agencies to assure compliance with the requirements of section 805.

Among the recommendations made by HUD were:

1. The issuance of regulations or binding instructions, requiring that each institution keep on file all loan applications, indicating the race or color of the applicant, together with other relevant information, such as the character and location of the neighborhood in which the property involved is located, and if the application is disapproved the reason why.

2. A requirement that each lending institution post a notice in its lobby stating that the institution does not discriminate in mortgage lending and informing the public that such discrimination is in violation of section 805.

3. The development of a special form of examining documents for use by examiners in checking on discriminatory lending practices covered by Title VIII.

4. Development of a data collection system designed to reveal patterns or practices of discrimination in home mortgage lending operations covered by Title VIII.²²¹

There were no recommendations, however,

concerning the Commission's second suggestion.

The regulatory agencies, agreeing to incorporate into their examinations procedures for detecting discrimination in mortgage lending, were opposed to requiring the lending institutions to maintain racial and ethnic data on loan applications. Absent such data collection, however, it was difficult to see how examiners would be in a position to detect patterns or practices of discrimination. Finally, a compromise was reached whereby the regulatory agencies agreed to send a questionnaire to all member institutions for the purpose of determining their current policies in making loans available to minorities and gauging whether discrimination was a serious problem. As of June 1970, the questionnaire was in the process of review by the Bureau of the Budget.

E. Staff Resources and Potential Use

Each of the four agencies employs a large number of examiners who visit member lending institutions on a regular and systematic basis to determine compliance with various laws affecting them. The Federal Home Loan Bank Board, for example, employs 600 examiners to examine its 4,800 member institutions. The Comptroller of the Currency employs 1,700 examiners to examine its 4,700 national banks. The Board of Governors of the Federal Reserve System employs 300 examiners to examine its 1,200 State member banks. The Federal Deposit Insurance Corporation employs nearly 1,000 examiners to examine its 7,500 State-chartered, nonmember, insured banks.

Through this network of examiners, these agencies maintain close supervision over the activities of their member institutions. As one administrative law authority has observed: "The regulation of banking may be more intensive than the regulation of any other industry. . . ." ²²²

These examiners also represent a potential source of civil rights compliance officers. Through them, the regulatory agencies have the capacity for conducting intensive and complete compliance reviews. The examiners, however, are not being utilized to carry out the agencies' responsibilities under Title VIII.

²²¹ HUD Proposals for Affirmative Action by Federal Financial Regulatory Agencies Under Title VIII (Fair Housing) of the Civil Rights Act of 1968, June 1969.

²²² Davis, *Administrative Law Treatise*, sec. 4.04, at 247 (1958).

Without detailed racial and ethnic data on loan applications examiners can do little more than go through the motions of checking on civil rights compliance.

The questionnaire that the regulatory agencies have agreed to send to their member institutions represents a commendable first step. Through it, they will, for the first time, obtain information indicating the extent to which the problem of discrimination in mortgage lending exists.²²³ This can be considered, however, only a first step. As in other areas of civil rights compliance, the collection of racial and ethnic data is crucial.

Moreover, the questionnaire relates only to the practices of the mortgage lending institutions themselves. No formal consideration has yet been given by the regulatory agencies to the Commission's second recommendation, relating to the practices of builders and developers financed through these institutions. Strong action on both recommendations would contribute significantly to achieving the goal of equal housing opportunity, in fact, as well in legal theory.

VI. THE GENERAL SERVICES ADMINISTRATION AND SITE SELECTION FOR FEDERAL INSTALLATIONS

As this Commission pointed out in its recent report on "Federal Installations and Equal Housing Opportunity", the leverage of the substantial economic benefits frequently generated by the location of Federal installations can be a persuasive force in opening up housing opportunities throughout metropolitan areas for lower-income and minority group families.²²⁴

²²³ The agencies have argued that they have received no indication that discrimination in mortgage lending is a problem at all. For example, as of March 1970, the FHLBB had received only four complaints concerning discrimination. The FDIC had received only two. The Board of Governors of the Federal Reserve System had received none. The Comptroller of the Currency office had received only one. It is doubtful, however, that these complaints reflect an accurate measure of the extent of the problem. For one thing, the agencies are largely unknown to those outside the financial communities. Therefore, it is doubtful whether people discriminated against would know to whom to complain.

²²⁴ U.S. Commission on Civil Rights, *Federal Installations and Equal Housing Opportunity* at 8, 9 (1970).

The Federal Government, like private industry, has been locating its facilities increasingly in suburban and outlying parts of metropolitan areas.²²⁵ These typically are areas in which the supply of housing within the means of lower-income employees either is inadequate or nonexistent. Many of these communities traditionally have also excluded minority group families, whatever their income. The relocation of Federal installations to these communities has caused hardships to lower-income and minority group employees and their families.²²⁶ Often they cannot find housing and must either commute long distances or seek new jobs.

The General Services Administration is the one Federal agency possessing the greatest potential for promoting uniform policy to assure the availability of housing for lower-income and minority group families in communities where Federal installations are located. Under Federal law, most space for Federal agencies is acquired and assigned by the GSA.²²⁷ Until March 1969 neither the General Services Administration nor any other Federal department or agency specifically considered the housing needs of lower-income or minority group employees among the criteria by which sites for Federal installations would be selected.²²⁸

In March 1969, however, GSA announced a new requirement to assure availability of low- and middle-income housing accessible to Federal installations.²²⁹ Under this GSA policy the agency will avoid locations where three conditions exist:

²²⁵ *Id.*, at 7.

²²⁶ See, for example, a description of the results of the move of the National Bureau of Standards from the District of Columbia to Gaithersburg, Md. *Id.*, at 9-14.

²²⁷ 40 U.S.C. 490(e), (1964). Some agencies, such as the Treasury Department, the Post Office Department and the Atomic Energy Commission, have authority to acquire their own space. However, they may request that GSA acquire land for buildings and contract and supervise their construction, development, and equipment. 40 U.S.C. 490(c), (1964).

²²⁸ For a description of past GSA policy, see *Federal Installations and Equal Housing Opportunity*, *supra* note 224, at 15-17.

²²⁹ Memorandum from William A. Schmidt to all regional administrators of GSA, Mar. 14, 1969. See, *Federal Installations and Equal Housing Opportunity*, *supra* note 224, at 17, n. 119.

1. The area is known to lack adequate housing for low- and moderate-income employees;

2. The area is known to lack such housing within a reasonable proximity; and

3. The area is not readily accessible to other areas of the urban center.

This policy, while it represents a commendable step forward, leaves a good deal to be desired. First, as of April 1970, the policy had not been implemented through any GSA regulations or guidelines. Secondly, it is totally silent on the issue of availability of housing for minority group members. GSA has explained that in view of the fact that it is not responsible for providing space for *all* Federal agencies, it would not be appropriate “. . . to decide and publicize that our program of locating Federal agencies be used as a leverage to enhance open access to housing.”²³⁰

The Commission contended that despite jurisdictional limits, GSA should exercise leadership in promoting a policy of open access to housing.²³¹ Nonetheless, believing that site selection policy should be uniform and applicable to all agencies whether or not served by GSA, the Commission also urged the issuance of a directive by the President.²³²

The Executive order recommended would establish a uniform policy of site selection governing location and expansion of all Federal installations.²³³ The goals of this Executive order recommended by the Commission were:

1. To expand housing opportunities for lower-income and minority group families outside areas of existing poverty and minority group concentration.

2. To facilitate employment opportunities for lower-income and minority group employees.

3. To promote the balanced economic development of central cities and suburban parts of metropolitan areas.

4. To contribute to the elimination of racial and economic separation.²³⁴

Specifically, the Commission recommended

²³⁰ *Federal Installations and Equal Housing Opportunity*, supra note 224 at 19, n. 135.

²³¹ *Id.*, at 19.

²³² *Id.*

²³³ *Id.*, at 22-23.

²³⁴ *Id.*, at 22.

that Federal departments and agencies having responsibility for determining sites for Federal installations be directed to apply the following as prerequisite to approving any community as a site for a Federal installation:

1. The community should be required to demonstrate that there is a sufficient supply of housing within the means of lower-income families to meet the needs of present and potential employees, or that such housing will be produced within a reasonable period of time.

Some ways the Commission suggested that this requirement could be satisfied were: (a) the community has taken the necessary steps involving local government approval to permit operation of the various Federal low-income housing programs; (b) the community maintains zoning ordinances, building codes, and other appropriate land use requirements that facilitate provision of lower-income housing in all sections of the community; and (c) plans for lower-income housing adopted by builders or developers have reached an appropriate point of maturity.

2. The community under consideration should be required to demonstrate that conditions exist, or will exist within a reasonable time, to facilitate housing of minority group residents within its borders on a desegregated basis.

Among the ways the Commission suggested that this requirement could be satisfied were: (a) the community maintains a comprehensive, enforceable fair housing law; (b) members of the local housing and home finance industry have adopted affirmative marketing policies designed to attract minority group members to the community; and (c) steps have been taken by local government officials and by local civil groups and leaders to assure that all facilities and services in the community are open to minority group families on an equitable and desegregated basis, and that minority group members will participate fully in community life.²³⁵

On February 27, 1970, the President issued Executive Order 11512, setting forth criteria to be considered in selecting sites for Federal installations. Although the order was issued shortly after issuance of the Commission's re-

²³⁵ *Id.*, at 22-23.

port and recommendations, it had been in preparation for some months prior to release of the Commission's report. The order contains two significant provisions bearing on the civil rights implications of Federal site selection policies.

First, among the policies which the order directs the General Services Administration and other executive agencies to be guided by in selecting sites for their installations is "the availability of adequate low and moderate income housing" ²³⁶

Second, the order directs that: "Consideration shall be given in the selection of sites for Federal facilities to . . . the impact a selection will have on improving social and economic conditions in the area." ²³⁷

Thus the order, in effect, incorporates the GSA policy on availability of lower-income housing as a uniform Federal policy, applying to all Federal departments and agencies. In addition, it goes beyond GSA policy to assure that consideration of the social and economic welfare of the area also will be uniform Federal site selection policy.

While the order specifies that these are among the policies by which departments and agencies are to be guided, it is not clear what priority is to be accorded them in relation to other, and perhaps conflicting, policies, such as "efficient performance" ²³⁸ and "adequacy of parking". ²³⁹ Further, the order is silent on the matter of racial discrimination.

In March 1970, HUD initiated a series of meetings with major departments and agencies that maintain installations in the Washington, D.C. metropolitan area. The purpose of the meetings is to strengthen the site selection policy for Federal installations to assure that adequate housing is available for lower-income employees and to assure that it is available on an equal opportunity basis.

HUD presented detailed recommendations for criteria that would achieve these ends. ²⁴⁰ One of the important considerations has been

how a uniform policy, if agreed upon, would be enforced—by what authority individual departments and agencies could be required to adhere strictly to the criteria decided upon. One means suggested would be through a new Executive order by the President incorporating these criteria into the recent, but limited, order on this subject.

VII. THE DEPARTMENT OF DEFENSE AND OFF-BASE HOUSING

A. Purpose and Aims of the Off-Base Housing Program

A 1963 Defense Department directive ²⁴¹ stated in part:

Discriminatory practices directed against Armed Forces members, all of whom lack a civilian's freedom of choice in where to live, to work, to travel and to spend his off-duty hours, are harmful to military effectiveness. Therefore, all members of the Department of Defense should oppose such practices on every occasion, while fostering equal opportunity for servicemen and their families, on and off-base.

Base commanders were charged with the responsibility of opposing discriminatory practices affecting their men and were given the authority, subject to the prior approval of the appropriate Service Secretary, to use the "off-limits" sanction to combat such discrimination. However, sanctions were not imposed on any housing units because of their refusal to rent on a desegregated basis.

This voluntary program did not produce much change in the Nation's segregated housing patterns, for in July of 1967 only 41 percent of the housing around military bases in the South and 60 percent of the off-base housing nationwide were reported by base commanders as being available to Negro servicemen. ²⁴² A new program was announced in April 1967 by Cyrus Vance, ²⁴³ then Deputy Secretary.

²⁴¹ DOD Directive 1120.36, Equal Opportunity in the Armed Forces, July 26, 1963.

²⁴² Department of Defense News Release No. 577.68, with attached table 303, June 20, 1968.

²⁴³ DSD multiaddressee memorandum, Equal Opportunity for Military Personnel in Rental of Off-Base Housing, Apr. 11, 1967.

²³⁶ Sec. 2(a)(b).

²³⁷ Sec. 2(a)(2).

²³⁸ Sec. 2(a)(1).

²³⁹ Sec. 2(a)(6).

²⁴⁰ HUD, "A Working Draft on Policy and Program Relating to the Relocation of Government Facilities," March 1970.

B. Mechanics of the DOD Program

The first phase of the new program consisted of a survey of multiple-unit rental facilities in the vicinity of each military base in the continental United States with 500 or more military personnel.²⁴⁴ It included a determination of which facilities were to be surveyed, personal contact with each facility owner or manager to ascertain his rental policy,²⁴⁵ and a report of the results to the Service Secretaries. The instructions were silent with regard to the inclusion of substandard housing. Each base commander was responsible for carrying out all parts of this phase by July 15, 1967.²⁴⁶

The second phase consisted of a mobilization of community support for the DOD housing program and a continuous updating of the statistics gathered in Phase I. The base commanders were required to enlist the assistance and support of all interested parties in and attempt to change the policy of those facilities that were closed to Negro servicemen.²⁴⁷ To accomplish this end, wide discretion was vested in each military commander. This phase was scheduled to end on August 31, 1968, but was subsequently extended indefinitely.

²⁴⁴ Id. The program was applied to smaller installations in November 1968 and made applicable to all in September 1969. ASD(M&RA) multiaddressee memorandum Concerning Extension of the Equal Opportunity in Housing to Smaller Installation, Nov. 25, 1968; DOD Instruction 11338.15, Equal Opportunity for Military Personnel in Off-Base Housing Program, Sept. 24, 1969.

²⁴⁵ DSD Apr. 11, 1967 memorandum, *supra* note 243. ASD(M) multiaddressee memorandum, Equal Opportunity for Military Personnel in Rental of Off-Base Housing, Apr. 22, 1967. Housing that was to be surveyed consisted of apartment buildings, housing developments and trailer courts, with five or more rental units, that were within the "normal commuting distance of the base." In order to obtain the necessary survey information, the base commander or a senior staff representative was to contact the owner of each facility in person. If this proved to be impossible, contact was to be made in writing. In a case where the commander had satisfactory evidence, which could be documented, that a facility was in fact operated on a nondiscriminatory basis, the necessity for personal contact was waived.

²⁴⁶ Id.

²⁴⁷ ASD(M) multiaddressee memorandum, Equal Opportunity for Military Personnel in Rental of Off-Base Housing: Phase II Guidance, July 17, 1967.

A department directive, in setting guidelines for installation commanders to follow in their affirmative action phase of the program, indicates that each commander was to determine the most effective approaches to achieve open housing for military personnel. The commander is warned, however, that "in some communities, a proposal for open housing evokes unjustified and emotional fear and antagonisms. . . ." ²⁴⁸ In addition, the commander is informed that "[T]he importance of seeking, obtaining, and mobilizing the cooperation and support of local leaders—elected, civic, business and religious—cannot be overemphasized. It should be made clear to owners and managers that they are not being asked to lower their standards of tenant acceptability. . . ." ²⁴⁹

The directive further indicates that where there is reason to believe that a facility, which has signed an open-housing assurance, has discriminated against Negro servicemen, the commander should check on the sincerity of the assurance "through appropriate means" but the commander is specifically directed not to test the policy of facility owners "by utilizing individuals who purport to be prospective tenants when in fact they are not." ²⁵⁰

Nowhere in the directive is contact with civil rights or open housing groups mentioned and although "testing" is forbidden, no alternative method of checking the sincerity of an owner's assurance is suggested. Furthermore, the directive does not advocate or even mention direct contact between command officials and minority group servicemen. Yet, if the command, which is usually all-white, is to develop a real understanding and appreciation of the problems faced by minority servicemen, open discussion must take place. This is especially true because many black and Spanish surnamed American servicemen will not report incidents in which they were discriminated against and, in some cases, they will not even know if they were refused a rental because of their race or ethnic background. Since military installations do not maintain central-

²⁴⁸ DOD Instruction 11338.15, Equal Opportunity for Military Personnel in Off-Base Housing Program, 4, Sept. 24, 1969.

²⁴⁹ Id.

²⁵⁰ Id., at 5.

ized lists of the address of each serviceman, frank discussions are the best method of discovering the reasons why, despite open housing assurances, many minority group servicemen continue to live in segregated and less adequate facilities than majority group servicemen.

C. Housing Referral Services

Military bases have always had a housing officer who assisted those military personnel seeking off-base housing. This officer maintains a list of facilities to which he refers those who approach him. To be included on that list, a landlord fills out a housing information sheet that provides the housing officer with all necessary information concerning the facility (e.g., number of units, price, facilities offered). In the past, however, many servicemen did not contact the housing officer, but preferred to fend for themselves.

In July 1967, the Secretary of Defense ordered that a housing referral office be established at every military base taking part in the program for equal opportunity for military personnel in off-base housing.²⁵¹ He directed that, at the time of arrival at the installation, all personnel requiring off-base housing should be required to clear through the office. Under the Secretary's order, the housing referral sends servicemen only to those housing facilities whose owners have completed a housing information sheet containing an assurance that the facility is open to all servicemen.²⁵²

To insure that all facilities listed with the housing referral office are operated on a non-discriminatory basis, each office instituted a mandatory feedback system whereby personnel are required to report their experiences in obtaining housing. A card is provided each serviceman for this purpose. On it he indicates which unit he has selected. He also specifies reasons, from among several stated on the card, why other units were rejected. There is no place on the card, however, for the serviceman to indicate that he believes he has been refused housing for discriminatory reasons.

Until November 1969, no money was appro-

²⁵¹ SD multiaddressee memorandum, Off-Base Housing Referral Services, July 17, 1967.

²⁵² ASD(M) multiaddressee memorandum, Housing Referral Listings, Aug. 31, 1967.

priated by Congress to provide staff for the newly created housing referral offices.²⁵³

During the first 2 years of the program, the housing offices were grossly understaffed.²⁵⁴ Occasionally they were operated by men out of sympathy with the concept of integrated housing.²⁵⁵

D. Reporting Requirements

In Washington, the program was initially directed and coordinated by the Office of the Coordinator of Off-Base Housing Services which was created in the Office of the Secretary of Defense. In 1969 the responsibility for the non-civil rights aspects of the program, i.e., the overall operation of the off-base housing referral offices, was transferred to the Director of Family Housing Program, Office of the Assistant Secretary of Defense (Installations and Logistics) and the equal housing aspects to the Office of the Deputy Assistant Secretary of Defense (Civil Rights).

Each military installation taking part in the program was required to send a copy of its original census report to the Off-Base Housing Coordinating Office. Thereafter, each base was to send a statistical and narrative report to Washington on a monthly (later a quarterly) basis until June 1969, when the reporting re-

²⁵³ Interview with Col. Charles Kane, Director, Office of the Coordinator of Off-Base Housing Services (Office of the Secretary of Defense), Apr. 15, 1970. For fiscal year 1971 Congress voted \$0.4 million for the operation of the housing referral offices. Prior to that time, the operating funds had to come out of the budgets of each participating installation. To avoid the expense of hiring a full-time housing referral officer, many base commanders merely detailed a military man to the job. Id.

²⁵⁴ Id. Interview with Col. Charles Kane, Director, Office of the Coordinator of Off-Base Housing Services (Office of the Secretary of Defense), Apr. 15, 1970.

²⁵⁵ For example, Commission staff members were told by one base housing referral officer: if Negroes have trouble in finding housing, two of the reasons are that they can't afford the good housing and that they often have so many children; that Negroes claim discrimination recklessly and that *Jones v. Mayer* is poor law. The same housing officer indicated that there was little housing discrimination in his area, but black servicemen testified to the contrary and a review by Commission staff of the housing accommodations of a number of the black servicemen who lived off-base demonstrated that they lived in black areas and in less adequate housing than whites of equivalent rank.

quirement was discontinued.²⁵⁶ The latest Defense Department instruction on the equal opportunity in off-base housing program reestablishes a quarterly reporting requirement beginning with the first quarter of 1970.²⁵⁷ The reports are similar to the reports required earlier and call for statistical information on facilities with five or more units, including whether or not they have Negro military residents. It also requests a narrative report summarizing the open housing activities and experiences of the reporting installation. According to the Department of Defense, 96.1 percent of surveyed units have signed a non-discrimination assurance. Sanctions have been imposed against the 56,451 apartment units in multiunit facilities which refused to sign assurances. There are no reports indicating that any sanctions have been imposed on facilities with fewer than five units. Sanctions rarely have been imposed other than in cases involving refusal to sign assurances.²⁵⁸ The list of sanctioned facilities has been shared with HUD and with the Department of Justice.

VIII. SUMMARY

Fair housing is the law of the land. All three branches of the Federal Government have acted to assure that housing is open to all without discrimination. The executive branch acted first, through issuance of the Executive order on equal opportunity in housing in November 1962, to prohibit discrimination in federally assisted housing. Congress, in 1964, added the support of the legislative branch by enacting Title VI of the Civil Rights Act of 1964, proscribing discrimination in programs of activities receiving Federal financial assistance. Four years later, Congress passed the Civil Rights Act of 1968, including a Federal fair housing law (Title VIII), which prohibits discrimination in most of the Nation's housing. And later that year, the Supreme Court of the United States, in *Jones v. Mayer and Co.*, relying on an 1866 civil rights law enacted

under the authority of the 13th amendment, ruled that racial discrimination is prohibited in all housing, private as well as public.

Under Title VIII and the *Jones* decision equal housing opportunity is a broadly protected legal right. Fair housing, however, like other legal civil rights, is not self-enforcing. In an area where, for decades, racial discrimination has been operating industry practice and where residential segregation has become firmly entrenched, vigorous enforcement and creative administration of fair housing laws are necessary if the rights that are legally secured are to be achieved in fact. Under Title VIII and *Jones* the tools provided for enforcement of Justice may bring lawsuits under Title VIII reliance is on litigation, with the principal burden for instituting it placed on the person discriminated against. In addition, the Department of Justice may bring lawsuits under title VIII in cases of patterns or practices of discrimination. The Department of Housing and Urban Development (HUD) is given primary responsibility for enforcement and administration of the fair housing law, but the only enforcement weapons specifically placed at its command are "informal methods of conference, conciliation, and persuasion". HUD is not authorized to issue cease and desist orders, nor may it institute litigation itself.

Despite the relative weakness of the enforcement machinery specifically provided under Title VIII, other mechanisms are available to assist in assuring compliance. Title VI and the Executive order on equal opportunity in housing, for example, both authorize use of the substantial leverage provided by Federal assistance to housing as a means of achieving an open housing market. In addition, Title VIII, itself, specifically directs HUD and all other executive departments and agencies to administer their programs and activities relating to housing and urban development in a manner which affirmatively furthers the purposes of fair housing. Title VIII also authorizes HUD to use techniques in addition to those strictly concerned with enforcement to promote the goals of fair housing.

On the basis of the Commission's examination of the activities of HUD and other agencies which can play a key role in the effort to achieve an open housing market, the results

²⁵⁶ DSD Apr. 11, 1967 memorandum, *supra* note 243.

²⁵⁷ DOD Instruction 1338.15, Equal Opportunity for Military Personnel in Off-Base Housing Program, Sept. 24, 1969.

²⁵⁸ Kane interview, *supra* note 254. Colonel Kane recalled six instances in which sanctions had been imposed for actual discrimination.

after 2 years of experience under Title VIII are disappointing. Few agencies have undertaken the kind of affirmative program necessary to carry out their fair housing responsibilities effectively. Most have not even fully recognized what their responsibilities are. Their activities have been characterized by a narrow view of the goals of fair housing and a failure to attune their programs to achieve them.

Department of Housing and Urban Development

HUD is the key Federal agency in the fair housing effort. Title VIII places principal enforcement responsibility in HUD and the agency has the major fair housing responsibility under Title VI and the Executive order on equal opportunity in housing.

The Department's performance in carrying out its responsibilities under the various Federal fair housing laws has not been such as to fulfill their potential. To some extent, its failure can be attributed to impediments inherent in the laws themselves, such as the lack of enforcement powers just discussed. HUD also suffers from restrictions in financial and staff resources for civil rights common to nearly all agencies.

The Department, however, has not made maximum use of the enforcement tools at its command nor has it made the best disposition of the available resources. Its activities have reflected a narrow approach toward achieving fair housing goals. Under Title VIII, the Department has emphasized complaint processing almost to the exclusion of other, potentially more effective, means of furthering the cause of fair housing. Under Title VI and the Executive order, there has been almost no activity at all. As of April 1970, the Department had not yet even taken the basic step of establishing complaint procedures.

Although the Department has begun to assume a leadership position in attempting to focus the entire Federal housing effort toward promoting equal housing opportunity, it has been less vigorous in shaping its own programs to that end. Decisions in such key areas as site selection and tenant selection have not yet been made. It was not until April of this year that the decision to collect data on racial

and ethnic participation in HUD programs was made and as of August 1970, data had not yet been collected. Confusion still exists as to the assignment of responsibility for Title VI among the various units of the Department and there is little coordination between equal opportunity staff and staff which administers the Department's substantive programs.

A number of the problems have been recognized by the Assistant Secretary for Equal Opportunity and efforts are being made to correct many of the deficiencies. In view of the fact that more than 2 years have elapsed since the Federal fair housing law was enacted, however, the fact that these deficiencies persist is a cause of major concern.

Department of Justice

The Department of Justice is one of the few Federal agencies with fair housing responsibilities that has attempted to carry them out vigorously and aggressively. Under Title VIII, the Department of Justice has the authority to bring lawsuits in cases involving a "pattern or practice" of Title VIII violations. This responsibility is carried out by the housing section of the Civil Rights Division.

Despite staff restrictions, the housing section has undertaken an aggressive program of litigation under title VIII. It has instituted sensible priorities to govern its activities and has attempted to bring wide publicity to the lawsuits it institutes to inform as many people as possible of their rights under Title VIII and to make it known that the law is being enforced. The section also has been conscientiously seeking to establish a close working relationship with HUD to assure effective coordination of the activities of the two Departments.

Unless the size of its staff is substantially increased, however, it will be unable to maintain the current pace of activities. The section has filed a number of cases. Soon, many of these will be coming up for trial and the lawyers will be required to devote their time to them. It then will be impossible to do the work necessary to file additional cases. The section must also expand its activities to include more cases involving discrimination against such minority groups as Mexican Americans, Puerto Ricans, and American Indians.

Veterans Administration

The Veterans Administration loan guaranty program, together with the FHA mortgage insurance program, represent the major direct Government involvement in the private housing market. The VA program, which uses the Government guaranty against loss as a means of inducing private lenders to make home loans to veterans under favorable terms, is covered both by the Executive order on equal opportunity in housing and Title VIII. VA rarely has assumed an aggressive posture in carrying out its civil rights responsibilities. Usually, it has followed the lead of its sister agency, FHA, in adopting civil rights requirements and procedures. Sometimes it has failed to go along with even the minimal steps taken by FHA.

For example, in June 1969, FHA, in light of the enactment of Title VIII and the Supreme Court's decision in *Jones v. Mayer and Co.*, prohibiting racial discrimination in all housing, eliminated its exception of one- and two-family, owner-occupied housing from coverage under the Executive order. As of April 1970 VA still retained that exception. Similarly, VA's policy on guaranteeing loans on property carrying racially restrictive covenants lags behind that of FHA in terms of promoting the cause of equal housing opportunity.

It moved ahead of FHA in 1968 by beginning to collect data on minority group participation in the sale of VA-acquired properties. As of April 1970, FHA still did not collect these data. Further, in August 1969, VA proposed to collect data on racial and ethnic participation with respect to the loan guarantee programs. Collection of these data was held up pending HUD concurrence. In April 1970, HUD announced a decision to collect racial and ethnic data on all its programs, but as of August 1970, it was still in the process of resolving problems of implementation. Presumably, when problems of implementation are worked out by HUD, the VA proposal will be put into effect.

VA has done little in carrying out its responsibilities to assure compliance with nondiscrimination requirements. Other than requiring a nondiscrimination certification from builders, the only compliance reviews conducted by VA are through complaint investi-

gations. The agency has received relatively few complaints and has been of assistance to minority group veterans in only a handful of cases brought to its attention. Further, any builder found guilty of discrimination is reinstated by VA once he agrees to make the dwelling unit available to the minority group veteran. No requirements are imposed upon such a builder other than to agree to sell to all persons without discrimination. This, of course, is precisely the agreement the builder originally made and subsequently violated.

Federal Financial Regulatory Agencies

The great majority of the Nation's housing is financed through conventional (non-FHA or VA) loans by mortgage lending institutions supervised and benefited by Federal agencies. The institutions are savings and loan associations, almost all of which are insured by the Federal Savings and Loan Insurance Corporation (FSLIC) and regulated by the Federal Home Loan Bank (FHLBB), and commercial and mutual savings banks, nearly all of whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC) and regulated either by the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or FDIC. These institutions are prohibited under section 805 of Title VIII from discriminating in the financing of housing. Further, in view of their central role in the housing market, a requirement of nondiscrimination imposed by them on builders and developers with whom they deal could be a major factor in achieving the goals of fair housing.

Each of the four agencies employs a large number of examiners who visit member lending institutions on a regular and systematic basis to determine compliance with various laws affecting them. The lending institutions, in turn, are required to keep written records so that examiners can determine instances or patterns of noncompliance.

With this network of compliance officers, these agencies have the capacity for conducting intensive and complete compliance reviews. This network of compliance, however, is not being utilized to carry out the agencies' responsibilities under Title VIII. Adequate records to permit examiners to determine compliance with the requirements of section 805

are not kept. The agencies have agreed only to send a questionnaire to their member institutions to determine the extent to which the problem of discrimination in mortgage lending exists. This can only be considered a first step. As in other areas of civil rights compliance, the required collection of racial and ethnic data is crucial. Further, the agencies have taken no steps with respect to the practices of builders and developers financed through these institutions.

The General Services Administration and Site Selection For Federal Installations

The economic benefits frequently generated by the location of Federal installations can be a persuasive force in opening up housing opportunities throughout metropolitan areas and furthering the purposes of fair housing. Increasingly, major Federal installations have been locating or relocating outside central cities in suburban and outlying parts of metropolitan areas. Until recently, the housing needs of lower-income employees and minority group employees were not specifically among the considerations taken into account in the site decision.

The General Services Administration, responsible for acquiring space for most Federal agencies, possesses the greatest potential for promoting uniform policy to assure the availability of housing for lower-income and minority group families in communities where Federal installations locate. In March 1969 GSA took a significant forward step by announcing a policy to avoid locations lacking adequate low- and moderate-income housing in reasonable proximity. This policy has not yet fully been implemented. Further, neither GSA nor other Federal agencies yet have adopted policies aimed at assuring access to housing for minority group members.

In its report on "Federal Installations and Equal Housing Opportunity," this Commission recommended a detailed Executive order aimed at both aspects of the problem. Shortly after the Commission's report was issued, the Presi-

dent issued an Executive order setting forth criteria to be considered in selecting sites for Federal installations. Although the order specified, as one of the criteria, availability of adequate low- and moderate-income housing, it, too, was silent on the matter of racial discrimination.

In March 1970 HUD initiated a series of meetings with major departments and agencies aimed at establishing a uniform site selection policy for Federal installations dealing both with the matter of housing for lower-income families and for minority group families. As of April 1970 these meetings were continuing.

The Department of Defense and Off-Base Housing

The program of equal opportunity for military personnel in off-base housing was initiated by the Department of Defense prior to the passage of the Federal fair housing law and the *Jones v. Mayer* decision. This early action by the Defense Department marked significant progress. The program has substantially improved the open housing situation in areas around the participating military installations. For example, only 22 percent of the surveyed facilities in July 1967, before the program was started, were open to Negro servicemen. As of June 1969 the owners of 96 percent of the surveyed housing units had signed an assurance of open housing. In Maryland and northern Virginia, where many large military installations are located, the percentage of open housing rose from 27 percent and 36 percent respectively to well over 90 percent.

However, the problems have not disappeared entirely. The percentage in Louisiana, for example, is still below 70 percent. It is also clear that many landlords sign assurances intending never to rent to minority servicemen. The Department is now first gathering rough statistics on the number of open facilities which are actually integrated. A review of the incomplete returns indicates that the degree of integration is still low.

CHAPTER 4

FEDERAL PROGRAMS

I. INTRODUCTION

Over the years, the Federal Government has established a large number of financial assistance programs to provide aid in meeting problems of national concern and to help achieve specific goals of national importance. Many of these programs are formulated to meet key social and economic problems of the American people; they involve such important aspects of life as education, health, food, housing, job training, business ownership, recreation, farm production, and economic development. They affect the lives of most Americans and are of particular importance to disadvantaged Americans, a disproportionately large number of whom are minority group members.

These programs take several forms. Some involve a direct relationship between the Federal Government and the intended beneficiaries, and the program benefits, in the form of payments, loans, subsidies, or technical assistance, flow directly from the Federal agency to the individual. Others involve one or more intermediaries—public or private institutions that intervene between the Federal Government and the intended beneficiaries—and the program benefits reach the individual beneficiary indirectly, through the intermediaries. In these indirect assistance programs, Federal aid often takes the form of cash disbursements—grants or loans—which go to the intermediaries to be used for specified program purposes. In other cases cash disbursements are not involved. Rather, the Federal Government assumes the role of underwriter, seeking to use the ordinary channels of the private credit industry for nationally desirable ends, by insuring or guaranteeing loans for particular purposes.

With respect to all of these Federal assist-

ance programs, direct and indirect, the Federal Government has an obligation to assure that program benefits reach intended beneficiaries on an equitable and nondiscriminatory basis. Indeed, if inequity or discrimination are permitted to persist, the programs necessarily are prevented from accomplishing their goals. For example, "a decent home and a suitable living environment for every American family," which is the goal of Federal housing programs, cannot be achieved so long as American families are denied the benefits of these programs because of their race or national origin. By the same token, the goal of quality education for every American child, which guides Federal education programs, cannot be achieved so long as school facilities and services provided under these programs are distributed inequitably and, above all, so long as children are educated in racially and ethnically isolated schools.

The Federal Government in one form or another, has, in fact, explicitly recognized its obligation to assure against discrimination with respect to all its programs. In direct assistance programs, the courts have made this obligation clear as a constitutional mandate. In programs of insurance and guaranty, executive action by the President, as well as judicial decisions, established this policy. And in programs involving grants or loans to intermediaries, Congress, as well as the judicial and executive branches, has spoken. Although the Federal responsibility to prevent discrimination has thus been recognized, the way in which that responsibility is being carried out by Federal departments and agencies is far from satisfactory.

This chapter will analyze the mechanisms and procedures that have been developed to

prevent discrimination in the three forms of Federal programs discussed above:

1. Grants or loans to intermediaries.
2. Insurance or guaranty of loans by private credit institutions.
3. Direct assistance programs.

The bulk of the chapter is devoted to grant or loan programs that flow through intermediaries to the benefit of intended beneficiaries. These are the programs in which Federal money is funneled through non-Federal agencies—public and private—for social and economic welfare purposes. These are the programs in which discrimination most frequently has come to prominent public attention.¹ These are the programs concerning which Congress, in Title VI of the Civil Rights Act of 1964, has set forth guidelines for ending discrimination based on race, color, or national origin. Thus, in these programs—unlike direct assistance or insurance and guaranty programs—Federal agencies have been under a statutory mandate to end discriminatory practices. To carry out this congressional mandate, Federal agencies have developed detailed mechanisms and procedures.

II. TITLE VI AND FEDERALLY ASSISTED PROGRAMS

A. Introduction

Of the 11 titles contained in the memorable Civil Rights Act of 1964 which was signed into law on July 2, 1964, one of the most significant is Title VI, concerned with nondiscrimination in federally assisted programs. The title states the following broad and unequivocal prohibition against discrimination:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.²

Other provisions of Title VI, dealing with the implementation of the law, limit coverage to programs or activities receiving Federal financial assistance “by way of grant, loan, or con-

tract other than a contract of insurance or guaranty.”³ Thus, Title VI applies mainly to Federal loan and grant programs. Although these Title VI programs differ widely in their purposes and functions, they have one significant element in common. They operate through intermediaries, called “recipients.”⁴ The loans and grants are made to recipients, not to intended beneficiaries. Frequently, these recipients are State agencies. For example, under HEW’s Aid to Families with Dependent Children program, recipients of Federal grants are State welfare agencies. Under the Department of Justice’s Law Enforcement Assistance Program, recipients of Federal grants are State or local law enforcement agencies. Under HUD’s Low-Rent Public Housing Program, recipients of Federal loans and annual contributions are local housing authorities, which are State agencies. Sometimes, recipients are private entities. For example, under the Commerce Department’s Economic Development Program, recipients of grants or loans may be private nonprofit organizations representing a development area. Under HUD’s Rent Supplement Program, recipients may be private nonprofit or limited dividend housing sponsors.

A 1969 study showed that in fiscal year 1968 Federal grant-in-aid payments under these programs amounted to more than \$25 billion. The bulk of this money, \$18 billion, went to State and local governments. Estimates are that Federal assistance will exceed \$30 billion in fiscal year 1970.⁵

³ Civil Rights Act of 1964, sec. 602.

⁴ The Department of Health, Education, and Welfare’s Title VI regulations define recipients as:

“Any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee or transferee thereof, but such term does not include any ultimate beneficiary under any such programs. 45 CFR 80.13(i).”

⁵ Cong. Q. Weekly Report, Aug. 15, 1969, vol. XXVII No. 33, at 1495–1501. The study covered 130 Federal grant-in-aid programs which were arranged into 17 general categories: Public assistance; highways; agricultural conservation, extension work and research; education; public health (research); public health (services); antipoverty; National Guard; food distribution; unemployment insurance; urban development and public works; veterans benefits; conservation

¹ U.S. Commission on Civil Rights, staff report, *Food Programs in Texas* (1969); U.S. Commission on Civil Rights, *Children in Need* (1969); U.S. Commission on Civil Rights, *Equal Opportunity in Farm Programs* (1965).

² Civil Rights Act of 1964, sec. 601.

In each of these programs, key decisions on how the program operates and how program benefits are distributed are made by recipients. Despite detailed Federal guidelines on program operation typically contained in the governing legislation and administrative regulations, recipients often have wide discretion in operating the program, and opportunities are presented to discriminate or otherwise deny program benefits to intended beneficiaries. For example, officials of State welfare agencies may require minority group families to meet stricter standards of eligibility than majority group families must meet and may force them to accept demeaning employment as a condition to remaining on the welfare rolls. Officials of State employment offices which receive funds from the Department of Labor may refer minority group applicants only to low-paying, low-skilled jobs even though they are qualified for better jobs.

Officials of the Cooperative Extension Service, which is funded jointly by Federal, State, and county sources, may provide technical and other assistance to black farmers of a lesser quality than provided to whites. Local housing authority officials may select sites for public housing projects and adopt tenant assignment policies that assure against racially integrated projects and promote residential segregation.

These are just a few examples of the kinds of discriminatory practices in which recipients under federally assisted programs can engage in administering the programs. They are by no means hypothetical examples.⁶ Title VI was enacted to eliminate these practices and to prevent their recurrence.⁷

practices; vocational rehabilitation; child care; business development and area redevelopment; and other programs. Public assistance payments and grants for highway construction, maintenance and related activities were the largest Federal assistance categories.

⁶ For examples of continuing discrimination under a variety of Title VI programs, see chapter 1 *supra*.

⁷ During congressional consideration of the act, the thrust of Title VI was enunciated by Congressman Emanuel Celler who said, "It seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money and other kinds of financial aid." 110 Cong. Rec. 2467 (1964).

B. Scope and Coverage of Title VI

Title VI provides a good deal of detail on the procedures to be followed in securing compliance with its requirement of nondiscrimination. These provisions concerning procedure are aimed primarily at assuring protection to recipients against precipitous and ill-advised actions by Federal departments and agencies.⁸ Concerning the scope and coverage of Title VI, however, the legislation, aside from two specific restrictions on coverage,⁹ offers only general guidance on its substance. Title VI delegates much of this responsibility to Federal departments and agencies. Section 602 of the title directs each Federal department and agency that extends Federal financial assistance to issue rules, regulations, or orders of general applicability to put into effect the provisions of the statute. In large part, the substance of Title VI has developed through agency regulations.

1. REGULATIONS

In enacting Title VI, Congress intended that, to the extent possible, Federal agencies would adopt uniform regulations.¹⁰ In the months immediately following enactment of Title VI, a task force, composed of representatives of the White House, the Commission on Civil Rights, the Department of Justice, and the Bureau of the Budget, worked with representatives of the Department of Health, Education, and Welfare to develop regulations for that agency. HEW regulations then were used as a model which other agencies adapted to their own programs.

In all, 22 Federal departments and agencies have issued Title VI regulations since the enactment of the Civil Rights Act of 1964.¹¹

⁸ Civil Rights Act of 1964, secs. 602 and 603.

⁹ Sec. 602 exempts contracts of insurance and guaranty from coverage. Sec. 604 exempts employment practices "except where a primary objective of the Federal financial assistance is to provide employment."

¹⁰ This intent is reflected in the provision in sec. 602 requiring Presidential approval before any rule, regulation, or order becomes effective.

¹¹ Agency for International Development; Department of Agriculture; Atomic Energy Commission; Civil Aeronautics Board; Department of Commerce (covering the Economic Development Administration and the Federal Highway Administration before its transfer to the Department of Transportation); Department of Defense; Federal Aviation Administration (before its

Nevertheless, as of May 1970, several agencies that operate programs subject to Title VI had not yet issued such regulations. For example, Title VI regulations for the Department of Transportation, which was established in October 1966 and which in fiscal year 1970 provided approximately \$6.1 billion to 1,682 recipients covered by Title VI,¹² were not submitted for Presidential approval until January 17, 1969, 3 days before President Johnson left office. The regulations, which have since been revised, were not approved until June 1970.¹³

The National Foundation on the Arts and the Humanities is another agency with Title VI programs which has not issued corresponding regulations. In 1968, proposed regulations were submitted to the Department of Justice for review. These regulations also were submitted to the President on January 17, 1969, along with Transportation's regulations. The President did not act on them and the Foundation has continued to operate without Title VI regulations despite the fact that it is re-

transfer to the Department of Transportation); General Services Administration; Department of Health, Education, and Welfare; Department of Housing and Urban Development; Department of Interior; Department of Justice (covering the Law Enforcement Assistance Administration); Department of Labor; National Aeronautics and Space Administration; National Science Foundation; Office of Economic Opportunity; Office of Emergency Preparedness; Small Business Administration; State Department; Tennessee Valley Authority; Treasury Department (covering the Coast Guard before its transfer to the Department of Transportation); and Veterans Administration.

With the exception of the Department of Justice, the Title VI regulations of all the issuing agencies were approved in either December 1964 or January 1965.

¹² Letter from John A. Volpe, Secretary of Transportation, to the Reverend Theodore M. Hesburgh, C.S.C. Chairman, U.S. Commission on Civil Rights, Aug. 13, 1970. Estimates of Department of Transportation expenditures (covered by Title VI) in fiscal year 1969 are about \$5 billion; most of the funds are authorized under the Federal Aid Highways Program which alone exceeds \$4 billion. Letter from Richard F. Lally, Director of Civil Rights, Department of Transportation, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Jan. 23, 1970.*

¹³ See 35 Fed. Reg. 10080 (June 18, 1970). Prior to this, four of the Department of Transportation's operating administrations, Coast Guard, Federal Aviation Administration, Federal Highway Administration, and Urban Mass Transportation Administration, continued to operate pursuant to the regulations issued by the agencies from which they were transferred.

sponsible for administering a number of federally assisted programs.¹⁴ The Equal Employment Opportunity Commission's (EEOC) program of assistance grants to State and local fair employment agencies to aid them in eliminating discriminatory employment practices¹⁵ appears to fall within the purview of Title VI. But, EEOC has not issued Title VI regulations. According to one EEOC official, until the Commission on Civil Rights staff raised the issue, the question of whether its grant program was subject to Title VI had never been considered.¹⁶ The official indicated that he would seek an opinion from EEOC's General Counsel. As of June 1970, however, the issue had not been resolved.¹⁷

In July 1967, an interagency committee, with the Department of Justice acting as Chairman, was formed to consider the adoption of uniform amendments to agencies' Title VI regulations. By that time, agencies had had the benefit of nearly 3 years' experience since the adoption of their original regulations. As a result of this experience and certain administrative changes that had occurred, there was a general recognition that the regulations needed to be brought up to date.¹⁸

The proposed uniform amendments contained many substantive provisions that had not appeared in the original regulations.¹⁹ Agencies proceeded to redraft their respective Title VI regulations to conform to the uniform amendment proposals. Like the regulations of the Department of Transportation and the Na-

¹⁴ Some Foundation programs with Title VI implications are assistance to groups for projects and productions in the arts, surveys, research, and planning in the arts, and assistance to State arts agencies for projects and productions in the arts.

¹⁵ Authorized under 42 U.S.C. 2000e-8(b) (1964); for description see the Bureau of National Affairs, Inc., *Fair Employment Practices—Summary of Latest Developments*, Oct. 23, 1969, at 1.

¹⁶ Telephone conversation with Peter Robertson, Director, Office of State and Community Affairs, Equal Employment Opportunity Commission, Nov. 17, 1969.

¹⁷ *Id.*, June 11, 1970.

¹⁸ See memorandum from David L. Rose, special assistant to the Attorney General for Title VI, transmitting the proposed regulation amendments to all Title VI coordinators, Nov. 28, 1967.

¹⁹ The uniform amendments contained requirements concerning such matters as site selection, affirmative action, and coverage of certain employment practices.

tional Foundation on the Arts and the Humanities, however, they were not submitted for Presidential approval until the last days of the outgoing Johnson Administration and were not approved.

The proposed Department of Transportation Title VI regulations incorporated most of the provisions suggested in 1967 by the Uniform Amendments Committee. These regulations, which were revised after original submission to President Johnson, were resubmitted for Presidential approval in April 1970²⁰ and approved in June 1970. Other agencies' Title VI regulations undoubtedly will be revised accordingly and resubmitted for Presidential approval.

2. DEFINING KEY TERMS

There are several key terms mentioned in Title VI that determine, in large part, the scope of coverage under the law. One is "discrimination"; another is "Federal financial assistance"; and another is "program or activity". These terms are not defined in the statute. Rather, the definition of these terms has been developed through agency regulations and interpretations. Although the Title VI regulations of Federal departments and agencies are similar, each agency determines for itself the definition of these terms as applied to its own programs. Thus, the distinct possibility for inconsistency is presented in program coverage. In actual fact, a good deal of uniformity has been achieved, although in some cases inconsistencies persist.

a. "Discrimination"

Despite the lack of statutory guidance on the definition of the term "discrimination", agency regulations uniformly have spelled out specific practices that fall within the meaning of the term and are thereby prohibited. These include the following:

- Segregation or separate treatment in any part of the program;
- Any difference in quality, quantity, or the manner in which the benefit is provided;
- Standards or requirements for participation which have as their purpose or which have the effect of excluding

members of certain racial or ethnic minorities;

- Methods of administration which would defeat or substantially impair the accomplishment of the program objectives;
- Discrimination in any activity conducted in a facility built in whole or in part with Federal funds;
- Construction of a facility in a location with the purpose or effect of excluding individuals from the benefits of any program on the grounds of race, color, or national origin;
- Discrimination in any employment resulting from a program established primarily to provide employment; and
- Discrimination in employment practices which has the effect of denying equality of opportunity to beneficiaries of the program.²¹

b. "Federal Financial Assistance"

"Federal financial assistance" is not defined in Title VI other than in terms of the means by which it is provided—"by way of grant, loan, or contract other than a contract of insurance or guaranty."

The legislative history of Title VI supports the view that Congress intended the term to be construed broadly.²² In fact, agency regulations generally have reflected a broad interpretation of this term. It generally has been defined to include:

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

²¹ See, e.g., 7 C.F.R. 15.3 (Agriculture); 15 C.F.R. 8.4 (Commerce); 45 C.F.R. 80.3 (HEW); 45 C.F.R. 1010.4 (OEO); 13 C.F.R. 112.3-112.7 (SBA). With respect to some issues concerning the meaning of "discrimination," there is no uniformity. For example, some agencies consider site selection to be within the ambit of the term (e.g., DOT, HUD). Some do not.

²² See, e.g., 110 Cong. Rec. 2467 (1964) in which Representative Celler, Chairman of the House Judiciary Committee and one of the chief spokesmen for Title VI in Congress, spoke of "granting money and *other kinds of financial aid.*" (Emphasis added.)

²⁰ Memorandum for the President from the Attorney General, Apr. 14, 1970.

to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.²³

Most of the agencies which have issued Title VI regulations have defined "Federal financial assistance" in a similar fashion.²⁴

Although this definition was developed to provide a common basis on which all Federal agencies could operate, definitional problems still arise in determining whether certain forms of financial assistance are covered by Title VI. For example, one issue of current controversy involves the tax exempt status accorded to private segregated schools by the Internal Revenue Service (IRS) of the Department of the Treasury. In its report on *Southern School Desegregation 1966-67*, this Commission found that many private segregated schools attended exclusively by white students had been established in the South as a means of avoiding public school desegregation. The Commission also found that some of these racially segregated private schools had been approved by the IRS as charitable institutions, thus exempt from paying income taxes. In addition, contributors to these institutions were entitled to deduct contributions from their taxable incomes. Based on these findings, the Commission recommended that the Secretary of the Treasury request an opinion from the Attorney General on whether title VI of the Internal Revenue Code author-

²³ HEW regulation, 45 C.F.R. 80.13(f).

²⁴ The Department of Commerce and the Tennessee Valley Authority added "waiver of charges which would normally be made for the furnishing of government services" or a variation thereof (15 C.F.R. 8.3(f) and 18 C.F.R. 302.2); the Department of Commerce also added "technical assistance" (15 C.F.R. 8.3(f)); the Office of Economic Opportunity added "the referral or assignment of VISTA volunteers (except the referral or assignment of such volunteers to work in programs or activities being carried out by private organizations under contract with the Federal Government or an agency thereof)" (45 C.F.R. 1010.2(e)); the Small Business Administration defined Federal financial assistance in terms of specific loans (13 C.F.R. 112.2); the State Department omitted "the sale and lease of . . . public interest to be served by such sale or lease to the recipient" (22 C.F.R. 141.12(e)); the Atomic Energy Commission added the "detail . . . of other personnel at Federal expense" (10 C.F.R. 4.3(d)); and the Civil Aeronautics Board limited its definition to "grants of Federal funds under section 406 of the Federal Aviation Act of 1958" (14 C.F.R. 379.12(b)).

ized or required the IRS to withhold tax benefits to racially segregated private schools.²⁵ In the Commission's view, tax exemptions represented cash subsidies to the exempt institutions by allowing them to keep revenues which otherwise would be paid to the Government, and thus become "Federal financial assistance" within the meaning of Title VI.²⁶

On August 2, 1967, IRS announced approval of the applications for tax benefits of 42 segregated private schools whose status had been under review. In a memorandum written on the eve of the IRS announcement,²⁷ the Civil Rights Division of the Department of Justice took the position that a school which bars Negroes on account of race is not an institution organized and operated exclusively for charitable or educational purposes within the meaning of the Internal Revenue Code, in that the racial policies of such schools do not promote any legitimate educational objective and are inconsistent with well-defined public policy. In support of its contention that there was a clear national policy condemning segregation in education, the Civil Rights Division cited, among other references, Title VI. Despite this, IRS approval was given.²⁸ On July 10, 1970, IRS reversed this policy by announcing that the tax exempt status of private schools which practice racial discrimination would be revoked.²⁹

²⁵ U.S. Commission on Civil Rights, *Southern School Desegregation 1966-67*, at 99.

²⁶ *Id.*, at app. VIII, at 144-45.

²⁷ Department of Justice, Civil Rights Division, "Federal Tax Status of Private Schools Which Discriminate on the Basis of Race," Aug. 1, 1967. This account of the Department of Justice's position was taken from a draft memo which was similar but not identical to the draft which was submitted to IRS.

²⁸ The IRS ruling now is the subject of litigation. See *Green v. Kennedy*, Civil Action No. 1355-69 (DC. D.C.). On Jan. 13, 1970, the court issued a preliminary injunction prohibiting IRS from granting tax exemptions to any new racially segregated private schools while the case was pending. On May 16, 1970, the New York Times reported that the Department of Justice had filed a brief in the case contending that exemptions did not constitute any form of Government support for these schools, an apparent change in position by Justice.

²⁹ Internal Revenue Service news release, July 10, 1970. However, recent comments by IRS Commissioner Thrower, suggest that vigorous enforcement procedures will not be undertaken. See, e.g., Washington Post, Aug. 12, 1970, B-6.

c. "Program or Activity"

Title VI is commonly viewed as applying to Federal grant and loan programs. By its terms, however, the statute applies to "any program or activity receiving Federal financial assistance." Thus, according to the literal language of the statute, it is not the Federal program with which title VI is primarily concerned, but rather the State, local, or private program which is receiving the Federal grants or loans. This distinction sometimes is of more than academic interest and can significantly affect the scope of Title VI coverage.

For example, HUD administers a college housing loan program under which below-market interest rate loans are made available to colleges and universities for the provision of student dormitories and other facilities. Under either definition of the term "program or activity," there is no question that the college dormitory provided under HUD loans would have to be operated on a nondiscriminatory and nonsegregated basis. That is, all students would have to be assigned to rooms in the dormitory without regard to race or ethnic background. But what of a college or university which enrolls only white students and systematically excludes racial minorities? If the term "program or activity" is defined as the *Federal* program—that is, the college housing program—this college or university presumably could satisfy the nondiscrimination requirement of assigning all students to the dormitory without regard to race and still maintain an all-white student body and an all-white dormitory. If, however, the term is defined by the literal words of the statute, then the "program or activity" is the college or university itself, and all aspects of the administration of the college, including its admissions policies, become subject to the nondiscrimination requirements of Title VI.

HUD was faced with this question shortly after Title VI was enacted. It chose to interpret the term "program or activity" broadly and in accordance with the literal words of the statute. HUD Title VI regulations are drawn to apply not only to dormitory assignments but to all other university policies and practices, including admissions policies.³⁰

³⁰ See HUD Title VI regulation, 24 C.F.R. 1.4 It is noteworthy that under Executive Order 11063, which

Some have urged an even broader interpretation of this term. For example, in a 1966 report on "Metropolitan Housing Desegregation", it was urged that all Federal aid to metropolitan areas be conditioned on the elimination of housing segregation in these areas.³¹ Thus, although the various Federal programs, such as highway construction, urban renewal, hospital construction, waste treatment plants, and electrical facilities, have different purposes and involve different recipients, if the "program or activity" receiving these various forms of financial assistance is defined as the metropolitan area, itself, then the requirement of nondiscrimination and desegregation extends to the entire metropolitan area. This argument, however, has not been adopted by any Federal agency.

Another issue concerning the definition of the term "program or activity" relates to the identity of the beneficiary of the Federal financial assistance. Generally, the direct payment of Federal funds to an individual beneficiary, as in the case of social security, does not come within the purview of title VI, because neither a "program" nor an "activity" is being assisted but only an individual.³² In explaining the distinction between direct assistance programs and programs covered by title VI, Nicholas deB. Katzenbach, then Deputy Attorney General, wrote the following to Mr. Celler, chairman of the House Judiciary Committee:

A number of programs administered by Federal agencies involve direct payments to individuals possessing a certain status. Some such programs may involve compensation for services rendered, or for injuries sustained, such as military retirement pay and

also prohibited discrimination in the college housing loan program, HUD declined to extend its nondiscrimination requirements beyond dormitory assignments. The language of the Executive order was quite different from that of Title VI, limiting its prohibition against discrimination to "housing . . . provided in whole or in part with the aid of loans . . . made by the Federal Government. . . ." Executive Order 11063 (1962), sec. 101(a)(ii). See also note 389 *infra* for comment on the only judicial consideration of the program or activity provision of Title VI.

³¹ The Potomac Institute, *Metropolitan Housing Desegregation* (1966).

³² See letter from David Rose, Special Assistant to the Attorney General for Title VI, to Robert C. Fable, Jr., General Counsel, Veterans Administration, Mar. 5, 1968. For a discussion of nondiscrimination in direct assistance programs, see sec. IV *infra*.

veterans' compensation for service-connected disability, and perhaps should not be described as assistance programs; others such as veterans' pensions and old-age survivors, and disability benefits under Title II of the Social Security Act, might be considered to involve financial assistance by way of grant. But to the extent that there is financial assistance in either type of program, the assistance is to an individual and not to a "program or activity" as required by Title VI For similar reasons, programs involving direct Federal furnishing of services, such as medical care at federally owned hospitals, are omitted.³³

Sometimes, however, even when Federal financial assistance is extended directly to the ultimate beneficiary, Title VI may apply. For example, under several education programs administered by the Veterans Administration,³⁴ direct payments are made to veterans and other beneficiaries to assist them in pursuing courses of education and training at institutions approved by State agencies or the VA Administrator. The Veterans Administration's General Counsel initially determined that these educational programs were not within the scope of Title VI because they represented a form of direct assistance. This position was opposed by the Department of Justice:

In our judgement, these educational programs in which veterans and orphans participate, can be viewed as federally assisted programs within the scope of Title VI. Although the question is not completely free of doubt, and despite the Veterans Administration's prior administrative interpretation to the contrary, it is our view that persuasive arguments can be made to sustain an administrative determination that Title VI applies to these education programs.³⁵

The Department of Justice later elaborated upon its position:

Since coverage of Title VI is specifically limited to "any program or activity" receiving Federal financial assistance, the direct payment of Federal funds to an individual beneficiary does not ordinarily come under the scope of the legislation, because neither a "program" nor an "activity" is being aided—only the individual. . . . Cash payments made by the Federal Government which may be utilized without restriction, and which are not dependent upon the individual beneficiary's participation in any program or activity, are thus not within the coverage of Title VI. However,

³³ Hearings on H.R. 7152 before the House Judiciary Committee, 88th Cong., 1st sess., pt. IV, at 2773 (1963).

³⁴ E.g., vocational rehabilitation, veterans' educational assistance, and widows' and war orphans' educational assistance.

³⁵ Letter from then Deputy Attorney General Warren Christopher, to the Director of the Bureau of the Budget Charles L. Schultz, Jan. 13, 1968.

under the assistance provisions encompassed by the veterans' educational aid statutes payment, although directly made to the beneficiary, is expressly conditioned upon his pursuit of an approved educational institution. . . . Thus, payments are specifically tied to the beneficiary's participation in an educational program or activity, which is thereby assisted through the availability of Federal funds.³⁶

In this opinion, the Department of Justice also rejected VA's contention that the payments were not covered because the assistance was primarily for veterans and only incidentally for the benefit of the schools. The Department of Justice asserted that the applicability of Title VI should not depend on whether the purpose of the assistance to the recipient institution was primary or incidental.³⁷

The General Counsel of VA, while disagreeing with Justice's position, acquiesced in its interpretation on the theory that the Department of Justice, and not VA, is charged with interpreting the Civil Rights Act of 1964.³⁸

By the same token, the direct business loan program of the Small Business Administration (SBA), which involves a direct payment from the Federal Government to beneficiaries, also has been interpreted to be covered by Title VI. Although the recipient of the loan is considered, for most purposes, the "ultimate beneficiary" and thus exempt from Title VI regulations,³⁹ for purposes of providing serv-

³⁶ Letter from Special Assistant to the Attorney General for Title VI, to the General Counsel of VA, at 2, Mar. 5, 1968. It is noteworthy that while in this case, the view of the Department of Justice, the agency charged with coordinating responsibility under title VI, was adopted by the program agency, in the IRS case discussed above it was not. For a discussion of the Department of Justice's role as Title VI coordinator, see sec. F, *infra*.

³⁷ *Id.*, at 3.

³⁸ Memorandum from General Counsel of VA, to the VA Administrator, Mar. 11, 1968.

³⁹ Title VI regulations apply to "recipient" and define that term as not including the "ultimate beneficiary." See e.g., 45 C.F.R. 80.13(i). In an undated letter to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, the Director of SBA's Office of Equal Opportunity wrote: "Naturally, we carry out a Title VI program going to equal opportunity obligations of recipients of assistance, but clearly the beneficiary of the assistance is the recipient and not those to whom some benefit might flow in terms of equal opportunity service or employment. . . ."

ices to customers and sometimes employment he is a "recipient" and the customers and employees are beneficiaries entitled to service and employment on a nondiscriminatory basis.⁴⁰

3. OTHER ISSUES OF SCOPE AND COVERAGE

a. Statutory Restrictions

(1) Insurance and Guaranty Programs

As noted earlier, Title VI excludes from coverage programs or activities receiving Federal financial assistance by way of contracts of insurance or guaranty. Thus, banks whose deposits are insured by the Federal Deposit Insurance Corporation, and savings and loan associations whose accounts are insured by the Federal Savings and Loan Insurance Corp. are not covered by Title VI.⁴¹

In addition, FHA mortgage insurance programs and VA loan guaranty programs also are typically excluded from Title VI coverage. In some cases, however, insurance or guaranty is not the sole form of assistance. In a number of FHA programs, it may take the form of cash payments to housing sponsors or mortgage lending institutions to enable lower-income families to obtain decent housing. For example, the rent supplement program involves rent assistance payments to housing sponsors on behalf of lower-income tenants. The FHA program of home ownership for lower-income families involves payments to mortgage lending institutions on behalf of lower-income homeowners which reduces the monthly payments which the homeowners must pay. These programs, by virtue of the assistance payments made by the Federal Government, are subject to Title VI despite the fact that assistance also takes the form of insurance or guaranty.

⁴⁰ For example, Title VI applies to economic opportunity loans, loans to State and local development companies, loans to small business investment companies, certain disaster loans etc. However, Title VI only covers the employment practices of economic opportunity and State and local development company recipients. Since Mar. 8, 1966, the employment practices of these recipients and all other business loan recipients (guaranty loans as of Aug. 1, 1970), have been subject to the nondiscrimination requirements of SBA's supplemental regulations (13 C.F.R. 113).

⁴¹ For a discussion of the role of these institutions in promoting equal housing opportunity, see ch. 3.

(2) Employment Practices

Section 604 of Title VI limits coverage of employment practices to those programs in which a primary objective of Federal financial assistance is to provide employment.⁴² Since the provision of employment is not a primary objective of most federally assisted programs, employment practices typically are not of Title VI concern. Notable exceptions are the programs administered by the Economic Development Administration (EDA) of the Department of Commerce. Unlike most Federal grant-in-aid programs, EDA programs have as one of their primary objectives the provision of employment, specifically in areas of substantial and persistent unemployment and underemployment.

Issues of employment coverage have proved to be complex. In some cases they have been resolved narrowly. For example, EDA's program of grants and loans to designated areas for community facility improvements under the Public Works and Economic Development Act of 1965, as amended,⁴³ has as its primary purpose the development of facilities necessary to foster industrial growth and employment in economically depressed areas. The types of projects vary greatly in size and scope and may run the gamut from water and sewage extensions to industrial parks, airport improvements, and vocational training centers.

The recipient of an EDA grant may be a local or county subdivision or a nonprofit organization representing a development area. EDA designates this type of recipient as the "recipient".⁴⁴ Identifiable business entities which are the substantial and direct beneficiaries of the public facility assisted by the loan or grant are also defined as "recipients".⁴⁵

Commerce's current Title VI regulations cover only the employment practices of substantial and direct beneficiaries which are *business* entities. A public facility, such as a

⁴² Executive Order 11246 and Title VII of the Civil Rights Act of 1964 are the principal means of reaching discrimination in employment. See ch. 2, *supra*.

⁴³ 42 U.S.C. 3121 (1965).

⁴⁴ 15 C.F.R. 8.3(i).

⁴⁵ 15 C.F.R. 8.6(b)(2). Substantial and direct beneficiaries, however, should not be confused with the ultimate beneficiaries, which are the employees and customers of the substantial and direct beneficiaries.

park, hospital, or school,⁴⁶ which may be benefited by a new sewer line, for example, would not be considered a substantial and direct beneficiary and thus neither its employment practices nor the services it provides would fall within Commerce's Title VI jurisdiction.⁴⁷ It is difficult to reconcile the distinction concerning employment practices that the Commerce regulations make between substantial and direct beneficiaries that are business entities and those that are not. Title VI, itself, makes no such distinction between types of employers, so long as a primary purpose of the Federal financial assistance is to provide employment.⁴⁸ At the time the Department of Commerce's Title VI regulations were drafted, the Economic Development Administration felt that its coverage should extend only to business entities since business entities would be creating jobs under its economic development programs. It was also believed that the extension of this coverage to parks, hospitals, and schools would duplicate the coverage of other Federal agencies. After some experience with the program, Commerce decided that all substantial and direct beneficiaries of EDA public works assistance should be covered by Title VI. This principle was included in its revised Title VI regulations which were submitted to the De-

⁴⁶ A private hospital or a private school, however, would be considered a business entity.

⁴⁷ Proposed amendments to Department of Commerce Title VI regulations would change this by stipulating that "discrimination which is prohibited by recipients * * * is also prohibited by or on the part of any *identifiable private or public entities* intended to receive a substantial and direct benefit from a public facility assisted or provided by the loan or grant." (Emphasis added.)

⁴⁸ 42 U.S.C. 2000d-3 (1964): ". . . of any *employer*, employment agency, of labor organization . . . where a primary objective of the Federal financial assistance is to provide employment" (emphasis added); see memorandum from Alfred Meisner, Assistant General Counsel, to Owen Kiely, Special Assistant for Equal Opportunity, Department of Commerce, June 12, 1967.

"We have in our Commerce Title VI regulations recognized certain practical problems in applying the above coverage to affected programs. For example, for Appalachia and EDA assistance for public facilities, beneficiaries of such assistance are limited to 'identifiable business entities intended to be substantial and direct beneficiaries of a public facility assisted or provided by the loan or grant.' (In our proposed revision of these regulations, we have suggested inclusion of 'public entities' as well.)"

partment of Justice on November 22, 1967, and are still awaiting approval.⁴⁹

Other agencies have resolved the issue of employment coverage so narrowly that they totally exclude the employment practices of their recipients even when coverage seems warranted. The Law Enforcement Assistance Administration (LEAA) of the Department of Justice is such an agency.

The LEAA was established to aid State and local governments in strengthening and improving law enforcement activities. This objective is accomplished primarily by means of block grants to States to support the development of comprehensive law enforcement plans and subsidize action programs developed under those plans at the State, regional, or local levels.⁵⁰

In fiscal year 1970, \$268 million was appropriated for law enforcement assistance.⁵¹ A substantial portion of this money is allocated to States in the form of grants for law enforcement purposes, also known as action grants. Action grants may be used for public protection; recruiting law enforcement personnel; public education; construction of law enforcement facilities; organized crime prevention and control; and recruiting, training, and education of community service officers.⁵² In view of the fact that recruiting is one of the principal purposes for which action grants may be used, it would appear that the provision of employment is a primary purpose of the assistance, and that employment practices thereby would be subject to Title VI. LEAA, however, does not interpret its program this way.

While there is a provision in the 1968 Omnibus Crime Control and Safe Streets Act which prohibits quota systems or other programs to achieve racial balance,⁵³ there would

⁴⁹ Letter from Rocco C. Siciliano, Under Secretary of Commerce, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 14, 1970.

⁵⁰ These grants are authorized under Title I of the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. 3701 et seq. (1968).

⁵¹ Public Law 91-153.

⁵² 42 U.S.C. 3731 (1968).

⁵³ 42 U.S.C. Supp. 3766(b) (1968): Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or gran-

appear to be a clear distinction between action to achieve racial balance and action to eliminate overt practices of discrimination in employment. In fact, the Department of Justice's own Civil Rights Division made this distinction in urging LEAA to issue equal employment opportunity regulations applicable to its grantees.⁵⁴ LEAA, however, has not issued such regulations.⁵⁵

If some agencies have taken an overly narrow view of their authority to cover employment practices under Title VI, others have in-

tee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

⁵⁴ Memorandum from David Rose, special assistant to the Attorney General for Title VI, to Daniel Skoler, Acting Director, LEAA's Office of Law Enforcement Programs, Mar. 12, 1969.

⁵⁵ On July 10, 1970, Department of Justice's Office of Legal Counsel concluded that LEAA does possess the authority to issue such regulations; however, Title VI was not the authority cited. See letter from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Richard Velde and Clarence Coster, Associate Administrators, LEAA, July 10, 1970.

According to LEAA, although the regulation governing its program severely limits the Agency's ability to examine the employment practices of recipients, it has always recognized that under some circumstances Title VI might apply to employment practices in State-administered, federally assisted programs. Hence, the Agency states, "We have fully endorsed and applied the Title VI mandate that employment practices are covered whenever a primary objective of Federal aid is to provide employment." Memorandum from Richard W. Velde and Clarence M. Coster, associate administrators, Law Enforcement Assistance Administration, to David Norman, Deputy Assistant Attorney General for Civil Rights, Aug. 25, 1970. LEAA also states:

"It seemed practical to us, however, to promulgate a comprehensive employment regulation based on the 14th amendment which would, in large measure, make the employment practices of our State and local recipients subject to broad equal employment criteria. To this end, this Agency, in accordance with our statute (sec. 501, Omnibus Crime Control and Safe Streets Act of 1968), will shortly present such a regulation to 'States and units of general local government' for 'appropriate consultation.' Promulgation of this regulation will obviate the necessity of Title VI employment considerations." *Id.*

In LEAA's view, "This Agency must be viewed as being ahead of most other Federal agencies in assuring equal employment opportunity under its Federal assistance programs." *Id.*

terpreted their authority much more broadly. For example, in late 1967, the Solicitor of the Department of Labor rendered an opinion on the applicability of Title VI to State employees⁵⁶ which pointed up a way of reaching recipients' employment practices other than under section 604. He noted that section 604 of Title VI precludes the Department from reaching State merit system matters since a primary objective of Labor's financial assistance to State employment agencies is not to provide employment for State personnel.⁵⁷ Therefore, Labor ordinarily could take no action under Title VI on behalf of a State employee who has been subjected to discrimination. Instead, however, the Solicitor relied on a different provision of title VI. Labor's title VI regulations effectuating section 602 provide in part:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the act or this part. . . .⁵⁸

The Solicitor's opinion pointed out that the conduct proscribed by Labor's Title VI regulations is not limited to conduct against a beneficiary alone. To the extent a recipient intimidates, threatens, coerces, or discriminates against one of its employees, this also could have the effect of interfering with the rights of persons using the services of the agency in violation of Title VI. Thus Labor justified action to prevent employment discrimination by its recipients on grounds of protecting the rights of ultimate beneficiaries, even though its action also inured to the benefit of employees.

Under similar reasoning, discrimination or segregation imposed on teachers could be prohibited under Title VI on the ground that it results in discrimination against school children, the intended beneficiaries. In fact, HEW has based its prohibition against faculty segregation in elementary and secondary schools

⁵⁶ Memorandum from Charles Donahue, Solicitor, to Arthur Chapin, Special Assistant to the Secretary of Labor, Nov. 13, 1967.

⁵⁷ State agency employment practices are covered by standards for a merit system of personnel administration, administered by HEW, and Title VII of the Civil Rights Act of 1964.

⁵⁸ 29 C.F.R. 31.8(e).

on this ground.⁵⁹ HEW's action has been upheld judicially.⁶⁰ Further, the proposed uniform amendments, if adopted, also would reflect this broader view of Title VI coverage regarding employment discrimination.⁶¹

Other agencies, while not interpreting their Title VI authority as prohibiting employment

⁵⁹ Department of Health, Education and Welfare, 1968 Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964, HEW Subpart B, sec. 10.

⁶⁰ See, e.g., *Rogers v. Paul*, 382 198 (1965); *United States v. Jefferson County Board of Education*, 372 F. 2d 836, 882-886 (5th Cir. 1966), aff'd en banc 380 F. 2d 382 (1967), cert. denied sub. nom., *E. Baton Rouge Parish School Board v. Davis*, 389 U.S. 840 (1967); *Bradley v. School Board of Richmond*, 382 U.S. 103 (1965). Furthermore, HEW also points out that courts of appeals have commonly required court ordered desegregation plans to contain provisions prohibiting teacher discrimination. *Whittenberg v. School District of Greenville County*, 424 F. 2d 196 (4th Cir. 1970). *Singleton v. Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1970); *Kemp v. Beasley* (11) 389 F. 2d 178 (8th Cir. 1968); *U.S. v. Board of Education, Independence School District No. 1, Tulsa County, Oklahoma*, F. 2d (10th Cir. No. 338-69, July 29, 1970). Letter from J. Stanley Pottinger, Director, Office for Civil Rights, HEW, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Sept. 18, 1970. See also memorandum from Alanson Wilcox, HEW, Feb. 15, 1968, in regard to HEW authority to issue school compliance policies under title VI.

⁶¹ The proposed amendments provide:

"Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color or national origin in the employment practices of the recipient or other persons subject to the regulations tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions . . . shall apply to the employment practices of the recipient or other persons subject to the regulations, to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries. . . ."

In 1967 the Uniform Amendments Committee justified its reasoning as follows:

"Even if a primary purpose of a program is not to generate employment, however, the beneficiaries' right to equal treatment necessarily encompasses the employment practices of the recipient to the extent that such practices affect the equality of treatment afforded beneficiaries."

See also the Department of Transportation's recently issued regulations (35 Fed. Reg. 10080) which incorporate this provision.

discrimination on the part of recipients, have reached these practices by means of other existing authority. For example, under the SBA interpretation, only those business loans made to borrowers under programs meant to foster employment are subject to the Title VI prohibition against discriminatory hiring practices.⁶² Nonetheless, SBA determined to deal effectively with the employment practices of all SBA borrowers. Shortly after Title VI was enacted, the SBA Administrator requested an opinion from the Department of Justice whether, aside from Title VI, the agency had statutory authority to cover the employment practices of all loan recipients.⁶³ The Department of Justice advised the Administrator that he had general statutory authority to take the action he desired and that the provisions of section 604 did not limit this authority.⁶⁴ Jus-

⁶² Letter from Philip Zeidman, SBA General Counsel, to David Filvaroff, Special Assistant to the Attorney General, Department of Justice, Mar. 30, 1965.

⁶³ Letter from Eugene Foley, SBA Administrator, to Robert F. Kennedy, Attorney General, July 9, 1964. In this letter, the SBA Administrator referred in part to sec. 5(b) of the Small Business Act (15 U.S.C. 634) which vests the Administrator with broad powers, viz., to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this act" and to "take any and all actions . . . determined by him to be necessary or desirable in making . . . loans under the provisions of this Act." The Administrator indicated that "It seems . . . that, unless superseded by the enactment of Title VI, this broad language contains authority to exclude from the benefits of our financial assistance programs business concerns which practice either or both of the two described forms of racial discrimination" (i.e., discrimination in the employment of workers or in the services provided to the public).

⁶⁴ Letter from Norbert Schlei, Assistant Attorney General, Office of Legal Counsel, to Eugene Foley, SBA Administrator, Aug. 3, 1964. The Assistant Attorney General wrote the following: "I do not construe Title VI of the Civil Rights Act as limiting the general authority vested in you by the acts which you administer."

Other agencies have adopted the use of a nondiscrimination clause as a means of providing nondiscrimination coverage of recipients' practices not otherwise covered by Title VI. For example, the Office of Economic Opportunity formerly relied upon a contract provision to insure that Job Corps facilities were operated in a nondiscriminatory manner (the Department of Labor currently has responsibility for the program). The Office of Economic Opportunity also uses grant conditions which prohibit discrimination in CAP employ-

tice also advised that if he chose to use this authority in cases where assistance to a recipient would be refused or terminated on grounds of racial discrimination, the procedures required by Title VI should be made applicable.⁶⁵ SBA then issued regulations prohibiting employment discrimination by all direct and immediate participation borrowers (guaranty borrowers as of Aug 1, 1970).⁶⁶ These regulations, in effect, supplement the Agency's Title VI regulations.

The examples described above suggest that, despite the restricted coverage of employment practices in Title VI, these practices can be reached by Federal agencies through such means as broad interpretations of the title and use of existing statutory authority as a supplement to Title VI. The examples also suggest a lack of uniformity in the Federal application to coverage of employment practices. Agencies determine for themselves the scope of Title VI coverage. In one case, involving the LEAA, uniformity of opinion was lacking within a single Federal department—the Department of Justice, which is charged with responsibility for coordinating the entire Title VI effort.

(3) Coverage of Programs under Preexisting Loan or Grant Contracts

One of the key issues that had to be decided shortly after Title VI was enacted related to coverage of programs or activities receiving

ment (not covered by Title VI) and requires affirmative action efforts to insure that applicants are hired, and that employees are treated during employment without regard to their race, creed, color or national origin. (OEO Instruction 6710-1, *Applying for a CAP Grant*, dated Aug. 1968, at VI-16). The question of whether such a grant condition is permissible and not preempted by Title VI was resolved by the Department of Justice in a letter which stated that "Title VI does not preempt the authority of an agency derived from a separate statute to impose and enforce conditions requiring nondiscrimination in employment in connection with grants of Federal financial assistance." (Letter from Frank M. Wozencraft, Assistant Attorney General, to Bertrand M. Harding, Acting Director, Office of Economic Opportunity, Sept. 5, 1969). For an earlier but perceptive treatment of this issue, see "In the Matter of Alachua County Board of Public Instruction (Gainesville, Florida, Project Headstart, Grant No. 0071), grantee, opinion rendered on Nov. 19, 1965, by Joseph W. Kaufman, hearing examiner.

⁶⁵ Id.

⁶⁶ 13 C.F.R. 113. See also note 225 *infra*.

assistance under preexisting loan or grant contracts. Involved were Federal programs which had been providing assistance to recipients for many years before passage of Title VI. In some cases, assistance had been terminated well before 1964, although the recipients still benefited from the goods or services provided under these programs. Where Federal financial assistance was extended and concluded to recipients before the effective date of agencies' Title VI regulations, these recipients were exempted from coverage.⁶⁷

In other cases, however, recipients were still receiving financial assistance, but receiving it pursuant to loan or grant contracts executed well before the enactment of Title VI. Did Title VI apply to programs or activities receiving assistance under preexisting loan and grant contracts, as well as to those for which contracts were executed after Title VI came into effect? The question was answered in the affirmative. With respect to programs or activities still receiving Federal financial assistance on the effective date of Title VI, but under Federal loan or grant contracts signed prior to that effective date, the decision was

⁶⁷ See, e.g., HEW Title VI regulation, 45 CFR 80.2. The significance of this exclusion is illustrated in a Tennessee Valley Authority program which involves the transfer, lease, and license of real property for a nominal consideration to States, counties, municipalities, and other public agencies for development and administration for public recreation purposes. Since the issuance of TVA's Title VI regulations, there have been 29 recipients of TVA land. In fiscal years 1968 and 1969 alone there were 12 recipients who received a total of 2,082 acres at an estimated value of \$1.7 million. Letter from L. Duane Dunlap, Assistant General Counsel, TVA, to Richard Gladstone, Program Analyst, U.S. Commission on Civil Rights, Nov. 5, 1969.

"There are, however, approximately 155 recipients of land that was transferred, leased, or licensed prior to the effective date of the agency's Title VI regulations. Ninety-nine of these 155 recipients are subject to a TVA nondiscrimination clause which appears in the transfer or lease instruments. As of June 20, 1969, however, 56 active licenses, leases and transfers neither contained a TVA nondiscrimination clause nor were subject to Title VI. Of these, 12 were State parks, nine county parks, twelve municipal parks, and four playgrounds."

Exhibit E attached to letter from L. Duane Dunlap, Assistant General Counsel, TVA, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Dec. 15, 1969.

that the language of Title VI applied to these programs or activities and that Congress had constitutional authority to do so.⁶⁸

b. Planning, Advisory, and Supervisory Boards

In some instances, Federal agencies extend financial assistance to boards which act in an advisory or planning capacity to State or local governments. In other instances, boards administer Federal grants given directly to State or local governments.

For example, the Law Enforcement Assistance Administration of the Department of Justice makes planning grants to States to assist in establishing and operating State law enforcement planning agencies (SPA's).⁶⁹ The function of the SPA's is to develop comprehensive, statewide, law enforcement plans and to set law enforcement priorities within the State.⁷⁰

The Economic Development Administration of the Commerce Department offers planning grants to redevelopment areas and to Economic Development Districts (EDD) to develop an Overall Economic Development program (OEDP) for the area. These programs are required before an area or district can receive EDA funds for the construction of public work facilities. The programs are developed by OEDP county and district communities.

HUD also operates programs that involve planning boards. For example, under its program of planning grants for metropolitan development, known as the "701" planning grant program, the plans are developed by State, metropolitan, and regional planning agencies.⁷¹

There is little question that the plans developed by these boards are subject to the requirements of Title VI. To the extent that

plans developed with Federal financial assistance exclude areas with heavy minority group concentration or otherwise discriminate against minority group members, these plans would be in violation of Title VI. The more difficult question is whether Title VI also covers membership on these planning boards. None of the three agencies, LEAA, EDA, nor HUD, has yet determined that Title VI applies.

Under LEAA program guidelines, State planning agencies must have "balanced representation" including "representation of community or citizen interests."⁷² LEAA has not determined that these guidelines require adequate minority representation, nor has it determined that Title VI applies.

In April 1969, the Lawyers Committee for Civil Rights Under Law filed a complaint with LEAA alleging that Negroes had been systematically excluded from membership on the board of the Mississippi SPA. Of the 34 members of the board, only one was a Negro, although Negroes comprised approximately 42 percent of the State's population. LEAA requested an opinion from the Department of Justice's Civil Rights Division regarding the applicability of Title VI to membership on the Mississippi SPA.⁷³ The response from the Civil Rights Division suggested that board membership was subject to Title VI.⁷⁴ The response also suggested that exclusion of Negroes from SPA membership was a violation of LEAA's own guidelines:

Even apart from the question whether or not there is a violation of Title VI, it is possible that exclusion of Negroes in the instant case is violative of that provision of the guidelines promulgated by your agency. . . .

In Mississippi, where Negroes represent over 42 percent of the total population, it is difficult to envision a "representative" group from which Negroes have been systematically excluded.⁷⁵

⁷² Law Enforcement Assistance Administration, *Guide for State Planning Agency Grants: Grants for Comprehensive Law Enforcement Planning* Nov. 8, 1968.

⁷³ Memorandum from Daniel Skoler, Acting Director, Office of Law Enforcement Assistance Administration, to David Rose, Special Assistant to the Attorney General for Title VI, May 7, 1969.

⁷⁴ Memorandum from David L. Rose, Special Assistant to the Attorney General for title VI to Daniel Skoler, Acting Director, Office of Law Enforcement Assistance Administration, Aug. 14, 1969.

⁷⁵ *Id.*

⁶⁸ Justice Department memorandum, "Application of Title VI of the Civil Rights Act to Future Payments under Existing Grants and Loans," Aug. 3, 1964. It should be pointed out that if a contrary decision had been made, many federally assisted programs, particularly those administered by HEW, which involve continued assistance, would have been entirely excluded from Title VI coverage. In addition, in housing programs, such as urban renewal and public housing, which involve long time lags between contract execution and the provision of housing, much of the housing produced after the effective date of Title VI would have been excluded from coverage.

⁶⁹ 42 U.S.C. 3722 (1968).

⁷⁰ 42 U.S.C. 3223(b) (1968).

⁷¹ 40 U.S.C. 461 (1964).

On June 9, 1969, the Lawyers' committee brought suit against the Mississippi Commission on Law Enforcement seeking a judgment which would enjoin the defendants from excluding Negroes from being represented on the State planning board. The lower court refused to grant an injunction holding that the plaintiffs had failed to show discrimination in the Governor's appointments to the SPA board and had failed to offer proof that the plaintiffs, or the class they represented (i.e., Negroes residing in Mississippi), were more qualified than the present members of the Commission.⁷⁶ The court, nevertheless, recommended that more Negroes be appointed to these posts. The decision has been appealed to the Fifth Circuit Court of Appeals.⁷⁷

EDA also does not treat representation on OEDP county and district committees as a Title VI matter.⁷⁸ In fact, at one time, EDA maintained that the issue of committee membership was not even within the jurisdiction of the Department of Commerce's Office of Equal Opportunity.⁷⁹ However, this matter was eventually favorably resolved.⁸⁰ A November 1969 survey of minority representation on OEDP committees, conducted by EDA's Office of Equal Opportunity, showed that "in general, minorities are under-represented in counties and districts where their population is high."⁸¹

⁷⁶ *Allen v. Mississippi Commission on Law Enforcement*, (No. 4487), S.D. Miss.), opinion denying preliminary injunction. Sept. 22, 1969.

⁷⁷ According to LEAA, the issue whether Title VI applies to the racial makeup of law enforcement State planning boards "is not an easy one; but this Agency will of course be guided by the determination of the courts." Memorandum from Richard W. Velde and Clarence M. Coster, *supra* note 55.

⁷⁸ EDA is in the process of developing standards providing for minority participation on these committees. See letter from Luther S. Steward, Jr., Special Assistant for Equal Opportunity, Department of Commerce, to Richard Gladstone, program analyst, U.S. Commission on Civil Rights, May 26, 1970.

⁷⁹ See memorandum from Thomas W. Harvey, former Deputy Assistant Secretary for Economic Development, to Luther C. Steward, Jr., Special Assistant for Equal Opportunity, Apr. 23, 1969.

⁸⁰ See memorandum from Larry A. Jobe, Assistant Secretary for Administration, to Robert A. Podesta, Assistant Secretary for Economic Development, May 7, 1969.

⁸¹ EDA, "Report on Minority Representation on OEDP Committees Survey," (November 1969).

EDA's position concerning nonapplicability of Title VI was taken despite the fact that under existing EDA policy all applicants for planning grants must comply with Title VI with respect to employment practices and the conduct of their operations.⁸² Although Commerce Deputy Assistant General Counsel, as well as its Special Assistant for Equal Opportunity, have recognized that Title VI does apply to minority representation on OEDP committees,⁸³ the Special Assistant for Equal Opportunity feels that coverage could be better provided under EDA's own regulations.⁸⁴ Nonetheless, no procedures have been established by EDA concerning this matter.⁸⁵

Like LEAA and EDA, HUD also does not consider membership on planning boards to be subject to Title VI. A HUD survey of "701" planning agencies which received HUD grants in fiscal year 1969 revealed that, of the 23 States having planning boards which provided information on the racial composition of these boards, only one had a black member. No other minorities were represented.⁸⁶ Nevertheless, no action to assure greater minority representation is contemplated by the Department.

c. Membership in Federally Assisted Organizations

An issue closely related to minority representation on advisory bodies is the question

⁸² 15 C.F.R. 8.4(c).

⁸³ Memorandum from Luther Steward, Jr., Special Assistant for Equal Opportunity, to Larry Jobe, Assistant Secretary for Administration, Department of Commerce, May 5, 1969.

⁸⁴ *Id.* Specifically, the Special Assistant indicated the following:

"However, we do not believe from an administrative point of view that the question of representation on OEDP committees needs to be handled under Title VI procedures In our opinion, Economic Development Order 3.02.-2, properly implemented, is and should be a means of insuring equitable minority group representation on OEDP committees."

⁸⁵ EDA's Office of Equal Opportunity has drafted detailed procedures for implementing EDA's policy of requiring minority representation on OEDP committees. These procedures are currently being reviewed by Commerce's Special Assistant for Equal Opportunity. Letter from Siciliano to Glickstein, *supra* note 49.

⁸⁶ Department of Housing and Urban Development, *701 Statewide and Metropolitan Survey—Preliminary Observations* (based on the partial returns of a July 1969 survey), Nov. 19, 1969.

of Medicine and Surgery of the Veterans Administration. The Department of Medicine and Surgery of the Veterans Administration, for example, administers a program which grants space in VA hospitals to national service organizations that help disabled veterans, primarily by aiding them in filling out forms for Government assistance. The organizations include such groups as veterans' organizations (e.g., The American Legion and The Catholic War Veterans), the Masons, and the American Red Cross. There are currently 495 office spaces being made available to these organizations in 165 VA hospitals.⁸⁷ While the VA considers the services being provided in the hospitals to be subject to Title VI (i.e., they must be dispensed in a nondiscriminatory manner), it does not consider the membership policies of these service organizations to be covered by Title VI.⁸⁸

The Department of Housing and Urban Development has taken a position contrary to that of the VA with respect to fraternal organizations participating in its urban renewal program. HUD's rationale seems to be the more compelling:

While . . . the owner-participation agreement must contain appropriate nondiscrimination covenants, a question remains as to whether those covenants must preclude discrimination on the basis of race, color or national origin in the owner-participant's membership policies and practices The Department has determined that the fraternal organization must use and operate their property without discrimination, and that a membership bar . . . would be incompatible with the commitments in the required covenant.⁸⁹

The Small Business Administration is another agency which requires an assurance of open membership policies from any social, civic, or fraternal organization which seeks assistance under its programs. The SBA position is stated in one of its directives concerning its direct loan program:

. . . that consideration of race, color, or national origin of applicants for membership in the organization during the term of the loan would be inconsistent with its commitment as set forth in the execution of the

⁸⁷ Interview with F. J. Frankina, Director of Legal and Legislative Staff, Department of Medicine and Surgery, Veterans Administration, Dec. 4, 1969.

⁸⁸ Id.

⁸⁹ Memorandum from S. Leigh Curry, Jr., Associate General Counsel (RHA) to Robert Pitts, Regional Administrator, Region VI, HUD, Jan. 12, 1968.

"Assurance" which is deemed to override any membership policies to the contrary required by either the local or national charter or constitution and bylaws.⁹⁰

Decisions and interpretations regarding issues of Title VI scope and coverage have tended to be made, not on a Governmentwide, but on an agency-by-agency basis. Sometimes failure to provide coverage has not resulted from a conscious decision to exclude it, but from the lack of any decision at all. Despite the need for uniform Federal policy on these important civil rights issues, neither the Department of Justice nor any other authority has attempted to develop definitive guidelines on the applicability of Title VI.⁹¹

4. SANCTIONS

Title VI provides for sanctions in the form of termination of or refusal to grant continuing assistance in the event violations occur.⁹² Before these sanctions may be invoked, however, several steps must be taken. First, the agency must determine that compliance cannot be secured by voluntary means.⁹³ Then the agencies are required "to consider alternative courses of action consistent with achievement of the objectives of the statutes authorizing the particular financial assistance."⁹⁴ In addition to terminating financial assistance, agencies may take other action authorized by law, including referral to the Department of Justice for appropriate legal action.⁹⁵

⁹⁰ SBA National Directive 1500-3A, sec. 4, Apr. 19, 1967, at 1.

⁹¹ In the Department of Transportation's recently issued Title VI regulations (35 Fed. Reg. 10080, June 18, 1970), however, the Federal Aviation Administration (in app. C) has provided coverage guidelines. These guidelines will be further supplemented by use of advisory circulars and implementing directives. Letter from Volpe to Hesburgh, *supra* note 12.

⁹² Civil Rights Act of 1964, sec. 602.

⁹³ Id.

⁹⁴ This requirement, unlike the voluntary compliance requirement, does not appear in the statute. See 28 C.F.R. 50.3, "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," Department of Justice, Dec. 27, 1965.

⁹⁵ Id. If there is a formal contract with a nondiscrimination agreement between the Government and the recipient, the appropriate legal action may be a civil suit to enforce the agreement or to invoke any other contractual remedies. If the recipient is a public institution, such as a public hospital or public school, the appropriate legal action may be a civil rights suit to secure a court order barring the unlawful practices

If an agency chooses to use the sanction of fund cut-off, several additional procedural steps must first be taken. First, the recipient must be afforded an opportunity for a hearing and there must be an express finding of discrimination on the record.⁹⁶

Another procedural safeguard required before termination of assistance can be imposed is the filing of a full report with the committees of Congress having legislative jurisdiction over the program or activity involved. There is a further requirement that 30 days must pass after the filing of such a report before the fund cutoff becomes effective.⁹⁷

The Office of Economic Opportunity at one time interpreted this provision as congressional authority to overrule an agency's termination decision.⁹⁸ While congressional pressures may cause this to occur, there is nothing in either the law or legislative history to suggest that the Congress was actually granted such a veto power.⁹⁹ A final procedural safeguard expressly afforded the recipient is judicial review of an administrative determination.¹⁰⁰

Although the statutory language concerning

under Title III or IV, respectively, of the Civil Rights Act of 1964. An agency may also seek the assistance of State or local authorities responsible for enforcing similar nondiscrimination standards. When a recipient's violation of title VI involves discriminatory employment practices, the case may be referred to a State or local fair employment practices commission or comparable body.

⁹⁶ Civil Rights Act of 1964, sec. 602. An opportunity for a hearing is not required if "compliance is effected by any other means authorized by law."

⁹⁷ *Id.*

⁹⁸ Office of Economic Opportunity, undated outline entitled, "Compliance Responsibilities—Office of Civil Rights," sec. 4c: "Denial of funds for failure to comply with civil rights requirements must be made by the Director of OEO with the advice of the Assistant Director for Civil Rights. The appropriate committees of the Congress can overrule the decisions of the Director."

⁹⁹ In fact, information recently received from OEO indicates that this has never been the official position; rather, the document was drafted for internal use to summarize the agency's responsibilities, but never approved. Letter from Wesley Hjernevik, Deputy Director of OEO, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 19, 1970.

¹⁰⁰ See Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 *Geo. Wash., L. Rev.*, 841-2, 856 (1968).

enforcement procedures is couched in discretionary terms,¹⁰¹ legislative history indicates that action to enforce Title VI would be mandatory whenever discrimination was disclosed.¹⁰²

It is important to distinguish between the procedural requirements for refusing or terminating Federal financial assistance as compared to deferral of such assistance. In order to refuse to provide or to terminate Federal assistance, there must be an express finding of discrimination on the record after the recipient is afforded an opportunity for hearing, and a full report must be filed with the appropriate congressional committees.¹⁰³ According to Department of Justice guidelines for enforcement of Title VI, however, an agency may defer action on an application without providing the above safeguards.¹⁰⁴ The guidelines provide that deferral is appropriate only in the case of applications for noncontinuing assistance or initial applications for programs of continuing assistance. Moreover, deferral cannot be continued indefinitely.¹⁰⁵

¹⁰¹ Civil Rights Act of 1964, sec. 601. "Compliance with any requirement adopted pursuant to this section may be effected"

¹⁰² Senator John D. Pastore, one of the principal spokesmen for Title VI, said:

"In accordance with the provisions of section 602, each agency affected is required by the term 'shall' to take action to eliminate discrimination within the programs under its jurisdiction. By the term 'may' each agency is given a certain degree of latitude in the procedure by which it accomplishes the mandate to eliminate discrimination Action is mandatory, but the procedure by which that action is accomplished is discretionary, subject, however, to the approval of the President." 110 Cong. Rec. 7058 (1964).

¹⁰³ Civil Rights Act of 1964, sec. 602.

¹⁰⁴ 28 C.F.R. 50.3 I A, II B.

¹⁰⁵ *Id.*, at I A: "Whenever action upon an application is deferred pending the outcome of a hearing and subsequent section 602 procedures, the efforts to secure voluntary procedures, if found necessary, should be conducted without delay and completed as soon as possible."

See also sec. 182 of the Elementary and Secondary Education Act of 1966, 42 U.S.C. 2000d-5 (Supp. II, 1965-66), which limits HEW's deferral period to 90 days.

Despite the availability of deferral, some agencies will not use it. The Atomic Energy Commission, for example, will not defer assistance even when the recipient has been found to be in noncompliance by another Federal agency in a hearing to which AEC was

Thus Title VI is heavily weighted with a number of procedural safeguards. The need for a speedy, efficient way of bringing about compliance and protecting the rights of minority group members has, in effect, been subordinated to the need to protect the rights of Federal program recipients. Close examination of the stringent procedural requirements which surround the use of Title VI sanctions demonstrates that the image of Federal officials arbitrarily and precipitously depriving States, localities, and private institutions of needed Federal funds on the basis of Title VI can be no more than a myth.

C. Organization and Staffing

In view of the scope and complexity of civil rights problems and their crucial importance to the future well-being of the Nation, effective administration, coordination, and enforcement of the laws aimed at resolving them deserve high priority attention. Title VI is among the most important of these laws. If it is to be enforced effectively, those who carry out the civil rights responsibility of Federal agencies must be in a position to affect agency policy and to make decisions concerning program operation. Accordingly, the chief civil rights official should be at the highest administrative level and his office should be comparably situated within the agency's structure. His status and organizational position within the bureaucracy should be at a level which affords the opportunity to participate fully in key agency policy decisions. In addition, he must have sufficient staff to conduct the kind of comprehensive compliance program that is necessary.

In none of the Federal departments and agencies that operate Title VI programs is the civil rights office organized and staffed adequately. In most cases, the civil rights chief is of low status and his position in the agency hierarchy is subordinate to those who operate programs; his authority to affect agency policy is limited and, in some cases, nonexistent; and his staff is hopelessly insufficient.

not a party. According to AEC's Civil Rights Coordinator, AEC could defer assistance without a hearing, but the Commissioners are opposed to doing this. Interview with Harry S. Traynor, Assistant to the General Manager, AEC, Oct. 27, 1969.

I. POSITION OF CIVIL RIGHTS ADMINISTRATORS AND EXTENT OF CENTRALIZATION OF CIVIL RIGHTS FUNCTIONS

There is no uniformity among the various Federal agencies with civil rights responsibilities with respect to the position of the principal civil rights administrator. The chief civil rights administrators, however, have in common relatively subordinate status in terms of title, grade level,¹⁰⁶ position in the administra-

¹⁰⁶ Just as the head civil rights administrator in any agency suffers from a low grade level, so do his subordinates. For example, HEW's Office for Civil Rights currently has only six supergrades including the Director and Deputy Director. Several divisions are headed by GS-15's and none of the field offices has been allotted supergrade status. According to the Assistant Director for Management, he had requested supergrades for all division and regional directors; however, no action had been taken on his request. Interview with Robert Brown, Jan. 30, 1970. Similarly, at the Department of Commerce, the departmental Office of Civil Rights is allotted two positions, neither of which is allotted a supergrade. The Office of Equal Employment Opportunity at the Department of Labor also has a low-grade structure. The Director is only a GS-15; the two assistant directors, GS-14's. The remainder of the professional central office equal opportunity staff (approximately 16 in number) are mostly GS-13's and GS-12's, while the regional civil rights staff of 13 is divided as follows: three GS-14's, five GS-13's and five GS-12's. See letter from Arthur A. Chapin, Director, Office of Equal Employment Opportunity, Department of Labor, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Jan. 22, 1970. The Director has submitted requests for overall upgrading and staff expansion (promotion requests submitted in July of 1969); however, no action has been taken. Likewise, the Director of Interior's departmental Office for Equal Opportunity is a GS-15 and his deputy also is a GS-15. Civil rights functions in Interior's Bureau of Outdoor Recreation are carried out by the Staff Assistant for Civil Rights, a GS-14. Although the Bureau of Outdoor Recreation contemplates establishing a staff assistant (civil rights program) position in four of the six regions, the grade will be only a GS-12. See memorandum from G. D. Hofe, Jr., Director, Bureau of Outdoor Recreation, to Director, Office for Equal Opportunity, Nov. 14, 1969.

Grade comparisons will be made throughout this portion of the study. It should be noted that, although there are instances in which individuals subordinate to others in terms of grade level actually exercise more power, Commission staff generally did not observe this to be the case as regards agency civil rights administrators. On the contrary, civil rights administrators are usually also subordinate in terms of power and influence.

tive hierarchy, and authority—particularly authority to enforce Title VI.

The position is also circumscribed by fragmentation of responsibility or lack of authority to implement Title VI and by the inability, in cases of departmental decentralization, to command performance of bureau civil rights staffs.

Only HUD, among the seven large Federal departments which administer significant programs subject to Title VI, has a civil rights administrator at the assistant secretary level.¹⁰⁷ In three of these major agencies—Commerce, Interior and Labor—the departmental civil rights officer is only a GS-15, thus not even occupying supergrade status.¹⁰⁸ Of the smaller agencies, four—Law Enforcement Assistance Administration, Office of Economic Opportunity, Small Business Administration, and Veterans' Administration—have significant Title VI programs. Only one of the four, Veterans Administration, has a civil rights administrator in a supergrade position.¹⁰⁹

In agencies in which the Title VI function resides in separate civil rights offices within the component bureaus, e.g., Commerce, Transportation, and Interior, the pattern of subordinate position and grade for the Title VI administrator prevails.¹¹⁰

The inferior status which characterizes the office for civil rights in most departments is reflected by the administrative layers interposed between the Secretary and his top civil rights officer. In three of the seven large agencies with significant Title VI activity—HEW, HUD, and Transportation—the civil rights director reports directly to the Secretary;¹¹¹

¹⁰⁷ The seven agencies included in this category are: Agriculture, Commerce, HEW, HUD, Interior, Labor, and Transportation.

¹⁰⁸ Of the other three—HEW, Transportation, and Agriculture—the chief civil rights officers are GS-17, 16 and 16, respectively.

¹⁰⁹ In one other, OEO, the position is allotted a GS-16 but the present occupant was hired at a GS-15 level.

¹¹⁰ At Commerce, the Assistant Secretary for Administration has overall responsibility for Title VI, among, his other duties. The Special Assistant for Equal Opportunity, however, assists in the day-to-day implementation of the Department's civil rights programs. Siciliano letter, *supra* note 49.

¹¹¹ At HEW, Mr. Pottinger's predecessor, Leon Panetta, reported to the Undersecretary. Mr. Panetta's predecessor, Ruby Martin, reported to an Assistant Secretary. U.S. Commission on Civil Rights, *HEW and Title VI* (1970).

in three others, Agriculture, Commerce, and Labor—he reports to an Assistant Secretary; and at Interior, to a Deputy Under Secretary. Of the four smaller agencies, in only the Veterans' Administration does the civil rights chief report directly to the Administrator.

Federal civil rights operations and authority, particularly in regard to Title VI, also are marked by decentralization and fragmentation.¹¹² Only two of the seven large agencies with important Title VI programs have centralized, departmentwide civil rights offices. At the Department of Housing and Urban Development and the Department of Health, Education, and Welfare, the civil rights enforcement operations are centralized in unitary, departmental offices—the Office of the Assistant Secretary for Equal Opportunity and the Office for Civil Rights, respectively. However, of the seven agencies, only HEW also has centralized authority for the decision-making regarding Title VI.¹¹³

At the Departments of Commerce and Transportation, responsibility is divided between the departmental civil rights offices and the civil rights offices of the operating bureaus; at Interior and Agriculture, between the department office and designated civil rights staff in the bureaus; at Labor, among various staff components.

Among four small agencies with major Title VI programs, there is no prevailing pattern: LEAA has no organization for effecting Title VI regulations,¹¹⁴ OEO and SBA have central-

¹¹² For purpose of this section, a decentralized operation is defined as one in which the enforcement of Title VI is divided between a departmentwide civil rights office and the program bureaus. The report also deals with the issue of decentralization of activity to the field. Fragmentation of overall civil rights responsibilities, e.g., when contract compliance is the duty of one office and Title VI or in-house employment of another, will not be considered in this report.

¹¹³ An anticipated change in HUD's Title VI regulations will centralize responsibility for Title VI enforcement under the Secretary's authority and it is contemplated that the Secretary's authority in this area will be delegated to the Assistant Secretary for Equal Opportunity. Letter from George Romney, Secretary of HUD, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 13, 1970.

¹¹⁴ LEAA disagrees with this statement. According to the agency: "LEAA has thoroughly mapped out the organizational structure of its compliance effort. Among other things, we are undertaking to revise the assur-

ized operations and VA shares Title VI enforcement with the program divisions.

Among 11 Federal agencies with minor Title VI programs, the emphasis tends to be perfunctory, sporadic, and centralized. Usually only one person in the headquarters office has a Title VI function and since almost no staff time is devoted to Title VI activity, the relative advantages of centralization cannot be evaluated.

The influence and leverage of the departmental civil rights head and of his counterpart in the operating bureaus are also lessened by his inability to exercise line authority over equal opportunity staff in the field offices, generally responsible to a regional director.¹¹⁵

Title VI functions such as compliance reviews and complaint investigations generally have been decentralized to the agencies' field offices. Of the 11 Federal agencies with major Title VI programs, only the Veterans Administration and the Law Enforcement Assistance Administration anticipate centralized operations in which compliance activities will be conducted by headquarters personnel. At the Department of Interior, compliance activities are divided between field staff and headquarters staff. Most agencies which have decentralized compliance enforcement to the field have designated full-time civil rights specialists to perform the functions of review and investigation.

a. Department of Housing and Urban Development

The Department of Housing and Urban Development is the *only* major agency with significant Title VI programs which has provided an assistant secretary for civil rights matters alone. The Assistant Secretary for Equal Op-

ances we accept from grantees, revise our guidelines, provide for a reporting system, and to establish a reasonably reliable system of shared compliance responsibility within the Agency." Memorandum from Richard W. Velde and Clarence M. Coster, *supra* note 55. A manual containing all relevant civil rights laws and regulations affecting LEAA programs, dated July 1970 (after Commission field work had been completed), has been distributed to State planning agencies. LEAA concludes: "In short, we have in the making, and already partially implemented, a comprehensive civil rights compliance program. This program should be fully operational by early 1971." *Id.*

¹¹⁵ The only civil rights administrator who has line authority over field civil rights personnel is the Director of the Office for Civil Rights of HEW.

portunity¹¹⁶ holds the same position in the administrative hierarchy as other assistant secretaries in the Department. He is the Secretary's principal advisor on matters relating to equal opportunity and reports directly to him.

However, some of the Assistant Secretary's liaison is through the Office of the Under Secretary,¹¹⁷ which is responsible for day-to-day operations at HUD.

Lack of line authority over field civil rights personnel and confusion over the locale of Title VI jurisdiction, diminish, at least in terms of effective enforcement, the potential advantages of having the principal equal opportunity enforcer at the Assistant Secretary level.

Organizationally, HUD has a centralized operation at the Washington level for all civil rights enforcement activities in the Office of the Assistant Secretary for Equal Opportunity. The Program Assistant Secretaries do not maintain separate civil rights offices or staff and no program people have been assigned a Title VI function.

Despite this centralized staffing pattern, responsibility for Title VI is not centralized. Although the Assistant Secretary for Equal Opportunity is the Title VI Coordinator, HUD's Title VI regulations state that the responsible Department official for Title VI is the Secretary or other official who has the "principal responsibility within the Department for the administration of the law extending such assistance,"¹¹⁸ i.e., the Program Assistant Secretaries. Revised Title VI amendments, which have been sent to the President, will assign responsibility to the Secretary or his designee, who, in fact, will be the Assistant Secretary for Equal Opportunity.¹¹⁹

Title VI compliance activity is also decentralized at the Department of Housing and Urban Development. All six HUD regional of-

¹¹⁶ The position is currently held by Samuel J. Simmons.

¹¹⁷ In an interview with Samuel Simmons, Assistant Secretary of Equal Opportunity at HUD, Mar. 6, 1970, he indicated that his office often works through the Under Secretary's office on important matters such as collection of racial data, tenant selection, and resolution of disagreements between his office and a Program Assistant Secretary concerning the compliance status of a recipient.

¹¹⁸ 24 C.F.R. 1.2(c).

¹¹⁹ Letter from George Romney, *supra* note 113.

ices in the continental United States¹²⁰ maintain a civil rights staff headed by an Assistant Regional Administrator for Equal Opportunity. However, although HUD's chief civil rights administrator is an assistant secretary, similar to the program assistant secretaries, he exercises no line authority over field equal opportunity personnel. According to HUD's manual, the assistant Regional Administrator for Equal Opportunity carries out his responsibilities "under the supervision and applicable delegations of authority of the regional administrator."¹²¹ As a result of this regionalization of equal opportunity staff without accompanying line authority, it is the regional administrators who make important final decisions when crucial questions arise on compliance status of a recipient or approved project grants.

b. Department of Health, Education, and Welfare

The Department of Health, Education, and Welfare has perhaps the most significant Title VI enforcement responsibilities of any Federal agency. Yet, the Director of the Office for Civil Rights, in charge of more than 350 staff members in Washington and in regional offices throughout the country, is only a GS-17 reporting to the Secretary.¹²² Until early 1968 the Director was a GS-18.¹²³

The HEW organization for effecting Title VI has fluctuated since passage of Civil Rights Act of 1964. Initially, the civil rights operation, primarily concerned with Title VI compliance, was decentralized with responsibility divided between an Office for Civil Rights and

the various operating agencies. In the Commission's recent study of *HEW and Title VI* the following conclusion was drawn concerning decentralized civil rights operations:

During this phase of the Title VI program, compliance was left mainly to the operating agencies. Although, in theory, a compliance program administered by the operating agencies should have greater impact in terms of imparting equal opportunity objectives to program managers than a centralized operation would have, in practice there is little indication that this actually occurred. Compliance staff members connected with operating agencies were regarded as specialists in civil rights. They had no real authority with respect to program management. Rather, they were largely a separate unit with little influence on the programs of the agencies out of which they functioned. If anything, their efforts were impeded by the structure of which they were a part.¹²⁴

At the direction of a House Appropriations Subcommittee, HEW placed all departmental Title VI enforcement responsibilities in one office. The centralization process was completed in fiscal year 1968, and became the most completely centralized of all Federal agencies with significant Title VI responsibility. Policies, procedures, and priorities for Title VI enforcement are determined and carried out by the OCR and its field staff. The program agencies play no role in Title VI.

The advantages of such centralization include clearer lines of authority and less fragmentation of responsibility. Most significantly, it eliminates situations whereby staff members charged with civil rights evaluation of a program are responsible to the administrator of that program. The major disadvantages are the danger that Title VI staff will not be sufficiently knowledgeable about the programs and that liaison with program administrators will be jeopardized. At HEW the first has not occurred because many of the OCR staff were formerly in the various program units. Liaison with program personnel, however, appears to be a problem. According to one OCR official, there is no feeling of liaison with program personnel, particularly with those of the Office of Education¹²⁵ and most of OCR's Title VI activity is in the area of education.

The Department of Health, Education, and Welfare is the only Federal agency in which the Department's civil rights director exercises

¹²⁰ On Mar. 27, 1969, the President directed that eight cities serve as regional centers for Labor, HEW, HUD, OEO, and SBA. See "Statement by the President Upon Establishing Common Regional Boundaries and Locations for Five Agencies Engaged in Social or Economic Programs," Mar. 27, 1969, reprinted in *Weekly Compilations of Presidential Documents*, vol. 5, No. 13 (Mar. 31, 1969), at 480-482.

¹²¹ Department of Housing and Urban Development, handbook 1170.1 change 8, Regional Organization.

¹²² The position was assumed by J. Stanley Pottinger in March 1970, succeeding Leon Panetta, who reported to the Under Secretary.

¹²³ A reorganization plan was developed by key OCR staff members during the latter part of 1969, whereby the Director would assume the position of Assistant Secretary for Civil Rights or Deputy Under Secretary. To date no action has been taken on this recommendation.

¹²⁴ *HEW and Title VI*, supra note 111, at 9, 10.

¹²⁵ Brown interview, supra note 106.

line authority over field equal opportunity personnel. Consequently, there is no problem of dual allegiance commonly found in other agencies in which equal opportunity staffs are in the position of being responsible to the person (regional director) whose programs they are monitoring.

At the same time that all Title VI compliance activities and staff were withdrawn from the operating agencies and centralized within the Office of Civil Rights, a large number of OCR staff was reassigned to HEW's nine regional offices. Each of the field offices has a Regional Director for Civil Rights, responsible only to the Director of the Office for Civil Rights. The regional director and his staff, which reports directly to him, are responsible for conducting Title VI field reviews and investigations. The regional civil rights directors have a good deal of autonomy in their own right. They recruit personnel for field equal opportunity positions and they have full responsibility for processing cases and complaints in the field, including authority to make affirmative determinations or to refer matters to Washington for enforcement. However, the Director of OCR retains the authority to cite recipients for a hearing or to recommend termination of funds to the Secretary.

Decentralization of HEW compliance functions to the field has both advantages and disadvantages. The Commission's report on "HEW and Title VI," which was undertaken during the early months following decentralization, found that generally the system was working well.

The report stated:

Although each of the field offices had had a somewhat different character and orientation, this does not appear to have hampered the conduct of the Title VI compliance operation. Anticipated problems of communication and coordination did not materialize to any significant extent. Indeed, the proximity to the field of operations has facilitated on-site reviews and investigations, permitted a closer working relationship with regional program administrators, and led to a better understanding of regional and local problems.¹²⁶

However, some problems became visible after the Commission's report on HEW was prepared and they were recorded in an October 1969 task force committee report on OCR reorganization. These included: lack of clear lines

¹²⁶ "HEW and Title VI," supra note 111, at 10.

and division of authority from the headquarters civil rights staff to the regional staff; lack of consistency and coordination among the various programs and regional offices; and inadequate and irregular communication of policy and developments from Washington to the regional offices.¹²⁷

c. Department of Transportation

The Director ¹²⁸ of the Office of Civil Rights at the Department of Transportation, a GS-16, the lowest supergrade level,¹²⁹ reports directly to the Secretary. Program administrators who oversee programs subject to Title VI (e.g., Federal Aviation Administration, Federal Highway Administration, and Urban Mass Transportation Administration) all hold the executive level position of Administrator.

Organization and authority for Title VI enforcement at the Washington level are decentralized and fragmented at the Department of Transportation. A small departmental Office of Civil Rights is charged with establishing overall policy in the area of Title VI and monitoring the Department's performance in this area. Each of the operating Administrations with Title VI programs, i.e., Coast Guard, Federal Aviation Administration, Federal Highway Administration, and Urban Mass Transportation Administration, has its own Office of Civil Rights whose Director reports to the head of the operating administration.

With the exception of responsibility for conducting complaint investigations, the departmental Office of Civil Rights is a staff and policy office only, with no line authority over the operating administration's Office of Civil Rights. This point was emphasized by the Secretary of Transportation in a memorandum to the administrators in which he stated:

Each Administration Director of Civil Rights shall be subject to line supervision only from his administrator.

The Departmental Director is authorized to provide technical advice directly to Administration Directors, but *any directed program action shall be addressed solely to the administrators.* [Emphasis supplied.]¹³⁰

¹²⁷ Memorandum from Paul M. Rilling, Regional Civil Rights Director, Region V, Atlanta, transmitting the Report of the OCR Reorganization Task Force, to the members of the Task Force Committee, Oct. 20, 1969.

¹²⁸ The present director is Richard F. Lally.

¹²⁹ The position, however, is allocated a GS-17.

¹³⁰ Memorandum from Secretary of Transportation to

As a result of this decentralization of Title VI authority, the departmental Director cannot command agency performance. The deleterious effect of this on Title VI performance was demonstrated by correspondence, beginning in October 1968, between the departmental Director of Civil Rights and the Federal Highway Administration (FHWA) in which the departmental Director informed the Federal Highway Administrator of the necessity of performing compliance reviews and of the Department of Justice's concern that no reviews had been performed. As late as May 1969 the departmental Director wrote: "The FHWA Quarterly Report indicated that no compliance reviews had taken place during the last quarter. . . . This gap in our program was previously pointed out, both formally and informally, by the Department of Justice."¹³¹ As of June 1970, FHWA still has never conducted a Title VI compliance review.

The Title VI fragmentation diffuses responsibility and duties. As of June 1970, the directors of civil rights in the program administrations were in charge of conducting compliance reviews and overseeing preaward procedures; the departmental Director of Civil Rights performed complaint investigations. It is not clear who determines when the mechanism for attempting voluntary compliance has been exhausted and whether a Title VI hearing should be held.¹³² This lack of clarity or delineation of Title VI authority is a common consequence of the decentralization of civil rights responsibility to the program administrations of bureaus.

The departmental civil rights staff has no direct counterparts in the field offices. Although two of Transportation's operating administrations¹³³ have regional offices staffed with equal

the administrators, "Civil Rights Standard Functional Statement and Uniform Relationships," May 8, 1969.

¹³¹ Correspondence from Richard F. Lally, Director of Civil Rights, DOT, to the Federal Highway Administrator, Oct. 21, 1968, Nov. 4, 1968 (to the Title VI Coordinator), May 6, 1969.

¹³² The departmental Director asserted that he would make such a decision; however, the Secretary has not yet authorized the Director to assume this function. In fact, Transportation has never held a Title VI hearing. Interview with Richard Lally, departmental Director of Civil Rights, Feb. 5, 1970.

¹³³ Of the four administrations with programs subject

opportunity personnel, there is no interaction between those officials and the departmental civil rights staff.

d. Department of Agriculture

At Agriculture the chief headquarters civil rights officer is the Assistant to the Secretary for Civil Rights, a GS-16.¹³⁴ At one time, the organizational structure of the Department showed the Assistant to the Secretary reporting directly to the Secretary. In actuality, he reported to the Assistant Secretary for Administration. The practice was formally recognized last September in a memorandum issued by Secretary Hardin.¹³⁵

It is indicative of the generally inferior status assigned to the civil rights chief that four of the other six office directors responsible to the Assistant Secretary for Administration are GS-17's,¹³⁶ even though the civil rights director also serves in the capacity of Assistant to the Secretary. Title VI authority and organization are completely decentralized at the Department of Agriculture. A small departmental civil rights staff exercises only a coordinative and monitoring function regarding the services' designated Title VI staff.

The Assistant to the Secretary for Civil Rights lacks the authority to command agency performance. Moreover, agency administrators are responsible for implementing Title VI, including decisions on whether to hold fund termination proceedings. The decentralization of Title VI authority has resulted in a weakening of Department efforts to achieve a consistent approach to compliance. On occasion, requests from the Assistant to the Secretary for action by a program unit have been totally ignored; moreover, program staff have actually blocked efforts to implement civil rights measures.¹³⁷

to Title VI, Urban Mass Transportation Administration has no regional offices and in another, Coast Guard, the Title VI function has not been decentralized. The other two, Federal Highway Administration and Federal Aviation Administration, do have regional civil rights staffs.

¹³⁴ William M. Seaborn now holds this position.

¹³⁵ Secretary of Agriculture Memorandum 1662 (Sept. 23, 1969).

¹³⁶ These are the directors of the offices of Budget and Finance, Information, Personnel, and Planning and Operations.

¹³⁷ For example, one component agency was able to

At Agriculture, there are also no civil rights staff members in the field offices. Generally, Title VI compliance reviews are conducted by field program personnel, who are responsible to the regional program administrators. In some cases, State personnel conduct the reviews. Complaints are investigated by the Office of the Inspector General field staff which is responsible to the Inspector General. Although the propriety of corrective action taken is subject to OIG review, responsibility for the adequacy and implementation of corrective action rests with the program administrators.

e. Department of Commerce

At the Department of Commerce, a Special Assistant for Equal Opportunity¹³⁸ reports to the Assistant Secretary for Administration. His grade level, GS-15, is the same as that of the administration directors of civil rights but lower than that of the program administrators.

The organization of the headquarters civil rights function at the Commerce Department is similar to DOT's. The two program agen-

effectively thwart attempts to secure an equal employment opportunity procedure for employees of the Cooperative Extension Service. In July 1966, acting in response to issues first raised by the U.S. Commission on Civil Rights in a 1965 report, U.S. Commission on Civil Rights *Equal Opportunity in Farm Programs* (1965), the Assistant to the Secretary initiated, staffed, and received approval for a departmental complaint procedure for extension workers who felt they had been denied equal employment opportunity because of racial discrimination. The procedure, although signed by the Assistant Secretary for Administration, was withdrawn by Department officials upon the report of the Administrator of the Federal Extension Service that it would meet resistance from the State. Thereafter it was agreed that a committee of the Association of Land Grant College Presidents would work cooperatively with the Department of Agriculture to develop a more acceptable procedure. Although this was anticipated by January 1967, it was not until January 1968, following an opinion by the Department of Justice supporting the Assistant to the Secretary's efforts, that the decision was taken to promulgate essentially the same procedures which had been suggested 18 months earlier. In May 1968, the proposed regulation was published in the Federal Register. See U.S. Commission on Civil Rights, *The Mechanism for Implementing and Enforcing Title VI of the Civil Rights Act of 1964*, USDA staff report (1968). As of July 1970, the regulation was not yet effective because USDA had withheld approval of any plans submitted under the regulation.

¹³⁸ The special assistant is Luther C. Steward, Jr.

cies with significant civil rights responsibilities, Economic Development Administration and Maritime Administration, have independent civil rights offices. However, here authority is more decentralized than at Transportation. The departmental Special Assistant for Equal Opportunity primarily exercises a coordinative and advisory role; all Title VI activity, including complaint investigation, is conducted by the Administrations' civil rights offices. Further, it is the program administrator who makes the decision to conduct a Title VI hearing. The division of responsibility meets the approval of the Special Assistant for Equal Opportunity as well as EDA civil rights personnel, who expressed the opinion that compliance with Title VI could best be achieved by units operating within the program agencies and that a more forceful role by the Department's civil rights staff would be viewed by the program people as an intrusion.¹³⁹ The efficacy of divided civil rights responsibilities has not been borne out by experience. For example, in the past, the Office of Equal Opportunity of EDA was not able to develop an effective Title VI compliance operation partly because it encountered opposition from the program people.¹⁴⁰

At the Department of Commerce,¹⁴¹ the departmental civil rights staff has no direct counterparts in the field offices. Although the Administrations' regional offices employ equal opportunity personnel,¹⁴¹ there is no interaction between those officials and the departmental civil rights staff.

¹³⁹ Interview with Luther C. Steward, Jr., Special Assistant for Equal Opportunity, Department of Commerce, Jan. 7, 1970; interview with John Corrigan, Director of EDA's Office of Equal Opportunity, Jan. 15, 1970.

¹⁴⁰ Id. Commerce contends, however, that the division of responsibility is predicated on past experience with the Maritime Administration's contract compliance program and its awareness of the new thrust of EDA's Title VI program. Letter from Siciliano to Glickstein, supra note 49.

¹⁴¹ Both the EDA and Maritime Administration have civil rights personnel assigned to the field offices. They are responsible to the regional directors, and not to the operating agencies' civil rights directors. The Director of the Office of Equal Opportunity at EDA can, however, assign workload, review compliance and investigation reports, and order reinvestigations, if necessary.

f. Department of Interior

At Interior, the Director of the Office for Equal Opportunity,¹⁴² a GS-15, has been reporting to the Deputy Under Secretary for Programs since July 1968. This represents a setback since formerly the Director of that office had been responsible to the Under Secretary.¹⁴³ The grade level of the Director is especially noteworthy because it is below that of all the bureau directors and associate directors.

The departmental Equal Opportunity Office has little or no control over the bureaus' civil rights personnel. It has little voice regarding appointments,¹⁴⁴ cannot compel attendance at training sessions, nor enforce mandates as set forth in the departmental manual. The fragmentation of Title VI is reinforced by the fact that the decision to conduct a noncompliance hearing is made by the bureau director¹⁴⁵ with little or no consultation with the departmental office.¹⁴⁶

As in the case of the Department of Agriculture, there is no civil rights staff in Interior's field offices.¹⁴⁷ Generally, Title VI compliance reviews are conducted by field program personnel, who are responsible to the regional program administrators. In some cases, State personnel conduct the reviews. Complaint investigations are conducted by field program personnel or headquarter's bureau civil rights staff. However, the program administrators decide what action, if any, is to be taken on the basis of these investigations.

¹⁴² Edward Shelton currently holds this post.

¹⁴³ Interview with Jack B. Bluestein, Office for Equal Opportunity, Department of the Interior, Dec. 8, 1969.

¹⁴⁴ The Office did have some input with respect to the selection of four Bureau of Outdoor Recreation civil rights specialists. Interview with Edward Shelton, Director of Departmental Equal Opportunity Office, Dec. 8, 1969.

¹⁴⁵ 43 C.F.R. 17.7(c).

¹⁴⁶ Shelton interview, *supra* note 144.

¹⁴⁷ Recently, the Director of the Bureau of Outdoor Recreation (BOR) approved the establishment of four staff assistants (Civil Rights Programs), at GS-12, in the northeast, southeast, midcontinent, and lake central regions. It is envisioned that the incumbents will be responsible in part for onsite compliance reviews and will be under the immediate supervision of the Regional Director of BOR. Memorandum from G. Douglas Hofe, Jr., Director BOR to Director, Office for Equal Opportunity, Nov. 14, 1969. At the time of this memorandum, BOR was recruiting for these positions.

g. Department of Labor

The Director of the headquarters Office of Equal Employment Opportunity¹⁴⁸ at the Department of Labor, a GS-15, is in the anomalous position of being subordinate to and, therefore, reporting to the Assistant Secretary for Manpower under whose administrative jurisdiction all Labor Department programs in the purview of Title VI fall.¹⁴⁹ Thus, the chief Title VI enforcement officer is responsible to the administrator of the Title VI programs, a situation likely to vitiate any effective compliance activity.¹⁵⁰

This situation is compounded by the low grade level of the Director of the Office of Equal Employment Opportunity (OEEO). The position has remained at a GS-15 since 1963, although the duties of the office have increased substantially. This grade level imposes a particularly severe handicap because it places the civil rights chief in a position subordinate to that of most program administrators.¹⁵¹

¹⁴⁸ This position is held by Arthur A. Chapin.

¹⁴⁹ See Secretary's Order No. 14-69 (Mar. 14, 1969).

¹⁵⁰ The Secretary of Labor has indicated that:

"First, the 'administrator of title VI programs' is the Manpower Administrator who is subordinate to the Assistant Secretary for Manpower. Hence, the Director of the Office of Equal Employment Opportunity does report to a very highranking policy official who is above the Administrator of manpower programs. The second point is that I too am fully responsible for manpower programs. The Assistant Secretary for Manpower and I work very closely together on these programs, and it is simply not accurate that the Assistant Secretary is less likely to enforce title VI than the Secretary. To the contrary, the Assistant Secretary is able to give closer attention to this critically important function than the Secretary is."

Letter from James D. Hodgson, Secretary of Labor, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Sept. 14, 1970.

¹⁵¹ According to the fiscal year 1971 U.S. Budget Appendix (at 1033) the following positions (not inclusive) in the Department of Labor's Manpower Administration were at a higher grade level than the Director of the Office of Equal Employment Opportunity in fiscal year 1969: Assistant Secretary for Manpower (executive level IV); Manpower Administrator (MA) (executive level V); Deputy MA for Employment Security. (GS-18); Associate MA (GS-18); Associate MA (GS-17); Deputy MA (GS-16); three Directors (GS-16); Deputy Director (GS-16); eight Regional MA's (GS-16); Administrator, Bureau of Apprenticeship and Training (BAT) (GS-17); Deputy Administrator, BAT (GS-16); Administrator, Bureau of Employment Security (GS 18); Director, U.S. Em-

Although the organization at Labor would seem to lend itself to centralization of Title VI authority and duties, this has not occurred. Responsibility is shared by (1) Director of the OEEO, who is charged with developing and administering "a program for carrying out . . . Title VI";¹⁵² (2) the Deputy Manpower Administrator for Employment Security, who has line authority over the Regional Manpower Administrators, including their civil rights staff; and (3) Staff Assistants for Minority Group Affairs, who report to the Deputy Manpower Administrator for Employment Security and who "provide leadership and assistance in implementing the Manpower Administrator's responsibilities under Title VI . . . (by providing) leadership, guidance, and technical assistance to the services and regional offices of the Manpower Administration, to State employment security agencies, and to client groups. . . ." ¹⁵³

The central OEEO has no direct authority over any of these separate EEO staffs and delineation of functions remains unclear. The OEEO staff does have responsibility for monitoring the adequacy of the Title VI review and investigative program. The decision on whether a recipient should be noticed for hearing or whether funds should be withheld, however, rests with the Assistant Secretary for Manpower and not with the Director for Civil Rights.

The regional equal opportunity staff is responsible to the Regional Manpower Administrator for Employment Security. The Director of the Office of Equal Employment Opportunity has no line authority over regional civil rights personnel.

Theoretically, the Director of OEEO cannot communicate directly with equal opportunity field staff even though the field staff is responsible for implementing the goals and procedures developed by the central office. In fact, a Labor Department directive states:

ployment Service (GS-17); and Director, Job Corps (GS-18).

¹⁵² Memorandum from Arnold R. Weber, Assistant Secretary for Manpower, to Arthur A. Chapin, Director of the OEEO, June 3, 1969.

¹⁵³ Memorandum from J. N. Peet to Elmer Jebo concerning "Establishment of the Organizational Substructure for the Staff of the Deputy Manpower Administrator for Employment Security," Apr. 24, 1969.

All communications to the field regarding equal opportunity matters shall flow from the OEEO through the Deputy Manpower Administrator for Employment Security to the RMA's and finally to the EEO officers.¹⁵⁴

Despite the written restrictions on direct communications, the OEEO Director has sign-off authority on implementation of corrective actions and can require that field equal opportunity staff reconduct investigations or modify corrective action. He has no authority, however, to require the imposition of sanctions.¹⁵⁵

h. Veterans Administration, Office of Economic Opportunity, Small Business Administration, and Law Enforcement Assistance Administration

These four small Federal agencies administer programs with major Title VI impact and have followed the pattern of the large agencies in relegating the civil rights enforcer to a subordinate position in terms of grade and position in the hierarchy.

Because of the relatively small size of their staffs, most of these agencies have tended to centralize their headquarters Title VI operations.¹⁵⁶ The Veterans' Administration is the

¹⁵⁴ Department of Labor, Compliance Officers' Handbook—A Handbook of Compliance Procedures Under Title VI of the Civil Rights Act of 1964, at 6.

¹⁵⁵ The Department of Labor reports that it has acted in recent months to decentralize responsibility for Title VI compliance reviews and complaint investigations to the Regional Manpower Administrators. Hodgson letter, supra note 150. According to Labor:

"It has proven impossible to monitor thousands of State employment security offices and contacts from Washington. Title VI surveillance must be integrated into the regular monitoring and evaluation process if we are to discharge our responsibilities effectively." Id.

As of September 1970 the Secretary of Labor was preparing to issue an order to clarify the lines of Title VI responsibility and authority to meet the problem of fragmentation. Id.

¹⁵⁶ VA is an exception. Title VI organization and authority at the Veterans Administration are decentralized. The Contract Compliance Service has no authority vis-a-vis the programs of the two operating departments, i.e., Department of Veterans' Benefits and Department of Medicine and Surgery, which are subject to Title VI other than to conduct a factfinding investigation in the event of a complaint, conduct periodic audits and evaluation, and attempt to secure voluntary compliance if noncompliance is disclosed. These duties of the Director, Contract Compliance Service are put into motion upon referral by the

only one of the four whose civil rights director, called Director of the Contract Compliance Service, holds a supergrade GS-17.¹⁵⁷ The Director is also advisor to the Administrator on Civil Rights matters and reports directly to him. The Veterans Administration is in process of establishing review and investigation procedures for its major Title VI programs. The review and investigation functions will be performed by headquarters civil rights staff from the departmental civil rights office.

A reorganization during early 1969 at the Office of Economic Opportunity resulted in a downgrading of the civil rights position. Prior to the reorganization, the head of the Office of Civil Rights was designated the Assistant Director of OEO for Civil Rights and occupied a GS-16 position. The Assistant Director reported directly to the Director and Deputy Director of OEO. Under the new organization, the chief civil rights person is designated the Director of the Human Rights Division¹⁵⁸ and reports to the General Counsel. Although the position remains a GS-16, the present Director is a GS-15. The other two divisions within the Office of the General Counsel, the inspection and legal divisions, call for GS-17 positions.¹⁵⁹

Title VI activity at OEO is completely decentralized to the regions. Each OEO region has at least one full-time civil rights coordinator who acts independently of the headquarters civil rights division. In turn, the headquarters division has no line authority over the regional coordinators.¹⁶⁰ Prior to the 1969 reorganization, the field civil rights coordinator reported to the Regional Director; currently, he reports to the Regional Counsel.

The Law Enforcement Assistant Administration, a branch of the Department of Justice, is the only Federal agency with a significant Title VI program which does not have an agency civil rights office. The person formerly given the Title VI function bore the title Civil

Chief Medical Director or the Chief Benefits Director. See 35 Fed. Reg. 10759 (July 2, 1970).

¹⁵⁷ George L. Holland occupies this position at present.

¹⁵⁸ Frank Kent was appointed to this position in November 1969.

¹⁵⁹ Interview with Wilfred Leland, former Chief of the Compliance and Evaluation Section in OEO's Office of Civil Rights, Nov. 12, 1969.

¹⁶⁰ Id.

Rights Compliance Officer and was a GS-14 attorney who reported to the Director of the Office of Academic Assistance and later to the General Counsel.¹⁶¹ LEAA now has one person who, as of June 1970, was just in the process of formulating a Title VI compliance program for the agency. He has discussed the matter with the Department of Justice's Civil Rights Division and other Federal agencies.¹⁶²

In the Small Business Administration, the Director of the Office of Equal Opportunity¹⁶³ is a GS-15 and reports to the Assistant Administrator for Management who in turn reports to the Administrator. Compliance activity is decentralized to the field at SBA although less so than at OEO. The Regional Equal Opportunity Officers (EEO's) report directly to the Regional Directors, but follow the guidelines and directives issued by the agency Civil Rights Director. Further, although the Civil Rights Director does not exercise line authority over regional staff, he is required to concur in compliance reviews and investigations submitted by the Regional EEO's.¹⁶⁴

i. Agencies With Minor Title VI Programs

An additional 11 Federal agencies have only minor programs identified as falling within the ambit of Title VI.¹⁶⁵ These range in size from the giant Department of Defense to the small Office of Emergency Preparedness, and in type of organizational unit from part of the Executive Office of the President to executive departments and independent agencies.

Many of the small agencies do not have a full-time Civil Rights Director, e.g., Tennessee Valley Authority, Office of Emergency Pre-

¹⁶¹ The position was formerly held by Miss Dorthea M. Klaibor who retired on Feb. 6, 1970, and was replaced by another attorney, Herbert Rice, on May 3, 1970.

¹⁶² Interview with Herbert Rice, attorney in LEAA's General Counsel's Office, May 27, 1970.

¹⁶³ This position is now held by Edward Dulcan.

¹⁶⁴ SBA National Directive 1500-11A at 32. A recommendation to centralize compliance responsibility under the Office of Equal Opportunity is currently under consideration.

¹⁶⁵ Included in this grouping are AID, AEC, CAB, DOD, GSA, NASA, National Foundation on the Arts and the Humanities, NSF, OEP, State Department and TVA. Excluded from the list are EEOC and Department of the Treasury which may in fact have Title VI programs but have not yet identified them.

paredness, Civil Aeronautics Board, and National Aeronautics and Space Administration. For those which do, the Director typically has neither the grade nor status nor authority to command agency performance in regard to Title VI. In agencies where there is an Equal Opportunity Director, he is generally only a GS-15, as in the General Services Administration and the Department of State. In a number of agencies, the Title VI function is carried out by an official who has other duties which are considered to be his primary responsibility, as in TVA, OEP, and NSF.¹⁶⁶ The person carrying the role of Title VI coordinator generally is below the supergrade level. In none of the above examples does the Title VI coordinator report to the agency head.

In addition to HUD, there appear to be only two other exceptions to the relatively low grade level of agency civil rights officials. The chief civil rights post in the Defense Department is the Deputy Assistant Secretary for Civil Rights and Industrial Relations, a GS-18 position.¹⁶⁷ The Deputy Assistant Secretary reports to the Assistant Secretary for Manpower and Reserve Affairs. At the Atomic Energy Commission, the civil rights officer is a GS-18 Assistant to the General Manager¹⁶⁸ and reports directly to the General Manager of the Commission.

2. OTHER PROBLEMS OF ORGANIZATION AND STAFFING

a. Staff Adequacy

In most agencies civil rights staffing, particularly with respect to Title VI, is inadequate in terms of number of allocated personnel. Moreover, positions often remain unfilled for inordinate lengths of time and requests for additional staff have generally gone unheeded.

¹⁶⁶ The Title VI coordinator at the TVA is L. Duane Dunlap, an Assistant General Counsel; at OEP the Assistant to the Civil Rights Coordinator, Richard Murray, is also an Assistant General Counsel; and at NSF, the Title VI person is Arthur Kusinski, an Assistant Counsel.

¹⁶⁷ The position has been vacant since May 1969, a period of more than 12 months; however, L. Howard Bennett has been acting in this capacity during this time. On June 3, 1970, Secretary Laird announced the appointment of Frank Render II to this position. (Washington Post, June 4, 1970).

¹⁶⁸ The post currently is held by Harry S. Traynor.

(1) Department of Health, Education, and Welfare

At HEW all division chiefs expressed the need for additional civil rights personnel. The head of the Education Division, for example, stated that 50 to 75 additional slots were needed for his program.¹⁶⁹ The Director of the Health and Social Services Division said he needed at least 50 field personnel;¹⁷⁰ he currently has 39. The Assistant General Counsel for Civil Rights has a staff of 18 attorneys; he says he needs at least 21.¹⁷¹

While there are indications that many HEW divisions may be inadequately staffed, the shortage appears to be proportionately more acute in civil rights activities than in program areas. The Commission's recent study of HEW noted the following:

Although OCR currently has nearly 300 persons assigned to Title VI activities in the Washington and regional offices. HEW is grossly understaffed in relation to the scope and complexity of its Title VI obligations. More than any single factor, lack of sufficient staff has seriously limited compliance efforts and has frustrated potential programs.¹⁷²

(2) Department of Housing and Urban Development

At HUD, the Assistant Secretary for Equal Opportunity stated that he did not have

¹⁶⁹ Interview with Dr. Lloyd R. Henderson, Director of the Education Division, HEW's Office for Civil Rights, Jan. 30, 1970.

¹⁷⁰ Interview with Louis Rives, Director of the Health and Social Services Division, HEW's Office for Civil Rights, Jan. 26, 1970.

¹⁷¹ Interview with Edwin Yourman, Assistant General Counsel, Civil Rights Division of HEW's Office for General Counsel, Jan. 23, 1970. This is a reference to allocations sought for the remainder of the 1970 fiscal year. The Civil Rights Division is now seeking an allocation of 34 attorneys for fiscal year 1971. Letter from Pottinger to Sloane, supra note 60.

¹⁷² U.S. Commission on Civil Rights, HEW and Title VI (1970). Over a year later nothing has changed to alter this finding. Although OCR asked for 149 positions for fiscal year 1970 to supplement the existing 326 (of which about 300 were allotted for Title VI activity), the request was whittled down to 120 by HEW's budget office and to 75 by the Bureau of the Budget. Due to the date of the passage of HEW's appropriation, as of Jan. 30, 1970, the positions had not been apportioned among the various program divisions; nor had any recruitment efforts been undertaken. The Office will request 140 additional slots for fiscal year 1971. Interview with Robert Brown, Assistant Director of Management, Office for Civil Rights, HEW.

enough Title VI staff to permit assumption of the function of preaward compliance review of projects and of tenant selection and assignment plans.¹⁷³

Although the Secretary approved a reorganization in September 1969 which brought the Directors for Equal Opportunity together under an Office of Assisted Programs, a 5-month hiatus in leadership occurred since the Director of that office was not sworn in until February 9, 1970. As of April 1970, the office was still being established and functions were still being assigned.

(3) Department of Transportation

At the Department of Transportation, the departmental Office of Civil Rights has six professional positions. As of February 1970, two of the professional positions were vacant; however, the two positions designated for public programs,¹⁷⁵ which include Title VI, were filled. The Director stated that he could utilize a total staff of 17, including clerical, and anticipates reaching this number in the future.¹⁷⁶ At DOT the four operating administrations with Title VI responsibility have their own Offices of Civil Rights. For example, in the Federal Aviation Administration's Office of Civil Rights, two professionals work full-time on federally assisted programs. The 10 regional FAA Offices all have full-time equal opportunity staffs. Typically they consist of a regional chief at the GS-14 level and one or more regional specialists as GS-12's or 13's. Although all of the regional chief positions were filled, six of the regional specialist positions, including three in the western region were vacant.¹⁷⁷

¹⁷³ Interview with Samuel Simmons, Assistant Secretary for Equal Opportunity; HUD, Mar. 6, 1970.

¹⁷⁴ Romney letter, *supra* note 113.

¹⁷⁵ The departmental Office of Civil Rights is divided into a public programs staff, which covers Title VI, contract compliance, and all other civil rights activities which relate to programs which may be partly or fully funded by the Department but which are not operated by them, and an internal programs staff, which has to do with agency operated programs (e.g., in-house employment).

¹⁷⁶ Interview with Richard F. Lally, Director of Civil Rights, Department of Transportation, Feb. 5, 1970.

¹⁷⁷ Interview with John M. Choroszy, Acting Deputy Director of FAA's Office of Civil Rights, Feb. 10, 1970. However, at the time of Commission interview, it was expected that the OCR would be assigned eight new

(4) Department of Commerce

At Commerce, the Department civil rights staff consists of only two professionals; a third position was not refilled when vacated because of a reduction in force.¹⁷⁸ EDA's Office of Equal Opportunity is insufficiently staffed to perform its Title VI review functions. The Office was without a Director from October 1968 until July 1969, almost a year. According to the new Director, although the headquarters staff of five professionals is adequate, field staff is not.¹⁷⁹ Each of EDA's seven regional offices was originally allotted one full-time civil rights position. In three of the offices, however, the civil rights specialist has been assigned other noncivil rights duties on a part-time basis. Two of these offices, Austin, Tex., and Huntsville, Ala., are among the busiest in terms of Title VI activity. The Director of EDA's Office of Equal Opportunity has requested that the three civil rights specialists be relieved of work other than their civil rights duties; he also has requested three additional field personnel, one each for Austin, Huntsville, and Seattle for fiscal year 1970.¹⁸⁰

(5) Department of Agriculture

Measured by the number of recipients, the Department of Agriculture has one of the largest Title VI programs in the Federal establishment. Yet there is no civil rights staff located in the regional offices to conduct reviews; instead they are performed by Agriculture program staff and by State personnel. For example, although the Federal Extension Service has three civil rights specialists who spend full-time on civil rights matters and two who devote part-time to it, their functions appear to be limited to review of the audits conducted by the Office of the Inspector General on the various State extension pro-

field office positions. Recent information received from DOT indicates that the three western region specialist positions have been filled, while specialist positions in the eastern, southern, and central regions remain unfilled due to local budgetary problems. Moreover, the Chief's position at the Aeronautical Center is now vacant pending selection. Also authorization has not as yet been received for the eight new positions mentioned above. Volpe letter, *supra* note 12.

¹⁷⁸ Interview with Luther C. Steward, Jr., Special Assistant for Equal Opportunity, Jan. 7, 1970.

¹⁷⁹ Interview with John Corrigan, Director of EDA's Office of Equal Opportunity, Jan. 15, 1970.

¹⁸⁰ *Id.*

grams. The former Administrator of FES expressed a need for additional staff to work on Title VI; however, he thought it should be comprised of program personnel and not of civil rights specialists.¹⁵¹

(6) Department of the Interior

At the Department of Interior, the ranks of the departmental Office for Equal Opportunity have been reduced from a former complement of 20 to a total of five persons, of whom two are clerical.¹⁵² Actual Title VI responsibilities are carried out by the operating bureaus, i.e., Bureau of Outdoor Recreation and Federal Water Pollution Control Administration. Neither has designated nor trained specific field personnel to conduct civil rights reviews; rather Title VI functions are performed by field program personnel. BOR does have a small headquarters staff composed of three professionals whose head, the staff assistant for civil rights, is only a GS-14. At a meeting with representatives of the Bureau of the Budget,¹⁵³ the staff assistant stated that at least 12 persons would be needed to do an adequate job for Title VI enforcement alone since BOR has more than 4,000 recipients and another thousand new ones are funded annually.

(7) Department of Labor

The total departmental civil rights staff at the Department of Labor consists of 24 persons, including clerical personnel. According to the Director of Labor's Office of Equal Employment Opportunity: "There is a lack of sufficient staff to assure Title VI compliance adequately for the manpower programs now running in the billions of dollars per year."¹⁵⁴ The regional offices also appear to be under-

¹⁵¹ Interview with Lloyd Davis, former Administrator, Federal Extension Service, USDA, Dec. 10, 1969.

¹⁵² Interview with Edward Shelton, Director of the Departmental Equal Opportunity Office, Department of Interior, Dec. 8, 1969.

¹⁵³ Meeting between the Bureau of the Budget, Department of the Interior, and U.S. Commission on Civil Rights, Mar. 5, 1970.

¹⁵⁴ Letter from Arthur A. Chapin, Director, Office of Equal Employment Opportunity, Department of Labor, to Martin Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Jan. 22, 1970. As of September 1970 there were 36 employees in the Department's EEO program, with 26 of them assigned to the field.

staffed. Of the nine offices, only four¹⁵⁵ have as many as two EEO representatives.

(8) LEAA, OEO, SBA

One of the most blatant examples of inadequate staffing for Title VI exists at the LEAA. Although LEAA will disburse almost \$200 million in fiscal year 1970 in programs covered by Title VI, it currently employs only one title VI staff member and he assumed his position in May 1970. Prior to this, the one position allotted to fulfill LEAA's Title VI responsibilities was filled by a GS-14 attorney with no civil rights experience, whose retirement was imminent at the time of the appointment, and who also was assigned unrelated personnel responsibilities.¹⁵⁶

As of November 1969, the staff of the Office of Civil Rights at the Office of Economic Opportunity had been depleted. From January 1969 through the end of November 1969, the Office had only an Acting Director: of the other eight professional positions, four were vacant.

Each of OEO's regional offices has a full-time regional civil rights coordinator.¹⁵⁷ Al-

¹⁵⁵ The New York, Atlanta, Chicago, and Kansas regions each have two EEO representatives while the Boston, Philadelphia, Dallas, San Francisco, and Seattle regions have only one.

¹⁵⁶ In a May 22, 1969 memorandum to the LEAA Administrators, Daniel L. Skoler, then Acting Director of LEAA's Office of Law Enforcement programs wrote:

"We have received informal criticism both from within the Department (Civil Rights Division) and without (our recent meeting with the lawyers' Committee for Civil Rights) with respect to our apparent unwillingness to allocate even one full-time professional position to the program. In short, the word is getting out that Title VI compliance in LEAA is a part-time job for one person whose major duties involve routine personnel activity. While we might be right on all the specific Title VI issues and procedures adopted, we would be highly vulnerable to criticism at this point."

According to LEAA, its audit staff, now consisting of 12 members, has always had clearly defined Title VI responsibilities. In addition, LEAA states it is presently evaluating its manpower needs and will shortly add several persons to its staff who will give full- or part-time to civil rights compliance investigative and review work. Under its new procedures, the regional offices, program people, and people out of LEAA's administrative office will have compliance responsibilities. Memorandum from Richard W. Velde and Clarence M. Coster, *supra* note 55.

¹⁵⁷ According to the former Acting Director of OEO's Office of Civil Rights, the regional civil rights coordi-

though three of the regions (Southeast, Southwest, and West) also have an assistant, lack of manpower remains one of the major Title VI problems. Moreover, in December of 1969 the Regional Coordinator in the Southeast office, the busiest in terms of Title VI activity, lost his assistant because of reductions in force just as two States were being added to his region.¹⁸⁸ The Southeast Regional Coordinator indicated that it was impossible for him to review all grant applications or to conduct more than 10 to 12 compliance reviews annually because of his staff shortage.¹⁸⁹ This was corroborated by the Acting Director of the OCR,¹⁹⁰ who stated that he had made innumerable requests for additional regional coordinators. These have been met by the addition of only one assistant in each of three regional offices. One of these was subsequently removed from his position as a result of a reduction in force.¹⁹¹

The headquarters staff of SBA's Equal Opportunity Office consists of four professionals and one clerical which the Director felt was a sufficient staff complement so long as the individuals filling these positions were competent.¹⁹² As for regional civil rights staff, each of the 10 regions had been assigned a Regional Equal Opportunity Officer although in Region VI (Dallas) the position had been vacant from March 1969 until October 1969.¹⁹³

Only three of the regional EOO's, Regions I, III, IV, were aided in varying degrees by program assistants¹⁹⁴ from the internal equal

nators were key authorities in the regions on civil rights matters; their duties typically consisted of advising the regional directors, providing related training, conducting compliance reviews, handling complaints, etc. Interview with Walter Robbins, former Acting Director, OCR, Nov. 18, 1969.

¹⁸⁸ Telephone interview with Robert Sanders, Southeast Regional Coordinator, Dec. 12, 1969.

¹⁸⁹ *Id.*

¹⁹⁰ Robbins interview, *supra* note 187.

¹⁹¹ Information recently received from OEO indicates that each region has been allocated a Human Rights Coordinator position and the Atlanta and San Francisco offices each have two such positions. Letter from Hjernevik to Glickstein, *supra* note 99.

¹⁹² Interview with Edward Dulcan, Director of SBA's Equal Opportunity Office, Dec. 14, 1969.

¹⁹³ *Id.*

¹⁹⁴ In Region III [Philadelphia] a former program assistant was elevated to the position of compliance officer when the regional EOO transferred; however,

employment program. However, the Pacific Coastal Region EOO and the New York Regional EOO was without clerical staff.

b. Staff Quality

At some agencies, the problem of insufficient staff is compounded by the problem of poor quality of staff. At the Department of Commerce certain officials admitted that the caliber of some of the field civil rights specialists was less than desired. One EDA equal opportunity staff member also indicated in an interview that several compliance reviews and investigations had had to be sent back by headquarters staff for reinvestigation including a review which noted segregated facilities but made no finding of noncompliance.¹⁹⁵ The problem of staff incompetency is not unique to Commerce, however. Civil rights administrators at other agencies e.g., Department of Transportation, Small Business Administration, and the Department of the Interior have indicated similar problems.

c. Minority Representation

Negroes are generally well represented on the agencies' civil rights staffs; however, Spanish surnamed Americans are grossly underrepresented. Representation of Spanish surnamed Americans has been exceedingly sparse among HEW's OCR staff, reflecting the Office's past concentration on the civil rights problems of black persons. Of 186 field personnel, there are only nine Mexican Americans and one Puerto Rican. Of the 18 civil rights attorneys on the General Counsel's staff, none is a Spanish surnamed American.¹⁹⁶ The Assistant Director for Management, cognizant of the problem, mentioned that he had begun to take definitive steps to recruit Spanish surnamed Americans, which had included a recruitment trip to San Antonio.¹⁹⁷

At the Department of Housing and Urban

her grade was only a GS-11 whereas most regional EOO's were at a GS-13 level.

¹⁹⁵ Interview with members of EDA's Office of Equal Opportunity, Jan. 15, 1960. This was corroborated in an interview with Luther C. Steward, Jr., Special Assistant for Equal Opportunity and Arthur Cizek, Equal Opportunity Coordinator and Title VI Coordinator at Commerce Department, Jan. 7, 1970.

¹⁹⁶ Interview with Donald K. Morales, Special Assistant to the Director, OCR, Jan. 23, 1970.

¹⁹⁷ Interview with Robert Brown, Assistant Director for Management, OCR, Jan. 30, 1970.

Development, blacks constitute more than half of HUD's central office and regional civil rights staff, while Spanish American representation is about 4 percent and other minorities such as Oriental Americans and American Indians constitute about 2 percent.¹⁹⁸

There is no Spanish surnamed American representation on the departmental civil rights staff at the Department of Transportation. Although the Director indicated that he is attempting to recruit three investigators who would be permanently assigned to the OCR, none of the prospective candidates is of Spanish ethnicity.¹⁹⁹ Similarly, of the 19 field civil rights personnel and the nine headquarters civil rights professional staff in Transportation's Federal Highway Administration, not one is a Spanish surnamed American.²⁰⁰ The pattern is similar at other agencies. The Department of Labor's civil rights staff contains only two Spanish surnamed employees, both of whom work in the field.²⁰¹

¹⁹⁸ Phone conversation with Miss J. Edwards of HUD's departmental Equal Employment Opportunity Office (under the Assistant Secretary for Equal Opportunity), June 4, 1970. The statistics were reported as of May 31, 1970. A more refined breakdown indicates the following: (1) Of 264 equal opportunity staff (professional and clerical), 144 (55 percent) are Negro; 11 (4 percent) are Spanish American but five of the 11 are employed in the Fort Worth office; three (1 percent) are Oriental Americans; and two (1 percent) are American Indians; (2) the Philadelphia and Atlanta regional offices have no minority representation on the equal opportunity staff other than Negroes, and the Chicago regional office has no Spanish American representation; (3) of a total of 169 GS-9's and above on the equal opportunity staff; 91 (54 percent) are Negroes, nine (5 percent) are Spanish Americans, and one (1 percent) is an Oriental American. Later, HUD reported that a Mexican American professional had been added to the Chicago office. Romney letter, supra note 119.

¹⁹⁹ Interview with Richard F. Lally, Director of Civil Rights, Department of Transportation, Feb. 5, 1970.

²⁰⁰ Interview with R. L. Harper, Chief of the Review and Evaluation Division, FHWA's OCR, Feb. 9, 1970. The Federal Aviation Administration, however, has two Spanish surnamed Americans on its western region civil rights staff. Letter from Volpe to Hesburgh, supra note 12.

²⁰¹ This does not include the five staff assistants for minority group affairs, one of whom is Spanish surnamed. See letter from Arthur A. Chapin, Director, Office of Equal Employment Opportunity, Department of Labor to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Jan. 22, 1970.

3. STAFF TRAINING

Civil Rights legislation during the 1960's created a whole new field of administrative responsibility. Title VI in particular posed novel questions of interpretation and applicability. The need to implement, review, and enforce its prohibition against discrimination in federally assisted programs was, and remains, enormous. In 1964, when Title VI was enacted, few persons understood its requirements and implications. Skill and experience in conducting compliance reviews were initially nonexistent so that, to a great extent, the entire Title VI enforcement effort has had to be built from scratch.

Even today few people possess the combination of attributes necessary for effective civil rights compliance—sensitivity to equal opportunity issues, knowledge of civil rights laws and regulations, investigative skills, and understanding of the requirements and operation of Federal programs. Thus, by virtue of the uniqueness, complexity, and significance of the Federal equal opportunity effort, and of Title VI in particular, staff training is of paramount importance. However, with a few notable exceptions, agencies have failed to develop their own training capacity.

Title VI training is usually provided in two ways. An agency may send its personnel to the Civil Service Commission which offers several courses relating to Title VI,²⁰² or the agency may provide its own on-the-job training, often coupled with periodic workshops it conducts. What little training there is, usually is given to civil rights personnel and program staff generally receive little such guidance. This is not to suggest that Title VI training of program personnel must necessarily be comparable in scope and depth to that provided civil rights staff. But since some agencies rely on program personnel to carry out civil rights functions, such as determining the civil rights implications of their programs, there is great need for these individuals to become sensitive to existing and potential civil rights problems.

²⁰² Many of the agency officials interviewed had serious reservations regarding the value of such training; one of the most commonly heard criticisms was that the content of the CSC courses was not relevant to the problems of a specific agency. This was the opinion of officials at the Departments of Labor and Commerce and the Small Business Administration.

Among the few agencies which have made serious attempts to come to grips with equal opportunity training needs are the Department of Transportation's Federal Highway Administration and the Department of Health, Education, and Welfare.

a. Department of Transportation

Within the Department of Transportation, the civil rights offices of the operating administrations are responsible for conducting their own civil rights training.²⁰³ One of the more ambitious programs has been developed by the Federal Highway Administration (FHWA). On July 1, 1969, FHWA initiated a 1-year training program for equal opportunity officers. The program involves rotational assignments at various agencies, including the Department of Transportation, Office of the Secretary; FHWA central office, FHWA regional offices; the Office of Federal Contract Compliance, the Department of Labor; the Department of Justice; the Equal Employment Opportunity Commission; Civil Service Commission; and the Commission on Civil Rights.²⁰⁴ The program, by affording the trainees the opportunity to become familiar with the activities of other Federal agencies with relevant civil rights responsibilities, provides them with a wide variety of experiences that will have a bearing on their role as equal opportunity officers.

Although the training does not focus solely on Title VI, many of the assignments relate to it. This training gives promise of providing a worthwhile investment, for it exposes the participants to a range of experiences in various civil rights areas, which will undoubtedly help them in developing overall sensitivity to the problems and sophistication in analyzing them. Although still in its early stages, the program has the potential to become a model for other agencies.

For purposes of training program personnel, there have been some equal opportunity workshops conducted by FHWA's civil rights staff for regional and division engineering per-

²⁰³ Lally interview, supra note 199.

²⁰⁴ Federal Highway Administration, "The Federal Highway Administration. One Year Training Program for Equal Opportunity Officers" (undated publication).

sonnel whose work impinges on civil rights matters such as dislocation.²⁰⁵

b. The Department of Health, Education and Welfare

The Title VI responsibilities of HEW are so important in nature and scope that it has established a separate training unit as part of the Department's Office of Civil Rights.

In response to its own very substantial training needs, the Department created its training unit in 1967 as part of the Office for Civil Rights. One of the unit's primary purposes was seen as "encouragement of team building, communications cohesiveness, group growth, and interstaff relations which will improve OCR performance."²⁰⁶ The unit has served as consultant not only to OCR staff in Washington and in regional offices but, on occasion, to staff from the operating agencies. In addition, it has served to explain HEW civil rights policies and OCR functions to interested individuals and outside organizations.

In line with field decentralization of OCR staff, training responsibilities as well as location have been shifted increasingly to the regional offices. Currently, the branch chiefs of the regions orient and train new workers in their units. Experience and training in field reviews are obtained by accompanying senior workers on investigations, then conducting reviews under direct supervision. In large regional offices with important civil rights responsibilities, such as Atlanta, the Regional Director participates in training. And, in Atlanta, orientation and training sessions are held periodically for all new employees.²⁰⁷

But short of on-the-job training in conjunction with sending personnel to Civil Service Commission courses, relatively few other agencies have recognized the need for establishing an organized agency program designed to ex-

²⁰⁵ Interview with R. L. Harper, supra note 200. Mr. Harper indicated that these workshops had been conducted in five regions. It should be noted that most of FHWA training is oriented to contract compliance rather than Title VI.

²⁰⁶ Undated memorandum issued by HEW's Office of the Assistant Director for Management (OCR): "Training and Staff Development, Purposes, Philosophy and Organization."

²⁰⁷ See U.S. Commission on Civil Rights, *HEW and Title VI* 15-17 (1970) for detailed information on training for staff development at HEW.

pose civil rights and/or program personnel to training in the Title VI area. For some of the agencies with minor title VI responsibilities, this method may be sufficient; for agencies with more substantial Title VI responsibilities, the need for developing units devoted primarily to providing civil rights training to agency personnel may become more pronounced. Thus far, however, only HEW has developed the capacity to provide civil rights training for staff through a separate training unit.

c. Other Agencies

Other agencies have begun to realize the necessity of adequate training for civil rights staff members or program personnel. Officials in the departmental Office of Equal Opportunity at Commerce feel that past training for the Economic Development Administration civil rights personnel has been inadequate.²⁰⁸ The EDA is the only agency within Commerce with major Title VI responsibilities: its program personnel has had no civil rights training of any kind.²⁰⁹

Not until the past year has the Department of Agriculture developed its own Title VI training program either for civil rights staff or program personnel. Pursuant to a departmental directive issued by Secretary Hardin in September 1969 calling for civil rights training for program managers,²¹⁰ an ambitious course of action has been undertaken. As of March 30, 1970, more than 3,000 Department of Agriculture officials from Washington and the field

²⁰⁸ Interview with Luther Steward and Arthur Cizek, supra note 195. Almost all EDA civil rights personnel, however, have attended formal courses sponsored by the Civil Service Commission and formal EDA training courses.

²⁰⁹ Enclosure to letter from Luther C. Steward, Jr., Special Assistant for Equal Opportunity, Department of Commerce, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Dec. 18, 1969. At the time the Commission interviewed at EDA, a 3-day pilot program for program personnel was being devised. This conference was conducted in July 1970. It consisted of an intensive examination of new Title VI procedures. Personnel from all EDA program units attended and participated in this conference as well as EDA field personnel and the equal employment opportunity officer for the Port of Oakland, Calif. Letter from Siciliano to Glickstein, supra note 49. Additionally, the Director of EDA's Equal Opportunity Office has addressed meetings of EDA area and district directors. Interview with John Corrigan, supra note 179.

²¹⁰ Secretary's memorandum No. 1662 (Sept. 23, 1969).

offices have participated in 1- or 2-day training sessions designed to heighten awareness of civil rights problems and sensitivity to racial issues. Each of the operating bureaus within the Department is responsible for developing its own program. Internal coordination of the training effort is provided by the Director of Personnel.

In January of 1969, the Department of Labor's Office of Evaluation, in the Manpower Administration (MA), issued a study of the MA's equal opportunity program.²¹¹ With respect to staff training, the report noted that there were instances of "scattered training activities, but these have not been carried out thoroughly, so that one encounters in the field widely different ideas of duties and powers, with little uniformity of understanding."²¹² In summary, the report found that staff training "is a vital and much neglected area of endeavor . . . what may be surprising, however, is the degree of ignorance with respect to equal opportunity responsibilities that we have encountered throughout the field visit phase of the study."²¹³

In November 1969, the Department of Labor's Office of Equal Employment Opportunity conducted equal opportunity training sessions for regional program staff in six regions and similar training sessions are planned for the five other regional offices.²¹⁴

Title VI training programs in most other agencies, where they exist at all, show deficiencies. For example, not one staff member involved in Title VI activities at the Tennessee Valley Authority has had any civil rights or compliance investigation training.²¹⁵ It is ap-

²¹¹ "Pilot Evaluation Study of the Manpower Administration's Equal Opportunity Program," issued by the Manpower Administration, Office of Evaluation, DSE Report No. 4 (January 1969).

²¹² Id., at 33.

²¹³ Id., at 36.

²¹⁴ Undated memorandum and report from Nelson S. Burke, Assistant Director for Policy and Procedural Development, OEEO, to all OEEO staff. See also letter from Arthur A. Chapin, Director, OEEO, Department of Labor, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Jan. 22, 1970.

²¹⁵ The Title VI coordinator indicated, however, that two attorney investigators, who do not perform Title VI functions had attended the Civil Service Commission seminar on compliance investigation. Moreover, at the time the Commission conducted interviews, TVA's Office

parent that the level of training in most agencies is deplorably low both qualitatively and quantitatively.²¹⁸ Although a uniform approach to training is neither practical nor necessary, standards and leadership are essential. For these purposes, some agency or unit within the Government must have authority to develop civil rights training guidelines and authority to review and evaluate agency training programs on a regular basis.

D. Achieving and Monitoring Compliance

Agencies engage in a variety of activities to assure compliance by recipients. They range from the mere issuance of explanatory pamphlets and educational materials to hearings pursuant to fund cutoffs. This section is primarily concerned with the procedures by which agencies have sought to achieve and maintain compliance with Title VI: assurances, compliance reports, compliance reviews, and complaint investigations.

I. ASSURANCES

In order to insure that recipients comply with the requirements imposed by Title VI and the corresponding Title VI regulations, all agencies have devised "assurance of compliance" forms to be executed by their recipients.²¹⁷

of Tributary Area Development, which was in the process of decentralizing responsibility for compliance investigations, was planning to hold a training session on conducting compliance reviews for field personnel who will be doing the reviews. Telephone interview with L. Dunlap, Assistant General Counsel, TVA, Oct. 24, 1969.

²¹⁶ At some agencies, however, civil rights staff were of the opinion that training provided to equal opportunity personnel was adequate (e.g., interview with Edward Dulcan, Director of SBA's Office of Equal Opportunity, Dec. 14, 1969).

²¹⁷ Assurances have to be executed by primary recipients (e.g., 45 C.F.R. 80.13(j) (HEW) and 29 C.F.R. 31.2(f) (Labor)) and also possibly by secondary or subrecipients (e.g., 45 C.F.R. 80.4(a) (1) (HEW); 15 C.F.R. 8.5(b)(7) (Commerce); 7 C.F.R. 15.4(a)(1) (Agriculture)).

See note 4 *supra* for HEW's definition of recipient. The usual Title VI situation exists where a Federal agency extends financial assistance to a recipient who subsequently passes on the economic benefit received, in some form, to the beneficiaries. For example, a grant to a university to purchase books or equipment constitutes assistance to the institution. The university recipient converts the benefit received into goods which are used by the students, the ultimate beneficiaries.

Typically, the applicant for Federal financial assistance promises to comply with Title VI and all requirements imposed by the corresponding regulations.²¹⁸ The applicant also expressly recognizes that "Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance and that the United States shall have the right to seek judicial enforcement of this assurance."²¹⁹

In the months immediately following enactment of Title VI, some believed that a well-drafted, legally sound assurance would provide the major tool in Title VI enforcement. According to this view, assurances would serve several purposes. They would place recipients on notice that they were liable to forfeit Federal financial assistance if they violated Title VI. Also, the act of signing the assurance would in itself induce recipients to make bona fide efforts to comply with the law.²²⁰ Finally, the assurance would provide a clear legal basis upon which action could be taken to terminate funds if the recipient signed and then violated the agreement.²²¹

In the summer and fall of 1965, this Commission conducted a survey of health and welfare services in the South.²²² As a result of

However, the sequence may be altered somewhat when another intermediary is interposed in the chain. A grant from a Federal agency to a State agency, which is then extended to a community agency, and eventually to the individual beneficiaries, represents a slight departure from the usual Title VI sequence. In effect, both of the intermediaries (i.e., State and community agencies) between the source and the beneficiaries are recipients. The first in the chain (i.e., State agency) may be characterized as the primary recipient; the other (i.e., community agency) a secondary or subrecipient.

For illustration of types of assurances required, see 45 C.F.R. 80.4 (HEW).

²¹⁸ See, e.g., HEW Form 441 (12-64) "Assurance of Compliance with the Department of Health, Education, and Welfare Regulation under Title VI of the Civil Rights Act of 1964."

²¹⁹ *Id.*

²²⁰ Closely associated with this view was the thought that the assurance forms and the explanatory material accompanying them would serve to educate recipients regarding the requirements of Title VI. See, e.g., "Explanation of the HEW Form 441" which accompanies the assurance when it is sent to recipients.

²²¹ For a fuller discussion see, U.S. Commission on Civil Rights, *HEW and Title VI* 18-20 (1970).

²²² U.S. Commission on Civil Rights, *Title VI—One Year After* (1966).

this review, it appeared that the mere act of obtaining assurances provided no guarantee of full compliance with Title VI. Subsequent reviews and studies have furnished additional evidence that submission of assurance forms did not in fact assure compliance with Title VI.²²³

2. AGENCIES' PROCEDURAL REQUIREMENTS FOR SECURING ASSURANCES

The use of assurances poses numerous questions which have been answered differently by the Federal agencies: Of whom should assurances be required? Who should secure the assurances? Should the assurance be contained in the application or incorporated by references? Should the assurance attempt to set forth all of the types of conduct proscribed by Title VI and the agency's Title VI regulations? What procedures should be followed upon a recipient's refusal to execute an assurance? Treatment of many of these issues is not dictated by Title VI or the agencies' Title VI regulations.

In fact, no effort at achieving uniformity of interpretation and coordination of practices has been made. Consequently, there is considerable variation in the way agencies have responded to these questions. Following are several illustrations of these.

The Small Business Administration maintains one of the more comprehensive sets of instructions for securing assurances, putting the recipient on actual notice of his Title VI responsibilities and setting forth the action to be taken against recipients who decline to sign an assurance.

The SBA's standard assurance form²²⁴ sets forth the applicant's nondiscrimination obligations and spells out the regulations which are authority for terminating assistance. The form, which also provides a basis for action against the recipient for failure to comply, is provided to all "direct and immediate participation loan applicants"²²⁵ and as of August 1,

²²³ See, e.g., U.S. Commission on Civil Rights, *Southern School Desegregation, 1966-67* (1967).

²²⁴ SBA form 652.

²²⁵ SBA National Directive 1500-3A, at 5. Under the regular business loan program, loans may be made directly (i.e., direct loans) or in participation (i.e., immediate participation loans) with banks or other financial institutions. If financial assistance is other-

1970, to guaranty loan applicants with the exception of home disaster loan applicants.²²⁶ In addition to the assurance form, the applicant is given copies of the SBA's nondiscrimination regulations²²⁷ and a "Notice to New SBA Borrowers."²²⁸ The latter, coupled with illustrative attachments, describes the requirements to be satisfied by the recipient as minimum evidence of his compliance with the SBA nondiscrimination requirements.

Whenever a loan application and signed assurance are received "from a social, civic, or fraternal organization, such as a golf club, Elks club, et cetera," the applicant is notified that the assurance and SBA's nondiscrimination regulations also apply to the organization's membership policies.²²⁹ SBA's way of handling the procedure for securing assurances assures that the applicant's execution of the assurance will be something more than a perfunctory exercise.

A less exemplary situation exists in the Department of Housing and Urban Development. In 1969, a task force was appointed by the Deputy Assistant Secretary for Equal Opportunity at HUD to study a variety of equal opportunity issues within the Department.²³⁰ According to a draft report of this task force, no consistency was found in the Title VI assurance forms used.²³¹ Moreover, the report indicated that some contract or grant document

wise available on reasonable terms, no loan may be made by SBA. Direct loans may not be made unless a bank or other lending institution is not willing to share on an immediate participation basis. Furthermore, the latter type loan may not be made unless a guaranteed loan is not available. Basically, under the guaranty plan, SBA guarantees a portion of the loan (up to 90 percent) made by a bank or other lending institution, which portion it (i.e., SBA) agrees to purchase upon default of the applicant (see 1971 U.S. *Budget Appendix*, at 947).

²²⁶ Letter from Hilary Sandoval, Jr., SBA Administrator, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 14, 1970.

²²⁷ 13 C.F.R. 112 and 13 C.F.R. 113.

²²⁸ SBA form 793; see app. 1 of the SBA's National Directive, ND 1500-10.

²²⁹ SBA National Directive 1500-3A, at 7.

²³⁰ Department of Housing and Urban Development, "Equal Opportunity Requirements and Procedures Relative to Federally Assisted Programs of the Department of Housing and Urban Development" (June 11, 1969 draft).

²³¹ *Id.*, at 5.

provisions, which contain only a reference to Title VI, may be legally unenforceable.²³² The report also pointed out that no assurances had been required of recipients in Federal Housing Administration programs, even though many are subject to Title VI.²³³ (This was subsequently remedied in the summer of 1969 when a form²³⁴ was adopted pursuant to an opinion by the General Counsel.)

In the majority of agencies with Title VI responsibilities, assurances are collected by program or service personnel, the latter being persons in the contract division of the grant office. Usually an agency will use one basic form, but in some agencies minor revisions have been introduced. For example, the Department of the Interior's Bureau of Outdoor Recreation and Federal Water Pollution Control Administration has made the assurance part of its application form.²³⁵

The Department of Agriculture is somewhat unique in its approach to obtaining Title VI assurances from recipients. A July 1968 Commission staff report²³⁶ noted that of the more than 7,500 assurances required, 165 incidences of refusal to file were under negotiation. As of the end of March 1969, 23 refusals to file were still under negotiation and had been for more than 30 days;²³⁷ as of July 1969, 22 refusals still had been under negotiation for more than 30 days.²³⁸ Eleven of these refusals were by land-grant universities, which are recipients under the Federal extension service program. In fact, as of April 1970, title VI assurances had not been certified by the presidents of 11 recipient land-grant universities and the directors of the corresponding State cooperative extension services.

Department of Agriculture officials have in-

²³² Id.

²³³ Id.

²³⁴ Undated letter from William Ross, Acting Assistant Secretary-Commissioner, FHA, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, at 8-9.

²³⁵ See e.g., BOR form DI-1350.

²³⁶ U.S. Commission on Civil Rights staff report, *The Mechanism for Implementing and Enforcing Title VI of the Civil Rights Act of 1964—U.S. Department of Agriculture* 16 (1968).

²³⁷ Department of Justice, "Quarterly Title VI Status Report for the Department of Agriculture," first quarter 1969.

²³⁸ Id., Second quarter 1969.

indicated that they have discouraged recipients from signing assurances until they are in full compliance.²³⁹ Agriculture's point is well taken; it would be a travesty of Title VI to accept an assurance from a recipient who is clearly in noncompliance.

Commendable as is Agriculture's refusal to engage in this sham exercise, the fact remains that substantial number of Agriculture recipients are still in noncompliance and continue to receive financial assistance from the Department.²⁴⁰

3. COMPLIANCE REPORTS

The most compelling method of monitoring Title VI compliance undoubtedly is to conduct periodic, onsite inspections of each of the hundreds of thousands of recipients of Federal aid who dispense services and other benefits to the millions of Americans whom Title VI is designed to protect. Such an undertaking, however, is impractical. A well-developed system of compliance reports, utilizing data collection and analysis, can provide an adequate basis for identifying actual or possible discrimination, thereby pinpointing programs, facilities, and services which require more intensive scrutiny and/or enforcement action.

Title VI regulations take cognizance of the need for the collection of sufficient information to determine compliance by providing for submission of periodic compliance reports by recipients.²⁴¹ Such reports can serve at least two

²³⁹ Interview with Lloyd Davis, former FES Administrator, Dec. 10, 1969. In lieu of assurances, these recipients have been required to submit a compliance plan in accordance with cooperative extension service's "Supplemental Instruction for Administration of Title VI of the Civil Rights Act of 1964." The compliance plans were to delineate how the recipient planned to achieve full compliance. It should be noted, however, that the supplemental instructions, which were issued in July 1965, only contemplated use of the compliance plans until December 1965. Despite this target date for achieving full compliance, as of April 1970, 11 recipients were still operating pursuant to their compliance plans.

²⁴⁰ See OIG compliance audits conducted during 1969 in 16 State and 147 county extension services.

²⁴¹ See, e.g., HEW's Title VI regulations, 45 C.F.R. 80.6(b), which provide:

"(b) Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and

important functions: (1) they can help civil rights staffs identify possible instances of discrimination in federally assisted programs that call for further investigation; and (2) they can provide a mechanism to ascertain generally what groups of people the program's benefits are reaching and, in particular, to measure participation by minority groups.

But very few Federal agencies have attained even the first of these objectives and data collection and analysis have rarely been utilized to evaluate the extent to which benefits of federally assisted programs are reaching minority groups.

a. Reports as an Aid to Compliance

Variations with respect to reporting requirements and data analysis are pronounced. The agency with the heaviest Title VI responsibilities—HEW—has taken the lead in the development of a compliance reporting system.²⁴² However, even HEW's reporting requirements vary from program to program. For example, it has an annual reporting requirement with respect to elementary and secondary education and a biennial reporting requirement for institutions of higher education. In the area of health, however, HEW's Office of Civil Rights does not require an annual compliance report form from hospitals and extended care facilities participating in Medicare or other forms of Federal financial assistance. An initial 1966 form was not followed up with a second form until June 1969 at which time 6,500 hospitals and 4,800 extended care facilities were sent new compliance questionnaires.

OCR uses the data primarily as a compliance tool, i.e., to flag recipients for onsite reviews if they indicate there may be noncompliance present. But even with this limited objective, disparities have arisen in reporting requirements. Thus, although employment of

containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part."

²⁴² For background material, see *HEW and Title VI*, supra note 221, at 28, 29.

faculty comes within the purview of Title VI, elementary and secondary school forms have elicited racial data on teaching staffs but the higher education report forms have not.

At one time, both education and medical facility report forms called for a simple three-category racial breakdown—white, Negro, and other—thereby precluding use of these forms as a means for monitoring compliance with respect to Spanish surnamed Americans and other minority groups.²⁴³

Despite its unevenness, HEW's compliance reporting system is exemplary compared to that of many other agencies. At HUD, for example, under existing Title VI regulations, the Department's Program Assistant Secretaries have jurisdiction over the collection of compliance reports but have not developed a program for receiving them.²⁴⁴ Consequently, compliance reports are not required of recipients despite the fact that many of HUD's programs have major Title VI implications and that compliance reviews are conducted regarding only a

²⁴³ Proposed 1970-71 elementary and secondary school report forms call for a five-category breakdown; namely: American Indian; Negro; Oriental; Spanish surnamed American; all individuals not included in the first four categories. Compliance report forms currently in use for hospitals, nursing homes and extended care facilities use virtually the same five category breakdown.

²⁴⁴ Letter from Romney to Glickstein, supra note 113, which indicated that when the new Title VI regulations are approved and Title VI responsibility is shifted to the Assistant Secretary for Equal Opportunity, Department compliance activities, including the collection of racial data and compliance reports, will be carried out on the basis of procedures now being developed and implemented in HUD's new area and regional reorganization. See also Letter from Samuel J. Simmons, HUD Assistant Secretary for Equal Opportunity to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 22, 1969: "The Assistant Secretary for Equal Opportunity is not the 'responsible department official' for purpose of effectuating compliance with Title VI . . . 'The responsible department official' is the Assistant Secretary responsible for extending financial assistance. These assistant secretaries have not developed a program for receiving compliance reports. . . . We have no indication from the responsible Department officials as to their plans for instituting compliance reports. Under a proposed amendment to the Department's Title VI regulation, this office is given the responsibility for administering Title VI requirements. We have established a task force which has been charged with developing a complete compliance program including compliance reports."

very small percent of the total number of HUD recipients. Thus, HUD generally has no way of being apprised of the compliance status of its recipients, other than through a severely limited number of compliance reviews.

Within the Department of Commerce, only the Economic Development Administration has ever utilized a compliance reporting system. Other programs have either been considered too minor to warrant the expense and effort (e.g., Maritime Administration) or have delegated compliance responsibility to HEW.

The Office of Equal Opportunity of EDA for several years attempted to collect a compliance report form (EDA Form 613) from all its recipients and direct and substantial beneficiaries. The form was a facsimile of the standard Government Equal Employment Opportunity Form (EEO-1) which requires only employment data by job category with racial and ethnic breakdowns.²⁴⁵ Despite numerous followup attempts, the rate of return was under 60 percent.²⁴⁶ As a result, EDA abandoned the reporting system.²⁴⁷

EDA programs would be immensely helped by a compliance reporting system for both compliance and program evaluation purposes since employment discrimination is more easily documented by statistics than other kinds of discrimination. This is particularly true if the data on job categories are buttressed by

information on wage levels. These data are easily collectable by visual survey and/or company records and, since one of the main purposes of EDA programs is to secure jobs for the unemployed and underemployed, many of whom are minorities, such data would be an invaluable tool for evaluating the programs' success.²⁴⁸ Given the nature of EDA programs, it is difficult to see how the agency can operate an effective Title VI compliance program without a reporting system.

Like Commerce's EDA, the Interior Department's Bureau of Outdoor Recreation has decided to terminate its compliance reporting system.²⁴⁹ Instead it will rely on reviews by program personnel to identify recipients whose practices are questionable and warrant further review. However, the reviews will only be performed during the initial year of the installation's operation and therefore will not be a satisfactory substitute for an annual compliance report form.²⁵⁰

There is no uniformity among the Department of Agriculture's Title VI agencies with respect to reporting requirements. Both the Forest Service and the Rural Electrification Administration require an annual report which simply calls for "yes" or "no" responses to a series of questions dealing with availability of services and facilities on a nondiscriminatory basis. No hard data are elicited. The Food and Nutrition Service collects racial participation data on an annual reporting form for one of its minor programs, food distribution for summer camps. However, no compliance report is required for the major programs with equal opportunity implications, such as food stamps, school lunch, special milk, and commodity distribution. The Farmers Home Administration has the most useful system at Agriculture. Monthly reports are submitted which list the number of borrowers, number of loans by category of loan, and the

²⁴⁵ In order to get BOB approval for the ED-613, EDA had to permit all businesses which file standard form 100's to omit their employment statistics on ED-613.

²⁴⁶ Interview with John Corrigan, Director, EDA's Office of Equal Opportunity, Jan. 15, 1970. Although approximately 1,000 of the report forms were returned, only 71 of these were filled out completely.

²⁴⁷ Id. The Director of EDA's Office of Equal Opportunity stated his intention to work out an agreement with the Equal Employment Opportunity Commission to obtain data on EDA's recipients. However, this may be an inadequate source as a compliance or program evaluation tool because EEOC requires data only from employers with 100 or more employees; most of EDA's recipients employ less than 100 persons. It should be noted that EEOC's SF-100 was revised in January of 1970 to require all "multiestablishment" employers employing 100 or more persons to file separate reports for all establishments where 25 or more persons are employed. Therefore, it is conceivable that EDA will receive information on some of its recipients and substantial and direct beneficiaries employing from 25 to 100 persons.

²⁴⁸ EDA's program analysis staff is now conducting a study of EDA business loans to ascertain whether EDA projects are securing jobs for the unemployed and underemployed; furthermore, a similar study of EDA public works projects is contemplated. Letter from Siciliano to Glickstein, *supra* note 49.

²⁴⁹ Meeting with Bureau of the Budget, Department of Interior, and U.S. Commission on Civil Rights, Mar. 5, 1970.

²⁵⁰ See sec. D3a(5) for further discussion.

number of applicants by various minority categories.

Of the four smaller agencies with significant Title VI responsibilities—OEO, SBA, LEAA, VA—only the first two have instituted compliance reporting systems.

The Law Enforcement Assistance Administration has not yet established a compliance program beyond the collection of assurances; consequently, no compliance reporting system has been devised.²⁵¹

The Veterans Administration is in the process of establishing compliance report systems to cover proprietary and training schools attended by veterans.²⁵²

VA also require annual compliance reports from national service organizations, such as the Veterans of Foreign Wars, which are given free office space in VA hospitals and centers. However, the report is only a reaffirmation of adherence to Title VI; identification of the organizations' memberships or of the veterans aided is not required.

OEO uses its compliance report as an integral part of the annual refunding request. Requests for grant refunding by community action agencies are made on an annual basis and must be accompanied by a number of forms including one on the agency's employment, by minority group, and on the racial and ethnic characteristics of the beneficiaries of the various programs run by the agency, such as legal services and neighborhood health centers.²⁵³ Like other agencies, however, OEO

²⁵¹ As of August 1970, LEAA was in the process of developing a compliance reporting system. Memorandum from Richard W. Velde and Clarence M. Coster, *supra* note 55.

²⁵² Each school will be required to submit an annual compliance report form giving specific numerical data on minority enrollment; however, no information is required on faculty employment. In addition, the school must respond positively or negatively to a series of questions, such as: "Do minority students attend job interviews?" The report forms will be used to select schools for onsite reviews. However, without specific information on placement of minority students, counseling services, financial aids, and similar items, the reporting system as a compliance tool possesses limited value.

²⁵³ It is characteristic of a number of Federal agencies that, because of manpower shortages, the information collected is not generally utilized as a major compliance tool. The single OEO Regional Coordinator for Civil Rights does not have the time to review all ap-

lacks sufficient equal opportunity manpower to evaluate all the information it receives from the reporting system for compliance purposes.

The Small Business Administration requires annual report forms from all recipient employers with 35 or more employees which requires precise employment data and information on the recipients' business practices. The forms are used by regional equal opportunity coordinators to identify recipients who may not be complying with Title VI.

b. Reports as an Aid to Program Evaluation

In addition to periodic, detailed, and accurate compliance reports, effective Title VI enforcement requires that agencies systematically determine the extent to which minority group members are participating in the benefits of federally assisted programs.²⁵⁴ For this determination to be made with any degree of accuracy, agencies must collect sufficiently detailed data to be in a position to evaluate the impact of their programs or their administration to assure equitable distribution of benefits.²⁵⁵

Some of the problems arising from lack of data and program evaluation or insufficient use of them are reflected in the following illustrations drawn from both large and small Title VI agencies.

At the Department of Housing and Urban Development, prior to April 1970, racial data were gathered on a continuing basis only for the low-rent public housing program, which collects occupancy data, and for the multi-family housing program, which collects occu-

plications for refunding, particularly since many must be processed hurriedly to meet the fiscal year deadline.

²⁵⁴ At times the distinction between compliance and noncompliance with Title VI becomes difficult. The familiar "freedom-of-choice" school issue illustrates the point. Despite removal of legal barriers to integrated education, a myriad of other factors can render "free" choice illusory. The result is perpetuation of the dual system. Similarly, longstanding practices of separate treatment and exclusionary use of services and facilities has in the past characterized scores of federally assisted programs. Even though recipients may now be adhering to the letter of Title VI, its spirit and basic purpose—full access to and use by all of the benefits of federally aided programs—is often thwarted.

²⁵⁵ See U.S. Commission on Civil Rights, *HEW and Title VI* 59 (1970).

pancy and relocation data. In the past, however, these data were not used to evaluate the civil rights compliance status of various recipients either by the Housing Assistance Administration, which administers the program, or by the Department's Equal Opportunity Office. In addition, for a period late in 1969 and early 1970, the Equal Opportunity Office had unsuccessfully urged the FHA to collect occupancy and application data by race or ethnic background.²⁵⁶ The issue was eventually resolved by FHA's agreement to collect the needed data; a few weeks later, in April 1970, Secretary Romney made a decision to collect data on all HUD programs.²⁵⁷ As of June 1970, problems of implementation were still being worked out.

A recent study by this Commission noted a mixed but generally inadequate pattern in regard to HEW's collection of racial data.²⁵⁸ Although recommendations by HEW staff for establishment of a departmental policy on collection and utilization of racial data were made early last year, those recommendations have not been acted upon.²⁵⁹

At the Department of Transportation, no racial data specifically oriented to Title VI are collected.²⁶⁰ Applications to the Urban Mass Transportation Administration (UMTA), however, must be accompanied by maps indicating the racial composition of the communities to be served. In the future, UMTA will re-

²⁵⁶ Interview with Lawrence Pearl, Special Assistant to the Assistant Secretary for Equal Opportunity, Feb. 19, 1970.

²⁵⁷ Letter from Romney to Glickstein, *supra* note 113.

²⁵⁸ For a more complete discussion see, *HEW and Title VI*, *supra* note 221, at 59-63.

²⁵⁹ In mid-January of 1969, Alice M. Rivlin, then Assistant Secretary for Planning and Evaluation, and Ruby Martin, then Director of the Office on Civil Rights, sent a memorandum to former Secretary Wilbur J. Cohen on "Equal Opportunity Goal Setting," recommending, among other things, that he "promulgate a departmental policy on the collection of racial data." The outgoing Secretary, in turn, passed these recommendations along to agency heads in two memoranda, "The Collection and Use of Racial and Ethnic Data" and "Pilot Reviews To Determine Program Impact on Minority Group Citizens." As noted in the text, no action has been taken.

²⁶⁰ Attachment to letter from Richard F. Lally, Director of Civil Rights, Department of Transportation, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Jan. 23, 1970.

quire transportation authorities to submit dislocation statistics by race.

Some of the smaller Title VI agencies have surpassed their larger counterparts in the matter of data collection and attempts at program evaluation from a civil rights viewpoint. The Small Business Administration, for example, requires information on the ethnic backgrounds of persons interested in and utilizing agency programs in conjunction with its minority enterprise program.

At the Office of Economic Opportunity, a good deal of racial and ethnic data are available relating to the community action program (CAP). They include the racial and ethnic composition of community action agency boards; minority information on the community that will be served; and estimates of characteristics of planned participants.²⁶¹ The latter report constitutes a plan against which the applicant will later report actual results on participant characteristics in quarterly reports. Because the regional civil rights coordinators do not require the staff to review each application, the program analysts must be relied upon to evaluate this information from a civil rights standpoint.

While some agencies have developed efficient information-gathering devices, none has yet developed the capacity to analyze and utilize available data fully.²⁶²

3. COMPLIANCE REVIEWS

The term "compliance review" includes a variety of activities by which agencies determine whether recipients are following nondiscriminatory practices, ranging from investigations of particular complaints²⁶³ to comprehensive and detailed examinations of the various aspects of a recipient's program. The most effective means of conducting compliance reviews is through onsite investigation of the recipient's operations.

Every agency with Title VI regulations is required to perform compliance reviews of its recipients. The language in the various agen-

²⁶¹ CAP Forms 3, 5, and 84 respectively.

²⁶² See *HEW and Title VI*, *supra* note 221, for a more detailed discussion of this problem as it has manifested itself within the largest Title VI agency.

²⁶³ For a discussion of complaint processing, see pp 230-34, *infra*.

cies' regulations is almost identical, conforming to the HEW regulations, which state:

The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.²⁶⁴

Despite the clarity of the mandate, several agencies have never performed a Title VI compliance review of any of their recipients, e.g., FHWA (of the Department of Transportation), AEC, NASA, AID, NSF, and the Department of State. To the extent that such reviews are conducted, they are typically post-approval reviews, performed after the Federal assistance has been extended and the recipient's program has been in operation for some time.

a. Post-Approval Reviews

Those agencies that do perform compliance reviews rarely reach more than a small percentage of their recipients each year. For many agencies, a large number of recipients have never been subject to an onsite compliance review, e.g., HEW, HUD, DOC, DOT, OEO, and VA.

Several factors have caused the limited number of compliance reviews by Federal agencies. Foremost has been the shortage of equal opportunity manpower (e.g., HEW, OEO, VA, HUD, DOT, and Department of Labor). A second factor has been the low priority accorded Title VI activity by many civil rights staffs (e.g., FHWA, HUD, and the Department of the Interior). A third cause has been the complaint orientation of some agencies, which assumes that their recipients are in compliance if no complaints are filed or, alternatively, the practice of some agencies of placing priority on investigation of complaints rather than on conducting compliance reviews.²⁶⁶

²⁶⁴ 45 C.F.R. 80.7(a). All agencies with programs subject to Title VI have such regulations except the National Foundation on the Arts and the Humanities.

²⁶⁵ Some of the agencies' recipients have been reviewed by HEW under one of the coordination plans. However, all of the agencies mentioned above, which have delegated compliance responsibility to HEW, have some recipients which do not fall under the delegation authority.

²⁶⁶ HEW, the most important Title VI agency, diverges from this approach and places highest priority on a planned program of compliance reviews. See, *HEW and Title VI*, supra note 221, for fuller discussion.

The compliance reviews that are conducted by many agencies are, as a rule, of poor quality and grossly inadequate in scope. There are many reasons for these deficiencies including: (1) lack of criteria for selecting candidates for review; (2) failure to develop and/or issue adequate guidelines for reviewers; (3) no training or poor training for civil rights staff involved in Title VI; (4) insufficient and, at times, incompetent or insensitive Title VI staff; (5) reliance on agency program or on State personnel with no civil rights training or sensitivity to perform the reviews as part of their other duties; (6) reliance on contract compliance personnel to do Title VI reviews while conducting their own reviews under Executive Order 11246; (7) failure by the civil rights office or the responsible program administrator to recommend corrective action to recipients who engage in questionable practices or (8) if recommendations are made, failure to conduct followup reviews to ascertain if the recipient has taken adequate corrective action.

The following outline of review activity by major Federal agencies illustrates the diversity of approaches which have been adopted and the pervasive quality of the deficiencies encountered by Commission staff.

(1) Department of Health, Education, and Welfare²⁶⁷

HEW is the only major Title VI agency with an effective, coordinated compliance review program.²⁶⁸ Because of its manpower shortage, HEW's Office for Civil Rights has established priorities in selecting programs on which to concentrate its review efforts. Following is the current status of reviews in major areas:

(A) Elementary and Secondary Education. Within the elementary and secondary school review program, priorities are being shifted so that more reviews of northern and western school systems will be conducted.

In the South, OCR's activity is being somewhat preempted by the courts. According to HEW's Southern School Coordinator, Office for

²⁶⁷ For a complete discussion of HEW's compliance review program through January 1969, *HEW and Title VI*, supra note 221, at 32-54.

²⁶⁸ There are exceptions, e.g., see discussion of higher education program in *HEW and Title VI*, supra note 221, at 42-43.

Civil Rights, if the Department of Justice brings statewide suits throughout the Southern and border States, the Department's review role will be substantially eliminated in the South, although it could conceivably play a role in reviewing the court orders.²⁶⁹ Although the State of Texas, with its large Mexican American population, is within its jurisdiction, the Southern school unit has admittedly concentrated on black school children.²⁷⁰ The head of the unit pointed to two major problems involved in proving school discrimination against Mexican Americans: (1) the legal ground is not clear cut, i.e., in many instances, discrimination appears to be de facto rather than de jure; and (2) enrollment data are still difficult to obtain. The unit has been made aware of the existence of discrimination against Mexican Americans and has begun to conduct compliance reviews in Texas systems with large Mexican American populations.²⁷¹

Review activity for Northern and Western school systems has greatly increased over the past year. Moderate-size school systems have been chosen which have schools of more than 80 percent minority enrollment and which appear to have a discriminatory pattern of teacher distribution. According to the Coordinator of the Northern school program, the major problem is the staff shortage. He contended that it takes "many man-hours" to review a system which appears to be segregated as a result of residential patterns rather than by de jure action and that to do an adequate job, he could easily utilize 100 more staff members. The Coordinator indicated that because of the present legal distinction between legally compelled segregation and segregation resulting

from factors other than law, such as residential segregation, the Title VI review mechanism is ineffective in dealing with the problems of Northern and Western schools. The necessary remedy, he stated, is legislation defining racial isolation, from whatever cause, as unlawful.²⁷²

The scope of elementary and secondary school compliance reviews encompasses such areas as student enrollment and transfers, hiring, firing, and assignment of teachers, other professional staffing, curriculum, adequacy of facilities, construction, and transportation.²⁷³

(B) Higher Education. Higher education has been consistently accorded second priority within the Education Division.²⁷⁴ The headquarters civil rights staff for higher education consists of only two professionals. From mid-1968 through January 1970, 375 reviews were conducted of a total of approximately 2,400 recipients. The programs are heavily focused on undergraduate education. As a rule, graduate schools are reviewed only if they are part of an undergraduate complex, located physically at the same facility. Criteria used to select schools for review include: (1) low minority enrollment; (2) unresolved complaints; (3) geographical distribution; and (4) distribution among public and private, and denominational and nondenominational.²⁷⁵

OCR has prepared detailed written guidelines for reviewers to follow and a standardized report must be filed at the conclusion of each review.²⁷⁶ The compliance reviews, which take approximately 2 days to complete, are relatively thorough and include review of such areas as counseling, training assignments, financial aid, student activities, recruitment methods, and placements. Interviews are conducted with university personnel as well as with minority students, majority students,

²⁶⁹ Interview with Donald Vernon, Southern School Coordinator, Office for Civil Rights, HEW, Jan. 30, 1970. Recently HEW pointed out, however, that:

"Even after the filing of court suits, HEW has a considerable Title VI responsibility in the South. There are nearly 1,000 districts in the South operating under HEW plans and they must be checked for possible discriminatory activities subsequent to the implementation of the plans. There are several more districts which are presumed to be in compliance with Title VI (by assurances given in HEW Form 441) and they must be checked for possible discriminatory practices. Letter from Pottinger to Sloane, *supra* note 60."

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Interview with Frederick Gioffi, Northern School Coordinator, Office for Civil Rights, HEW, Jan. 30, 1970.

²⁷³ See, e.g., Office for Civil Rights, *HEW Staff Manual on Elementary and Secondary Dual School Systems*, (February 1968).

²⁷⁴ Interview with Dr. Lloyd Henderson, Director, Education Division, Office for Civil Rights, HEW, Jan. 30, 1970.

²⁷⁵ Interview with Burton M. Taylor, Acting Higher Education Coordinator, Office for Civil Rights, HEW, Feb. 4, 1970.

²⁷⁶ *Id.*

and high school guidance counselors in the vicinity.²⁷⁷

Despite the attempted thoroughness of the reviews, the higher education compliance program is deficient in some respects: (1) lack of manpower; (2) lack of onsite reviews to ascertain if HEW's recommendations to the institution's president after the first review have been put into effect. Information is then to be returned to HEW indicating what corrective action²⁷⁸ has been taken in response to the Department's recommendations.

(C) **Health and Welfare.** By far the weakest link in HEW's compliance review system is its program for health and welfare. Instead of reviewing individual facilities or programs, OCR staff reviews the State agencies responsible for administering the programs and insuring compliance with Title VI. It then reviews only a small sampling of facilities, such as hospitals, nursing homes, and extended care facilities in the State. As of May 1970, OCR had completed 32 State agency reviews; it expects to have completed all 50 by the end of the 1970 fiscal year.²⁷⁹

(2) Department of Housing and Urban Development

HUD's compliance review system is plagued

²⁷⁷ A perusal of four samples of higher education compliance reviews indicated a thoroughness and competence rarely found in other agencies' title VI reviews.

²⁷⁸ HEW's procedure for dealing with State college system desegregation as outlined in a memorandum from Leon E. Panetta, former Director of HEW's Office for Civil Rights to Regional Directors of Civil Rights in regions III, IV, and VIII (Oct. 22, 1969) is more elaborate:

1. Within 60 days after appropriate compliance reviews are completed, requests for desegregation plans will be made by the Regional Civil Rights Director.

2. Requests for desegregation plans should indicate that an outline plan be submitted to . . . (HEW) within 120 days and upon receipt of . . . (HEW's) written comments by the State, a final plan be submitted within 90 days.

3. A copy of the State's response to . . . (HEW's) request for an outline desegregation plan should be sent to the Higher Education Coordinator.

4. Comments on the outline desegregation plan, however adequate or inadequate it may be, shall be made to the State in writing.

²⁷⁹ For a detailed discussion of the problems in HEW health and welfare compliance reviews, see U.S. Commission on Civil Rights, *HEW and Title VI* (1970), at 43-54.

by the same problems as other aspects of HUD's Title VI enforcement program. As noted earlier, both the Assistant Secretary for Equal Opportunity and the Program Assistant Secretaries disavow responsibility for performing compliance reviews.²⁸⁰ Although the equal opportunity office has conducted a very small number of onsite compliance reviews, most of HUD's recipients have never been subject to such a review. For example, only five of the 150 model cities programs have been reviewed; only 186 of the more than 2,000 local public housing authorities have been reviewed. Moreover, no criteria have been developed for choosing the recipients to review and no guidelines have been written for conducting the reviews. According to the Assistant Secretary for Equal Opportunity, a review program is in process of being devised.²⁸¹

(3) Department of Commerce

Although several of the operating bureaus administer programs that fall within the ambit of Title VI, compliance reviews are conducted only by the Economic Development Administration.

In the past, EDA's compliance review program has been completely inadequate as a means of ascertaining if the Federal funds it grants are utilized by recipients in a nondiscriminatory manner. The scope of the Office of Equal Opportunity's reviews has been limited to the employment practices of recipients and subrecipients.²⁸² Other issues which have a bearing on equal opportunity for beneficiaries of EDA programs, such as site selection for EDA-funded projects, availability of housing and transportation, and use of EDA-financed public works projects by public or private institutions that operate in a discriminatory manner, were routinely considered during compliance reviews.²⁸³

²⁸⁰ See ch. 3 supra.

²⁸¹ Interview with Samuel J. Simmons, Assistant Secretary for Equal Opportunity, HUD, Mar. 6, 1970.

²⁸² On Apr. 24, 1970, EDA issued Directive 7.03, "Equal Opportunity Title VI Compliance Review Procedures," which delineates procedures to be followed by equal opportunity specialists in conducting equal employment opportunity compliance reviews.

²⁸³ Interview with Luther C. Steward, Jr., Special Assistant for Equal Opportunity, and Arthur Cizek, Equal Opportunity Coordinator, Department of Commerce, Jan. 7, 1970. Some of these issues are matters which

The number of reviews conducted has also been inadequate. In fiscal year 1969, for example, only about 80 compliance reviews were conducted, while EDA had more than 1,300 recipients.²⁸⁴ A directive signed by the Assistant Secretary for EDA states that each equal opportunity specialist should conduct 40 reviews annually.²⁸⁵ The Director of EDA's Office of Equal Opportunity indicated that he will request that each equal opportunity specialist conduct eight reviews a quarter.²⁸⁶ In order to augment the review capability of EDA, the Director of EDA's Office of Equal Opportunity stated that he hoped to utilize reviews of the employment practices of EDA recipients by contract compliance agencies. He made it clear that EDA would not review any recipient that had been reviewed by another Federal agency even if that agency proved uncooperative and would not release a copy of its review to the Office of Equal Opportunity.²⁸⁷

The quality of EDA compliance reviews has given rise to additional problems. Of three such reviews examined by Commission staff, only one was adequate. In the other two, no findings other than full compliance were made despite the fact that in one plant in Fayette, Miss., the workforce was almost entirely black while the officials and managers all were Caucasian; in the other plant, in Ohio, only two of 211 skilled craftsmen were Negro.

(4) Department of Transportation

With the exception of the Coast Guard, none of Transportation's operating administrations

should be considered before an application is approved. EDA directives 7.04 and 7.05 provide procedures for considering some of these areas in the preapplication and application stages.

²⁸⁴ Attachments to letter from Luther C. Steward, Jr., to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Dec. 18, 1969.

²⁸⁵ Economic development order 2.12-6 (July 10, 1969). The order encompassed compliance reviews under Title VI and Executive order 11246.

²⁸⁶ Interview with John Corrigan, Director, Office of Equal Opportunity, EDA, Jan. 15, 1970. The Director drafted a directive to this effect which was signed by the Assistant Secretary for Economic Development on Apr. 9, 1970 (EDA Directive 7.02). The change was made because additional duties were to be required of the field civil rights personnel. Letter from Siciliano to Glickstein, *supra* note 49.

²⁸⁷ *Id.*

has instituted independent Title VI compliance review programs. Two constituent units have included perfunctory Title VI questions in their contract compliance reviews (UMTA and FAA), while one has never conducted any type of Title VI review (FHWA).

(A) **Coast Guard.** In terms of Title VI implications, Coast Guard's programs are less significant than others within the Department of Transportation. Yet it is the only one of the operating administrations that has developed a Title VI compliance review program. The Coast Guard provides several marine harbor and waterfront services to State agencies, political subdivisions, and private organizations. Almost all of the Coast Guard's Title VI activity revolves around the Coast Guard auxiliary, a voluntary group of private citizens whose aim is to promote boating safety. The auxiliary offers public education courses in boating, patrols regattas, assists in search and rescue missions, and conducts courtesy motorboat examinations. Reviews cover membership policies, services provided to boating enthusiasts, and admission to education courses within the auxiliaries. Only a small number of reviews have been conducted: 17 in fiscal year 1968 and 22 in fiscal year 1969. These were all done by one staff member. An evaluation of a sample of these reviews revealed some deficiencies. These were commented on by the then Special Assistant to the Attorney General for Title VI, in a letter to DOT's Director of Equal Opportunity, October 3, 1968, stating:

Another example of the failure to pursue the facts completely can be seen in the review of the Coast Guard Auxiliary. . . . [I]t is reported that . . . a Negro couple requested membership in a flotilla meeting at an "extremely exclusive marina which normally did not cater to minority personnel." While the owner of the marina told the Commodore "to carry on as usual," the Commodore was apparently prepared to move the place of the meeting had the owner objected to the Negro couple. While the reviewer's report terminates at that point, the obvious question arises as to what the Commodore would have done in the future had the owner asked that he move the meeting. To have continued to go to that particular marina, and provide significant business to it, only when there were no Negroes in the flotilla, would raise serious questions as to the Coast Guard's compliance with Title VI. In any case, this whole relationship should clearly have been explored more fully in the review.²⁸⁸

²⁸⁸ Letter from David L. Rose, then Special Assistant to the Attorney General, Department of Justice, to

(B) **Urban Mass Transportation Administration (UMTA).** UMTA has not yet initiated a Title VI compliance review program. The only instructions relating to title VI that have been issued by UMTA consist of one sentence contained in a memorandum from the Assistant Administrator for Program Operations concerning travel.²⁸⁹ Some Title VI reviews have been conducted very superficially as part of a contract compliance review. Regarding Title VI, the review format asks only whether there was any evidence of Title VI violation. The person who has conducted all the reviews to date has an engineering background with no former civil rights experience.

(C) **FHWA.** Despite the enormity of the Federal financial assistance rendered to recipients through the highway program,²⁹⁰ FHWA has never conducted a Title VI compliance review.²⁹¹ FHWA's failure to fulfill its Title VI responsibilities was pointed out in an October 3, 1968 letter from the then Special Assistant to the Attorney General for Title VI:

We were particularly disappointed to note that no compliance reviews were initiated under the Federal-aid for Highways Program in the period covered in your latest report

The absence of any affirmative compliance reviews

Richard F. Lally, Director of Civil Rights, Department of Transportation, Oct. 3, 1968. According to information recently received from DOT, a meeting was held at DOT in October 1968 with Mr. Rose. The instance in question was explained to him and he then agreed that the situation had been explored sufficiently. Letter from Volpe to Hesburgh, *supra* note 12.

²⁸⁹ Memorandum from W. B. Hurd, Assistant Administrator for Program Operations to Office of Program Operations staff, Oct. 13, 1969. The sentence states that "Each trip report will contain a specific statement on observed compliance or noncompliance with Title VI of the Civil Rights Act."

²⁹⁰ Federal highway assistance amounts to more than \$4 billion annually.

²⁹¹ The FHWA, however, in its conduct of its contract compliance reviews is obtaining on a regular basis information pertaining to the existence of minority subcontractors on Federal-aid highway work (a title VI matter). Also State highway departments are required to inquire as to the utilization of minority group subcontractors on such projects. FHWA also requires that the contractors keep records documenting their efforts to recruit minority group subcontractors for Federal-aid highway work. Letter from Volpe to Hesburgh, *supra* note 12.

. . . suggests a need for examination of the staffing and organization of your Title VI efforts.²⁹²

Seven months later, when FHWA still had not conducted a compliance review, the Director of Civil Rights advised the Federal Highway Administrator:

We believe a Title VI compliance program is essential to fulfill our Title VI compliance responsibility. This gap in our program was previously pointed out . . . by the Department of Justice.²⁹³

(D) **FAA.** During the fiscal years 1967 and 1968, five Title VI reviews of airports²⁹⁴ were conducted by civil rights personnel. These were done by one person and his efforts in this regard have since been discontinued. Although these reviews were relatively comprehensive,²⁹⁵ the information elicited was predominately limited to yes or no responses to a series of questions contained in a reviewer's guideline.²⁹⁶

Currently, the FAA conducts only superficial Title VI reviews, usually as part of the technical reviews conducted by program personnel. In the course of their technical reviews, which examine such matters as runway paving and navigational and lighting aids, the reviewers have been instructed to look for Title VI violations in the airport generally.²⁹⁷

In the future, Title VI reviews will be more comprehensive although they may be done in conjunction with contract compliance reviews.²⁹⁸ Priority will be given to control tower airports which are usually the busiest.²⁹⁹

²⁹² Letter from Rose to Lally, *supra* note 288.

²⁹³ Memorandum from Richard F. Lally, Director of Civil Rights, Department of Transportation, to FHWA Administrator, May 6, 1969. As of February 1970, FHWA still had not conducted a Title VI review.

²⁹⁴ The airports were located in Atlanta, Ga., Memphis, Tenn., Greensboro, N.C., Miami, Fla., and Daytona Beach, Fla.

²⁹⁵ These reviews primarily investigated whether the facilities operated by the airport or its tenants and lessees were segregated or whether services at the airport were provided in a discriminatory manner.

²⁹⁶ See Federal Aviation Administration "Compliance Checklist, Title VI" identified as a CS-400 program guide.

²⁹⁷ Interview with John M. Choroszy, Acting Deputy Director of FAA's Office of Civil Rights, Feb. 10, 1970.

²⁹⁸ *Id.*

²⁹⁹ The scope of the future FAA compliance is suggested in the recently approved Transportation Department title VI regulations. Appendix C of these

(5) Department of the Interior

The Department of the Interior has relied on bureau regional program personnel to perform compliance reviews. This system has not proved satisfactory. By profession, the reviewers may be engineers, marine biologists, game refuge managers, or contract compliance investigators. Except for contract compliance investigators, none has received civil rights investigative training. They are generally provided with a checklist to fill in.

The Bureau of Outdoor Recreation administers the most significant of the Department's Title VI programs. Its compliance review system is indicative of the status of Title VI enforcement at Interior.

The Bureau of Outdoor Recreation is in the process of changing its review procedures. As of April 1970, reviews were being conducted by regional program personnel who filled in a departmental questionnaire. Frequently the reviewer had the State liaison officer³⁰⁰ fill out the review report.³⁰¹

In a review of 10 compliance review reports,

regulations indicates that the nondiscrimination requirements of Title VI apply in part to "furnishing, or admitting to, waiting rooms, passenger holding areas, aircraft tiedown areas, restaurant facilities, restrooms . . .;" the providing of services to the public by the airport sponsor and any of his lessees, concessionaires, or contractors; the parking of aircraft; the providing of services (e.g., fueling) to aircraft pilots; etc. 35 Fed. Reg. 10080 (1970).

³⁰⁰ A description of the State liaison officer follows:

"Each Governor has named an individual within the State government, known as the State Liaison Officer (SLO), to represent him for purposes of the Land and Water Conservation Fund Act [under this act grants are made on a 50-50 matching basis for acquisition and development of high-quality areas and facilities dedicated to outdoor recreational uses.] . . . All project proposals (applications) must be submitted to the Bureau through the SLO. The Bureau, in turn, makes grants for approved projects to the SLO in behalf of the State or local agency participant. The SLO, frequently in consultation with an advisory body made up of State officials and citizens, has the initial responsibility of determining which projects shall be submitted for financial assistance and the order in which funding will be requested. . . ."

This description was taken from a BOR publication entitled *Land and Water Conservation Fund, Grants-in-Aid Program* (revised March 1968).

³⁰¹ Interview with Charles Montgomery, Staff Assistant for Civil Rights, Bureau of Outdoor Recreation, Dec. 18, 1969.

Commission staff found nine to be grossly inadequate. In each of the nine, a finding of compliance for all the BOR-aided recreation areas in the State [all Southern States] was made, although the reviewer spoke only with State park and recreation personnel. No minority group representatives were contacted.³⁰²

(6) Department of Agriculture

Compliance reviews at Agriculture are generally conducted by program personnel; however, there is no procedure for reviewing recipients on a systematic basis. A July 1968 study of Agriculture's Title VI procedures noted the following:

The compliance review systems in use by the agencies of the Department of Agriculture are not serving the purpose of providing a meaningful measure of compliance. Part of this failure stems from the fact that untrained program staff (and in some cases State program staff) are used to perform these reviews. Another failing of the compliance review function results

³⁰² Answers to some of the review questions reveal the insensitivity of the reviewer in conducting a Title VI compliance review.

Review of the State of Mississippi, fiscal year 1968:

"Q. What action has the recipient actually taken to establish or improve communication with minority group and civil rights organizations?"

"A. No special action has been taken and none intended as it is expected that everyone will be treated alike as it is required by the law in question.

"Q. Are advisory committees actively engaged in the direction and overall guidance of the project or program of the recipient?"

"A. Advisory committees . . . are not considered necessary to maintain the present excellent compliance situation."

Review of the State of Louisiana, fiscal year 1968:

"Q. What action has the recipient actually taken to establish or improve communication with minority group and civil rights organizations?"

"A. The Governor handles this."

Review of the State of Florida, fiscal year 1968:

"Q. What has the primary recipient [State] done beyond securing a statement of assurance from other recipients to whom he has extended Federal financial assistance to inform them of their obligation to comply?"

A. No particular steps have been followed because none are considered necessary other than the completion of routine assurances.

"Q. What action has the recipient actually taken to establish or improve communication with minority group and civil rights organizations?"

"A. No special action is considered necessary so far as this program is concerned in the State of Florida."

from the inadequacy of the instruments used and the inadequacy of methods used.³⁰³

For the purposes of this study, Commission interviews focused on the Federal Extension Service and the Food and Nutrition Service. There was still no formal compliance review process in the Extension Service. The only reviews conducted were in 1965 and 1966 and no followup reviews were conducted to determine whether noncompliance had been eliminated. Currently, the only reviews done of Extension Service programs are performed by the Office of the Inspector General.³⁰⁴

With respect to the Food and Nutrition Service, compliance reviews are conducted in the school feeding programs primarily by State officials. Private institution reviews are conducted by Federal officials, i.e., program staff in Regional Food and Nutrition Service offices, in those private schools and institutions where the child feeding programs are administered directly by Food and Nutrition Service. The reliability of these reviews has been subject to question both by the Commission on Civil Rights and Agriculture's Office of the Inspector General.³⁰⁵

(7) Department of Labor

Until recently, Labor's departmental Office of Equal Employment Opportunity (OEEO) set the schedule for conducting reviews for all manpower administration equal opportunity staff. Under Labor's recent decentralization of Title VI enforcement activity, this responsibility now rests with the Regional Manpower Administrators.³⁰⁶ Regional Manpower Admin-

istrators also conduct negotiations for corrective action and their implementation.³⁰⁷ OEEO conducts compliance reviews only if requested to do so by the Assistant Secretary for Manpower or by the Regional Manpower Administrators. OEEO has responsibility, however, for monitoring the regional Title VI compliance program by onsite visits and regular reviews of actions taken in the region.³⁰⁸

At present, the procedure for conducting a compliance review is set forth in Labor's "Compliance Officers' Handbook."³⁰⁹ Primarily, it focuses on reviewing employment service offices, specifically treating such issues as merit staffing, assignment of occupational classifications of job applicants, referral, testing, and counseling of job applicants, and staff training.³¹⁰

(8) Office of Economic Opportunity (OEO)

The compliance review system at OEO has been a totally decentralized process.³¹¹ The regional civil rights coordinators have conducted virtually all of the compliance reviews; however, most of these have been done, not through a systematic review program, but as a result of complaints or in response to specific problems.

One regional coordinator indicated that word-of-mouth information made him aware of what recipients to review. Of some 225 community action programs (CAP) grantees in that region, the Coordinator indicated that, on the average, he is able to review only about 10 to 15 annually. He has developed his own compliance review form and has relied some-

³⁰³ U.S. Commission on Civil Rights staff report, *The Mechanism for Implementing and Enforcing Title VI of the Civil Rights Act of 1964*, U.S. Department of Agriculture 33 (1968); see also pp. 26-32. This report is reprinted in "Nutrition and Human Needs, U.S. Senate, pt. 8, (May 1969) at 2693. Continuing failure of the Department of Agriculture to adequately enforce civil rights in its Title VI programs is underlined in a letter from the Attorney General to the Secretary of Agriculture (Apr. 16, 1969) when the Attorney General stated: "Despite the evidence of these widespread violations of law disclosed by your Department's investigations, I am not aware of any meaningful action which has been taken to correct the situation. . . ."

³⁰⁴ Interview with Lloyd Davis, former FES Administrator, Dec. 10, 1969.

³⁰⁵ *The Mechanism for Implementing and Enforcing Title VI of the Civil Rights Act of 1964*, U.S. Department of Agriculture, supra note 303.

³⁰⁶ Hodgson letter, supra note 150.

³⁰⁷ Id.

³⁰⁸ Id.

³⁰⁹ Department of Labor, "Compliance Officers' Handbook" (undated).

³¹⁰ The handbook discusses such topics as development of evidence; amount of proof; examination of records; transcription and identification of records evidencing violations; closing conferences with recipient; negotiations; and interviews. The handbook also provides a checklist for evaluation of compliance reviews. This handbook is further supplemented by training guides which deal with such topics as investigative techniques; report preparation; the conduct of an investigation; and recipient compliance reviews. There is, of course, some overlap between the handbook and training guides.

³¹¹ At the time this Commission conducted its interviews at OEO a significant reorganization was taking place.

what on the *Compliance Officer's Manual* developed by the U.S. Commission on Civil Rights.³¹²

One of OEO's headquarters civil rights staff indicated that, in the past, compliance reviews were not done on a regular basis. Office of Civil Rights staff in Washington, which has responsibility for overall civil rights policies, has not issued compliance review procedures, nor was it even aware of what regional coordinators were doing.³¹³ Recently, however, coincidental with the arrival of the new Director of the civil rights staff, there has been a shift in policy. Consultants now conduct reviews on a contract basis at the request of the regional human rights coordinators. Many reviews are now being evaluated in headquarters by the Human Rights Division and agreement is reached between regional and headquarters staff as to any action indicated on the basis of the findings.³¹⁴

(9) Small Business Administration

SBA, unlike most of the other Title VI agencies, has issued comprehensive compliance review guidelines³¹⁵ and its reviews are conducted by the regional equal opportunity officers.

SBA's national directive on compliance reviews and investigations is a comprehensive document that should serve as an extremely useful guide to the investigators.³¹⁶ In terms of procedures, the agency has developed an impressive document on how to conduct compliance reviews and investigations.

Recipients are selected for review on the

³¹² Telephone conversation with Robert Sanders, Southeast Regional Coordinator, OEO Dec. 12, 1969. It should be noted that the *Compliance Officer's Manual*, a handbook of compliance procedures under Title VI of the Civil Rights Act of 1964, was prepared by the Commission in October 1966.

³¹³ Interview with Wilfred Leland, former Chief of the Compliance and Evaluation Section, OEO, Nov. 20, 1969.

³¹⁴ Letter from Hjernevik to Glickstein, supra note 99.

³¹⁵ See SBA National Directive ND 1500-11A (Feb. 6, 1969).

³¹⁶ In addition to the compliance reviews conducted by civil rights specialists, loan service officers often make field visits to certain recipients; they complete a short report devoted to civil rights compliance (SBA form 712). If any evidence of noncompliance is revealed, the loan service officer is required to transmit a copy of his findings to the appropriate regional EOO.

basis of the information collected on the required compliance report form.³¹⁷ They must also be located in communities in which minority groups either total at least 2,500 or 5 percent of the population based on whichever figure is the lesser.³¹⁸ Priority is given to recipients with 50 or more employees; the compliance review program does not apply to recipients with less than 35 employees.³¹⁹

The regional equal opportunity officers are responsible for conducting five reviews per month, or 60 a year. This represents a total of approximately 500 for all the regions. Since in the last 3 years approximately 12,000 loans have been made annually, this means that the reviews are reaching only about 4 percent of the loan recipients.³²⁰

SBA's guidelines pertaining to the scope of compliance reviews are fairly exhaustive. The regional equal opportunity officers usually determine the scope of a review or complaint investigation by considering such factors as the nature and size of the recipient's operation, and number of allegations of discrimination.³²¹ It is required that enough aspects of the operation be examined to ascertain definitively whether the recipient is in compliance.

On the average, a review takes about 21½ days including the preparation, actual review, and writing of the report.³²² SBA's headquarters Office of Equal Opportunity usually reviews the reports and provides critiques of form and content to the regional equal opportunity officers.

An examination of four SBA compliance reviews by Commission staff indicates that headquarters' civil rights staff do evaluate compliance reviews. In one review, the Washington staff found a number of points to criticize which they conveyed to the reviewer.³²³

³¹⁷ SBA Form 707.

³¹⁸ ND 1500-11A, supra note 315, at sec. 2 (A-2).

³¹⁹ SBA maintains that although recipients with less than 35 employees represent 90 percent of SBA's loan business, they are not of sufficient size to warrant reviews.

³²⁰ Figures are not available on what percentage of employers with 35 or more employees are being reached.

³²¹ ND 1500-11A, supra note 315, at sec. 6a.

³²² Interview with Edward Dulcan, Director, Equal Opportunity Staff, SBA, Dec. 14, 1969.

³²³ Memorandum from J. Arnold Feldman, then Acting Director of SBA's Office of Equal Opportunity, to

They pointed out, for example, that the reviewer did not offer reasons for the nearly total absence of nonwhite employees in a business with 66 employees. The reviewer also did not consider the racial composition of the employer's apprenticeship program, location in terms of access to centers of minority residence, or terminations and employee mobility in terms of race, color, or national origin. In addition, the reviewer did not send a letter to the recipient setting forth recommendations for needed changes. Despite these valid and comprehensive criticisms, the headquarters Office of Equal Opportunity requested a reinvestigation limited to the apprenticeship program and did not ask for a reinvestigation on the other relevant matters.³²⁴

Although a few deficiencies appear in some of the SBA compliance reviews, the reviews seem to be of good quality and sufficient scope, especially when compared to the compliance review programs of other agencies.

(10) VA and LEAA

LEAA's audit and inspection staff has completed a civil rights compliance review in the State of Maryland and, as of August 1970, a similar review was taking place in the State of Florida.³²⁵ VA's Department of Medicine and Surgery conducted some reviews of State nursing homes in 1965 before compliance responsibility was delegated to HEW. By contrast, VA's Department of Veterans' Benefits which has compliance responsibility for proprietary schools, has prepared compliance review guidelines but has not conducted any reviews of these establishments.³²⁶

the Regional Equal Opportunity Officer for the Southeast region, May 19, 1969.

³²⁴ Id. Since SBA's Office of Equal Opportunity provided the Commission only with the review and its comments, it is not known what followup action was taken. Note also that there appear to be other significant issues which the Washington office did not comment on. For example, the narrative portion of this review indicates that, although no testing is required, all employees are expected to meet union standards. It does not mention, however, the standards or membership policies of the union.

³²⁵ Memorandum from Richard W. Velde and Clarence M. Coster, *supra* note 55.

³²⁶ Interview with Thomas E. Denton, Chief of Review Group Four of the Compensation, Pension, and Education Service, Department of Veterans' Benefits, VA, Dec. 4, 1969.

b. Preapproval Compliance Reviews

As noted earlier, most agencies that conduct compliance reviews of recipients' programs or activities typically do so after the fact, that is, after the grant is awarded and/or the project is completed. A problem inherent in this approach is well illustrated in the field of housing. Once a site for a public housing project is selected and the project is completed, a post-review finding that the site has been discriminatorily located is of little value. The same problem arises in connection with the construction of a sewer line which discriminatorily bypasses the minority community of a city. To assure that this does not occur, each project proposal must be examined before approval. Information which will enable the agency to determine whether or not the project as contemplated will discriminate against some persons on the basis of race or ethnicity should be requested before the project is approved.

There are several agencies for which a preapproval procedure appears particularly important. HUD is one such agency. At the present time, however, there is no concerted preapproval program at HUD. The Assistant Secretary for Equal Opportunity is reluctant to have his own staff undertake responsibility for preapproval review; rather, he seeks to develop standards and procedures that will require program staff to take civil rights considerations into account before approving a project application.³²⁷

Although some limited preapproval procedures already are in effect, they are not applied uniformly or consistently. In HUD's water and sewer grant program (metropolitan development), a map is required indicating who is to be served and who is not. If a nonwhite area is to be bypassed, an explanation must be given as to why no service is planned and when, if at all, service will be provided.³²⁸ Program personnel are supposed to check these maps but sometimes they are not appended and/or not checked.³²⁹

Generally, preapproval at HUD also involves insuring that projects are not approved for

³²⁷ See ch. 3, *supra*.

³²⁸ HUD Form 41903.

³²⁹ Interview with Phil Sadler, former Director of Equal Opportunity for Metropolitan Development, HUD, Feb. 13, 1970.

applicants who are already in some stage of noncompliance. One HUD circular³³⁰ states that the Regional Administrator is to check with the Assistant Regional Administrator for Equal Opportunity prior to final approval as to "whether there is any pending equal opportunity problem which would affect such approval." A checkpoint procedure has been adopted in the Office of the Assistant Secretary for Equal Opportunity to monitor this process.³³¹

EDA is another agency in which preapproval is important although there is currently no comprehensive preapproval system there. Both the Special Assistant for Equal Opportunity for the Department of Commerce and the Director of EDA's Office of Equal Opportunity recognize the need to institute a comprehensive preaward compliance review program if Title VI is to have any meaning for EDA programs.³³² It would necessarily have to encompass two elements: a review of the employment practices of the recipients and substantial and direct beneficiaries, with special consideration given to the number of minorities that will be hired as a result of the project grant or business loan;³³³ and a review of the project itself for civil rights implications, such as site selection and availability of transportation and housing facilities.

Procedures have now been adopted to insure nondiscrimination by employers who are substantial and direct beneficiaries of public works projects or who are recipients of loans. The procedures involve the participation of the equal opportunity specialists in all phases of the application and approval process. They also

provide for a revised form to include present and prospective employment data by racial and ethnic composition, and require that all recipients of business loans who employ 50 or more persons submit an affirmative action plan. Further, the Office of Equal Opportunity will review applications that have been flagged by the equal opportunity specialists as being of a problem nature.³³⁴

The second and more difficult area of EDA preaward review involves review of the project itself. Procedures have been drafted by EDA's Office of Equal Opportunity under the guidance of the Department's Office of General Counsel which require assurances that minority members of the community will receive an equitable share of any of the direct or indirect benefits of EDA assistance. According to the procedures, project applicants have to submit maps showing minority concentrations and indicating where the project will run.³³⁵ Commerce's Special Assistant for Equal Opportunity is optimistic that these procedures will be approved by the Assistant Secretary for Economic Development.³³⁶

At the Department of Transportation the FHWA does not have any preapproval award procedures which consider the racial and/or ethnic implications of highway projects such as dislocation.³³⁷ As noted earlier, FHWA also has never conducted a postTitle VI review of a project. UMTA, on the other hand, requires that applicants for assistance submit racial maps. The maps must show the areas "which are predominantly inhabited by Negroes,

³³⁰ HUD Circular 8000.1. Dec. 2, 1968.

³³¹ Before the project is cleared, the following are checked: HEW's interagency report, Justice Department's litigation list, and a list prepared by HUD's Office of the General Counsel. However, in practice, the lists from Justice and the General Counsel are not always current. Further, although the field equal opportunity personnel are supposed to call to get clearance for the project, according to HUD personnel, they do not always do so.

³³² Interview with Luther C. Steward, Jr., Special Assistant for Equal Opportunity and Arthur Cizek, Equal Opportunity Coordinator, Department of Commerce, Jan. 7, 1970.

³³³ At the time of this writing, EDA had issued Directive No. 7.04 (effective May 18, 1970) which requires preapproval clearance of all business entities in terms of equal employment opportunity.

³³⁴ Interview with Steward and Cizek, *supra* note 322.

³³⁵ EDA Directive No. 7.05 (approved July 10, 1970); "Equal Opportunity in Connection with EDA-assisted Water and Sewer Facilities."

³³⁶ Letter from Luther C. Steward, Jr., Special Assistant for Equal Opportunity, to Richard Gladstone, U.S. Commission on Civil Rights, May 26, 1970.

³³⁷ It should be noted that on Jan. 14, 1969, the FHWA did institute a procedure for the conduct of two public hearings in connection with each Federal-aid highway project to assure adequate consideration of all major influences upon highway design and location. Also, on Oct. 20, 1969, Secretary of Transportation Volpe established a new Departmental policy to insure that in all DOT projects and activities involving the displacement or relocation of people, such projects will not be approved unless and until adequate and fair replacement housing has been provided for or built. Letter from Volpe to Hesburgh, *supra* note 12.

Puerto Ricans, Spanish and Mexican Americans”³³⁸ and must also show existing and proposed routes of the urban mass transportation system. In addition, the application must contain a statement which will enable UMTA to determine whether the benefits, i.e., service, facilities, and equipment, of the new and existing systems will be available to all, and demonstrate that no person will be discriminated against in the use or benefits of the transit system.³³⁹

An effective preapproval process at any agency also must consider the racial and ethnic implications of program designs. It is pointless for a program to be open to all and operated in such a manner as to encourage minority participation, if the eligibility criteria or program design are such as to exclude most minorities from reaping the advantages. For example, when the Department of the Interior provides funds for a recreation facility, the nature of the facility often determines who will use it and may have the effect of excluding many minority and disadvantaged persons. Federal assistance for the construction of a boat landing is of relatively little benefit to persons who do not have the necessary money to own a boat.

This demonstrates the need for each agency to conduct comprehensive program evaluations to eliminate or to minimize exclusionary program practices and to determine if the services and benefits available under existing programs are in fact distributed in an equitable manner. Where an inherently exclusionary program continues, some consideration should be given to developing a compensatory program to offset the imbalance.

Essentially this position was taken in a January 1969 memorandum to the Secretary of HEW on the need for “equal opportunity goal setting”.³⁴⁰ The memorandum stressed the need for equitable delivery of program services and benefits, and recommended, among other

³³⁸ Attachment F. 2 to letter from Richard F. Lally, Director of Civil Rights, Department of Transportation to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Jan. 23, 1970.

³³⁹ Id.

³⁴⁰ Memorandum from Alice M. Rivlin, Assistant Secretary for Planning and Evaluation, HEW, and Ruby G. Martin, Director, Office for Civil Rights, HEW, to HEW Secretary Cohen, Jan. 19, 1969.

things, that procedures be instituted to measure minority group participation in HEW programs. The memorandum also recommended a pilot review of the process by which programs are administered to determine how the processes affect program impact on minority group citizens.

To date HEW has not acted on the recommendations contained in the memorandum nor has any other agency adopted such an approach.

4. COMPLAINT PROCESSING

Processing of complaints is another way in which agencies monitor Title VI compliance. Although Title VI does not specifically mention complaint procedure, methods for handling them are outlined in general terms in each agency's Title VI regulations. All agencies provide the right to file a written complaint with the appropriate agency to any person who believes he has been subjected to discrimination.³⁴¹

The regulations also provide that the “responsible department or agency official”³⁴² or his designee will launch a “*prompt* [italic supplied] investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply”³⁴³ This same provision outlines in

³⁴¹ See e.g., 7 C.F.R. 15.6 (Agriculture); 15 C.F.R. 8.8 (Commerce); 45 C.F.R. 80.7(b) (HEW); 24 C.F.R. 1.7(b) (HUD); 43 C.F.R. 17.6(b) (Interior); 29 C.F.R. 31.8(b) (Labor). All the other agencies have essentially the same filing provisions with some minor variations.

³⁴² See e.g., 45 C.F.R. 80.13(c) (HEW). The term “responsible Department official” with respect to any program receiving Federal financial assistance means the Secretary or other official of the Department who by law or by delegation has the principal responsibility within the Department for the administration of the law extending such assistance.

³⁴³ See e.g., 10 C.F.R. 4.43 (AEC); 15 C.F.R. 8.10(a) (Commerce); 32 C.F.R. 300.8(c) (Defense); 41 C.F.R. 101-6.210-3 (GSA); 45 C.F.R. 80.7(c) (HEW); 24 C.F.R. 1.7(c) (HUD); 28 C.F.R. 42.107(c) (Justice); 45 C.F.R. 1010.8(r) (OEO); 13 C.F.R. 112.10(c) (SBA). The remaining agencies impose a virtually identical requirement on the responsible agency official except in a few cases where the responsibility for conducting the investigation is limited to the agency head, viz., 29 C.F.R. 31.8(c) (Labor) which stipulates that the Secretary shall make the investigation. In such cases, the responsibility has, of course, been delegated by means of a subsequent agency order or directive.

general terms what the scope of the investigation should include.³⁴⁴

All agencies also require the responsible agency official to apprise the recipient of any instances of noncompliance that may have been revealed in the course of an investigation and then to attempt to resolve these informally. If the noncompliance cannot be corrected by informal means, the agency can proceed to effect compliance by termination of assistance or other means authorized by law. Conversely, if an investigation discloses compliance, the responsible agency official is obligated to inform the recipient and complainant of the fact in writing.³⁴⁵ Since the regulations provide the complainant with no right of appeal if the complaint is found to be invalid, the complainant's only recourse is private litigation.

Agencies also prohibit intimidatory or retaliatory acts against any complainants.³⁴⁶ The provision is not limited to persons who file complaints but also applies to any person who testifies, assists, or in any way participates in an investigation, review, or hearing. The provision also requires that the identity of the complainant be kept confidential except under certain circumstances.³⁴⁷

Finally, Title VI regulations require recipients to inform beneficiaries of their right to complain.³⁴⁸

³⁴⁴ See e.g., 45 C.F.R. 80.7(c) (HEW); "The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part."

³⁴⁵ See e.g., 45 C.F.R. 80.7(d) (2) (HEW). Every other agency with the exception of the Department of Agriculture has a similar provision. Agriculture treats noncompliance disclosed in complaint investigations in a general manner: "Such complaint shall be promptly referred to the Office of Inspector General. The complaint shall be investigated in the manner determined by the Inspector General and such further action taken by the Agency or the Secretary as may be warranted." 7 CFR 15.6.

³⁴⁶ See e.g., 45 C.F.R. 80.7(e) (HEW). All other agencies use similar language.

³⁴⁷ Id. "The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder."

³⁴⁸ Each recipient shall make available to participants,

Despite the explicit requirements of Title VI regulations, Commission staff has found extensive problems in complaint handling by Federal agencies. Inordinate delays, and in many instances, actual failure to conduct investigations, are not uncommon. In some instances the quality of the investigation has been found wanting and in other instances agencies have failed to take effective remedial measures after alleged Title VI violations have been substantiated. A widespread shortcoming has been the failure on the part of recipients to inform beneficiaries and applicants of their right to complain. Another pervasive problem has been the absence or inadequacy of agency procedures for responding to complaints, including delineation of responsibility, investigation, and followup.³⁴⁹

beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program under which the recipient receives Federal financial assistance and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part. 45 C.F.R. 80.6(d) (HEW).

³⁴⁹ Some agency officials justified the absence of complaint procedures on the ground that there have been no formal Title VI complaints. It may well be, however, that agencies' failure to communicate the complaint vehicles available to minority groups, is one of the prime reasons for an "unblemished" complaint record.

There seems to be a tendency among program people to equate the absence of title VI complaints against a recipient with the assumption that the recipient is in full compliance. See, e.g., Department of Labor, "Pilot Evaluation Study of the Manpower Administration Equal Opportunity Program" (Jan. 1969) at 22: "We found a tendency to equate lack of receipt of complaints from an area with an assumption that there was equal opportunity in the manpower programs. . . . However, our field study suggests that the complaint system is not sufficiently well known to be effective. . . ." (The reader should note that although the study refers to both Titles VI and VII complaints and is somewhat outdated, the finding still appears to be valid.) In part, the low number of complaints received may be attributable to the victim's ignorance that he has been discriminated against. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 Yale L.J., 1171, 1192 (1965). This would be particularly true for cases in which proof of discrimination is difficult, and would, above all, be true where subjective evaluation of an applicant's qualifications are important.

Many victims are fully aware that they have been

The problem of delay from the time a complaint is received until it is investigated and resolved exists in many agencies. By way of illustration, one of the largest, the Department of Housing and Urban Development, received 28 Title VI complaints in its Chicago regional office (Region IV) during 1969. As of February 1970, 10 of these cases had been closed while 18 still remained open. Of the 18 open cases, two had been received as early as February 1969; two had been received in March 1969; and five had been received in April 1969. Investigations had been completed on only four of the 18 open cases and only one of those four had been of a complaint received prior to April 1969. This meant that as of February 1970, Region IV had not even completed the investigations on eight of nine Title VI complaints received on or before April 1969, almost a full year before.

An analysis of the Department of Labor's complaint system in January 1969 revealed that there were similar problems of investigating and resolving complaints in a timely manner.³⁵⁰ The analysis disclosed that:

The amount of time it took to settle the sixteen sample cases varied greatly. The shortest elapsed time was 5 weeks. The longest was 18 months. The numerical average duration for all closed cases in the sample was slightly over four and one-half months. . . . *The average duration of the still-open cases is eleven and one-half months.* (Italic added.)³⁵¹

The delay in resolution had some undesirable results for "often programs in which the complainant claimed discriminatory nonenrollment would be terminated before the deter-

discriminated against but, for a variety of reasons, choose not to file complaints. This does not indicate that such victims are uninterested in the matter. See Blumrosen, *Antidiscrimination Laws in Action in New Jersey: A Law Sociology Study*, 19 Rutgers L. Rev. 189,200 (1965). There may, for instance, be a variety of psychological reasons why a person, who knows that he has been discriminated against because of his race or national origin, may be unwilling to file a complaint. Also failure to file complaints may frequently reflect skepticism that anything good could come from the filing.

³⁵⁰ This analysis was conducted by the Department of Labor itself. See "Pilot Evaluation Study of the Manpower Administration's Equal Opportunity Program," supra note 349. The findings of the report relate to both Titles VI and VII of the Civil Rights Act of 1964.

³⁵¹ Id., at 28.

mination could be made, making a finding in favor of the complainant moot."³⁵²

Poor investigation poses still another problem. In the Federal Aviation Administration (FAA), before complaint investigation responsibility was shifted to the departmental Office of Civil Rights, complaints were investigated by FAA's field Title VI staff. One such complaint lodged in 1968 alleged that a barber at a federally assisted airport had refused service to a Negro customer.³⁵³ The complaint was found invalid.³⁵⁴ However, some months later, the Department of Justice criticized the quality of the investigation. The Department commented as follows:

Specifically, with respect to the investigation into the practices of the barbershop . . . it would appear to be insufficient to obtain the sworn statement of many white persons but only one Negro (an employee of the airport) for purposes of determining whether the barbershop discriminates against Negroes. In addition the review attached does not indicate what, if any, specific questions were asked of persons interviewed, but instead merely contains their sworn statements which, in some instances, consist of only a few brief sentences. Reliance on the statements alone, without discussing in detail the information obtained from specific inquiries, would not appear to insure the full disclosure of all pertinent facts.

While the name of the victim of the alleged discrimination apparently could not be determined in the instance, it is of course mandatory that all such victims be interviewed whenever possible. Moreover, the practice of various barbers of announcing to Negroes who request a haircut that they do not know how to cut the hair of Negroes, with the apparent intention and result that Negroes must press their demands for a haircut, would appear to be a violation of law and should be expressly prohibited.³⁵⁵

Another significant issue is the inadequacy of

³⁵² Id.

³⁵³ FAA File No. EA 68.80. See also letter from James V. Nielson, FAA Title VI Coordinator to Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, June 19, 1968.

³⁵⁴ Letter from James Nielson, FAA Title VI Coordinator to complainant, June 19, 1968.

³⁵⁵ Letter from David Rose, Special Assistant to the Attorney General, to Richard F. Lally, Director, Transportation's Departmental OCR, Oct. 3, 1968.

DOT has since informed this Commission that this criticism was valid only in the above instance. Following that criticism by Mr. Rose, investigative reports were given greater scrutiny by the national office and field personnel were informed of deficiencies or were requested to provide additional information. Letter from Volpe to Hesburgh, supra note 12.

public information on the rights protected and the procedures that those who believe they have been subjected to discrimination should follow.

Although Title VI regulations provide for apprising beneficiaries of the protections against discrimination, the provision is couched in discretionary language, viz. "as the responsible agency official finds necessary." In actual practice little is done to make beneficiaries aware of their rights and the attendant complaint procedures. There are, however, a few agencies which have included complaint procedures in some of their publications.³⁵⁶

Some other agencies are on the verge of doing so 6 years after passage of the Civil Rights Act. For example, a draft of a proposed Bureau of Outdoor Recreation (Department of the Interior) Manual chapter dealing with Title VI states that "recipients and subrecipients have a duty to take such action as may be necessary to notify all potential users that their facilities are being operated on a non-discriminatory basis, and that all persons are welcome to make use of the facilities without regard to race, color, or national origin."³⁵⁷ In a separate attachment concerning "indicators of compliance," procedures for informing participants, beneficiaries, and the general public of recipients' civil rights posture are listed.³⁵⁸ As of June 1970, the manual provision still had not been issued.

The Office of Economic Opportunity has no system for apprising intended beneficiaries of OEO's complaint procedures. A proposed instruction prepared by OEO's Office of Civil Rights in March 1969 addresses itself to this issue. It would require that notices be posted "in places where they will be observed by employees, applicants for employment, beneficiaries, and other prospective participants in OEO programs, setting forth the civil rights requirements and indicating where and how to

file complaints of discrimination."³⁵⁹ The instruction still was in draft form 9 months later.³⁶⁰

The Small Business Administration has developed a poster which must be displayed by each recipient indicating that the firm is an equal opportunity employer and provides equal treatment to customers.³⁶¹ The poster which indicates where violations may be reported must be visible to employees, applicants for employment, and the public. Failure to display it may be viewed as evidence of noncompliance with SBA's Title VI regulations or supplemental nondiscrimination regulations.³⁶²

A number of Federal agencies have never developed internal procedures for dealing with Title VI complaints. In some other agencies, built-in weaknesses impair efficient and timely action. For example, the Department of Transportation currently has no guidelines describing how complaint investigations should be conducted. Further, the civil rights offices within the operating agencies are supposed to forward Title VI and other civil rights complaints to the departmental OCR.³⁶³ There are no guidelines, however, specifying the kinds of complaints to be forwarded. In the absence of such guidelines, it is likely that the operating agencies will fail to recognize many civil rights complaints as such, and will bypass the departmental Office of Civil Rights.³⁶⁴

³⁵⁹ OEO Instruction No. 1315, "Control System for Civil Rights Complaints Against Grantees and Contractors," (p. 4, 7-a) (draft dated Mar. 7, 1969).

³⁶⁰ Interview with Wilfred Leland, former Chief of the Compliance and Evaluation Section in OEO's Office of Civil Rights, Nov. 18, 1969.

³⁶¹ SBA Form 722 (9-66).

³⁶² SBA National Directive (ND) 1500-8 (Sept. 21, 1966).

³⁶³ Memorandum from Secretary of Transportation Volpe to DOT administrators. Subject: Civil Rights Standard Functional Statement and Uniform Relationships, May 8, 1969. Attachment 1 to this memorandum states, in part, "[t]hat investigations of alleged or suspected discriminatory practices . . . [be] conducted by, or . . . guided by civil rights specialists . . ."

³⁶⁴ The problem of civil rights complaints not being brought to the attention of civil rights specialists is not peculiar to the Department of Transportation; other agencies, such as the Department of Housing and Urban Development, have had similar experiences. In-

³⁵⁶ See, e.g., (Department of Labor) *Know Your Employment Rights* (1966). Also Health, Education, and Welfare, *HEW and Civil Rights*, (1968).

³⁵⁷ See proposed manual chapter attached to memorandum from Director, Bureau of Outdoor Recreation to Director, Office for Equal Opportunity, Department of Interior, Oct. 16, 1969, at pt. 450-3c.

³⁵⁸ *Id.*, at illustration IV.

In the Department of Commerce, the only Title VI complaints received to date have involved programs of the Economic Development Administration. According to administrative orders, only the Special Assistant for Equal Opportunity may request that an investigation be initiated, even in cases where it is to be conducted by the operating unit.³⁶⁵ However, it is the head of the operating unit who decides on the validity of the complaint. Neither the Department generally, nor EDA specifically, has drafted complaint investigation procedures.³⁶⁶

The system for handling civil rights complaints in the smaller agencies is no less confusing nor fragmented than for the larger agencies. During the course of Commission staff interviews, the Headquarters Office of Civil Rights for the Office of Economic Opportunity could provide no reliable data on the processing of complaints in the regions.³⁶⁷ This was a result of the lack of any provision for regular, orderly reports to the headquarters civil rights staff. Because the handling of complaints was, for the most part, a totally decentralized process, the central civil rights staff had no knowledge of the number, nature, or disposition of complaints in the regions, except in cases where a particular complaint was brought to its attention.³⁶⁸ On July 31, 1970, however, OEO instituted a new complaint control system whereby every Human Rights Coordinator is now required to report all cases to headquarters. A central file is maintained in Washington and the enforcement branch of the Human Rights Division is responsible

interview with Phil Sadler, former Director of Equal Opportunity for Metropolitan Development, HUD, Feb. 13, 1970.

³⁶⁵ Department of Commerce, administrative order 215-1 (Mar. 19, 1969).

³⁶⁶ Interview with Luther C. Steward, Jr., Special Assistant for Equal Opportunity and Arthur Cizek, Equal Opportunity and Title VI Coordinator, Department of Commerce, Jan. 7, 1970. EDA specialists, however, have been provided with this Commission's *Compliance Officer's Manual*. In addition, certain sections of EDA Directive 7.03 pertain to employment investigations. Letter from Siciliano to Glickstein, *supra* note 49.

³⁶⁷ There have been relatively few Title VI complaints; most have concerned alleged discriminatory employment practices by the community action agencies or their delegate agencies.

³⁶⁸ Leland interview, *supra* note 360.

for insuring that the complaints are processed in a minimum amount of time.³⁶⁹

E. Methods of Enforcement

I. VOLUNTARY COMPLIANCE

The simplest and least disruptive way of achieving the goals of Title VI is through voluntary compliance, whereby recipients agree to abide by the law and do so. Title VI places emphasis on voluntary compliance by providing that before an agency may take any compliance action against a recipient, the agency must advise the offending party of his failure to comply and must seek to secure compliance by *voluntary means*.³⁷⁰ However, neither the act nor the legislative history affords guidance in determining the lengths to which an agency must go in attempting to obtain compliance by voluntary means. Some agencies have interpreted this requirement broadly and have entered into protracted negotiations with non-complying recipients. Sometimes Federal officials, believing they were on the verge of obtaining compliance, have acquiesced in repeated delays. In short, some Federal agencies have construed "voluntary means" so generously as to permit open-ended negotiations and interminable postponements. The great danger of heavy emphasis on voluntary compliance is that it may be a substitute for enforcement, rather than a means of assuring compliance, encouraging recipients to delay in eliminating discriminatory practices. It also may further erode public confidence in the Government's determination and ability to enforce the letter and spirit of the law.

The difficulty in making effective use of voluntary compliance as a means of enforcement and setting limits on the negotiation process is illustrated by problems which have arisen at the Department of Labor. Labor's *Compliance Officers' Handbook* states that the Civil Rights Act of 1964 and Title VI regulations "require that efforts be made to the fullest extent practicable to obtain voluntary compliance before there can be a refusal, suspension, or termination of Federal financial assistance."³⁷¹ The handbook warns, that:

³⁶⁹ Letter from Hjernevik to Glickstein, *supra* note 99.

³⁷⁰ 42 U.S.C. 2000d-1 (1964).

³⁷¹ Department of Labor, *Compliance Officers Handbook*, at 20.

Attempts to obtain voluntary compliance should not be unduly protracted Intensive negotiation is likely to reveal whether the recipient is actually using the process of negotiation for purposes of delay or whether in fact concrete headway is being made.³⁷²

However, time limits for negotiation and other efforts at voluntary compliance are not specified, nor are protracted negotiations defined. A report of a recent training session for regional staff indicated the following:

The participants, rather than having ideas as to how [voluntary compliance] could be more effectively achieved, held little faith in voluntary compliance. They wanted specific guidelines as to how long to pursue voluntary compliance, and what steps were to be taken when this tactic failed.³⁷³

In the past, the Department of Labor has been reluctant to employ sanctions such as court enforcement or termination of assistance in instances of noncompliance. The preference for negotiations is evidenced by the fact that no recipient has ever been taken to a hearing leading to the imposition of sanctions. In one case, in which the Department of Justice participated, negotiations were entered into with the Texas Employment Commission in May 1968. An agreement was submitted to the Texas Employment Commission in December 1968 and resubmitted in May 1969 with some minor revisions. In July 1969, more than 1 year after negotiations had begun, the Texas commission asserted its refusal to sign the agreement although it had already agreed to take corrective action and had begun to do so.³⁷⁴

In October 1969, the Assistant Secretary for Manpower and the Assistant Attorney General, Civil Rights Division, wrote to the administrator of the Texas commission urging him to reconsider his decision not to sign the agreement and indicating that further compliance reviews would be conducted.³⁷⁵ Further compli-

³⁷² Id.

³⁷³ Undated memorandum from Nelson Burke, Assistant Director of Labor's Office of Equal Employment Opportunity, to all OEEO staff, on equal opportunity training sessions for regional staff in Philadelphia (held Nov. 4, 1969), at 5.

³⁷⁴ Letter from R. L. Coffman, Administrator, Texas Employment Commission, to Arthur Chapin, Director, Office of Equal Employment Opportunity, Department of Labor, July 28, 1969.

³⁷⁵ Letter from Arnold Weber, Assistant Secretary for Manpower, Department of Labor, and Jerris Leon-

ance reviews were conducted and concluded that the Texas commission was not complying with several important provisions of the agreement (such as first-in first-out referral systems) and was probably violating Title VI.³⁷⁶ As of June 1970, more than 2 years after negotiations had begun, formal action had not yet been initiated against the Texas Employment Commission.³⁷⁷

These practices of the Department of Labor indicate an unwarranted reliance on negotiations, almost to the exclusion of other enforcement actions.³⁷⁸ This is not unique to the Department of Labor. For example, the Department of Agriculture's Federal Extension Service has also been engaged in protracted negotiations. In a March 6, 1970, letter to this Commission, the Assistant to the Secretary for Civil Rights wrote (conveying an FES response to a Commission questionnaire):

Assurances of compliance with the U.S. Department of Agriculture regulation under Title VI of the Civil
ard, Assistant Attorney General for Civil Rights, DOJ, to R. L. Coffman, administrator, Texas Employment Commission, Oct. 13, 1969.

³⁷⁶ Hodgson letter, supra note 150.

³⁷⁷ According to Labor, the Texas Employment Commission recently submitted a proposed program to eliminate discrimination. Hodgson letter, supra note 150. One other case has been referred to Justice. In 1968 the Department of Justice filed a complaint in a U.S. district court against the Ohio Bureau of Employment Services, alleging racially discriminatory practices in the operation of the federally financed employment service in violation of Titles VI and VII of the Civil Rights Act of 1964, Labor's Title VI regulations, Employment Security Manual of the Bureau of Employment Security (currently being revised), Title VI assurances, and the 14th amendment. As of October 1969, the case was still pending in the U.S. District Court for the Southern District of Ohio, *U.S. v. Ohio Bureau of Employment Service* (civil action No. 68-391), where an attempt was being made by the litigants to negotiate some sort of agreement. Memorandum from the Solicitor of Labor to the Assistant Secretary for Manpower, Oct. 27, 1969.

³⁷⁸ The Labor Department comments on this point:

"We would like to emphasize that we have done our utmost to achieve compliance with Title VI. However, we are mindful that a cutoff in funds would produce a harmful effect on the beneficiaries of the program, many of whom are the disadvantaged. Therefore, alternative legal action must be considered (e.g., suit by the Department of Justice) which would secure compliance but would not produce a detrimental effect on the beneficiaries."

Hodgson letter, supra note 150.

Rights Act of 1964 have not been certified by the Presidents and Directors of Cooperative Extension Services at (eleven) land-grant universities. . . .³⁷⁹

Nevertheless, Federal financial assistance is still being extended to these universities 6 years after the enactment of Title VI.

2. SANCTIONS

Sanctions for recipient noncompliance with Title VI may include fund cutoff or other means authorized by law. Specifically, Title VI stipulates that:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . or (2) by any other means authorized by law³⁸⁰

However, it is clear from the legislative history of Title VI that the drastic measure of fund cutoff is not to be undertaken lightly. As one of the sponsors of Title VI emphasized:

Cutoff of assistance is not the object of Title VI. . . . I wish to repeat: Cutoff is a last resort, to be used only if all else fails to achieve the real objective—the elimination of discrimination in the use and receipt of Federal funds. . . .³⁸¹

a. Termination

In order for an agency to terminate assistance under Title VI, the allegedly noncomplying recipient must be afforded an opportunity for an administrative hearing³⁸² and there must be an express finding on the record of failure to comply.³⁸³ The agency head is also obliged to file a written report with the congressional committees having legislative jurisdiction over the program or activity involved and then wait 30 days before effecting an order

³⁷⁹ Letter from Edwin L. Kirby, Administrator, Federal Extension Service, USDA, to William M. Seabron, Assistant to the Secretary for Civil Rights, USDA, Feb. 24, 1970.

³⁸⁰ 42 U.S.C. 2000d-1 (1964).

³⁸¹ 110 Cong. Rec. 7059, 7063 (1964).

³⁸² There is provision in the regulations for waiver of the hearing. See, e.g., 45 C.F.R. 80.9(a) (HEW): "An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the act and . . . this part and consent to the making of a decision on the basis of such information as is available." An examination of other agencies' Title VI regulations reveals a similar provision.

³⁸³ 42 U.S.C. 2000d-1 (1964).

terminating Federal financial assistance.³⁸⁴ Some agencies include an additional requirement to this sequence, viz., that the agency head may "vacate it, or remit or mitigate any sanction imposed".³⁸⁵

Once an agency decides to use the sanction of fund cutoff, elaborate and often time-consuming steps have to be taken to insure due process. The procedures developed at HEW illustrate how extended the hearing process may become. It should be noted that negotiations frequently take place at any or all stages of the proceedings outlined below.

After HEW's regional Office for Civil Rights staff has conducted a compliance review (a time-consuming process in itself), a report is prepared recommending that appropriate steps be taken to terminate Federal assistance to the noncomplying recipient. These recommendations are examined by OCR Washington staff and by HEW's Office of General Counsel and a summary of the case is submitted to the Department of Justice for review. After the staff recommendation [that enforcement action be initiated] has been approved, and provided the Department of Justice has not raised a question or objection within 7 days, a notice of opportunity for hearing is issued. The actual proceeding is heard by an examiner designated by the Civil Service Commission pursuant to the Administrative Procedures Act.³⁸⁶ The decision by the hearing examiner to terminate Federal funds is final unless appealed to a review tribunal,³⁸⁷ whose members are appointed by the Secretary pursuant to the revised Title VI regulation. The decision of the review tribunal is final unless the Secretary agrees to review the proceedings. The Secretary transmits a report of the final decision of the review tribunal or the hearing examiner to the appropriate congressional committees and, 30 days after this report is delivered, the order terminating Federal funds

³⁸⁴ *Id.*

³⁸⁵ 45 C.F.R. 80.8(c)(3). This requirement was deleted by HEW in an amendment to the regulations, 32 Fed. Reg. 14556 (1967). However, Title VI regulations of other agencies still impose a similar requirement.

³⁸⁶ 5 U.S.C. 1010 (1946), sec. 11 of the Administrative Procedures Act. See also 5 U.S.C. 3105 and 3344 (1966).

³⁸⁷ The review tribunal which originally was a three-man body was expanded to five members in May 1969. 34 Fed. Reg. 7390 (1969).

takes effect.³⁸⁸ The entire process may take 6 months or more.³⁸⁹

The emphasis on HEW hearings should not be construed as indicating wide use of the sanction of fund cutoff. In fact, most agencies have never noticed a recipient for hearing, nor have they ever terminated assistance.³⁹⁰

b. Other Means Authorized by Law

The threat of termination of assistance is

³⁸⁸ For additional information on HEW's hearing operation, see U.S. Commission on Civil Rights, *HEW and Title VI* 54-55 (1970). Also note that the status of cases in the HEW Office of General Counsel as of January 23, 1970, was as follows:

Under review for possible enforcement proceedings	67
Noticed but not yet heard	49
Heard but no initial decision rendered	42
Presently terminated	67

³⁸⁹ In August of 1969, the U.S. Court of Appeals for the Fifth Circuit decided a case, *Board of Public Instruction of Taylor County, Fla. v. Finch*, 414 F.2d 1068, 1079 (5th Cir. 1969), which may lengthen the fund cutoff process even more. The case held in part that "the administrative agency seeking to cut off Federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." *Id.*, at 1079. As a result of *Taylor*, approximately 50 pending Title VI cases which had already passed the hearing stage, had to be remanded for rehearing. In addition, there are more than 100 new cases which must be heard in accordance with the new requirements imposed by *Taylor*. Telephone conversation with Lewis E. Grotke, Office of General Counsel, Civil Rights Division, HEW, Apr. 15, 1970. The *Taylor County* case itself was not reheard until Apr. 16, 1970. As of June 1970, the case was still pending. See Administrative Proceeding in the Department of Health, Education, and Welfare, *In the Matter of Taylor County Board of Public Instruction and State Department of Education of Florida, Respondents*, Docket No. CR-512, On Remand—Federal Agencies' Brief and Proposed Additional Findings, Conclusions and Amended Order, May 28, 1970, at 1-3.

³⁹⁰ Agencies which have not held hearings or terminated assistance include the Departments of Housing and Urban Development, Commerce, Labor, and Transportation, and the Law Enforcement Assistance Administration, Tennessee Valley Authority, and Office of Emergency Preparedness. Other agencies have been a party to a hearing conducted by HEW but have never held their own (e.g., Atomic Energy Commission, National Science Foundation, and Veterans Administration). The Department of Agriculture and Interior, the Office of Economic Opportunity, and the Small Business Administration have independently conducted Title VI hearings.

obviously most effective against recipients who rely heavily on Federal aid. However, if, despite the threatened or actual loss of assistance, a recipient still refuses to comply, consideration must be given to alternative courses of action.

The Department of Justice's *Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964*³⁹¹ lists two additional courses of action: court enforcement³⁹² and other administrative action.³⁹³ Before action other than a hearing is taken to effect compliance, Title VI regulations require that a minimum of 10 days elapse after notice to the recipient of his failure to comply.³⁹⁴

Litigation, which may be an alternative to termination proceedings, may also be of value, especially in cases of school desegregation, as a sanction in addition to fund cutoff to provide added leverage in the effort to secure compliance. That is, recipients would know that not only would Federal funds be cut off for noncompliance, but litigation could be brought

³⁹¹ 28 C.F.R. 50.3.

³⁹² *Id.*

"Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements or compliance or desegregation plans filed pursuant to agency regulations, (2) a suit to enforce compliance with other titles of the 1964 act [such as Title II (Public Accommodations), Title III (Public Facilities), or Title IV (Public Education)], other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination, and (3) initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance."

³⁹³ *Id.* Such action may include:

"(1) consulting with or seeking assistance from other Federal agencies . . . having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from, or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries."

³⁹⁴ See, e.g., 45 C.F.R. 80.3(d) (HEW). HEW's Title VI regulations, before being amended in 1967, required the approval of the Secretary before "other means authorized by law" could be undertaken to effect compliance. This requirement was deleted in the 1967 amendment. (See 29 Fed. Reg. 16298 (1954) as amended at 32 Fed. Reg. 14556 (1967)). The regulations also require that during this 10-day period additional efforts be made to effect compliance by voluntary means.

to bring about compliance.^{394a} Thus, defiance of nondiscrimination requirements, even at the cost of losing Federal funds, would be an act of futility.

Over the last year, however, litigation has been used in lieu of, rather than in support of, fund termination procedures. In fact, it now appears that litigation is the principal Title VI enforcement tool. This was implicit in a July 3, 1969 statement issued jointly by the Secretary of HEW and the Attorney General. Speaking about school desegregation, they noted that:

To the extent practicable, on the Federal level the law enforcement aspects will be handled by the Department of Justice in judicial proceedings. . . .³⁹⁵

The statement further indicated that it was the objective of this procedure: "To minimize the number of cases in which it becomes necessary to employ the particular remedy of a cutoff of Federal funds. . . ." ³⁹⁶

Robert H. Finch, then Secretary of Health, Education, and Welfare, also enunciated this position in a recent radio interview:

Mr. Thomas Foley:³⁹⁷ One part of that law calls for cutting off the funds to schools that refuse to desegregate. I think the last time that you did cut off those funds was maybe last August, sometime. Now several orders for cutoffs are apparently headed to you now. What's going to be your policy? Is there a new change in policy?

Secretary Finch: No. We will follow the same policies, but I would say that on the whole, what we try to do is to make a much greater effort to get that district, not under administrative proceedings, but under court proceedings, to set a timetable and a program which the court orders, and then if the school system or the schools involved do not follow that agreed upon program, then we will cut off funds. But we won't do it in advance of the court order.³⁹⁸

The strategy of using the courts to enforce the requirements of Title VI for bringing about

^{394a} Such litigation, of course, would have to be predicated on something other than Title VI for "it is not possible to use litigation as 'other means' to enforce [compliance with] Title VI concurrently with a fund termination proceeding involving the same assistance because the two remedies are inconsistent." Letter from Pottinger to Sloane, *supra* note 60.

³⁹⁵ Statement of the Secretary of HEW and the Attorney General (July 3, 1969), at 9.

³⁹⁶ *Id.*

³⁹⁷ Mr. Foley is a Los Angeles Times reporter.

³⁹⁸ This dialogue occurred on Metromedia's "Profile," Mar. 1, 1970, at p. 10 of transcript.

school desegregation, instead of economic leverage of fund cutoff, was examined at length in this Commission's September 1969 report on Federal enforcement of school desegregation.³⁹⁹ Among the Commission's findings were the following:

Frequently, court orders have imposed less than minimal requirements.⁴⁰⁰

In case after case, district courts have entered desegregation orders that have largely been ignored by local officials.⁴⁰¹

A small minority of Federal judges . . . have indicated by their past judicial actions that they will not, where school desegregation or other civil rights cases are concerned, discharge their responsibilities impartially. . . .⁴⁰²

The report also noted that Title VI was envisioned as removing the burden of desegregation in elementary and secondary schools from the courts and shifting it to administrative machinery.⁴⁰³

4. POST TERMINATION PROCEEDING

In 1967 the Committee on Uniform Title VI Regulation Amendments recommended, as an additional means of assuring compliance, the adoption of standards and procedures prerequisite to restoration of funds to a recipient whose assistance had been terminated.⁴⁰⁴ The

³⁹⁹ U.S. Commission on Civil Rights, *Federal Enforcement of School Desegregation*, (September 1969).

⁴⁰⁰ *Id.*, at 10.

⁴⁰¹ *Id.*, at 11.

⁴⁰² *Id.*, at 40.

⁴⁰³ *Id.*, at 34. The Report of the White House Conference, *To Fulfill These Rights*, also stressed this point:

"It was the Congressional purpose, in Title VI . . . to remove school desegregation efforts from the courts, where they had been bogged down for more than a decade. . . . Judicial proceedings by the Attorney General can play an important role in enforcement, but litigation cannot be made a substitute for the administrative proceedings prescribed by Congress as the primary device of enforcing Title VI. Those school districts which remain in outright defiance of national policy should be subjected immediately to administrative action, lest the credibility of the national policy remain any longer in doubt.

Report of the White House Conference, *To Fulfill These Rights*, at 63. The conference was held June 1-2, 1966.

⁴⁰⁴ Report of the Committee on Uniform Title VI Regulations Amendments, at 21 (attached to a Nov. 28, 1967, memo from David Rose, formerly Special Assistant to the Attorney General for Title VI, to all Title VI Coordinators).

Committee's recommendation was taken in part from amended Title VI regulations of HEW.⁴⁰⁵ HEW is the only agency to provide specifically for post-termination procedures.

HEW's Title VI regulation states that a recipient will be restored to full eligibility to receive assistance if it comes back into compliance with Title VI. In the case of an elementary or secondary school, or school system to which assistance has been terminated, in order to be restored to full eligibility the school or school system may file a court order or an acceptable desegregation plan with the Commissioner of Education and provide reasonable assurance that it will comply with the order or plan.⁴⁰⁶ During the period from July 1969 to January 1970, 14 terminated school districts returned to compliance as a result of a court order; four districts returned to compliance as a result of a voluntary plan.⁴⁰⁷

A former recipient who is seeking to restore its eligibility to receive Federal financial assistance must show that compliance has been achieved.⁴⁰⁸ If the request for restoration is denied, the recipient may request a hearing and a determination on the record.⁴⁰⁹ However, the burden of proof is on the recipient and while the proceedings are pending, the sanctions imposed by the original order remain in effect.⁴¹⁰

F. Coordination

I. INTRODUCTION

From the time the Civil Rights Act of 1964 was signed by the President, on July 2, 1964, it was clear that a single body would be necessary to review and assist in coordinating the activities of the large number of Federal agencies which were directed by Title VI of that act to eliminate all racial and ethnic discrimination from their programs. It was acknowledged that there would be problems in legal interpretation, staff acquisition and training,

⁴⁰⁵ 45 C.F.R. 80.10(g). See also 29 Fed. Reg. 16298 (1964) as amended at 32 Fed. Reg. 14556 (1967).

⁴⁰⁶ 45 C.F.R. 80.10(g)(1).

⁴⁰⁷ Department of Health, Education, and Welfare, "Information on Compliance Proceedings, Office of General Counsel—Civil Rights Division" (current up to Jan. 23, 1970).

⁴⁰⁸ 45 C.F.R. 80.10(g)(2).

⁴⁰⁹ 45 C.F.R. 80.10(g)(3).

⁴¹⁰ 45 C.F.R. 80.10(g)(3) and (4).

development of investigative capability, and commitment to take strong action in cases where recipients refused to comply with the mandates of the law.⁴¹¹ Foremost among the anticipated difficulties was the inherent reluctance of program personnel to pursue vigorously a responsibility which might interfere with what they considered the essential purpose of their organic statutes—to keep Federal financial assistance flowing.

The Department of Justice had taken a leading role in defining the requirements of Title VI during the congressional debates on the Civil Rights Act of 1964 and, immediately thereafter, was in the forefront of the inter-agency effort to draft agency regulations for approval by the President, required by the title.⁴¹² The first agency, however, to which the leadership, review, and coordination functions were assigned was the President's Council on Equal Opportunity. The Council, created by Executive order on February 5, 1965,⁴¹³ was under the direction of the Vice President.

Its role went beyond Title VI coordination. The Council's function was to act "as a coordinating device" for the entire Federal civil rights effort.⁴¹⁴ The life of the Council was short. On September 24, 1965 it was abolished by another Executive order.⁴¹⁵

⁴¹¹ Interview with Lee C. White, former Special Counsel to President Johnson, June 16, 1970; interview with David Filvaroff, former General Counsel, President's Council on Equal Opportunity, June 17, 1970.

⁴¹² Filvaroff interview, *supra* note 411.

⁴¹³ Executive Order 1197 (1965). Its members consisted of 16 Government officials, including the Attorney General, the Secretaries of Defense, Agriculture, Labor, HEW, Commerce; the Chairman of the Civil Service Commission, the Commission on Civil Rights, and the Equal Employment Opportunity Commission. Sec. 2(2).

⁴¹⁴ The Executive order gave the Council wide latitude. See sec. 4. The Council discussed such diverse subjects as police and jury discrimination in the South, school desegregation, the need for cease and desist powers for EEOC, racial data collection, discrimination in the building trade unions, equal opportunity in housing, and the availability of hearing examiners to judge compliance of Federal aid recipients charged with violating Title VI. Interview with Wiley Branton, former Executive Director, President's Council on Equal Opportunity, Apr. 6, 1970.

⁴¹⁵ Executive Order 11247, "Providing for the Coordination by the Attorney General of Enforcement of Title VI of the Civil Rights Act of 1964."

A memorandum to the President from the Vice

That same Executive order transferred to the Attorney General the responsibility for assisting Federal "agencies to coordinate their programs and activities and adopt consistent, and uniform policies, practices, and procedures with respect to the enforcement of Title VI of the Civil Rights Act of 1964."⁴¹⁸

2. THE DEPARTMENT OF JUSTICE'S TITLE VI COORDINATION EFFORT

a. *Structure and Staffing*

Shortly after Executive Order 11247 was issued, the former General Counsel of the President's Council on Equal Opportunity, David B. Filvaroff, was appointed Special Assistant to the Attorney General for Title VI at the GS-17 level. The Office of the Special Assistant had a professional staff of two attorneys and one research assistant. Although the Special Assistant reported directly to the Attorney General, his office, for administrative purposes, was made part of the Civil Rights Division.⁴¹⁷

From the inception, there was a conflict between the approach of the Special Assistant

President, which was released on the day the Council was abolished, indicates:

" . . . during this period of evaluation and adjustment to the Civil Rights Act of 1964 it has been essential to have had the Council on Equal Opportunity. . . . Now that this significant program of insuring that Federal funds are not used to support state and local programs administered on a discriminatory basis has moved to the phase in which hearings and possible judicial action is involved, the Justice Department which has the ultimate responsibility for enforcing Title VI should be assigned the task of coordinating the Federal Government's enforcement policies in this area."

Memorandum for the President from the Vice President on "Recommended Reassignment of Civil Rights Function" (Sept. 24, 1965). It has been asserted that the main reasons for the transfer of duties were political and related to conflicts between the White House staff and the personnel of the Council. Branton interview, *supra* note 414. For a further discussion of the President's Council on Equal Opportunity, see ch. VI, *infra*.

⁴¹⁸ Id. Executive Order 11247 also indicated that the reorganization was motivated by the fact that the future issues arising under Title VI would be legal in character.

⁴¹⁷ The Special Assistant, David B. Filvaroff, had worked on the staff of Attorney General Katzenbach when Mr. Katzenbach was Deputy Attorney General and, therefore, a personal relationship existed between them.

ant to the Attorney General for Title VI, who advocated that the Department adopt a broad view of its responsibilities, and officials in the Department's Civil Rights Division, who essentially viewed the title as a litigation tool.⁴¹⁸ Although there was some contact between the Division and the Office of the Special Assistant, it was on an ad hoc basis.

When Mr. Filvaroff resigned in August 1966, no replacement was named; rather, the First Assistant to the Assistant Attorney General for the Civil Rights Division assumed the function on a part-time basis.⁴¹⁹ In December 1966, one of the Civil Rights Division's chief trial attorneys was given the job of Special Assistant to the Attorney General for Title VI. The new Special Assistant, D. Robert Owen, a GS-16, was required to spend a large part of his time away from Washington working on trials he had become involved with prior to his appointment. Although it had been announced by Mr. Owen that the professional staff of the unit would triple in size, only one part-time attorney was added to the staff during his short tenure.⁴²⁰

In early April 1967, only 4 months after Mr. Owen became Special Assistant and only 8 months after the first Special Assistant resigned, another Department of Justice staff member, David L. Rose, assumed the role of Special Assistant to the Attorney General.⁴²¹

⁴¹⁸ Filvaroff interview, *supra* note 411. Interview with Morton H. Sklar, attorney, Civil Rights Division, Department of Justice, Feb. 13, 1969. Mr. Sklar was one of the original two-man staff of the Office of the Special Assistant to the Attorney General and was still acting in that capacity at the time of the writing of his report.

⁴¹⁹ Stephen J. Pollak was the First Assistant to the Assistant Attorney General at this time. No replacement had been secured for Mr. Filvaroff despite the fact that he provided the Attorney General with more than 4 months notice of his intended departure and strongly urged that an independent, high level replacement be secured. Filvaroff interview, *supra* note 411. Mr. Pollak's tenure began the process of integration into the Division of the Office of the Special Assistant to the Attorney General for Title VI.

⁴²⁰ Since one of the two original staff attorneys assigned to the office left during the same period of time, the effective size of the office was actually smaller than it had been a year and a half earlier.

⁴²¹ Mr. Owen became the First Assistant to the Assistant Attorney General for Civil Rights and David L. Rose, who had been Assistant Chief of the Appellate

During Mr. Rose's almost two and a half years as Special Assistant, the size of the professional staff reached its peak, growing from two attorneys and one research assistant to eight attorneys and two research assistants. It was also during this time, however, that the emphasis of the Office's work began to shift away from Title VI.

The Office became an integral part of the Civil Rights Division, with Mr. Rose reporting to the Assistant Attorney General for Civil Rights, not to the Attorney General.⁴²² It became the focal point for all Department of Justice contact with other Federal agencies on civil rights matters, whether or not related to Title VI.

The unit was assigned the Division's legislative drafting responsibilities and became involved in a good deal of litigation, some of which related to Title VI, but most of which did not. These added responsibilities more than consumed the additional manpower added to the Title VI office.

By July 1969, when the Office of the Special Assistant for Title VI was merged by the Assistant Attorney General of the Civil Rights Division with the Division's internal Office of Planning and Coordination, any semblance of independence for the Office or of the existence of a "Special Assistant to the Attorney General" disappeared. The Assistant Attorney General's memorandum announcing the merger indicated that the new Office of Coordination and Federal Programs "will be responsible

Section of the Civil Division of the Department of Justice, became Special Assistant to the Attorney General for Civil Rights. Mr. Rose, who was a GS-15 in the Civil Division, became a GS-17 when he came to the Civil Rights Division. Interview with David Rose, Special Assistant to the Attorney General, Feb. 8, 1969. See Department of Justice News Release, Apr. 4, 1967.

⁴²² Directive No. 10 from Stephen J. Pollak, Assistant Attorney General, "Reorganization of the Civil Rights Division," Jan. 18, 1969. When the Civil Rights Division revised the geographic boundaries of its litigation sections in January 1969, the Office of the Special Assistant for Title VI was formally made part of the Division, and directed to report to the Assistant Attorney General. The memorandum set forth three duties for the Office: Assisting and coordinating the Title VI efforts of the Federal agencies; preparation and presentation, in conjunction with the litigation sections, of court cases relating to Title VI; and research and development of civil rights legislation.

for planning appeals and legislation as well as internal coordination and coordinating the civil rights programs of the [F]ederal agencies." ⁴²³The staff time devoted to Title VI work did not increase. In fact, the added functions of the unit resulted in even less emphasis on Title VI matters.

In September 1969, the Civil Rights Division was reorganized and Mr. Rose became Chief of the employment litigation section. One of the staff members who had been appointed as his deputy in the July reorganization, J. Harold Flannery, an experienced Civil Rights Division attorney, became director of the partly reorganized Title VI unit, now called the Office of Coordination and Special Appeals.⁴²⁴ Mr. Flannery did not assume the title "Special Assistant to the Attorney General" ⁴²⁵ nor, despite his long Civil Rights Division experience, did he have a background in matters relating to Title VI.⁴²⁶ His main function as director of the new unit was to review all appellate briefs and to draft briefs of special importance. Mr. Flannery did not report directly to the Assistant Attorney General, as his predecessor had done, but re-

⁴²³ Memorandum No. 69-3 to All Personnel from Jerris Leonard, Assistant Attorney General, Civil Rights Division, "Merger of Coordination Functions In The Civil Rights Division," July 28, 1969.

⁴²⁴ Interview with J. Harold Flannery, Director, Office of Coordination and Special Appeals, Nov. 14, 1969.

⁴²⁵ Mr. Flannery's predecessor, Mr. Rose, had urged that Mr. Flannery be given the title. The title, "Special Assistant to the Attorney General for Title VI," was originally created so that the individual holding the position would be able to relate on an equal basis with the civil rights and program officials of the various Title VI agencies. It was also felt that the agencies would then understand that they have no appeal from the decisions of the Special Assistant, other than to the Attorney General himself. Rose interview, *supra* note 421.

It became common practice, however, for agencies to go to the Assistant Attorney General, when unhappy with opinions of the Special Assistant. Thus, beginning in late 1969, most important letters to agencies coming out of the Special Assistant's Office were signed by the Assistant Attorney General.

⁴²⁶ *Id.* Actually, none of the individuals, other than David Filvaroff, assigned responsibility for the Title VI coordinating function, had any significant background or experience in working with the title, nor more familiar with the programs of the large number of agencies involved.

ported to the senior Deputy Assistant Attorney General.

The Office of Coordination and Special Appeals consisted of Mr. Flannery, his deputy, five staff attorneys, and one research assistant. Only one person was assigned to Title VI on a full-time basis. The division of responsibilities within the unit was arranged so that Mr. Flannery was mainly occupied with appellate litigation and his deputy, Benjamin W. Mintz, was to supervise the Federal liaison efforts. Mr. Mintz's orientation, however, was in the employment discrimination area, which is only tangentially related to Title VI.⁴²⁷

Finally, on June 1, 1970, with the departure from the Department of Justice of Mr. Flannery and Mr. Mintz, the Coordination and Special Appeals Section was split into three separate units.⁴²⁸ The Title VI unit was placed under the direction of Thomas Ewald, a GS-15 attorney from the Civil Rights Division's employment section, who has had no previous significant experience with Title VI matters.⁴²⁹

⁴²⁷ Interview with Benjamin Mintz, Deputy Director, Office of the Special Assistant to the Attorney General for Title VI, Feb. 23, 1969; Flannery interview, *supra* note 424.

⁴²⁸ Memorandum 70-2 to All Personnel from Jerris Leonard, Assistant Attorney General, Civil Rights Division, "New Appointments and Personnel Changes", May 27, 1970. In addition, to a Title VI unit, two other units were created: Legislation and Special Projects, and Planning and Special Appeals. The Director of the first of these units reports directly to the Assistant Attorney General, and the second unit head reports to Mr. Leonard's senior Deputy.

⁴²⁹ Mr. Ewald has been involved in civil rights enforcement for 4 years and when he was appointed unit director was a GS-14. The Department of Justice has indicated that Mr. Ewald's first order of business, which is *now* being carried out, is to survey the state of compliance with Title VI, to identify the problems of enforcement and coordination, and to prepare a detailed program for carrying out the requirements of Title VI, including developing goals, priorities, organizations, techniques, and staffing. Such questions as the number of persons needed on the staff, the amount of Title VI litigation to be conducted and its relationship to nonlitigative activities, and the grade level and responsibilities of the Director's job and each other job in the Office, will be determined by the needs of Title VI enforcement as developed in this program. (Emphasis added.) Letter from Jerris Leonard, Assistant Attorney General, Civil Rights Division, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, attachment, Aug. 25, 1970.

Thus the Title VI function, previously under the direction of a section chief, has been further downgraded by being assigned to a small unit under the direction of a relatively junior attorney. Further, he reports to one of the junior deputy assistant attorney generals. The unit, with its staff of four professionals, spends full-time on Title VI coordination: on the development of a title VI program and on litigation under Title VI.⁴³⁰

Where Federal officials are defendants in suits alleging racial discrimination, the unit handles the factual investigation within the defendant agency and coordinates between the defendant officials and the Department's Civil Division, which usually represents the Government at trial.⁴³¹ The Title VI unit continues to serve as the Division's liaison with Federal agencies concerning civil rights matters, many of which do not relate to Title VI.⁴³²

The Justice Department's effort to fulfill the mandate of Executive Order 11247 regarding coordination of Title VI matters within the Federal Government has suffered from inadequate staffing and a progressive lowering in priority. The reasons why the Department's Title VI responsibilities have been handled in this manner relate to the basic philosophy of its Civil Rights Division. First and foremost, the Division, made up entirely of lawyers and their research assistants, is geared for and oriented toward a litigative approach to problems. There is little or no appreciation of the value of nonlitigators within the Division and they are regarded as performing a lesser function.⁴³³ Thus when David Filvaroff, the first special assistant, left his position, the

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² Mintz interview, *supra* note 427. For example, a staff member of the Title VI unit was involved in a meeting held in June 1970 concerning implementation by the Federal Communications Commission of its rule prohibiting employment discrimination by broadcasters. However, the Department of Justice has indicated that the unit is no longer responsible for the Division's liaison with all Federal agencies on all civil rights matters. Letter from Jerris Leonard, *supra* note 429.

⁴³³ Branton interview, *supra* note 414. Interview with Harold Himmelmann, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 15, 1969; interview with Diane Wayne, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 8, 1969.

Division sought to turn the Title VI unit into a litigating arm.

Justice officials, in defense of their approach to Title VI, contend that the best way to learn about the programs of an agency and to win the respect of agency personnel is to work with the agency on a lawsuit.⁴³⁴ In addition, there appears to be a belief within the division that the remedy available under Title VI—fund termination—is not as effective as court suits.

Since a major part of the Title VI unit's function has become one of trying civil rights cases, it is reasoned that it should be an integral part of the Civil Rights Division, reporting to the Assistant Attorney General. Further, it is argued that if the Division is to have a unit for assisting agencies with their Title VI programs, that same unit ought to conduct all of the Division's coordinating activities.⁴³⁵ Finally, the Division argues that the Attorney General should have only one advisor on civil rights: the Assistant Attorney General for Civil Rights.⁴³⁶

The staffing and organization decisions, based on these arguments, though rational on the surface, have prevented the Justice Department from exercising the effective leadership and coordination that is necessary to effective enforcement of Title VI.

b. Coordinating Activities of the Department of Justice

In the 3 $\frac{3}{4}$ years of its experience in the Justice Department, the Title VI unit has engaged in a number of significant activities aimed at coordinating and assisting Federal agencies' Title VI programs. In its first year, the Office was responsible for: following through on some of the efforts of the President's Council on Equal Opportunity; the

⁴³⁴ Interview with Stephen J. Pollak, former Assistant Attorney General, Civil Rights Division, Nov. 8, 1969; interview with David L. Rose, Special Assistant to the Attorney General for Title VI, Jan. 23, 1969; interview with Benjamin Mintz, Deputy Director, Office of the Special Assistant to the Attorney General for Title VI, Feb. 8, 1969. Himmelman interview, supra note 433.

⁴³⁵ In view of the fact that the Division's number one priority for the past few years has been employment discrimination, a matter only tangentially affected by Title VI, most of the Title VI unit's efforts in the coordination field have centered around that goal.

⁴³⁶ Rose interview, supra note 421; interview with D. Robert Owen, First Assistant to the Assistant Attorney General, Civil Rights Division, Jan. 23, 1969.

issuance and initial implementation of three plans of coordinated procedures for enforcing Title VI in the areas of higher education, medical facilities, and elementary and secondary schools;⁴³⁷ the issuance of guidelines signed by the Attorney General governing the deferral of funds or action on an application for assistance by an agency because of a recipient's probable noncompliance with Title VI;⁴³⁸ assisting HEW on the preparation of its guidelines for desegregation of elementary and secondary schools; drafting proposed Title VI regulation changes; and establishing a framework for assisting and evaluating agency compliance and termination efforts.⁴³⁹

For example, personnel of the Title VI office worked with officials from the Departments of Agriculture, Defense, Interior, and HEW, and the Office of Economic Opportunity, concerning the procedures they intended to utilize in terminating assistance to recipients who would not sign assurances of compliance or who had signed assurances but continued to discriminate in the provision of Federal assistance to beneficiaries. The special assistant and his staff appeared at meetings of the Bureau of the Budget to assist that agency in evaluating the compliance forms being developed by such Title VI agencies as the SBA and the Departments of Interior, Labor, and Commerce. In addition, legal issues, such as the interpretation of the section in Title VI

⁴³⁷ Department of Justice, "Coordinated Enforcement Procedures for Institutions for Higher Education Under Title VI of the Civil Rights Act of 1964" (February 1966); U.S. Department of Justice, "Coordinated Enforcement Procedures for Medical Facilities under Title VI of the Civil Rights Act of 1964" (February 1966); U.S. Department of Justice, "Coordinated Enforcement Procedures for Elementary and Secondary Schools and School Systems Under Title VI of the Civil Rights Act of 1964" (May 1966). For a discussion of the substance and operation of these plans and an evaluation of HEW's role thereunder, see U.S. Commission on Civil Rights, *HEW and Title VI* (1970).

⁴³⁸ U.S. Department of Justice, "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," (Dec. 27, 1965).

⁴³⁹ Memorandum from Morton H. Sklar and Jeffrey M. Miller, attorneys, Office of the Special Assistant to the Attorney General for Title VI to David B. Filvaroff, Special Assistant to the Attorney General for Title VI, "Prognosis for the Office of the Special Assistant for Title VI", Aug. 10, 1966. Sklar interview, supra note 418.

that employment practices of recipients are not covered unless employment is a primary purpose of the assistance program, were discussed with the Departments of Commerce, HEW, and Interior.

During the period from August 1966, when Mr. Filvaroff left the Justice Department, until April 1967, when Mr. Rose was appointed Special Assistant to the Attorney General for Title VI, little new activity was undertaken by the Title VI office. Brief reviews were undertaken of the Title VI problems and programs of major agencies.⁴⁴⁰ These were performed, however, mainly by Civil Rights Division staff, on loan especially for that purpose, and were concluded in a matter of less than 2 weeks. In addition, Mr. Owen met with the Title VI officials of key agencies, such as the Departments of Agriculture and Interior, to discuss their manpower needs and then tried to obtain Bureau of the Budget approval for staff and budget increases for the agencies.

During that period, the office limited its activities largely to responding to legal and policy questions put to it by Title agencies, *e.g.*, AEC, and the Departments of Interior, Treasury, Commerce, HUD, and Labor. It also helped in the preparation of litigation relating to Title VI, which the Division was handling, *e.g.*, a suit against the Alabama Department of Pensions and Security for refusal to sign a Title VI assurance, and a proposed desegregation suit under Title VI against the Dale County, Alabama School System. Work continued on proposed uniform changes in agency Title VI regulations and on developing regulations for the National Foundation on the Arts and the Humanities.⁴⁴¹

⁴⁴⁰ See, *e.g.*, Memorandum from Robert Moore, attorney, Civil Rights Division, to the Files, "Federal Aviation Agency," Dec. 14, 1966; Memorandum from Owen M. Fiss, Special Assistant to the Assistant Attorney General, Civil Rights Division, to D. Robert Owen, Special Assistant to the Attorney General for Title VI, "Title VI Program of the Department of Commerce," Dec. 15, 1966; Memorandum from D. Robert Owen, Special Assistant to the Attorney General for Title VI, to the files, "Department of Interior Survey," Dec. 12, 1966.

⁴⁴¹ Interviews with Morton H. Sklar, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 13 and 20, 1969. At the meeting of agency Title VI officials at the Justice Department on Dec. 1, 1966, Mr. Owen indicated that he expected to

The title VI office began to take on its present form during the period in which Mr. Rose was Special Assistant.⁴⁴² It continued to respond to agency requests for assistance, initiated some attempts at improved coordination and, on occasion, attempted to stimulate increased and improved agency compliance activity. But two significant, related changes occurred in the operation of the office: first, it no longer restricted itself to Title VI issues; second, its staff began to participate in the preparation and conduct of litigation, much of which was unrelated to Title VI. These added activities, combined with the office's legislative and appellate functions, prevented an increase in the amount of time devoted to Title VI commensurate with staff increases that occurred.

The most important coordinative activities engaged in by the unit fall into seven major categories: (1) collection and analysis of Title VI quarterly reports; (2) meetings with Title VI coordinators; (3) appointment of special interagency committees; (4) assistance to agencies in the development of a system for establishing equal opportunity goals for each of their programs; (5) ad hoc assistance to agencies in resolving particular problems; (6) assistance in litigation; and (7) coordination of matters not related to Title VI.

(1) The Title VI office inherited a reporting system from the President's Council on Equal Opportunity under which each agency with programs covered by Title VI was required to submit quarterly reports giving in detail the status of Title VI activities undertaken by the agency. These reports were not in narrative form but rather consisted of a listing of data, such as the number of assurances of compliance submitted by recipients, the number of complaints received and investigated, the number of compliance reviews undertaken, and

increase the size of the Title VI unit, clear up all outstanding questions, and submit to the President a complete package of Title VI regulation amendments by Apr. 1, 1967. See, Memorandum from Walter B. Lewis, Director, Federal Programs Division, U.S. Commission on Civil Rights to the files, "Title VI Coordinators Meeting," Dec. 2, 1966. None of the above was completed within that time span; indeed, the Title VI regulations were not transmitted by the Justice Department until Sept. 30, 1968.

⁴⁴² See section on structure and staffing, *supra*.

the number and nature of actions taken on noncompliance situations. The quarterly reports were of limited value, since they provided only statistics and offered no explanation of what the statistics meant.⁴⁴³

The reports were not regularly reviewed by members of the staff of the Title VI office and followup was rare. In the spring of 1968, Mr. Rose requested agencies to attach copies of complaint investigation and compliance review reports to the quarterly report forms. On a few occasions, Mr. Rose commented to the agencies on the inadequacy of the reviews.⁴⁴⁴ The reporting system was finally discontinued in late 1969.⁴⁴⁵

(2) Another President's Council practice inherited by the Title VI office was the holding of meetings with all of the ranking civil rights officials of the Title VI agencies. These meetings were used as a forum for making important announcements, e.g., the Attorney General's guidelines on deferral assistance;⁴⁴⁶ for discussing implementation of an important policy, e.g., the coordination plans administered by HEW;⁴⁴⁷ and as a means of facili-

tating communication among officials with Title VI enforcement functions and stimulate them to take increased action.⁴⁴⁸ Although major policy decisions were not made at the meetings, it was generally felt that they had a salutary effect on agency personnel. Individuals who attended could go back to their agencies and indicate that action had to be taken because "the Attorney General said so". Nevertheless, no meetings were held after December 1969, despite the fact that the special assistant recommended to the Assistant Attorney General in November 1968 and early 1969 that they be continued.⁴⁴⁹

In addition to the large coordinators' meetings, the Attorney General met, on a fairly regular and informal basis, with the top civil rights officials of the Departments of HEW, HUD, Labor, and Agriculture to discuss their Title VI programs. These meetings kept the Attorney General informed of broad Title VI problems and encouraged agency activity.⁴⁵⁰ These meetings also ceased in early 1968.⁴⁵¹

(3) The third coordinative mechanism utilized by the Department of Justice consisted of interagency task force committees. In July 1967, Mr. Rose established four such committees to study problems in data collection and regional coordination, Federal transactions, employment discrimination under Title VI, and the development of uniform Title VI regulation amendments. Even though Justice attorneys did most of the work, Justice officials did not consider the experience with the committees to be a successful one.⁴⁵² One committee actually

⁴⁴³ See e.g., Department of Agriculture Quarterly Reports on Title VI Activity, Oct. 19, 1966, Nov. 17, 1967, second quarter, 1969.

⁴⁴⁴ In late 1968, as a followup to a letter he had sent, Mr. Rose and a member of his staff met with the civil rights staff of the Department of Transportation (DOT) to discuss the adequacy of compliance reviews DOT had attached to their quarterly reports. Himmelman interview, *supra* note 433. Department of Interior compliance reviews were inspected and found to be similarly wanting; and although no letter was sent, an attorney from the Title VI unit did mention her findings to an Interior Department official. Interview with Dorothy Mead, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 28, 1969. Letters were also drafted to VA, SBA, and the Economic Development Administration of the Department of Commerce, pointing out the flaws in the compliance reviews they had submitted. Interview with Morton H. Sklar, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 14, 1969.

⁴⁴⁵ Interview with Carolyn Maize, Research Assistant, Title VI Unit, Civil Rights Division, June 16, 1970.

⁴⁴⁶ The Attorney General's Guidelines were announced and explained at a Dec. 27, 1965 coordinators meeting.

⁴⁴⁷ Justice had a meeting of all Title VI coordinators on Dec. 1, 1966, at which time F. Peter Libassi, then Director, Office for Civil Rights, HEW, explained his agency's Title VI program. He then outlined how other agencies would receive information and join in HEW fund terminations under the coordinated operating pro-

cedures. See Lewis Memorandum of Dec. 2, 1966, *supra* note 441.

⁴⁴⁸ At the coordinators meeting of July 11, 1967, the Attorney General spoke of the importance of Title VI in his own and the Administration's order of priorities, explained how Justice was fulfilling its Title VI responsibilities and stressed the need for agencies to conduct compliance reviews. A similar meeting was held in December 1967.

⁴⁴⁹ Memorandum from David Rose, Special Assistant to the Attorney General for Title VI to Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, "Title VI Coordinators Meeting," Nov. 15, 1968; interview with David Rose, Special Assistant to the Attorney General for Title VI, Mar. 5, 1969.

⁴⁵⁰ Rose interview, *supra* note 449.

⁴⁵¹ Rose November 15 Memorandum to Pollak, *supra* note 449; Rose interview, *supra* note 449.

⁴⁵² Rose interview *supra* note 449.

prepared a draft set of uniform Title VI regulation amendments, which it submitted to Mr. Rose in November 1967.⁴⁵³ The others, however, were less productive. For example, the Federal Transactions Committee did not file a report, and the only result of its study was an amendment to GSA regulations requiring a nondiscrimination clause in GSA contracts for sale of land to public agencies. The Employment Committee never got off the ground.⁴⁵⁴ No further attempts at utilizing interagency committees have been made.

(4) The most ambitious attempt made by the Title VI unit in the area of coordination was its suggestion to the Attorney General in July 1968 that he propose to the Title VI agencies that they adopt and implement specific equal opportunity goals for each of their major programs providing Federal financial assistance. The goals were to consist of two parts: the first would seek to identify measurable targets for civil rights compliance activities which are aimed at eliminating segregation and other institutionalized discrimination; the second part would be concerned with the administration of the Federal assistance itself, rather than with civil rights enforcement activities as such.⁴⁵⁵

⁴⁵³ The Title VI regulation amendments committee included representatives from HEW, DOT, Commerce Department, Defense Department, Justice Department, and the U.S. Commission on Civil Rights. The co-chairmen were Edward Yourman of HEW and Robert Cohen of the U.S. Commission on Civil Rights. It discussed and resolved a number of significant issues, e.g., the revision of the definition of "discrimination" to take into account the consideration of racial factors to overcome past discriminatory practices; the revision of the definition of "employment" along the lines of the EDA and Appalachian Commission proposals which sought to clarify those situations in which employment practices are covered by Title VI; and the inclusion of illustrative examples relating to site selection.

⁴⁵⁴ Rose interview, *supra* note 449. For a discussion of the duties of the various committees, see, memorandum to the files from Morton H. Sklar, attorney, Office of the Special Assistant to the Attorney General for Title VI, "Minutes of Coordinators Committees," July 21 and 24, 1967; memorandum from Benjamin W. Mintz, Deputy Chief, Office of the Special Assistant to the Attorney General for Title VI, to David L. Rose, Special Assistant, "Committee No. 2 on Coordination," Aug. 21, 1967.

⁴⁵⁵ Memorandum from David Rose, Special Assistant to the Attorney General for Title VI to the Attorney General, "Establishment of Agency Equal Opportunity

The basic objective of these goals would be to afford to minority group members their fair and intended share of the services and benefits that are provided by each program. Attainment of these goals would have required the identification and removal of program procedures which exclude or reduce minority group participation to a point substantially below the proportion of their representation in the target population to which Federal assistance is directed.⁴⁵⁶

The proposal included a requirement that the agencies report to the Justice Department on the progress made in achieving their goals. Examples of how the system would operate in various programs were prepared by Justice attorneys, and meetings were held between Mr. Rose and representatives of the Agriculture Department and HEW to discuss the proposal before it was sent to the Attorney General for approval.⁴⁵⁷ In his speech to Federal program and equal opportunity personnel at an equal opportunity conference in October 1967, Ramsey Clark, then Attorney General had appeared to endorse just such an approach. A proposal was officially sent to the Attorney General in July 1968, but he refused to approve it.⁴⁵⁸ Despite continued support for the project by Title VI staff, after Attorney General Clark's initial decision not to endorse it,⁴⁵⁹ no further action was undertaken.⁴⁶⁰

Objectives and Accompanying Reporting System," July 5, 1968. The proposal was based in part on traditional Title VI authority and in part on proper program planning and administration techniques.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* Also see memorandum from David L. Rose, Special Assistant to the Attorney General for Title VI to Messrs. Chapin, Lewis, Libassi and Seabron (the top Title VI officials at the Departments of Labor, HUD, HEW and Agriculture) "Establishing Equal Opportunity Objectives and Reporting System," Jan. 17, 1968.

⁴⁵⁸ Although the proposal was sent to the Attorney General in July, he did not comment until October or November. He offered no reason for his adverse decision. Rose interview, *supra* note 449.

⁴⁵⁹ See, e.g., Memoranda from Morton Sklar, attorney, Office of Special Assistant to the Attorney General for Title VI to David L. Rose, Special Assistant to the Attorney General for Title VI, "Proposed Activities," Sept. 13, 1968; "Title VI Coordinating Activities," Jan. 17, 1969.

⁴⁶⁰ Rose and Sklar interviews, *supra* notes 449 and 444. It should be noted that the goal setting approach was endorsed by the Assistant Secretary for Planning

(5) Measured by the amount of time devoted to it, the most important facet of the Justice coordination effort has been ad hoc problem solving. The number of Title VI issues, both large and small, that have been referred to the Office or that have been initiated by it is extensive. They include: efforts to prod such agencies as HUD, the Department of Agriculture, and the Department of the Interior, into more aggressive Title VI actions;⁴⁶¹ attempts to get certain Federal agencies, such as LEAA and the Federal Highway Administration, to adopt regulations to cover the employment practices of their grant recipients;⁴⁶²

and Evaluation and the Director of the Office for Civil Rights in HEW. See Memorandum from Alice M. Rivlin, Assistant Secretary for Planning and Evaluation, and Ruby G. Martin, Director, Office for Civil Rights, HEW, to the Secretary, HEW, "Equal Opportunity Goal Setting," Jan. 17, 1969.

⁴⁶¹ Justice attorneys drafted the HUD public housing tenant selection plans issued in 1968 and held lengthy discussions with Walter Lewis, when he was Director of Equal Opportunity for HUD, concerning that agency's failure to conduct adequate investigations. The Attorney General also spoke with the Secretary of Housing and Urban Development, Robert Weaver, concerning the status of HUD's Title VI program. Rose interview, supra note 449; interview with Simon Eilenberg, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 7, 1969.

Mr. Rose and his staff reviewed the compliance reviews conducted by Agriculture Department field program staff and State officials, and found them totally inadequate. The findings of Agriculture's Office of Inspector General, that discrimination abounds in the Cooperative Extension Service, were of special concern to Justice, but despite discussions at the highest level, Agriculture took little remedial action. Rose interview, supra note 449; interview with David Marblestone, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 17, 1967.

The Departments of Interior and Justice conducted a joint review of the Alabama park system in July 1968 and Justice spent considerable time trying to get Interior officials to act on the finding of noncompliance made by the reviewers. The general inadequacy of the Interior Title VI effort was recognized by the Assistant Attorney General, and on Nov. 11, 1968, the Civil Rights Division wrote to the Secretary of the Interior supporting the U.S. Commission on Civil Rights' recommendation that Interior restructure its Title VI office. Rose and Mead interviews, supra notes 449 and 444.

⁴⁶² Memorandum from David Rose, Special Assistant to the Attorney General, Civil Rights Division, to Daniel L. Skoler, Acting Director, Office of Law Enforcement Programs, LEAA, "Proposed Equal Employment Op-

portunity Regulation for LEAA Grantees," Mar. 12, 1969. Rose, Mintz and Himmelman interviews, supra notes 449, 427 and 433.

portunity Regulation for LEAA Grantees," Mar. 12, 1969. Rose, Mintz and Himmelman interviews, supra notes 449, 427 and 433.

(6) In the opinion of Justice Department officials, the most important aspect of the Title VI office's work is litigation. Mr. Rose estimated that his staff spent almost 40 percent of its time preparing for and conducting

portunity Regulation for LEAA Grantees," Mar. 12, 1969. Rose, Mintz and Himmelman interviews, supra notes 449, 427 and 433.

⁴⁶³ Rose and Sklar interviews, supra notes 449 and 444. Memorandum from David L. Rose, Special Assistant to the Attorney General for Title VI, to Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, "Programs to Enforce Title VI in regard to GI Bill Benefits," Nov. 18, 1968; Memorandum from Morton Sklar, attorney, Office of the Special Assistant to the Attorney General for Title VI, to David L. Rose, Special Assistant to the Attorney General for Title VI, "VA's Compliance Procedures," Dec. 17, 1968; memorandum from David L. Rose, Special Assistant to the Attorney General for Title VI, to Jerris Leonard, Assistant Attorney General, "Pending Matters of Significance in the Title VI Office," Jan. 28, 1969.

⁴⁶⁴ Memorandum from the Attorney General, to the President, "Transmittal of Title VI Regulation Amendments," Sept. 30, 1969. The regulation amendments were sent to the President in late 1969, but were not approved because of President Johnson's desire to leave decisions to the President-elect. Two agencies still had no regulations as of Sept. 1, 1970: the Appalachian Regional Commission and the National Foundation on the Arts and the Humanities. The DOT regulations were sent to the White House again in May 1970, and were finally issued on June 18, 1970. Rose and Mintz interviews, supra notes 449 and 427.

⁴⁶⁵ Memorandum from David L. Rose, Special Assistant to the Attorney General, to Title VI Coordinators, "Grants of Assistance to the Economically Disadvantaged," July 8, 1968.

⁴⁶⁶ Rose and Sklar interviews, supra notes 449 and 444.

trials.⁴⁶⁷ The section has handled a wide variety of court suits, including suits under Title VI to require school districts to eliminate dual school systems;⁴⁶⁸ defending the Secretary of HEW when his decision to terminate financial assistance was challenged;⁴⁶⁹ suing a local housing authority for its failure to comply with HUD's tenant selection plans;⁴⁷⁰ and a number of employment suits not directly related to Title VI.⁴⁷¹ For each of the cases filed, many others have been reviewed by the Title VI office. For example, the unit joined the Department of Labor in investigating the practices of the Texas Employment Service;⁴⁷² conducted reviews into discrimination in the Alabama and Mississippi Cooperative State Extension Service in preparation for suit;⁴⁷³ and conducted field visits to a number of cities to determine compliance with HUD's tenant selection plan by local housing authorities.⁴⁷⁴

⁴⁶⁷ Rose interview, supra note 449. In some cases nearly 85 percent of the time of a staff attorney in the coordination unit would be spent in litigation. Interview with Harold Himmelman, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 15, 1969.

⁴⁶⁸ e.g., *United States v. Darlington County School District, et al.*, (D.S.C.); *United States v. Bamberg County School District No. 2, et al.*, (D.S.C.).

⁴⁶⁹ *Taylor County Board of Public Instruction v. Cohen*, (5th Cir.); *Bulloch County Board of Education v. HEW*, (5th Cir.).

⁴⁷⁰ *United States v. The Housing Authority of Little Rock, et al.*, (E.D. Ark.).

⁴⁷¹ *United States v. Frazer, et al. (M.D. Ala.)*, which successfully challenged as discriminatory the employment practices of the six Alabama State agencies which are subject to the Federal merit system standards; *United States v. Ohio Bureau of Employment Services and Willard P. Dudley*, (S.D. Ohio) in which it is alleged that the Ohio Bureau discriminates against Negroes in the operation of its State employment service system; and *United States v. Local 189, United Papermakers and Crown Zellerbach* in which the district court on Mar. 24, 1968, issued an order requiring the union and Crown Zellerbach to eliminate the system of job seniority which the court found has the necessary effect of perpetuating past discrimination against Negro employees, and restraining local 189 from striking, 282 F. Supp. 39 (E.D. La. 1968).

⁴⁷² Interview with Benjamin Mintz, Deputy Director, Office of the Special Assistant to the Attorney General for Title VI, Feb. 23, 1969.

⁴⁷³ Interview with David L. Rose, Special Assistant to the Attorney General for Title VI, Jan. 23, 1969; Marblestone interview, supra note 461.

⁴⁷⁴ Interview with Diane Wayne, attorney, Office of

Justice officials offer several reasons to explain why the coordinating unit is engaged in trial work, instead of focusing entirely on attempts to improve Government-wide Title VI implementation. This use of manpower is justified on grounds that suits are a coordinating device;⁴⁷⁵ that the attorneys desire and need the experience if they are to be able to work effectively with agency personnel;⁴⁷⁶ and that agencies will not always accept the position of the Department of Justice unless a suit is brought by the Department or is pending against the agency.⁴⁷⁷ Justice officials also assert that the cases handled by the Title VI unit cannot be handled by the litigative sections because of the small size of their staffs and because their attorneys have no experience in dealing with Federal agencies.⁴⁷⁸ In addition, it is contended that if the litigative sections were to bring these suits, the Title VI unit would not be able to coordinate effectively

the Special Assistant to the Attorney General for Title VI, Feb. 8, 1969.

⁴⁷⁵ Interview with Stephen J. Pollak, former Assistant Attorney General, Civil Rights Division, Nov. 8, 1969; Rose interview, supra note 473. Justice officials contend that by working with agencies on a law suit you learn the deficiencies of their program, their compliance procedures, and their equal opportunity staff, thus enabling you to work with them on nonlitigative matters on a more realistic basis. Id.

⁴⁷⁶ Rose interview, supra note 473, interview with J. Harold Flannery, Chief, Coordination and Special Appeals Section, Nov. 14, 1969.

⁴⁷⁷ Rose, Himmelman, and Eilenberg interviews, supra notes 473, 467, and 461. It was felt that HUD, Labor and the Office of State Merit Standards of HEW would not have acted against the State agencies subsequently sued by Justice even if urged to do so by the Attorney General. For example, Justice urged the Department of Agriculture to move against the State Extension Services which discriminate, but Agriculture refused and now Justice has joined one private suit against the Alabama Cooperative Extension Service and is seeking to join another suit against the Mississippi Cooperative Extension Service. Id.

⁴⁷⁸ Rose and Mintz interviews, supra notes 473 and 472. These reasons probably were more cogent prior to the time that the Civil Rights Division was reorganized in September 1969 and attorney assignments were shifted from a geographic basis to a subject matter basis. It is now anticipated that the Housing Section and the Employment Section will handle almost all of the litigation in their respective areas. Interview with Frank Schwelb, Chief, Housing Section, Civil Rights Division, Nov. 13, 1969; Rose interview, supra note 473.

with the trial attorneys and would thus not be in a position to obtain a good deal of important information.⁴⁷⁹

(7) The final category of coordinative activities engaged in by the Title VI unit relates to non-Title VI matters. The unit's involvement in these matters resulted from its assignment, by the Civil Rights Division, as coordinator for all Government civil rights problems and programs. The range of subject matters covered under this category is broad. Unit staff conducted investigations into housing discrimination in violation of Title VIII of the Civil Rights Act of 1968;⁴⁸⁰ it reviewed the structure and civil rights operations of the Civil Service Commission in carrying out its responsibilities under Executive Order 11246 for assuring nondiscrimination in Federal employment; it reviewed apprenticeship programs sponsored by the Navy; it studied problems of minority entrepreneurs and contractors; it inquired into discrimination by local draft boards under the Selective Service System; and it participated with the Bureau of the Budget and other Federal agencies reviewing programs available to disadvantaged veterans.⁴⁸¹

The main non-Title VI activity of the office of the special assistant has been coordination with EEOC and OFCC. The deputy director of the office spent almost all of his time on employment matters, much of which concerned these two agencies.⁴⁸² The Title VI office was involved in drafting OFCC regulations in 1968, passing on the legality of the Philadelphia Plan, attending the joint coordinating staff committee meetings,⁴⁸³ reviewing affirmative

action plans negotiated between OFCC and Federal contractors, and ad hoc problem-solving for EEOC and OFCC.⁴⁸⁴

Although Executive Order 11247 charges Justice only with responsibility for Title VI coordination, there is little doubt that the Justice Department, in general, and the Civil Rights Division, in particular, have a key role to play in assisting and coordinating the entire Federal civil rights effort. It is not feasible, however, for the Title VI unit, with its extremely limited staff resources, to engage in so broad an enterprise. If the unit is to perform effective Title VI coordination, it cannot become involved in protracted litigation even if the issues involved in the cases relate to Title VI. The result of the civil rights division's assignment of litigation and non-Title VI coordination responsibilities to the Title VI unit has been that there is rarely a time when as much as two man-years have been devoted to the type of work anticipated by Executive Order 11247.

Despite these impediments, the Title VI office has provided a significant amount of assistance to a number of agencies. Yet, as indicated in this chapter, the Title VI agencies for the most part, have not undertaken the kind of effort necessary to purge their programs of racial and ethnic discrimination. Justice must accept a portion of the blame for this. The Department has not taken the kinds of actions necessary to establish it as a credible leader in the Title VI area, and the Government's Title VI effort has suffered as a result of this failure.

The Title VI unit has never clearly identified Government enforcement goals and priorities; it has undertaken no program of systematic, indepth analysis of agency compliance potential; it has not routinely supported agency civil rights staffing requests before the Bureau of the Budget; it has not met regularly with agency personnel to discuss quarterly reports and to identify deficiencies in agency actions; it has not used all the means at its disposal to insure that agencies take strong and prompt administrative action where noncompliance is

Rights Division in the area of equal employment opportunity see ch. 2, sec. V supra.

⁴⁸⁴ See ch. 2, sec. 4, supra for a discussion of the operation of the joint EEOC, OFCC, Justice Department coordination effort.

⁴⁷⁹ Mintz and Himmelman interviews, supra notes 472 and 467.

⁴⁸⁰ Interviews with David Rose and Diane Wayne, supra notes 473 and 474. It should be noted that this activity predated the establishment of the housing section in the Civil Rights Division. Work of this nature is now being undertaken only by that section.

⁴⁸¹ Mintz and Himmelman interviews, supra notes 472 and 467; interview with Morton H. Sklar, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 14, 1969; interview with Dorothy Mead, attorney, Office of the Special Assistant to the Attorney General for Title VI, Feb. 28, 1969.

⁴⁸² Mintz interview, supra note 472. Mr. Mintz was Deputy from June 1967 to June 1970.

⁴⁸³ Mintz and Sklar interviews, supra notes 472 and 481. For a further discussion of the role of the Civil

uncovered; and it has taken no steps to require agencies to devote adequate manpower to the problems of the Spanish-speaking minority. Finally, instead of increasing manpower and expanding the effort to develop an effective uniform Government Title VI program, the Justice Department has cut back its Title VI staff, reduced the level of its Title VI office, and relegated it to the role of litigating Title VI suits and responding to agency requests for aid on an ad hoc basis.

III. INSURED AND GUARANTEED LOAN PROGRAMS

A. Introduction

Title VI is concerned with assuring against discrimination in programs or activities receiving Federal financial assistance by way of loans and grants. The majority of programs subject to Title VI involve direct outlays of Federal moneys, funneled through intermediaries for the purpose of providing assistance to a wide variety of individual beneficiaries. The Federal Government also administers programs which seek to provide assistance, not through direct Federal expenditures by way of loans or grants, but through the stimulation of credit through private lending channels. These programs operate through the mechanism of Federal insurance and guarantees of loans from private lending institutions.

Although these programs do not typically involve the expenditure of Federal funds, they nonetheless represent a significant means of assisting millions of individuals and they involve as intermediaries thousands of financial institutions and other business enterprises. Because of the protection against loss afforded by the Federal insurance or guaranty, private lending institutions are encouraged to invest in areas they otherwise might be reluctant to enter. By the same token, these programs, which typically provide more liberal terms than generally can be obtained under ordinary credit standards, enable individuals to obtain financing which otherwise might be unavailable to them.⁴⁸⁵

The Title VI programs, programs of insur-

⁴⁸⁵ See, for example, the discussion of FHA and VA housing programs ch. 3, supra.

ance and guaranty involve intermediaries between the Federal Government and those intended to be beneficiaries under the programs. Also like Title VI programs, key decisions on who may participate and the conditions under which they may participate frequently are made by these intermediaries, as well as by the Federal Government.⁴⁸⁶ To the extent these programs involve assistance solely in the form of contracts of insurance or guaranty, however, they are expressly exempt from the effectuating provisions of Title VI.⁴⁸⁷

B. The Programs

Federal programs of insurance and guaranty are administered by five departments⁴⁸⁸ and three independent agencies.⁴⁸⁹ The value of all loans insured or guaranteed under these programs will amount to approximately \$40 billion in 1971.⁴⁹⁰ Some of the programs are

⁴⁸⁶ A lending institution always represents one of the intermediaries between the Federal Government and the ultimate beneficiary. In some cases, however, such as FHA-assisted housing programs, builders, developers, and apartment house owners also are intermediaries and ultimate beneficiaries. Homeseekers must gain approval of both sets of intermediaries before obtaining the benefit of FHA mortgage insurance.

⁴⁸⁷ Sec. 602 of Title VI directs Federal departments and agencies to "effectuate the provisions of Sec. 601" with respect to programs or activities extending Federal financial assistance "by way of grant, loan, or contract other than a contract of insurance or guaranty." Sec. 605, however, provides: "Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty." Thus it is made clear that Title VI does not curtail existing authority to assure nondiscrimination in programs of insurance and guaranty.

⁴⁸⁸ Department of Agriculture (FMHA); Department of Commerce (Economic Development Administration and Federal Maritime Administration); Department of Health, Education, and Welfare; Department of Housing and Urban Development (Federal Housing Administration, and Metropolitan Development); and Department of Interior.

⁴⁸⁹ Veterans Administration, Small Business Administration, and Export-Import Bank.

⁴⁹⁰ *The Budget of the United States Government, 1971. Special Analyses* (1970), at 69. [Hereinafter cited as *Special Analyses*]. The total value of all Government-insured and guaranteed loans outstanding is approximately \$145 billion. *Id.*, at 78. In addition, there are six major Government-sponsored, privately owned institutions which administer credit programs. These are:

unrelated to issues of civil rights or social and economic injustice.⁴⁹¹ Others, however, deal with important social welfare concerns, such as housing,⁴⁹² business entrepreneurship, education, and farm assistance. It is these programs which this section of the report will consider.

1. HOUSING

The Federal Housing Administration, a component of the Department of Housing and Urban Development, insures housing loans made by private lending institutions to assist individuals in purchasing or renting housing or in repairing their present dwelling. FHA estimates that the value of its insured loans in Fiscal Year 1971 will be in excess of \$21 billion.⁴⁹³ It is anticipated that more than 1.2 million housing units will be affected by these FHA programs in Fiscal Year 1971.⁴⁹⁴

The Loan Guaranty Service of the Veterans Administration guarantees loans by private lending institutions to veterans for the purchase of houses. Approximately 220,000 such loans, valued at more than \$4 billion, were made in 1969.⁴⁹⁵ It is estimated that such loans

The Federal National Mortgage Association; the Banks for Cooperatives, Federal Intermediate Credit Banks and Federal Home Loan Bank Board; and the Federal Reserve. The total value of loans made by these institutions which are outstanding constitute an additional total of more than \$46 billion. *Id.*, at 77. See discussions in ch. 3, *supra* and sec. IV of this chapter on direct assistance, *infra*.

⁴⁹¹ For example, the Federal Maritime Administration's Federal Ship Mortgage program involves insurance of commercial loans to finance the construction and reconditioning of maritime vessels. The Export-Import Bank's Export Credit Insurance and Commercial Bank Guaranty program protects American exporters against loss of export sales and credit transactions caused by political events or business factors.

⁴⁹² Approximately 85 percent of all of the value of loans insured or guaranteed by the Federal Government relate to housing. They include programs of the Federal Housing Administration, the Veterans Administration, and the Farmers' Home Administration.

⁴⁹³ *Special Analyses*, *supra* note 490, at 69.

⁴⁹⁴ *The Budget of the U.S. Government, 1971, Appendix* (1970) at 507. [Hereinafter cited as *Budget Appendix*].

⁴⁹⁵ Figures supplied by the Veterans Administration in response to a questionnaire sent by the U.S. Commission on Civil Rights, Nov. 2, 1969. Data or information obtained from such sources will hereinafter be cited as *Questionnaire Response of (name of agency)*. *Special Analyses*, *supra* note 490, at 69.

will total \$5.3 billion in Fiscal Year 1971.⁴⁹⁶

2. BUSINESS ENTREPRENEURSHIP

The Small Business Administration guarantees loans by private lending institutions for the establishment and operation of small business companies. In 1969, more than 6,600 guaranteed loans, valued at more than \$402 million, were approved by SBA.⁴⁹⁷ In Fiscal Year 1971, it is estimated that such loans will total \$825 million.⁴⁹⁸

3. EDUCATION

The Department of Health, Education, and Welfare guarantees loans by private lending institutions to students to help them obtain a higher education. In 1969, more than 787,000 such loans, valued at approximately \$64 million, were made.⁴⁹⁹ It is estimated that more than 1 million student loans, valued at approximately \$150 million, will be made in Fiscal year 1971.⁵⁰⁰

4. FARM ASSISTANCE

The Farmers Home Administration, an agency of the Department of Agriculture, insures loans for a variety of purposes, such as farm and home ownership and improvement, in rural areas. In 1969, nearly 73,000 loans, valued at \$990 million, were insured by FMHA.⁵⁰¹ It is estimated that more than 165,000 insured loans, valued at approximately \$1.8 billion, will be made in Fiscal Year 1970.⁵⁰²

C. Areas of Possible Discrimination

As noted earlier, insurance and guaranty programs, like Title VI programs, involve parties other than the Federal Government in the key decisionmaking process that determines who will benefit in the programs and under what terms and conditions they will benefit. In insurance and guaranty programs,

⁴⁹⁶ *Special Analyses*, *supra* note 490, at 69.

⁴⁹⁷ *Questionnaire Response of Small Business Administration*.

⁴⁹⁸ *Special Analyses*, *supra* note 490, at 69.

⁴⁹⁹ *Questionnaire Response of Department of Health, Education, and Welfare*.

⁵⁰⁰ *Budget Appendix*, *supra* note 494, at 426-7.

⁵⁰¹ *Hearings on Department of Agriculture Appropriations for 1970 Before the Subcommittee on Agricultural Appropriations, Committee on Appropriations, 91st Cong., 1st sess., pt. 3, 288, 291 (1969)*.

⁵⁰² *Id.*

the sole intermediary may be a lending institution, as in the case of SBA-guaranteed small business loans or HEW-insured student loans. They also may involve additional intermediaries, such as builders and developers, as in the case of FHA and VA housing programs. As in Title VI programs, these decisions may be made in a discriminatory manner so as to deny minority group members program benefits or make them available under less desirable terms or conditions.⁵⁰³

Such discrimination may take an overt and obvious form. For example, lending institutions may deny SBA-guaranteed business loans to minority group applicants while approving similar loans for applicants of the majority group having the same credit standing. They also may require more onerous credit terms for minority group applicants than for majority group applicants, such as higher downpayments and shorter loan terms. In federally insured housing programs, which represent the great bulk of Federal insurance and guaranty program activities, builders and developers may refuse to sell the housing to minority group families or sell at a higher price than offered to majority group home-seekers.

Discrimination also may take a more subtle form. For example, business or farm loans insured by the Farmers Home Administration, when made to members of the majority group, may be of an amount and kind sufficient to enable them to improve their housing or their financial position, while those made to similarly situated minority group applicants may enable them only to meet emergencies or existing credit expenses. By the same token, FHA- or VA-assisted builders may sell houses to minority group members, but only in designated parts of their subdivisions. Even in the absence of current discriminatory practices, the memory of past discrimination against them and apprehension over possible rejection or humiliation may make minority group members reluctant to assert rights that are secured in legal theory, and represents an equally

⁵⁰³ Even in programs which involve a direct relationship between the Federal Government and ultimate beneficiaries, opportunities for discrimination exist. See sec. IV of this chapter, *infra*.

formidable factor in denying them full access to the benefits of these programs.

Existing racial and ethnic data on participation in programs of insurance and guaranty suggest that, in fact, minority group members are not sharing equitably in program benefits. They also suggest that the departments and agencies which administer these programs have been failing to take the steps necessary to assure full minority group participation. For example, as pointed out earlier,⁵⁰⁴ this Commission, in its recent hearings in St. Louis, found that less than 1 percent of FHA-insured subdivision houses in the metropolitan area were occupied by Negroes. Analysis of business loans guaranteed by SBA in 1969 showed that only 2.1 percent of such loans were made to Mexican American borrowers and the average amount of the loans made to them was less than \$27,200 as compared to an overall average amount of \$50,500 received by all borrowers.⁵⁰⁵ Similarly, analysis of farm ownership loans insured by the Farmers Home Administration in 1969 showed that only 4.5 percent of such loans were made to Negro borrowers and the average amount of the loans made to Negroes was only \$11,050, as compared to an overall average amount of \$20,400 received by all borrowers.⁵⁰⁶

D. Nondiscrimination Requirements

As noted earlier, to the extent these programs involve assistance solely in the form of contracts of insurance or guaranty, they are expressly exempt from the effectuating provisions of Title VI.⁵⁰⁷ This, however, does not mean that these programs may not be operated in a discriminatory manner or that the Federal agencies which administer them do not have a legal obligation to assure against such discrimination.

Some of these programs involve assistance not only in the form of insurance and guaranty, but also in the form of cash payments or other financial subsidies.⁵⁰⁸ These pro-

⁵⁰⁴ See ch. 1.

⁵⁰⁵ Calculations from data supplied in *Questionnaire Response of Small Business Administration*.

⁵⁰⁶ Calculations from data supplied in *Questionnaire Response of Farmers Home Administration*.

⁵⁰⁷ See note 487, *supra*.

⁵⁰⁸ For example, lower income housing programs administered by the FHA, such as rent supplements, sec.

grams, by virtue of the payments or subsidies, are subject to the requirements of Title VI and the regulations thereunder.

Further, in programs involving housing, which represent, in dollar amount, the great bulk of Federal insurance and guaranty program activities, most of the housing is subject to the nondiscrimination requirements of Title VIII of the Civil Rights Act of 1968. In addition, Executive Order 11063 directs the FHA, VA, and Farmers Home Administration "to take all action necessary and appropriate to prevent discrimination" in housing provided by loans insured or guaranteed under their programs.⁵⁰⁹

The basic prohibition against discrimination in these programs and the basic legal obligation to assure against it, imposed upon Federal agencies that administer them, is a constitutional one. Although the discrimination may be practiced by private parties, such as lending institutions and builders, the Federal involvement and the extent of Federal control over the way in which these programs operate is so great as to place the Federal Government in the position of violating the prohibition against discrimination contained in the fifth amendment to the Constitution. Federal agencies cannot justify the persistence of discriminatory practices in programs of insurance and guaranty by claiming that private parties, not themselves, are practicing the discrimination. Their failure to prevent it through the exercise of control available to them renders them constitutionally culpable. As the U.S. Supreme Court has stated: "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them. . . ." ⁵¹⁰

In fact, of the five agencies whose insurance and guaranty programs are considered in this section, four already have adopted require-

235, and sec. 236, involve assistance payments to lower income housing sponsors and homeowners, as well as mortgage insurance. See ch. 3 supra. Similarly, under HEW's program of guaranteed loans to students seeking higher education, HEW pays part or all of the interest on the loans.

⁵⁰⁹ Executive Order 11063 (1962).

⁵¹⁰ *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). For a full discussion of the constitutional prohibition against discrimination in programs of insurance or guaranty, see Legal Appendix.

ments against discrimination and the fifth is about to do so.⁵¹¹ The manner in which these agencies enforce these requirements, however, differs widely. None has developed the mechanisms necessary to enforce them with maximum effectiveness.

E. Mechanisms for Nondiscrimination Requirements

The existence of a nondiscrimination requirement is of limited value unless the agencies responsible for administering the insurance and guaranty programs institute the mechanisms and procedures necessary to secure it in fact. They must assign sufficient staff to carry out this responsibility; they must develop procedures by which complaints of discrimination can be processed expeditiously and fairly; they must institute review techniques to assure that nondiscrimination requirements are being complied with; and they must develop data collection systems to determine whether their programs are reaching intended beneficiaries on an equitable basis.

1. STAFFING

Of the five agencies under consideration, only the Veterans Administration maintains civil rights staff with specific responsibility for programs of insurance and guaranty. The VA maintains a staff of two in its central office who devote full time to the civil rights aspects of the loan guaranty program.⁵¹² Of the other agencies, personnel who handle other civil rights aspects of programs also handle

⁵¹¹ At the time of Commission interviews, the Small Business Administration indicated its intent to prohibit discrimination in its guaranteed loan programs. Interview with Arnold Feldman, Assistant Director, Office of Equal Opportunity, SBA, May 28, 1970. Regulations to this effect were subsequently published and became effective Aug. 1, 1970. 35 Fed. Reg. 9920 (1970). In two cases, FMHA and HEW's student loan program, insured loans are considered subject to Title VI. In the FMHA, the bulk of insured loans is actually made directly out of the Agricultural Credit Insurance Fund and then the notes are sold to private lenders. Therefore, the Department of Agriculture considers them subject to Title VI. 7 C.F.R. 15, Subtitle A, appendix Supp. No. 3, at 162 and Supp. No. 4, at 163. The civil rights obligations of FHA are embodied in Executive Order 11063 and have been incorporated into program manuals. For additional information see ch. 3.

⁵¹² Interview with Aaron Englisher, Staff Assistant to Director, Loan Guaranty Service, VA, Nov. 14, 1969.

programs of insurance and guaranty. Thus, at HEW the Office for Civil Rights carries out this responsibility.⁵¹³ At the Farmers Home Administration, a staff of two is maintained in the central office to monitor all civil rights aspects of that agency's programs.⁵¹⁴ And at the Department of Housing and Urban Development, the departmental Office of Equal Opportunity carries the responsibility for assuring nondiscrimination in FHA mortgage insurance programs.⁵¹⁵

Thus, in most agencies, those concerned with administering the insurance and guaranty programs are divorced from civil rights responsibility. Further, with the exception of the Department of Agriculture, which in 1969 instituted a comprehensive training program for program personnel, including those of the Farmers Home Administration, the agencies do not provide civil rights training for officials who administer their programs of insurance and guaranty.⁵¹⁶

2. INFORMATIONAL CHANNELS

The requirements for nondiscrimination in programs of insurance and guaranty must be made known at three levels: Federal field offices, intermediaries (e.g., financial institutions), and prospective beneficiaries (borrowers).

a. Federal Field Offices

Information concerning nondiscrimination requirements is transmitted to Federal field offices through such devices as notices, manuals, regulations, and instructions. Although all agencies transmit this information general-

⁵¹³ Interview with Jerald W. Donaway, Chief, Federal Insured Loans Section, Office of Education, HEW, May 28, 1970.

⁵¹⁴ Interview with William Tippins, Civil Rights Coordinator, FMHA, Apr. 6, 1970.

⁵¹⁵ As noted earlier, there currently is confusion at HUD as to who actually has this responsibility. See ch. 3, *supra*.

Once SBA's mechanisms concerning nondiscrimination in its guaranteed loan program are in effect, SBA staff having overall civil rights responsibility undoubtedly will handle civil rights for the guaranteed loan program. See note 511, *supra*.

⁵¹⁶ SBA indicated that it is planning to provide training for its staff in the near future. *Questionnaire Response of Small Business Administration*. HEW, in 1966 and 1967, carried on extensive training for its civil rights staff. See U.S. Commission on Civil Rights, *HEW and Title VI* 15, 16 (1970).

ly to their field offices, not all provide such information specifically on programs of insurance and guaranty. For example, HEW provides no information to its field offices concerning nondiscrimination in its student loan program.⁵¹⁷ The Farmers Home Administration also provides no information on nondiscrimination requirements that singles out its farm and home loan insurance programs.⁵¹⁸ The FHA, while it does provide specific information concerning nondiscrimination requirements on most of its mortgage insurance programs, does not do so with respect to its property improvement program.⁵¹⁹ The VA does provide information to the field specifically addressed to nondiscrimination requirements in its loan guaranty program.⁵²⁰

b. Intermediaries

Nondiscrimination requirements typically are transmitted to intermediaries involved in federally insured or guaranteed loan programs through notices and through appropriate language incorporated in application documents used by intermediaries. For example, under the HEW student loan program, the lender's contract of Federal loan insurance carries a provision for nondiscrimination certification.⁵²¹ FHA and VA commitment forms submitted by builders and lenders include a general notice that nondiscrimination is required.⁵²² FHA forms, however, still make no reference to the fact that the Federal fair housing law

⁵¹⁷ Donaway interview, *supra* note 513.

⁵¹⁸ FMHA officials pointed out to Commission staff that a letter from the Administrator, FMHA, to all State directors, May 28, 1965, does point to the requirement on nondiscrimination in all FMHA loan programs. This letter is currently being revised. Interview with Sylvester Pranger, Assistant Administrator, FMHA and other FMHA officials, Oct. 27, 1969.

⁵¹⁹ An FHA official involved in this program conceded that no instructions or policy statements regarding nondiscrimination in the property improvement program had been transmitted. Interview with William B. Stansbery, Deputy Assistant Commissioner for Property Improvement, FHA, Jan. 30, 1970.

⁵²⁰ See e.g., VA Manual 26-5, change 10, sec. 1.10, 1.11, 5.04.1 5.04.2 and 5.13, Oct. 30, 1969.

⁵²¹ Donaway interview, *supra* note 513.

⁵²² See e.g., FHA Form 2433. In the Farmers Home Administration loan insurance programs, it is the Federal agency that actually makes the loan; therefore, information is not transmitted to lending institutions, whose role is to hold the loan.

prohibits discrimination in housing provided under its programs.⁵²³

c. Beneficiaries

Nondiscrimination requirements are transmitted to beneficiaries by way of program brochures which contain general statements that nondiscrimination is required,⁵²⁴ or by posters in local Federal offices which contain similar general statements.⁵²⁵ In some cases, however, such statements do not provide guidance to persons, who believe they may have suffered discrimination, on how they may seek redress.⁵²⁶ In the case of some agencies, program brochures contain no reference to nondiscrimination requirements.⁵²⁷

3. COMPLAINT PROCEDURES

In contrast to programs covered by Title VI, where complaint procedures typically are spelled out in detail, programs of insurance or guaranty seldom provide specific procedures for processing, investigating, or resolving complaints. The VA is the only one of the five agencies that provides a specific procedure for the processing of complaints.⁵²⁸ The lack of specific complaint procedures in federally insured or guaranteed programs represents a

⁵²³ New FHA forms will be required in the future containing notification that violations of Title VIII of the Civil Rights Act of 1968 could result in withdrawal of FHA support. The new forms, however, will not be issued until a substantial supply of older forms, lacking such notification, are exhausted. As of June 1970, no interim notification of this requirement had been transmitted to intermediaries or to local FHA offices pending printing of the new forms. Interview with George O. Hipps, Deputy Assistant Commissioner for Home Mortgages, FHA, Jan. 30, 1970. Thus, more than 2 years after Title VIII was enacted into law, no notification of its requirements had appeared on FHA forms.

⁵²⁴ See e.g., HUD brochure, "Fixing Up Your Home"; VA pamphlet, "To the Home-Buying Veteran."

⁵²⁵ See e.g., HUD poster, "Equal Opportunity".

⁵²⁶ The HUD brochure indicates that persons aggrieved may file suit or complain to HUD but gives no details on the procedure to be followed. See note 524, supra. On the other hand, the VA provides specific information on how complaints are to be filed. See note 524, supra and note 528, infra.

⁵²⁷ None of the FMHA brochures or HEW brochures regarding insured loans contains any mention of nondiscrimination requirements. See e.g., FMHA brochure "Rural Housing Loans". SBA reported that no announcement or poster publicizes nondiscrimination requirements. *Questionnaire Response of Small Business Administration*.

⁵²⁸ VA Manual 26-1, change 26, Nov. 19, 1965.

serious deficiency. Specific complaint procedures that are well publicized would have several salutary effects. They would inform beneficiaries of their right to complain and how to go about having their complaint heard. They also would provide specific guidance to program officials on the proper and expeditious processing of such complaints. Currently, complaints in most of the agencies are handled on an ad hoc basis. The lack of specific complaint procedures is particularly unfortunate in light of the often-relied-upon argument of Federal officials, including those that administer insurance and guaranty programs, that the lack of complaints means that there is no discrimination in their programs.⁵²⁹

4. COMPLIANCE REVIEWS

If systematic compliance reviews are a necessary ingredient to an effective enforcement program under Title VI, they are equally necessary to enforce nondiscrimination requirements in insurance and guaranty programs, which also operate through intermediaries. In only one instance, of those agencies considered, are compliance reviews carried out by Federal agencies that operate these programs.⁵³⁰ Thus, enforcement of nondiscrimination requirements is limited largely to reliance on the good faith of intermediaries, who execute certifications of nondiscrimination, and the processing of complaints.

5. COMPLIANCE REPORTS AND RACIAL AND ETHNIC DATA COLLECTION

As in the case of Title VI, a well-developed

⁵²⁹ E.g., one FHA official stated that he doubted the existence of discrimination in his program and indicated that he could remember only one complaint alleging discrimination in 22 years. Stansberry interview, supra note 519. See generally, ch. 3, supra.

⁵³⁰ The Farmers Home Administration recently introduced a revised compliance review form which is accomplished on an annual basis by district and State FMHA supervisors. Interview with William Tippins, FMHA Civil Rights Coordinator, Aug. 24, 1970. In some cases, compliance reviews are not conducted because, although the agency may recognize the desirability of such reviews, it simply has not established procedures which call for them. Interview with Samuel J. Simmons, Assistant Secretary for Equal Opportunity, HUD, Mar. 5, 1970. Also *Questionnaire Response of the Department of Housing and Urban Development*. In other agencies, the value or necessity of such reviews is not recognized. Stansberry interview, supra note 519.

system of compliance reports, utilizing data collection and analysis, can provide a substantial basis for identifying actual or possible discrimination in programs of insurance and guaranty. Further, through the collection of data on racial and ethnic participation in these programs it is possible to determine whether program benefits are reaching intended beneficiaries on an equitable basis and whether the programs are achieving their goals.

Although most intermediaries involved in programs of insurance and guaranty are informed of nondiscrimination requirements through notifications and certifications associated with application documents, none is required to submit reports concerning their compliance with these requirements to Federal agencies administering such programs. The absence of a requirement for compliance reporting from intermediaries means that the Federal Government is denied one important mechanism for informing itself as to whether or not discrimination, in fact, exists. For example, Federal agencies do not know on a systematic basis whether minority group applications for loans by lending institutions are disapproved at a differential rate from those of other applicants. The availability of such information would constitute a significant means for implementing equal opportunity in federally insured and guaranteed loan programs.

Four of the five agencies—SBA, HEW, FMHA and VA—collect some racial and ethnic data concerning their insurance or guaranty programs.⁵³¹ The quality and usefulness of these data vary.

For example, SBA collects monthly data from all of its offices on the number of applications, withdrawals, and approvals in its insured business loan programs, by race and ethnic background of the applicant.⁵³² This information is fed into a computer and evaluated by both the civil rights enforcement staff and officials concerned with the minority entrepreneurship program. FMHA also maintains de-

tailed information on loan applications processed by its offices.⁵³³ The agency did not begin to collect data on minority group members, other than Negroes, however, until this year. The VA gathers information concerning the race or ethnicity of persons involved in the showing or sale of VA-owned properties.⁵³⁴ VA-owned properties, however, constitute a small percentage of houses for which VA assistance is provided. HEW only collects data on the number of insured student loans by race or ethnicity.⁵³⁵ No data are available on the amounts loaned by race or ethnicity.⁵³⁶

The example of one agency, the Farmers Home Administration, illustrates the value of racial data collection as a means both of determining civil rights compliance and evaluating programs to insure that program goals are being met. In 1965, the U.S. Commission on Civil Rights, in its report on *Equal Opportunity in Farm Programs*, examined selected loan programs administered by the FMHA and found evidence of racial disparities in the type, amount, purpose, and supervision of loans made to white and Negro borrowers in the South.⁵³⁷ Shortly thereafter, the FMHA upgraded its racial data collection capacity by centralizing the collection process and utilizing computers in the analysis of the data. As a result of these improvements, the FMHA now has available extensive data depicting the impact of its loan programs on minority group borrowers. Armed with facts and figures establishing that Negroes were not sharing equitably in the benefits of their programs, FMHA officials were able to refocus their efforts and by 1969 the number of loans to Negroes in the South represented an almost 100-percent increase over the number of loans in 1964, from 11,000 to 21,000, and the total dollar value of such loans increased by more than 300 percent, from \$21.7 million to \$95.2 million.⁵³⁸

⁵³¹ Pranger interview, supra note 518.

⁵³² Englisher interview, supra note 512.

⁵³³ *Questionnaire Response of the Department of Health, Education, and Welfare.*

⁵³⁴ Donaway interview, supra note 513.

⁵³⁵ U.S. Commission on Civil Rights, *Equal Opportunity in Farm Programs* (1965).

⁵³⁶ Calculations from data supplied in *Questionnaire Response of Farmers Home Administration*. There is some reason to believe that the progress made by

⁵³¹ FHA does not yet collect any racial or ethnic data at all. HUD Secretary Romney decided in April 1970 to collect such data on all HUD programs. Problems of implementation are currently being worked out.

⁵³² *Questionnaire Response of Small Business Administration.*

IV. DIRECT ASSISTANCE PROGRAMS

A. Introduction

Title VI programs and programs of insurance and guaranty both involve intermediaries intervening between the Federal Government and the ultimate beneficiaries of the program. The Federal Government also administers programs which involve a direct relationship between Government and the beneficiaries. These direct assistance programs typically take the form of cash benefits, such as income security payments, direct loans, and cash subsidies.⁵³⁹

By far the largest category of direct assistance programs is that of income security benefits and payments. For example, the Social Security Administration (SSA) administers the old age and survivors insurance program which will pay approximately \$29.7 billion in retirement and survivor benefits to approximately 23.5 million retirees and their dependents in 1971.⁵⁴⁰ SSA also administers the disability insurance program which will pay approximately \$3.2 billion to more than 2.5 million beneficiaries in 1971.⁵⁴¹ The Railroad Retirement Board administers similar programs and will pay in 1971 \$1.7 billion in benefits to approximately one million beneficiaries.⁵⁴² The Veterans Administration also administers a wide range of direct benefit and service programs for more than 5 million veterans and their dependents (as of June 1969) which will amount to approximately \$10 billion in 1971.⁵⁴³

Direct loans by the Federal Government will amount to approximately \$12.4 billion in

FMHA is not consistent throughout the Nation and that, although some FMHA offices have changed policies, others have not. See Washington Research Project, "Farmers Home Administration Services to Negroes" (1970).

⁵³⁹ They also may take the form of technical assistance, such as that provided to farmers by the Soil Conservation Service.

⁵⁴⁰ *The Budget of the U.S. Government, 1971. Special Analyses* (1970), at 179. (Hereinafter cited as *Special Analyses*.)

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ *Id.*, at 27 and *The Budget of the U.S. Government, 1971. Appendix* (1970), at 833. (The latter is hereinafter cited as *Budget Appendix*).

1971.⁵⁴⁴ For example, the Small Business Administration, in addition to its guaranteed business loan program, also makes direct loans for the establishment of small businesses. It is estimated that loans under this program will amount to more than \$350 million in 1971.⁵⁴⁵ The Farmers Home Administration, in addition to its insured loans programs, makes direct loans to farmers for operating and emergency expenses. It is estimated that such loans will amount to more than \$400 million in 1971.⁵⁴⁶

The Federal Government also provides direct subsidies to individuals. The primary example in this category are payments for the support of farm income. Payments in this category, the bulk of which are administered by the Agricultural Stabilization and Conservation Service (ASCS), will amount to approximately \$4.2 billion in 1971.⁵⁴⁷

In 1971, total Federal expenditures for direct assistance programs will amount to approximately \$75 billion, nearly three times the amount in grant-in-aid programs which are subject to Title VI.⁵⁴⁸

B. Possibilities for Discrimination

It might be expected that possibilities for discrimination in direct assistance programs are more remote than in grant-in-aid programs or programs of insurance or guaranty because the relationship between the Federal Government and the ultimate beneficiaries is a direct

⁵⁴⁴ Direct loans involve an expenditure of Federal funds whereas guaranteed or insured loans involve only the guaranty or insurance of private investment against loss. See sec. III, *supra*. In general, the trend of federally assisted credit programs has been away from direct loans in favor of guaranteed and insured loans. For example, direct loans in fiscal year 1969 amounted to \$15.9 billion and guaranteed and insured loans amounted to \$25.3 billion. In fiscal year 1971 direct loans will amount to only \$12.4 billion while guaranteed and insured loans will amount to \$39.1 billion. *Special Analyses*, *supra*, note 540 at 69. Eligibility criteria are generally the same for both direct and guaranteed or insured loans. Repayment time for guaranteed and insured loans is generally longer.

⁵⁴⁵ *Special Analyses*, *supra* note 540, at 69.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*, at 270. Other examples of Government subsidies include payments by the Civil Aeronautics Board to air carriers and the operating differential subsidy of the Maritime Administration.

⁵⁴⁸ *Id.*, at 8, 69.

one and because many programs determine the rights of beneficiaries according to strict and impartial criteria. Indeed, this view is held by some Federal agencies that administer direct assistance programs and has been offered as justification for the failure to take specific steps to assure against discrimination. For example, the Railroad Retirement Board, in response to a Commission questionnaire concerning nondiscrimination regulations governing the operation of its programs, said:

... we have published no regulation prescribing a nondiscrimination requirement; entitlement to the benefits provided by the Railroad Retirement and Railroad Unemployment Insurance Acts is a matter of statutory right, with any denial subject to judicial review in the U.S. Courts of Appeals, and there is thus no possibility of discrimination in the adjudication of benefit claims under these acts.⁵⁴⁹

Similarly, the Veterans Administration said on this point:

Nondiscrimination is not applicable in this program (compensation for service connected disability as well as for nonservice-connected disability) because of the nature of the benefit.⁵⁵⁰

There is some question, however, whether this confidence that direct assistance programs necessarily operate in a nondiscriminatory manner is warranted. Even though these programs involve direct relationships between Federal officials and beneficiaries they frequently permit a degree of discretion and judgment on the part of Federal officials that lends itself to acts of discrimination against minority group beneficiaries. Even in programs which limit the discretion of Federal officials and grant benefits as a matter of statutory right, this right nonetheless may be undermined.

For example, disability benefits to veterans depend on the degree of disability found by Federal officials. These officials, by finding a lower degree of disability for minority group veterans than for majority group veterans similarly disabled, can reduce the amount of benefits awarded to minority group veterans.

⁵⁴⁹ Information provided by the Railroad Retirement Board in response to a questionnaire sent by the U.S. Commission on Civil Rights, Nov. 2, 1969. (Data or information obtained from such sources will hereinafter be cited as *Questionnaire Response of (name of agency)*.)

⁵⁵⁰ *Questionnaire Response of Veterans Administration*.

By the same token, Social Security Administration officials or VA officials may systematically fail to advise minority group members of their rights under Social Security or VA benefit programs, thereby preventing them from enjoying the full benefits to which they are entitled. Again, Soil Conservation Service officials may offer minority group farm operators technical assistance of a lesser amount or quality than offered to majority group farmers, leading to lower productivity of their land. Further, in face-to-face dealings with minority applicants, Federal officials may be deliberately rude or may otherwise treat them in an insulting or degrading manner.

These examples are not entirely hypothetical. There is evidence to suggest that minority group beneficiaries are not participating in some direct assistance programs on an equitable basis. For example, the Soil Conservation Service, which provides technical assistance but no financial assistance to land owners and farm operators, provided one quarter more services on a per capita basis to whites than to Negroes in 1969.⁵⁵¹ Of direct business loans made by SBA in 1969, 22.1 percent were made to minority borrowers; however, the composition of economic opportunity direct loans—considerably smaller in size of average loan—was 69.9 percent minority.⁵⁵² Of direct loans for operating and emergency expenses made by FMHA in 1969, Negroes received 11.2 percent of the operating loans and 21.1 percent of the emergency loans; however, the composition of economic opportunity loans—again, of smaller average size—was 34.2 percent Negro.⁵⁵³ The ASCS agricultural conservation

⁵⁵¹ Calculations from data supplied in *Questionnaire Response of Soil Conservation Service*. Furthermore, calculations from the same source revealed that only 30.7 percent of the potential number of nonwhite farmers were cooperating in the soil conservation program compared to 52.2 percent of the white potential.

⁵⁵² Calculations from data supplied in *Questionnaire Response of Small Business Administration*. Direct business loans average \$22,600 but direct economic opportunity loans averaged only \$10,830.

⁵⁵³ Calculation from data supplied in *Questionnaire Response of Farmers Home Administration*. The average size of operating loans received by Negroes was \$2,226 but was \$5,928 for loans received by whites. Such large discrepancies are caused in part by the fact that the size of operations is much larger for whites. It must also be remembered, however, that FMHA

program encourages farmers to install approved conservation practices by sharing the costs with the farmers. A 1968 survey of selected counties showed that 34 percent of the eligible white operators but only 18 percent of the eligible black operators were participating in the program.⁵⁵⁴

In the largest categories of direct assistance programs, those dealing with income security, the lack of racial and ethnic data makes it impossible to determine whether minority group members are participating on an equitable basis. The Commission has received complaints, however, alleging discriminatory treatment in the operation of these programs.⁵⁵⁵

The examples cited above, both hypothetical and actual, suggest that discrimination in pro-

lends only to persons who cannot receive credit elsewhere. Thus, the extent of the differential in size of loans by the race of the borrowers raises the question as to whether or not such differentials can be explained away in nonracial terms. In addition, there are also racial discrepancies in the size of economic opportunity loans. The average size of such loans to whites was \$2,281 but only \$1,319 for Negroes. Size of farm operations bears little relation to differentials in this category of loans.

⁵⁵⁴ Agricultural Stabilization and Conservation Service, "Report on Minority Group Participation in ASCS Programs, Committee Elections, County Office Employment, and Public Meetings in 1968" (1969). The major decisionmaking power in ASCS is a system of indirectly elected three-member county committees. Although such committees have been in existence since the mid-1930's, it was not until 1968 that the first Negro was elected to such a committee in the South. Another Negro was elected in 1969 making a total of two Negroes out of a total 4,150 county committeemen in the South. Nationwide, out of a total of approximately 9,200 county committeemen, only 97 are held by minority group members, with three Negroes, 20 Mexican Americans, 10 American Indians, and 12 Oriental Americans having been elected in 1969. The remaining 52 minority group members were elected in previous years. *Questionnaire Response of Agricultural Stabilization and Conservation Service*.

⁵⁵⁵ For example, the Commission recently received complaints concerning the administration of the Social Security program in one southern city. The principal complaint concerned discourteous treatment by SSA office staff, such as referring to Negro applicants as "niggers." Other complaints allege that benefits were terminated without reasonable explanation and that SSA officials were not providing assistance to Negro applicants.

grams of direct Federal assistance may be more of a problem than some Federal officials believe it is and that there is a need to institute mechanisms and procedures to assure against it.

C. Nondiscrimination Requirements

There is no question that discrimination in direct assistance programs is in violation of the fifth amendment to the U.S. Constitution.⁵⁵⁶ Nonetheless, although Federal agencies have established regulations prohibiting discrimination in programs involving other governmental bodies and private citizens as well, such as in programs regarding education, welfare, contract compliance, and federally assisted housing, they have generally failed to do so with respect to direct assistance programs in which the Federal Government itself is most closely involved and in which the constitutional mandate is clearest.⁵⁵⁷ This general failure to establish regulations to implement the constitutional obligation of nondiscrimination in direct assistance programs places the Federal Government in the untenable position of imposing stricter nondiscrimination requirements upon recipients of indirect assistance programs than it is willing to impose upon itself.

⁵⁵⁶ See letter from the Deputy Attorney General to the Chairman of the House Judiciary Committee, Dec. 2, 1963. "A number of programs administered by Federal agencies involve direct payments to individuals. . . . [D]iscrimination in connection with them is precluded by the fifth amendment to the Constitution . . ." See also *Bolling v. Sharpe*, 347 U.S. 497 (1954), where the U.S. Supreme Court said that racial discrimination by the Federal Government is "unthinkable."

⁵⁵⁷ Only one agency, the Department of Agriculture, has spoken directly to the problem of prohibiting discrimination in direct assistance programs. Its regulation, which parallels its Title VI regulation, specifically prohibits discrimination in direct assistance programs or activities by Department agencies and employees and establishes a complaint procedure. 7 C.F.R. 15.50. In addition, VA has a general statement forbidding discriminatory conduct by VA employees but provides no procedure or mechanism for monitoring it. 38 C.F.R. 0.735-10(c). Some agencies, such as the Soil Conservation Service, Farmers Home Administration, Veterans Administration (educational assistance payments) and HEW (medicare payments) consider some direct assistance programs as subject to Title VI. See sec. II, of this chapter, *supra*.

D. Mechanisms for Nondiscrimination in Direct Assistance Programs

1. STAFFING

No agency maintains specific staff assigned to implement and enforce nondiscrimination in direct assistance programs and activities. Where responsibility for nondiscrimination in these programs is recognized, either explicitly or implicitly, it is often carried out by personnel identified as Title VI staff.⁵⁵⁸ Further, few agencies administering direct assistance programs have engaged in civil rights training specifically designed by the agencies to meet their needs.⁵⁵⁹ Even where civil rights training has been conducted, direct assistance has been incidental to other areas covered.

2. INFORMATIONAL CHANNELS

Agencies administering direct assistance programs, while frequently issuing general directives concerning the need for fairness and impartiality, have been almost uniformly silent on providing information concerning requirements of nondiscrimination. The program regulations of the VA are case in point. The VA rating schedule guidelines concerning the degree of compensation for disability have remained unchanged since 1945. They contain the following statement:

The rating official must not allow his personal feeling to intrude; (veterans attitudes) should not in any in-

⁵⁵⁸ See discussion of Title VI organization and staffing, sec. II of this chapter, *supra*. In agencies which do not operate Title VI programs, such as the Social Security Administration and the Railroad Retirement Board, or where the majority of programs are not subject to Title VI, such as the VA, there is no staff and there are no specific procedures for enforcing nondiscrimination in direct assistance programs. ASCS, where the majority of programs are direct assistance, is an exception. In ASCS, there is one full-time person assigned to both Title VI and non-Title VI matters.

⁵⁵⁹ Two exceptions are HEW and the Department of Agriculture. Both have provided civil rights training developed for their own needs. In 1966-67, HEW concentrated on compliance training for its civil rights staff. Agriculture, in 1969-70, undertook a program concentrating on sensitizing program officials to minority group concerns. USDA agencies have not generally included compliance training in their program, however. SBA has indicated that it has conducted training for its own civil rights staff and plans to provide training to program officials as soon as a training program can be developed. *Questionnaire Response of Small Business Administration*.

stance influence the officer in the handling of the case.⁵⁶⁰

The guidelines make no specific reference to racial attitudes or discrimination, nor do they even inform VA officials that racial discrimination is prohibited.⁵⁶¹ Similarly, information to beneficiaries of VA direct assistance programs does not include notification of nondiscrimination policies.⁵⁶² In contrast, ASCS, through pamphlets, posters in local offices, and handbooks of instruction to local office employees, has attempted to communicate some information on nondiscrimination requirements in its programs.⁵⁶³ Although no nondiscrimination requirement exists in programs administered by the Social Security Administration, that agency reported several steps it has taken to provide nondiscriminatory treatment in its programs.⁵⁶⁴

⁵⁶⁰ Letter from Rufus H. Wilson, Chief Benefits Director, VA, to Staff Director, U.S. Commission on Civil Rights, Jan. 8, 1970, at item 8.

⁵⁶¹ *Id.* Interview with Frank Williams, Deputy Director, Compensation, Pensions and Education Services, VA, Nov. 13, 1969.

⁵⁶² "Veterans (and other claimants) are routinely furnished with data on appellate rights from a decision on an issue of a basic benefit administered by the VA. The standard language does not include any reference to race, color, or national origin." *Questionnaire Response of Veterans Administration*.

⁵⁶³ An ASCS pamphlet, "Vote for Farmers of Your Choice," does not mention nondiscrimination or equal opportunity, but clearly communicates the idea of integrated committee meetings and services through pictures showing white and Negro farmers together. An ASCS poster, "Equal Opportunity," July 11, 1966, required to be posted in all local ASCS offices, specifically refers to equal opportunity program participation and employment as well as giving specific guidance on filing a complaint. The ASCS Handbook 5-CA "Basic County Administrative Management," contains sections establishing requirements that officials not participate in segregated meetings as well as nondiscrimination clauses in leasing of space and facilities. Other handbooks prescribe equal employment opportunity, civil rights reviews, and nondiscriminatory conduct of elections. See also ASCS Handbooks 6-CA and 7-CA.

⁵⁶⁴ The steps include: attempting to insure that all facilities used are equally available to all; conducting special programs to insure that all who may be entitled to benefits are aware of their rights; and opening offices in areas to insure easy access by minority group members. *Questionnaire Response of Social Security Administration*. No additional information as to how these steps were being carried out was provided.

3. COMPLAINT PROCEDURES

Although many Federal officials concede the weakness of agency positions with respect to the state of civil rights enforcement in direct assistance programs, they contend that discrimination is not a problem in such programs and point to the absence of specific complaints to support their contention.⁵⁶⁵ Given the inadequacies of present mechanisms for facilitating the filing and processing of discrimination complaints in direct assistance programs, this evidence appears extremely weak. In many cases, however, there have been substantial numbers of discrimination complaints.⁵⁶⁶

In addition, the way in which some agencies handle civil rights complaints leaves much room for improvement. For example, in the Veterans Administration, the Contact and Administration Service maintains written complaint procedures but they are not used as an instrument for enforcing nondiscrimination. The complaint procedure calls upon VA attorneys in local field offices to record the complaint and attempt to advise the veteran on all remedies available to him.⁵⁶⁷ VA officials told Commission staff that no complaints had been referred to Washington and that only six complaints had been made nationwide during the first 10 months of 1969.⁵⁶⁸ These officials had made no inquiry into the nature of the complaints, keeping a record only of the number that had been processed at the local offices.⁵⁶⁹

In many cases, agency procedures do not provide specific guidance as to how such complaints are to be investigated.⁵⁷⁰ The usual procedure is to refer the complaint to a field level program official with instructions to look into the matter and prepare a report.⁵⁷¹ Further, when program officials are used to conduct complaint investigations, they are seldom trained in complaint investigation techniques.⁵⁷² Rarely does an individual complaint trigger a program compliance review to determine if the complaint is unique or possibly part of a wider pattern.⁵⁷³

Officials of the Agricultural Stabilization and Conservation Service, for example—an agency of the Department of Agriculture which administers programs for the maintenance and stabilization of farm income which total more than \$4 billion or two-thirds of the net expenditures of the Department of Agriculture—conceded to Commission staff that a considerable number of “program irregularities,” dealing mainly with landlord-tenant relations, had been found in investigating civil rights complaints.⁵⁷⁴ They added, however, that no finding of discrimination had ever been made.⁵⁷⁵ They further stated that it was difficult to make a finding of discrimination unless a particular complaint was found to be part of a pattern. When asked if ASCS had attempted to determine if such patterns existed, the officials admitted that in only a limited number of instances had such an attempt been made.⁵⁷⁶

⁵⁶⁵ Interview with Rufus H. Wilson, Chief Benefits Director, Department of Veterans' Benefits, VA, Nov. 20, 1969; interview with William R. Van Dersel, Deputy Administrator for Management, SCS, Nov. 4, 1969.

⁵⁶⁶ The U.S. Commission on Civil Rights annually receives more than a thousand complaints alleging denial of equal protection of the laws. Many of these complaints regard Federal assistance programs and, of these, a substantial number regard direct assistance programs, such as veterans' benefits and services, farm payments, loans, and the like. It is likely that the complaints which come to the attention of the Commission represent only a small proportion of the complaints received by the Federal agencies themselves.

⁵⁶⁷ DVB Circular 20-68-13, app. D (revised Nov. 18, 1969).

⁵⁶⁸ Interview with John G. Miller, Director, Contact and Administration Services, VA, Nov. 14, 1969.

⁵⁶⁹ *Id.*

⁵⁷⁰ Williams interview, *supra* note 561. Interview with H. Eugene Harker, Director, Administration Division, Federal Crop Insurance Corporation, USDA, Oct. 28, 1969. Interview with Dr. H. C. Kretzschmar, Assistant Chief Medical Director, Department of Medicine and Surgery, VA, Nov. 24, 1969. Exceptions to this exist in SBA and the work of the Office of Inspector General in USDA. *Questionnaire Responses of Small Business Administration and Department of Agriculture.*

⁵⁷¹ Interview with Victor B. Phillips, Assistant to the Administrator, ASCS, Oct. 29, 1969. Miller interview, *supra* note 568.

⁵⁷² Interview with Marjorie Quandt, Director, Medical Administrative Services, Department of Medicine and Surgery, VA, Nov. 24, 1969.

⁵⁷³ Phillips interview, *supra* note 571. Interview with William B. Seabron, Assistant to the Secretary, USDA, Oct. 12, 1969.

⁵⁷⁴ Phillips interview, *supra* note 571.

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

4. COMPLIANCE REVIEWS

As in the case of programs of insurance and guaranty, compliance reviews generally are not conducted in direct assistance programs.⁵⁷⁷ Many Federal agencies administering direct assistance programs conduct administrative or financial reviews of their programs, but these do not include questions which would provide reviewers with information on the nondiscriminatory operation of the programs.⁵⁷⁸ The single exception to this is the auditing activity of the Office of Inspector General in the Department of Agriculture, which has incorporated civil rights compliance reviews into its regular program audits.⁵⁷⁹

5. RACIAL AND ETHNIC DATA COLLECTION

As noted earlier, the most effective and perhaps the only accurate way to measure the relative impact of direct assistance programs upon individual beneficiaries and to assure that equal opportunity policies are in fact working, is to collect and use racial and ethnic group data. Such information can help determine whether minority group recipients are being reached in proportion to their need and if program objectives are being achieved.

Racial and ethnic data collection among Federal agencies administering direct assistance varies widely. Some agencies collect such information and use it to measure the nondiscriminatory operation of their program.⁵⁸⁰ Others collect such information but do not

⁵⁷⁷ *Questionnaire Response of Railroad Retirement Board*. Williams interview, supra note 561; Miller interview, supra note 568; Phillips interview, supra note 571.

⁵⁷⁸ Kretschmar interview, supra note 570; interview with John McGovern, Chief, Manpower Utilization and Standards, Department of Medicine and Surgery, VA, Nov. 24, 1969.

⁵⁷⁹ The Office of Inspector General, USDA, conducts more than 5,000 audits annually. In 1968, it added a section regarding civil rights to its regular audit guides for major programs. USDA, Office of Inspector General, "Audit Guide for Civil Rights Activities" 7050.1, March 1968.

⁵⁸⁰ E.g., both SBA and FMHA collect racial and ethnic data regarding direct loans and use such information to evaluate whether minority groups are receiving an equitable share of such loans. FMHA also collects data on the socioeconomic characteristics of its borrowers and can measure the economic impact of its loans upon beneficiaries.

use it effectively.⁵⁸¹ Still others collect no racial data at all.⁵⁸²

Many agency officials interviewed expressed confidence in the nondiscriminatory operation of their direct assistance programs, despite the lack of adequate data to demonstrate it.⁵⁸³ They based their confidence either on their long experience with the programs which, in their view, enabled them to sense whether or not such problems existed;⁵⁸⁴ from the absence of complaints alleging discrimination;⁵⁸⁵ or on program quality control mechanisms which, though not directed toward the specific question of nondiscrimination, were thought to assure that all other program requirements were being satisfied.⁵⁸⁶ General program familiarity and lack of complaints, however, are unreliable indicators of the actual state of affairs with respect to the nondiscriminatory operation of programs. While familiarity with program operations undoubtedly provides an official with a certain intuitive feeling for overall operations, it cannot be depended upon as an accurate, much less specific, measure of the existence or absence of discrimination. Similarly, lack of complaints alleging discrimination is no assurance that discrimination is not present. It might equally reflect such factors as the unavailability of appropriate mechanisms for exposure of complaints or reluctance on the part of beneficiaries to com-

⁵⁸¹ E.g., SSA has the capacity for distinguishing the number of beneficiaries of its programs by race and ethnicity but apparently does not evaluate such information as a means of assessing the impact of income security programs upon minority group beneficiaries. Similarly, although ASCS collects racial and ethnic data on program participants, it did not begin to use such information for measuring nondiscrimination in its programs until quite recently.

⁵⁸² E.g., VA collects no racial data on beneficiaries of its direct assistance programs. Neither does the Railroad Retirement Board.

⁵⁸³ *Questionnaire Response of Social Security Administration*; Wilson interview, supra note 565; Interview with Dr. Joseph Samler, Chairman, Vocational Rehabilitation Board, VA, Nov. 14, 1969.

⁵⁸⁴ Interview with James W. Stancil, Chairman, Board of Appeals, VA, Nov. 19, 1969. Interview with Frank J. Frankina, Director, Legal and Legislative Staff, Department of Medicine and Surgery, VA, Nov. 24, 1969.

⁵⁸⁵ Williams interview, supra note 561; Miller interview, supra note 568.

⁵⁸⁶ Samler interview, supra note 583; Van Dersal interview, supra note 565.

plain. By the same token, quality control mechanisms which are not specifically directed toward the discovery of problems which might reflect discriminatory treatment or patterns of discriminatory program operations can only reveal the existence of such problems on an accidental basis. In short, there are no reliable substitutes for the collection and use of racial and ethnic data as a means of informing program administrators of the impact of their programs on minority group beneficiaries. Few agencies, however, collect these data.

For example, the Veterans Administration, third largest of all Federal agencies in terms of civilian employment and an agency which administered a budget of more than \$8.7 billion in 1969 for a wide range of program services and benefits to more than five million veterans and dependents, collects no racial or ethnic data regarding participation in program benefits with the exception of its relatively minor housing loan guaranty program. In interviews with Commission staff, VA officials repeatedly asserted that they were confident that veterans and their dependents suffered no discrimination. Yet, when pressed as to the basis of their judgment, they were unable to support their contention with any degree of persuasion.⁵⁸⁷ There are, in fact, indications that minority group veterans may not be receiving important VA services such as educational and employment assistance, vocational rehabilitation, and counseling and social work services, which are as responsive to their needs as compared to services received by majority group veterans.⁵⁸⁸

⁵⁸⁷ The primary basis for their assertion of nondiscrimination in VA programs was the absence of complaints. Commission staff inquired if any systematic program review involving racial and ethnic data was used. All responses were in the negative. Commission staff then inquired; "How, in the absence of such an affirmative process, could such disclaimers be made with certainty?" VA officials conceded that they could not really be certain whether discrimination occurred in their benefits programs. Wilson interview, *supra* note 565; Samler interview, *supra* note 583; Williams interview, *supra* note 561; Miller interview, *supra* note 568; Kretzchmar interview, *supra* note 570.

⁵⁸⁸ A recent Bureau of the Budget survey of Veterans Administration services to returning Vietnam veterans found sufficient indication of problems among minority group veterans as to raise the question of whether they are being reached and served equally. Bureau of the

V. SUMMARY

The Federal Government maintains a large number of federally assisted programs, many of which are aimed at meeting key social and economic problems of the American people—housing, education, health, job training, economic development. These programs frequently take the form of benefits flowing directly from the Federal Government to the individual beneficiary, such as social security payments, Small Business Administration business loans, and farm support subsidies. Other Federal programs involve one or more intermediaries, and program benefits reach individual beneficiaries indirectly, through the intermediaries. Some of these indirect assistance programs take the form of cash disbursements—grants or loans—which go to intermediaries to be used for specified program purposes, as in the case of urban renewal and Federal aid to education. In other instances, the indirect assistance is in the form of Federal insurance or guarantees of loans for specific purposes made by private lending institutions, as in the case of VA housing loan guarantees and HEW student loan insurance.

All three forms of Federal program assistance carry prohibitions against discrimination. In direct assistance programs, which involve only the Federal Government and the individual beneficiaries, the fifth amendment to the Constitution clearly prohibits racial or ethnic discrimination by Federal officials who administer these programs. In indirect assistance programs that operate through Federal insurance and guarantees of loans made by intermediaries, the constitutional prohibition against discrimination applies with equal force. In indirect assistance programs involving loans or grants, this constitutional prohibition is strengthened by legislation—Title VI of the Civil Rights Act of 1964. Although Federal agencies that administer these programs of direct and indirect assistance have generally recognized the legal principle of nondiscrimination, the manner in which they have sought

Budget, *A Survey of Socially and Economically Disadvantaged Vietnam Era Veterans* (November 1969); See also, James Fendrich and Michael Pearson, "Difficulties of Adjustment and Alienation Among Black Veterans" (March 1970 working paper).

to translate the principle into operating practice in the administration of their programs varies widely. In the case of Title VI, some agencies have made efforts to enforce nondiscrimination requirements aggressively, but in no case have Federal agencies implemented these nondiscrimination requirements with maximum effectiveness.

Title VI and Federally Assisted Programs

Title VI of the 1964 Civil Rights Act has great potential for eliminating discrimination throughout the country. The loan and grant programs subject to its provisions affect the lives of most Americans and are of vital importance to the Nation's social and economic growth. Community development programs, such as urban renewal and Federal aid for the construction of highways, are necessary to the orderly development of cities and metropolitan areas. Federal aid for education is playing an important role in the effort to assure quality education for the Nation's children. Federal programs of health and welfare are needed to assist in caring for those who are infirm and indigent. Through these programs, substantial leverage is afforded to attack the problem of racial and ethnic discrimination on a broad front. Title VI provides Federal departments and agencies with strong authority to make use of this leverage. Thus far, however, the Federal effort under Title VI has failed to match the law's promise.

The mechanisms developed by Federal agencies with Title VI responsibilities have glaring deficiencies. For example, as of June 1970, some agencies with programs subject to that law, had not yet issued regulations to effect its provisions.

In addition, there are inconsistencies in the way agencies view the scope of their responsibilities under Title VI. Uniformity of interpretation has not yet been achieved even with respect to the meaning of basic statutory terms, such as "Federal financial assistance," "program or activity," or "discrimination."

In addition to the problem of lack of uniformity and inconsistent interpretations by agencies with Title VI responsibilities, there are a number of deficiencies common to nearly all Title VI agencies. All are severely handicapped by a lack of sufficient staff to carry out Title VI responsibilities adequately. In most

agencies, the official in charge of Title VI compliance has relatively low status, as measured by title, grade, authority, and relative position within the administrative hierarchy. In some instances, Title VI duties are secondary to other functions and are shared with program managers over whom the Title VI officers have no authority. Rarely do agencies conduct training programs for civil rights or program personnel to assist them in developing the knowledge and awareness necessary to carry out effective Title VI compliance programs. In those cases where training programs are conducted, they tend to be superficial and inadequate.

The methods agencies have devised for achieving and monitoring compliance with Title VI requirements have had serious weaknesses. Undue reliance has frequently been placed on paper assurances, with no attempt made to review the actual compliance status of the recipients. In the case of at least one agency a number of recipients have never even submitted assurances.

Further, although Title VI regulations provide for submission of compliance reports by recipients to assist agencies in determining their compliance status, few agencies have made adequate use of this important monitoring device. In some cases, recipients of Federal aid have never been asked to furnish compliance reports or to provide information showing racial or ethnic participation in their programs. In others, where such information is provided, the data lack sufficient detail to be of real use as a means of determining compliance. Many reporting systems which otherwise are adequate are rendered ineffective because information is elicited too infrequently (e.g., every second or third year).

Of those agencies which have developed good compliance reporting systems most have not developed the capacity to utilize the data collected to its fullest potential. Few agencies follow up on the information revealed in compliance reports by conducting onsite reviews of recipients' facilities and services to determine the actual state of compliance. Some agencies never have conducted a single onsite review of any of their recipients. No agency has reviewed more than a small fraction of its recipients and many of the reviews that have been conducted have been superficial or

otherwise lacking in thoroughness. Frequently persons assigned to conduct field reviews for purposes of Title VI compliance are drawn from program bureaus and lack any Title VI training. Further, to the extent compliance reviews are conducted, they are almost always conducted well after the funds are committed and the program is underway. In many cases, it is then too late for effective corrective action to be taken. For example, a water and sewer line planned and constructed so as to bypass those areas where minority families are heavily concentrated cannot easily be altered once it is built, nor can the configuration of a federally aided highway, which effectively seals off centers of minority population from the rest of the community, readily be changed after it is completed.

Another problem common to most agencies with Title VI responsibilities has been their passive approach to implementation. Most rely heavily on receipt of complaints as the principal indicator of compliance. The way they carry out their responsibility for complaint processing, moreover, leaves much to be desired. Inordinate delays in investigating complaints are commonplace. In some instances, complaint investigations are not performed adequately. Sometimes agencies fail to conduct any investigation at all.

One of the strengths of Title VI lies in the strong sanctions available to Federal departments and agencies to bring about compliance. Among the available sanctions is termination of Federal financial assistance. It has rarely been used. Rather, many agencies have placed sole reliance on voluntary compliance as the means of ending discrimination in their programs. Protracted negotiations with noncomplying recipients have taken place, sometimes extending over a period of several years, while Federal funds continue to flow. In most instances where the sanction of fund termination has been used, it has been imposed only after a prolonged course of investigation, negotiation, hearing, and appeal and review, during which time discriminatory practices have often continued unabated. Further, the mechanism of judicial enforcement, intended to be used in addition to the administrative procedure leading to fund termination, is currently being used instead of the administration

procedure, thus further weakening the force of Title VI.

Because Title VI involves well over 20 Federal departments and agencies and covers some 400 Federal loan and grant programs, coordination of agency efforts is of particular importance. It has been inadequate.

Under Executive Order 11247, the Department of Justice is vested with responsibility for coordinating and supervising enforcement of Title VI. The Department consistently has failed to devote adequate manpower or resources to the task. Over the years, Title VI coordination has become increasingly peripheral to the work of the Department. Originally, this responsibility was carried out by a Special Assistant to the Attorney General, who reported directly to the Attorney General. Now it is carried out by a relatively junior attorney, who directs a small unit within the Civil Rights Division. He reports to a junior Deputy Assistant Attorney General. Further, the Department of Justice views its Title VI responsibility narrowly, focusing on litigation rather than on assuring effective administrative enforcement by various Federal agencies. Liaison with agencies is maintained primarily on an ad hoc basis. The inconsistencies in agency interpretations of their responsibilities under Title VI and the general inadequacy of agency compliance programs can be attributed, at least in part, to the failure of the Department of Justice to carry out its coordination responsibility with maximum effectiveness.

Programs of Insurance and Guaranty

Federally insured and guaranteed loan programs constitute a significant economic benefit for millions of persons in the United States. They involve assistance in such key areas as housing, education, business entrepreneurship, and agriculture. In terms of dollar value alone, these programs will amount to some \$40 billion in fiscal year 1971. Although programs of insurance and guaranty, like Title VI programs, generally operate through intermediaries intervening between the Federal Government and individual beneficiaries, these programs are expressly excluded from coverage under Title VI to the extent they involve assistance solely in the form of insurance or guarantees. Despite this exemption from Title VI coverage, discrimination in programs of insurance and

guaranty is prohibited by the fifth amendment to the Constitution. Further, most agencies that operate these programs are prohibited from practicing or permitting discrimination, either by Presidential Executive order or by regulations which they have issued. The enforcement mechanisms established by these Federal agencies, however, have not been adequate to assure compliance with their nondiscrimination requirements. For example, no agency requires compliance reports from intermediaries such as lending institutions. The racial and ethnic data concerning program participation that agencies collect themselves are frequently inadequate to inform the agencies whether minority group beneficiaries are participating on an equitable basis. None of the agencies conducts affirmative compliance reviews to determine firsthand whether intermediaries are following nondiscriminatory policies and practices. Sole reliance for enforcement most frequently is placed on complaint procedures. These procedures have rarely been made formal, nor have specific guidelines been set down governing investigations and resolution of complaints. Further, little information is provided to the public or to Federal officials responsible for assuring compliance with nondiscrimination requirements concerning the existence of these requirements or the procedure to be followed when discrimination occurs.

If the mechanisms established to enforce Title VI have been inadequate, the civil rights enforcement mechanisms for programs of insurance and guaranty are in a barely rudimentary stage.

Direct Assistance Programs

Direct assistance programs—those in which Federal benefits flow directly to individual beneficiaries—involve benefits, such as social security, business loans, and assistance to veterans, which are of importance to many Americans. In terms of dollar value, they will

amount to some \$75 billion in fiscal year 1971, three times as much as the amount represented by grant-in-aid programs covered by Title VI.

Discrimination in direct assistance programs clearly is prohibited by the fifth amendment to the Constitution. Unlike indirect assistance programs involving loans, grants, insurance, or guarantees where statutory and administrative procedures and requirements have been established to prevent discrimination by public and private program intermediaries, almost no action has been taken to implement nondiscrimination requirements in direct assistance programs. Congress has not addressed itself to the problem of discrimination in these programs, nor has the President or the agencies that operate these programs taken any significant action to assure against such discrimination. Thus, the Federal Government is in the position of holding itself to a lesser standard of nondiscrimination enforcement that it imposes on others.

These programs, which operate without intermediaries, frequently limit the discretion of Federal officials in determining the rights of beneficiaries. Hence the opportunities for discrimination here are somewhat more remote than in programs of indirect assistance. Nevertheless, the opportunities do exist and charges of discrimination have been made.

Currently, little in the way of mechanisms exists to assure equal opportunity in direct assistance programs. Compliance reviews are not conducted. Data on racial and ethnic participation frequently are not collected at all, and when collected, are not adequately used. There also are no complaint procedures specifically concerned with racial or ethnic discrimination, nor are personnel given special guidance on how such complaints are to be investigated or what steps should be taken to eliminate discrimination when found.

CHAPTER 5

REGULATED INDUSTRIES AND CIVIL RIGHTS

I. Introduction

Many of the Nation's largest business enterprises are subject to close Federal regulation and supervision. They are members of industries which Congress has deemed of sufficient public importance to warrant creation of independent agencies to oversee their activities, pursuant to specific rules and regulations.

Many of these business enterprises require Federal licenses in order to conduct business at all and, because of the limited number of licenses granted, enjoy, in a sense, a federally protected monopoly position. For example, radio and television stations, telephone companies, and other communications enterprises are licensed and regulated by the Federal Communications Commission (FCC). Railroads, motor carriers, freight forwarders, and other common carriers are licensed and regulated by the Interstate Commerce Commission (ICC), the oldest of the regulatory agencies. Hydroelectric plants and natural gas companies are licensed by the Federal Power Commission (FPC). In addition, many electric power companies are regulated by the FPC. Those in the business of providing air transportation are regulated by the Civil Aeronautics Board (CAB) and they may only operate on routes as approved by CAB.

In other industries, although individual companies are not licensed by the Federal Government, their activities, nonetheless, are subject to close Federal regulation. For example, those in the shipping business are regulated by the Federal Maritime Commission (FMC).

These Federal agencies are charged with responsibility for regulating specific industries, such as power, communications, and transportation. Other agencies have regulatory respon-

sibilities that cut across industry lines. For example, the Federal Trade Commission (FTC) has major responsibility for protecting consumers and enforcing antitrust laws, regardless of the industry involved. The Securities and Exchange Commission (SEC) has the responsibility to provide protection for investors and the public in securities transactions, without regard to the industry to which the company involved belongs. The overriding criterion governing the activities of these regulatory agencies is the public interest.

There are civil rights issues involved in the activities of these regulated industries and there are ways in which the agencies, charged with responsibility for regulating them, can contribute significantly to furthering the cause of equal opportunity. Under Title VII of the Civil Rights Act of 1964, all business enterprises, with 25 or more employees, including most members of regulated industries, are required to follow equal employment policies. Further, to the extent that regulated businesses are Government contractors, they also are subject to equal employment opportunity requirements by virtue of that status.¹ Beyond the requirements imposed on Government contractors and other employers, members of regulated industries, because of the unique federally protected status that many of them enjoy, should feel a special obligation to further the cause of the key national policy of equal employment opportunity. In view of the size and resources of many of these regulated businesses, affirmative efforts to employ and upgrade minority group members could contribute significantly to furthering this cause. By

¹ Executive Order 11246 (1965) prohibits discrimination by all Government contractors and requires the adoption of affirmative programs to promote greater employment opportunities for minority group members.

the same token, action by the regulatory agencies to require and promote equal employment opportunity in the industries they regulate could also contribute significantly to the achievement of this national goal.

In addition to the issue of equal employment opportunity, which is common to all industries, special opportunities for facilitating the goal of increased minority entrepreneurship are available to certain of them. Some, such as shipping and airlines, require such large capital investments as to preclude the possibility of all but a very small number of minority group entrepreneurs from even applying for entrance. Other regulated industries, such as those involving communications and motor transportation, require relatively small capital investments and offer excellent opportunities for minority entrepreneurship. For example, the cost of operating a radio station or a trucking company, while considerable, is not so prohibitive as to bar minorities, solely on a financial basis, from entering this aspect of the business world. In view of the authority of the regulatory agencies concerned (FCC and ICC, respectively) to determine, through their licensing power, who may conduct business in these industries, a special opportunity is provided to promote minority business ownership. With respect to the radio and television industries in particular, greater minority group participation in ownership and operation could substantially increase understanding and sensitivity on the part of the majority community to the social and economic injustices that underlie the unrest of the minority groups.

Discrimination in the provision of services by the regulated business is another civil rights issue with which these industries and the agencies that regulate them should be concerned. For example, discrimination and segregation by railway and bus companies, regulated by the ICC, or by air carriers, regulated by the CAB, is unlawful, but instances of such discrimination and segregation continue to appear. Recreational facilities provided at hydroelectric projects, licensed and regulated by the FPC, may be operated on a racially discriminatory basis, even though such discrimination is unlawful. More subtle issues may arise with respect to the provision of services on a non-

discriminatory basis. Railroad and bus routes may be designed for the convenience of the majority group alone, and recreational facilities may be located in a manner that effectively excludes use by minority group members or may be of a kind (boating marinas, for example) that would appeal mostly to the more affluent.

These are some of the civil rights issues with which members of regulated industries and the agencies that regulate them should be concerned. In this chapter, the policies and practices of the following major regulatory agencies will be examined to determine their current and potential role in furthering the cause of equal opportunity:

- Interstate Commerce Commission (ICC)²
- Federal Trade Commission (FTC)³
- Federal Power Commission (FPC)⁴
- Securities and Exchange Commission (SEC)⁵
- Federal Communications Commission (FCC)⁶
- Federal Maritime Commission (FMC)⁷

² The ICC, the oldest of the regulatory agencies, was created in 1887, and charged with responsibility of regulating interstate railroad transportation. Throughout the years the responsibilities of the ICC have expanded. It now also exercises regulatory responsibility over motor carriers, inland water carriers, and freight forwarders.

³ The FTC was created by Congress in 1914, under the Federal Trade Commission Act. Its regulatory duties are divided between direct consumer protection and enforcement of antitrust laws.

⁴ The FPC was created in 1920, under the Federal Water Power Act and given responsibility to issue licenses for non-Federal hydroelectric projects. The agency now also has responsibility for regulating the interstate transmission of electricity and the interstate transportation and sale of natural gas.

⁵ The SEC was created in 1934, under the Securities Exchange Act. The laws administered by the SEC relate to fields of securities (stocks) and finance, and seek to provide protection for investors and the public in securities transactions.

⁶ The FCC was created in 1934, under the Communications Act. It has responsibility for regulating interstate and foreign communication by radio, television, wire, and cable.

⁷ The FMC was created by Congress in 1961, with responsibility to regulate waterborne foreign and domestic offshore commerce and to assure that American international trade is open to all Nations on fair and equitable terms. In contrast to the Federal Maritime Administration of the Department of Commerce, which

II. EQUAL EMPLOYMENT OPPORTUNITY IN REGULATED INDUSTRIES

Of the seven regulatory agencies under discussion, four—FPC, ICC, CAB, and FCC—have the capacity to play a significant role in expanding job opportunities for minority group members in specific industries.⁹ The industries they regulate—power, surface transportation, airlines, and communications—offer a valuable source of skilled, high-paying jobs. Currently, minority group members are grossly underrepresented in all of these industries. In many cases, there is evidence to suggest that their underrepresentation is not entirely accounted for by factors such as lack of training but, rather, is the result of discriminatory practices.

A. The Industry Record

I. THE POWER INDUSTRY

The Equal Employment Opportunity Commission's report on employment patterns in the power industry for 1966-67 showed that the record of this industry in employing minorities lagged far behind that of other industries. Only 3.7 percent of the industry jobs were held by blacks—the lowest percentage among major industries. Spanish surnamed Americans accounted for only 1 percent of the jobs. In addition, black and Spanish surnamed

has the responsibility to promote and subsidize American shipping trade, the FMC only regulates such trade.

⁸ The CAB was created by Congress in 1958, under the Federal Aviation Act with the responsibility to promote and regulate interstate air transportation.

For a discussion of financial regulatory agencies, see ch. 3, *supra*.

⁹ Neither the FTC nor the SEC regulates a specific industry. Rather, these two agencies regulate broad sectors of the business world and have only limited potential for promoting equal employment opportunity in any given industry. Nonetheless, the FTC and the SEC can have significant impact on equal employment opportunity throughout industries. See pp. 292-303 *infra*. While the FMC regulates a specific industry—water carriers—the employment practices of the industry are the responsibility of the Federal Maritime Administration of the Department of Commerce under the provisions of Executive Order 11246 and Title VI of the Civil Rights Act of 1964.

employees were heavily concentrated in lower level jobs.¹⁰

In June 1968, the Federal Power Commission and the Equal Employment Opportunity Commission held a joint conference in Washington, D.C., with members of the power industry to encourage greater progress in opening employment opportunities to minority group members.¹¹ A year later, however, little if any progress had been made. For example, according to William H. Brown III, Chairman of the Equal Employment Opportunity Commission, in 1969 the electrical power industry occupied the bottom rung of the ladder in terms of minority employment.¹² At a hearing of the U.S. Commission on Civil Rights in Montgomery, Ala., in April 1968, it was found that the Alabama Power Co., a Federal contractor in the amount of \$2.5 million, had a work force that was 8 percent black. Almost all of the black employees were laborers or service workers.¹³

The Department of Justice has filed suit against one electric power company under Title VII of the Civil Rights Act of 1964, alleging that the company, which employs about 6,300

¹⁰ Equal Employment Opportunity Commission, *Employment Patterns in the Utilities Industry, 1966-67* pp. 1-2 (June 1, 1968).

¹¹ The FPC has indicated that "[A]s a followup to this meeting some 100 visits were made to the utility companies by representatives of EEOC and the FPC in an effort to encourage better minority employment practices. The FPC will continue to assist EEOC in its effort to effect a better minority employment posture in the industries we regulate." Letter from John N. Nassikas, Chairman, FPC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 7, 1970.

¹² Address by William H. Brown, III, Chairman of the Equal Employment Opportunity Commission, at the Edison Electric Institute's Affirmative Action Conference, Denver, Colo., May 1969. Mr. Brown's statement was based on reports for 1968 and 1969 submitted to the EEOC by the 115 members of the Institute. These members employ a majority of the work force in the electric power industry.

For further information on the employment practices of the public utilities, see Bernard E. Anderson, *The Negro in the Public Utility Industries*, Report No. 19, *The Racial Policies of American Industry*, University of Pennsylvania. The Wharton School of Finance and Commerce (1970).

¹³ Hearings before the U.S. Commission on Civil Rights held in Montgomery, Ala., Apr. 27-May 2, 1968, at 413-427.

white persons and about 450 black persons, maintains a racially segregated, dual system of jobs and lines of progression. The Justice Department alleged that the company considers only white persons for jobs with the highest pay and the greatest opportunity for training and advancement. It also is alleged that the company maintains racially segregated facilities for employees.¹⁴

At another Commission on Civil Rights hearing, held in San Antonio, Tex., in December 1968, headquarters for the El Paso Natural Gas Co., it was found that Mexican Americans, who comprise more than 45 percent of the area population, made up less than 5 percent of the work force of that company and were totally unrepresented in supervisory positions.¹⁵

The Chairman of FPC, John N. Nassikas, recently testified before a Senate subcommittee that "we are mindful of the seriousness of the problem because when we talk of quality of life we consider as inherent part of that quality human rights, we could observe them. Certainly the progress in the entire United States is not to the satisfaction of concerned citizens regarding involvement in equal employment opportunity. I think progress is being made. It is slower than it should be. I think we will try to assure that it will be made."¹⁶

2. THE TRANSPORTATION INDUSTRY

The transportation industry, regulated by the ICC, offers exceptional opportunities for

¹⁴ *United States v. Georgia Power Co.*, C.A. No. 12355 (N.D. Ga., filed Jan. 10, 1969).

In addition, the NAACP Legal Defense and Education Fund, Inc., filed a suit against the Duke Power Co. for allegedly violating Title VII of the Civil Rights Act of 1964. The district court held that there was no violation of Title VII, *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (D.C.N.C. 1968), rev'd, 420 F. 2d 1225 (4th Cir. 1970), certiorari granted, June 29, 1970.

¹⁵ *Hearing before the U.S. Commission on Civil Rights* held in San Antonio, Tex., Dec. 9-14, 1968, at 1078. For the first time in the history of the FPC, a petition for intervention in a power company license renewal proceeding has been granted. The petition, which was made by the California Rural Legal Assistance, Inc. (CRLA) on behalf of low-income persons in 19 rural California counties, alleged discriminatory employment practices on the part of the Pacific Gas and Electric Co.

¹⁶ Hearings before the Subcommittee on Energy, Natural Resources, and the Environment of the Senate Committee on Commerce 36-37 (Jan. 30, 1970).

minority group members. According to the Bureau of Labor Statistics of the Department of Labor, because of the steadily rising demand for motor freight services, employment in the motor freight transportation and storage industry is expected to increase rapidly. Between 1947 and 1964, employment in this industry increased by 80 percent, from 516,000 workers to nearly 920,000. By 1975, it is expected that employment will increase by an additional 30 percent to 1.2 million.¹⁷

Although racial and ethnic employment data are not available on an industrywide basis, a number of lawsuits against trucking and railroad companies, filed by the Department of Justice¹⁸ and private parties,¹⁹ sug-

¹⁷ U.S. Department of Labor, Bureau of Labor Statistics, *America's Occupations and Industrial Manpower Requirements and Needs: 1964-75* (1965).

¹⁸ The Justice Department has filed four suits against trucking companies.

(1) *United States v. Roadway Express, Inc.*, C.A. No. C68-321 (N.D. Ohio, filed May 2, 1968).

(2) *United States v. T.I.M.E. Freight, Inc.*, C.A. No. 5069 (M.D. Tenn., filed May 15, 1968).

(3) *United States v. Associated Transport, Inc.*, C.A. No. C-99-G-68 (M.D.N.C., filed June 28, 1968).

(4) *United States v. Central Motor Lines, Inc.*, C.A. No. 2521 (W.D.N.C., filed Aug. 12, 1969).

In addition, the Justice Department filed three suits against railroad companies.

(1) *United States v. St. Louis-San Francisco Ry.*, C.A. No. 67 C 243(1) (E.D. Mo., filed July 24, 1967).

(2) *United States v. Jacksonville Terminal Co.*, C.A. No. 68 239 Civ. J. (M.D. Fla., filed June 24, 1968).

(3) *United States v. The Chesapeake and Ohio Ry.*, C.A. No. 1469-NN (E.D. Va. filed Oct. 17, 1969).

¹⁹ *Marcus Jones, Willie B. Hodge, and Clarence L. Irving v. Leeway Motor Freight, Inc.* C.A. No. 68-33 (W.D. Okla. filed Mar. 13, 1968).

The NAACP Legal Defense and Education Fund, Inc., has filed a number of cases against employment discrimination by railroad and trucking companies:

"Railroad Companies:

Dent v. St. Louis-San Francisco Ry., Civ. No. 66-65 (N.D. Ala., filed Aug. 14, 1967); *Morgan v. Norfolk and Western Ry.*, C.A. No. 68-C-29-R (W.D. Va., filed June 3, 1968); *Gamble v. Birmingham Southern Railroad Co.*, C.A. No. 68-596 (N.D. Ala., filed Oct. 14, 1968); *Burks v. Denver Rio Grand Railroad*, C.A. Civ. No. 1153 (D. Col., filed Nov. 1, 1968); *Brotherhood of Railway Trainmen, Local 974 v. Norfolk & Western Railroad Co.*, C.A. No. 255-69-N (E.D. Va., filed June 2, 1969).

"Trucking Companies:

Black v. Central Motor Lines, Inc., C.A. No. 2152 (W.D.N.C., filed July 11, 1966); *Gude v. Railway Express*, Civ. No. 12, 330 (N.D. Ga., filed Dec. 26, 1968);

gest that minority group members are not sharing equitably in the benefits of the transportation industry's growth. In a suit against the Roadway Express Co., for example, the Department of Justice complaint stated that Roadway:

. . . employs no Negroes among its 2,110 long haul over-the-road drivers, or its 7,334 officers and managers, or its approximately 232 professional, technical and sales personnel; of approximately 1,143 office and clerical employees, two are Negro. The balance of Roadway's Negro employees are garage workers, pickup and delivery workers, checkers and service workers.

The complaint alleges that this low Negro representation is a result of discriminatory policies and practices.

The former Deputy Contracts Compliance Officer of the Post Office Department, Paul A. Neagle, stated in a March 1967 speech, that one of the difficulties of the Department was in bringing truckers into compliance with Executive Order 11246. The main problem was in the employment of Negro sleeper-drivers. Drivers constantly travel in pairs in over-the-road trucking. One sleeps in the back of the truck car while the other drives. He stated that integration of these teams has met strong resistance by companies and unions alike.²⁰

A study prepared for the Colorado Civil Rights Commission, under the auspices of the Equal Employment Opportunity Commission, showed that throughout the Southwest, among companies reporting to the EEOC which includes transportation companies, a general stairstep employment pattern for minority

Holiday v. Railway Express, C.A. No. 12987 (N.D. Ga., filed Aug. 5, 1969)."

²⁰ Address by Paul A. Neagle, former Deputy Contracts Compliance Officer, Post Office Department, at Equal Employment Opportunity Commission Affirmative Action Workshop, sponsored by Joint Council Thirteenth International Brotherhood of Teamsters Mar. 9, 1967. He indicated:

" . . . one large company which has been training Negro sleeper-cab drivers tells us that its employees, while not opposing Negroes into line-haul jobs, finds its white drivers reluctant to go to truck stops where drivers for other companies speak in the most vulgar possible terms of the tomorrow when the drivers themselves will be sharing the bunk in a cab with a Negro. . . . I, for one, feel more than a little unclean whenever an operator suggests that he might be able to place Negroes in sleeper service provided that each such Negro agrees to take off whenever his accepted partner absents himself from duty." *Id.*

workers had emerged. This pattern showed that their portion of the available jobs in an occupation descends as the occupational hierarchy ascends and that their share of available jobs descends steeply once the line separating white-collar from blue-collar jobs is crossed.²¹

3. THE AIRLINE INDUSTRY

According to employment statistics of the major air carriers, provided to the Equal Employment Opportunity Commission in 1966, only 4.7 percent of jobs were held by blacks and 2.5 percent by Spanish surnamed persons. Since then, the situation has not appreciably improved. EEOC's 1969 report shows that only 5.7 percent and 2.6 percent of major airline employees are black and Spanish surnamed respectively. They are generally heavily concentrated in lower-level jobs. Of the more than 46,000 professional and managerial employees, the percentage of minority group members is less than 1 percent. In laborers jobs, however, minority group members were much better represented: 33.1 percent for blacks and 6.9 percent for Spanish surnamed Americans.

4. THE COMMUNICATIONS INDUSTRY

The employment records of radio and television stations and of telephone and telegraph companies show similar underrepresentation of minority group members. According to 1969 EEOC reports, only 5.8 percent of the employees in the broadcasting industry were black and only 3 percent were of Spanish surname. Again, minority group members were grossly underrepresented in supervisory and skilled jobs and much better represented in lower level jobs. Black employees represented only 1.5 percent of the officials and managers and only 3.7 percent of the technicians, and Spanish surnamed Americans made up 0.7 percent of the officials and managers and 1.4 percent of the technicians. For service workers, however, 36.8 percent were blacks and 4.4 percent were Spanish surnamed Americans.²²

²¹ See F. Schmidt, *Spanish Surnamed American Employment in the Southwest*, (a study prepared for the Colorado Civil Rights Commission, under the auspices of the Equal Employment Opportunity Commission) May 1970.

²² For further documentation of the underrepresenta-

Evidence suggests that the record of telephone and telegraph companies is similar to that of broadcasting companies. At the Commission's 1968 hearing in San Antonio, Tex., numerous complaints were received concerning the employment practices of the Southwestern Bell Telephone Co. At the time, less than 15 percent of the company's employees in San Antonio were Mexican Americans, although the population was approximately 40 percent Mexican American.²³ In addition, a number of private lawsuits have been filed against telephone companies alleging employment discrimination,²⁴ and many such complaints have been filed with the EEOC.

B. Current and Potential Role of the Regulatory Agencies

Of the four agencies that regulate the industries whose employment records have just been described, only the FCC has taken significant action to improve the employment record of the industry it regulates. Since the other three regulatory agencies possess ample authority to take similar action, to the extent that they permit a continuation of discriminatory employment practices in their respective industries, they are in violation of the U.S. Constitution.

I. FEDERAL COMMUNICATIONS COMMISSION

On July 5, 1968, in adopting a broad policy statement prohibiting employment discrimination by licensed broadcasters,²⁵ the FCC be-

tion of minority group members in the broadcasting industry, see Hearings Before the Equal Employment Opportunity Commission, on Discrimination in White-Collar Employment, held in New York City, Jan. 15-18, 1968, at 325, 352, 369, and 621. See also, Hearings Before the Equal Employment Opportunity Commission, on Utilization of Minority and Women Workers in Certain Major Industries, held in Los Angeles, Calif., Mar. 12-14, 1969, at 288, 318, and 330.

²³ San Antonio Hearing, supra note 15, at 593.

²⁴ See, for example, *Parham v. Southwestern Telephone Co.*, Civ. No. LR 68-C-81 (E.D. Ark., July 19, 1968); *Urquidez v. General Telephone Co. of the Southwest*, Civ. No. 7680 (D.C.N.M., Sept. 24, 1969); *Francisco y Trujillo v. A.T.T.*, Civ. No. C-2109 (D.C. Colo., filed Feb. 26, 1970).

²⁵ The action resulted from a petition filed on Apr. 24, 1967, by the Board for Homeland Ministries and the Committee for Racial Justice Now of the United Church of Christ, asking for a rule that would deny

came the first regulatory agency to speak out on this crucial subject. The agency based its statement on its responsibility under the Communications Act to insure that broadcast stations operate in the public interest as well as by the national antidiscrimination policy embodied in Title VII of the Civil Rights Act of 1964. In discussing its legal authority to require nondiscriminatory employment practices of its licensees, the FCC said:

When these two considerations are taken together—the national policy against discrimination and the nature of broadcasting—we simply do not see how the FCC could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination of violating the national policy.²⁶

Stephen J. Pollak, then Assistant Attorney General in charge of the Civil Rights Division, was consulted by the FCC before it issued the policy statement. Mr. Pollak urged adoption of antidiscrimination rules and supported the FCC's authority to do so, stating:

Because of the enormous impact which television and radio have upon American life, the employment prac-

a broadcast license to any station found to have discriminated in employment on grounds of race, color, religion or national origin and would require evidence of compliance to be furnished annually.

²⁶ FCC Memorandum Opinion and Order and Notice of Proposed Rule Making, Docket No. 18244, July 5, (1968) at 5. The FCC can grant an application for a broadcast authorization only after finding that the "public interest, convenience and necessity" would be served thereby.

Sec. 307 (a), (d) and 309(a) of the Communications Act, 47 U.S.C. 307 (a), (d) and 309(a). In making this determination, the FCC has to consider whether the applicant has violated the laws of the U.S., see *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1953).

In addition the broadcast licensee is a "public trustee," *Television Corporation of Michigan v. FCC*, 294 F. 2d 730, 733-34 (D.C. Cir. 1961); *McIntire v. William Penn Broadcasting Corp. of Philadelphia*, 151 F. 2d 597, 599 (3rd Cir. 1945), cert. denied, 327 U.S. 779 (1946). In *Office of Communications of United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966), the court's opinion written by Judge Warren Burger, now Chief Justice of the U.S. Supreme Court, stated that:

"A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. . . . After nearly five decades of operation, the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty." *Id.*, at 1003.

tices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries. For these reasons I consider adoption of the proposed rule, or one embodying the same principles, a positive step which your Commission appears to have ample authority to take.²⁷

The FCC policy statement indicated that the agency doubted the usefulness of embodying the policy in rule form and requiring periodic (at renewal time) showings of compliance with the policy, but the agency requested comments from interested parties on these issues. The FCC found the comments urging issuance of a rule to be convincing. It, therefore, issued a report and order, released on June 6, 1969, adopting the policy statement in rule form.²⁸

The FCC's adoption of its rule against employment discrimination by licensees represented a significant affirmative step. Following its adoption, however, the agency, showed little inclination to implement the rule.^{28a} For

²⁷ Letter from Stephen J. Pollak to Rosel H. Hyde, Chairman, FCC, May 21, 1968. The U.S. Commission on Civil Rights also urged adoption of the rule, see letter from Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights, to Rosel H. Hyde, Chairman, FCC, Sept. 9, 1968.

²⁸ The FCC stated in its June 6, report and order that:

"A number of commenting parties have urged that a formal rule would be useful, not only to emphasize the policy and make it specific, but also to make available the remedy of forfeitures under Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. 503, where to be meritorious Despite the workload problems, these considerations impel us to adopt further requirements to assure equal opportunity program requirements which the Civil Service Commission has adopted for Government agencies, and which are the product of considerable experience."

^{28a} Letter from Nicholas Johnson, Commissioner, FCC, to Howard A. Glickstein, staff director, U.S. Commission on Civil Rights, Sept. 16, 1970. Mr. Johnson wrote to the Commission to express his dissent to the letter the FCC sent to the Commission commenting on the draft sections of this report dealing with the FCC. (See letter from Ben F. Waple, Secretary to the FCC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, August 5, 1970.)

Mr. Johnson stated, in part:

"I am in basic agreement with your assessment of the FCC's record on enforcement. As you noted, our rule-making proposals have led the way in comparison with other regulatory agencies. I now hope that our enforce-

example, in October 1969, this Commission pointed out to the FCC that one of its radio licensees, WMUU, in Greenville, S.C., was owned by Bob Jones University, which has been debarred by HEW under Title VI for refusing to submit an assurance of nondiscrimination.²⁹ The Commission also pointed out that the university employed no blacks among its nearly 200 employees which suggests a possible violation of Title VII of the Civil Rights Act of 1964. The Commission urged the FCC to investigate this situation and, in the event it found violation of Titles VI and VII, to refuse to renew the radio station's license.³⁰ The Commission learned, however, that instead of conducting an investigation, the FCC merely wrote to the licensee concerning its employment policies. The station stated that it employed only one black person, a part-time employee, on its 21-man staff, justifying this by a lack of applications. The station added:

The stations [sic] program [is] primarily classical and religious music with a rather complicated news format. Negro announcers and other personnel are not generally interested in this type of format. Their training preference seems to run more to the rock and soul music type of format.³¹

Despite the obvious inadequacy of this explanation, the FCC renewed the license. On June 5, 1970, however, following receipt of additional correspondence from this Commission, the FCC rescinded its action and placed the station's application in "deferred status pending further consideration of the matters raised

ment of our new rules will also be a model for other agencies to follow. It is not now. . . . I am unaware of any significant increase in FCC resources committed to this area (civil rights) despite the new obligations we have and are undertaking in both the common carrier and the broadcast fields. In fact there has been some evidence of reluctance within the Commission for a vigorous enforcement program. There is also the attitude that stations should be renewed because they are doing more than before, and more than most other stations—not whether they are in fact complying with national policy on equal employment."

²⁹ Letter from Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, to Rosel H. Hyde, former FCC Chairman, Oct. 23, 1969.

³⁰ Id.

³¹ Letter from Jim Ryerson, station manager, WMUU to James O. Juntilla, Deputy Chief Broadcast Bureau, FCC, Dec. 24, 1969.

by the U.S. Commission on Civil Rights".³² At present FCC is conducting a field investigation of radio station WMUU.³³

The agency showed a further indication of lack of vigorous enforcement of its rule on other occasions. In November 1969, the FCC Acting Director of the Conglomerate Study Group, Louis C. Stephens, in speaking about the FCC equal employment requirement, was quoted as informing the Delaware, Maryland, and District of Columbia Broadcasters' Association: "No one that I know of can look at an employment profile and say whether or not a station is obeying or disobeying the law."³⁴ He urged broadcasters to "make a decision which you feel is fair in your mind, and if you do, you will probably find the decision is fair as far as the Commission [FCC] is concerned."³⁵ Although he substantially disclaimed his statement in a letter to the newspaper which quoted it,³⁶ there was no public statement by the FCC, itself, concerning the importance it placed on its nondiscrimination rule.³⁷

On June 3, 1970, the FCC adopted implementing procedures for this rule. As of July 10, 1970, it announced that it would require an annual report from its broadcast licensees of employment statistics broken down by racial and ethnic groups. It would also henceforth require the preparation of equal employment opportunity programs to be furnished by existing stations and to be included in all applications for construction permits, assignments, or transfers of control and renewals of licenses.³⁸ As of August 1970, the proposed FCC forms, to implement the rule,

³² Letter from George S. Smith, Chief, Broadcast Bureau, FCC, to Bob Jones University, radio stations WMUU and WMUU-FM, June 5, 1970.

³³ Letter from Ben F. Waple, Secretary, FCC to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 5, 1970.

³⁴ The Washington Post, Nov. 10, 1969, at A55.

³⁵ Id.

³⁶ The Washington Post, Jan. 23, 1970, at A22.

³⁷ The U.S. Commission on Civil Rights urged the FCC Chairman to issue an official statement denying the accuracy of the coverage of the remarks cited in the newspaper article, and affirmatively setting forth the policy of the FCC. Letter from Isaiah T. Creswell, Jr., Acting Staff Director, U.S. Commission on Civil Rights, to Dean Burch, Chairman, FCC, Dec. 18, 1969.

³⁸ FCC 70-545, Docket No. 18244, released June 3, 1970.

had not been approved by the Bureau of the Budget.³⁹

While the FCC has requested comments from different organizations, including civil rights groups, public interest law firms, and the broadcasting industry concerning the most appropriate mechanism for enforcing the rule, the agency currently relies exclusively on the processing of complaints. It has not established any formal coordination with other agencies concerned with equal employment opportunity, such as the Equal Employment Opportunity Commission and the Department of Justice.

If the FCC rule is to be meaningful in opening employment opportunities for minority group members, it must be effectively implemented. Because it is the first regulatory agency to take a stand against employment discrimination by the industry it regulates, its performance under this rule should be a model from which other regulatory agencies, that have not yet instituted such a rule, can profit.

In addition to the rule prohibiting employment discrimination by broadcasting stations, the FCC adopted a "Notice of Proposed Rule-making," on November 19, 1969, which stated that its policy prohibiting employment dis-

³⁹ At a meeting held at the Bureau of the Budget on June 25, 1970, to discuss FCC's application forms for broadcast licensees, the FCC representatives stated: (a) that their Commission had not adopted standards as to what would constitute full compliance with their rule; (b) it was proposed that the FCC would set up within the Broadcast Bureau a full-time staff of nine people, to review affirmative action plans received by the FCC from the broadcasting stations; (c) that the FCC presently did not have the manpower to review the affirmative action plans of the stations because the necessary funds were not included in the FCC's 1971 fiscal budget, and they did not have enough staff now on board in order to transfer people into the unit on a temporary basis. A representative from the U.S. Commission on Civil Rights suggested that the FCC request a supplemental application from the Bureau of the Budget, so that it could hire the necessary staff as soon as possible.

In addition, a representative from the U.S. Commission on Civil Rights suggested that all statements or posters announcing equal employment opportunity in the broadcast industry should be written in both English and Spanish, in order to afford Spanish-speaking citizens an opportunity to share in the full benefits of the rule.

crimination would also be extended to the common carriers (telephone and telegraph companies). The FCC statement indicated that the same considerations of public policy on which the decision to cover the employment practices of the broadcasting stations were based, were applicable to common carriers subject to their jurisdiction. As of May 1970, the rule had not yet been adopted.⁴⁰

The FCC's extension of its rule to telephone and telegraph companies would have special significance. Its regulatory relationship to broadcasting stations is much closer than to telephone and telegraph companies, involving periodic license renewals based on a number of considerations, including a finding of whether the licensee's programming is satisfactory to the various elements of the community. With respect to telephone and telegraph companies, while FCC approval is required before they may begin or discontinue operations, there is no provision for renewal of such approval.

Thus, if the FCC's action with respect to the broadcasting industry could be considered unique because of its special relationship to the members of that industry, its extension of the rule to telephone and telegraph companies would have potentially far-reaching significance as precedent for other regulatory agencies. Just as the FCC's approval of these companies, once given, is generally permanent, certificates of authority granted by other regulatory agencies also are, for the most part, permanent. Accordingly, their legal relationship to the industries they regulate, while perhaps distinguishable from the legal relationship between the FCC and the broadcasting industry, is closely analogous to that of the FCC and telephone and telegraph companies. The analogy also exists in a practical sense. Because of the enormous financial investment required, certificate to operate a telephone company is not the readily salable commodity that a radio or television license is. By the same token, a certificate to operate a major airline or a power or natural gas company, is not readily salable. While other agencies, therefore, might dis-

⁴⁰ The issue was still pending in the FCC's Common Carrier Bureau. It was expected to reach the Commissioners for a final vote by the end of June. Interview with Tracy Western, legal assistant to Commissioner Nicholas Johnson, May 26, 1970.

tinguish FCC's action regarding the broadcasting industry on practical grounds, such a distinction cannot be made with respect to telephone and telegraph companies.

2. INTERSTATE COMMERCE COMMISSION, CIVIL AERONAUTICS BOARD, AND FEDERAL POWER COMMISSION

Although the ICC, CAB, and FPC are governed by the same criteria of serving the public interest as the FCC, none of the three has taken similar action to prevent employment discrimination in the industries they regulate. Indeed, none has gone so far as to assert that it has authority to take such action.⁴¹ In this

⁴¹ Of the three regulatory agencies, the FPC and the CAB have demonstrated some degree of interest in issuing a policy statement similar to the FCC. The FPC, under the chairmanship of Lee White, determined that the FPC should begin to assume the responsibility of eliminating discrimination in the utilities industry. A proposal was sent to the General Counsel's office for consideration in early 1969. Interview with Lee White, former Chairman, FPC, Feb. 17, 1970.

As of August 1970, there has been no decision from the General Counsel's office. The reason provided as to why no action has been taken is that the FPC is considering the petition made by the California Rural Legal Assistance (CRLA), requesting a denial of a license renewal to the Pacific Gas and Electric Co. (P.G.&E.) for allegedly utilizing discriminatory employment practices. (See p. 301 *infra*, for further comment on this case.) The FPC is expected to pass on the extent of its power in this area, which would therefore relate to any rule prohibiting employment discrimination by the industries it regulates. Interview with Drexel Journey, Deputy General Counsel, FPC, June 5, 1970.

A copy of the FCC's policy statement prohibiting employment discrimination was provided to Charles Keifer, former Executive Director of the CAB, by a representative of the Commission on Civil Rights in December of 1969. He indicated that he had not heard of the FCC action and had not contemplated the possibility of the CAB's taking similar action until that time. He sent a copy of the rule to the General Counsel's office for legal research. Interview with Charles Keifer, former Executive Director, CAB, Dec. 5, 1969. As of May 1970, the CAB had taken no action on the proposed rule. Interview with Oral D. Ozment, Deputy General Counsel, May 27, 1970.

The Deputy General Counsel of the ICC, Fritz Kahn, told Commission staff that the FCC's jurisdiction did not cover the employment practices of the regulated industries. He felt this was the responsibility of the EEOC, the U.S. Commission on Civil Rights, and the Department of Justice. Interview with Fritz Kahn,

Commission's view, the broad and plenary power granted to all three agencies by Congress to control the interstate operation of those industries is ample, in each case.

Like the FCC, the ICC, CAB, and FPC, are granted power to issue rules.⁴² They also have extensive power to issue, revoke, extend, or amend licenses. While the legal relationship of the FPC to the industries it regulates differs from that of the ICC and CAB,⁴³ they have

Deputy General Counsel, ICC, Jan. 14, 1970. The ICC's position was recently restated:

"The Motor Carrier Act of 1935 is a remedial statute under which this Commission possesses only that jurisdiction which is specifically delineated or which may be reasonably inferred as necessary and incidental to regulation of the dynamic character of the Nation's surface transportation system and its inherent problems. That jurisdiction relates solely and directly to the regulation of transportation. In my opinion, neither the act nor its legislative history provide any indication of a congressional intent to convey to this Commission any jurisdiction over the employment practices of regulated carriers—matters which appear to be the sole responsibility of the EEOC, the U.S. Commission on Civil Rights, and the Department of Justice. To convey such jurisdiction to this Commission, an amendment to the Interstate Commerce Act would be required."

Letter from George M. Stafford, chairman, ICC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, July 23, 1970.

⁴² 49 U.S.C. 304 (6) (Interstate Commerce Commission). 16 U.S.C. 825 (h) (Federal Power Act). 15 U.S.C. 717 (e) (National Gas Act). 49 U.S.C. 1324 (Federal Aviation Act).

⁴³ The ICC and CAB not only regulate, but license, through certificates of authority, the industries over which they have jurisdiction. The ICC regulates and issues certificates of authority to interstate railroads, bus and trucking companies, inland water carriers and freight forwarders. The CAB regulates and issues certificates of authority to interstate "trunk line" carriers conducting long-haul passenger and cargo operations, local air carriers (e.g., Mohawk and Allegheny Airlines), and helicopters. The FPC issues licenses for the planning, construction, and operation of non-Federal hydroelectric projects. Hydroelectric projects are licensed for a maximum period of 50 years and at the expiration of the period are subject to being taken over by the U.S. Government or licensed to a new licensee or licensed to the original licensee. In addition, the FPC issues permanent certificates of authority to natural gas companies in interstate commerce. While the FPC regulates the rates and services of companies selling electricity in interstate commerce at wholesale rates, it does not license these companies. Although, an electric company whose electric rates and services the FPC regulates may also be a licensee and therefore regulated on both scores.

the same regulatory authority and are governed by the same principle of serving the public interest.

For example, when railroads, airlines, or natural gas companies apply to respective regulatory agencies for certificates of authority they must establish the following: (1) that their services are a public convenience and necessity; (2) that they are willing and able to render service; and (3) that they will conform to the provisions of governing law and to rules and regulations adopted by the regulatory agencies.⁴⁴

Further, although all three agencies have power to issue certificates of authority for a period of time, in practice they issue permanent certificates. All three also have authority to revoke certificates of authority for failure to comply with their rules and regulations. They seldom have had to resort to use of this sanction; industry members generally come into compliance with agency rules and regulations rather than defy them and risk losing their certificates.

Thus, the three agencies have the power to delineate, through administrative decisions and rules and regulations, the scope of their responsibilities, guided by the principle of serving the public interest. In fact, this principle governs every decision and action taken by the three agencies. While regulatory agencies, themselves, frequently have tended to interpret their public interest responsibility narrowly, over recent years the courts have viewed the responsibility more broadly. For example, the courts have made it clear that the agencies' primary responsibility is not the mere protection of the regulated industries,⁴⁵

⁴⁴ See, e.g., 49 U.S.C. 307 (ICC). 49 U.S.C. 1371 (CAB). 15 U.S.C. 171(j)(e) (FPC).

⁴⁵ ICC: "The Outlook of the Commission and its powers must be greater than the interest of the railroads, or of that which may affect those interests. It must be as comprehensive as the interest of the whole country," *Interstate Commerce Commission v. Chicago, R.I. & Pac. Ry. Co.*, 218 U.S. 88, 103 (1910).

FCC: In *Banzhaf v. Federal Communications Commission* 405 F. 2d. 1082 (D.C. Cir. 1968) the court decided that in the public interest the FCC, under its fairness doctrine, had to demand from the television and radio stations time for anti-smoking organizations to present to the public their case against the dangerous health consequences of smoking. "Whatever else it may mean, however, we think the public interest

but lies in serving and protecting the general public.⁴⁶

In view of these judicial decisions, the agencies would appear to have clear legal authority to use their broad rulemaking power in support of the established national policy of equal employment opportunity, concerning which all three branches of the Government have acted. There is no question that the adoption of fair employment practices is in the public interest. Further, it is well established that a licensee or holder of a certificate of authority is a trustee for the public interest and that the regulatory agencies may refuse to renew their

undisputedly includes the public health. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends." *Id.*, at 1097.

FPC: In *Scenic Hudson Preservation Society v. Federal Power Commission*, 354 F. 2d 608 (2nd Cir. 1965) and in *Udall v. Federal Power Commission*, 387 U.S. 428 (1967) the courts showed an awareness that environmental preservation must not only be considered but must be given primary consideration by the Federal Power Commission and its regulated industries.

"FPC " . . . the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." *Scenic Hudson Preservation Society v. Federal Power Commission*, 354 F. 2d. 608, 620 (2d Cir. 1965).

"We agreed that the Federal Power Commission has an active and independent duty to guard the public interest and that this may require consideration of alternative courses, other than those suggested by the applicant." *Citizens for Allegan Company v. Federal Power Commission*, 414 F. 2d 1125, 1133 (D.C. Cir. 1968).

CAB: "It is the Board's duty under the Civil Aeronautics Act to ascertain, promote and protect the public interest, as to which the Board is the final arbitrator," *Western Airlines v. Civil Aeronautics Board*, 184 F. 2d 545, 549 (9th Cir. 1950).

ICC: "The National Transportation Policy has recently been authoritatively summarized by Congress. That declaration requires administration so as to preserve the inherent advantages of each method of transportation and to promote 'safe, adequate, economical, and efficient service.' Such broad generalizations, while well expressing the congressional purpose, must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress." *ICC v. Parker*, 326 U.S. 60, 66 (1945).

licenses or certificates if they fail to act in the public interest.⁴⁷ These three regulatory agencies need only follow the example of the FCC to require their licensee to act in the public interest in this area as they are required to do in other areas.

Aside from the matter of the authority of these agencies to require their licensees to be equal opportunity employers, there is a serious question whether failure to do so places them in the position of violating the U.S. Constitution. Through the issuance of licenses or certificates of authority, the agencies confer upon the regulated industries an exclusive right to enjoy the use of part of public domain. The FCC permits licensees to make exclusive use of particular airwaves; the CAB and the ICC give airlines and railroads the right to provide service, free of the extensive competition they ordinarily would have if the industries were not regulated; and the FPC permits gas companies to offer their services, free from similar competition. In view of the substantial and close involvement of the regulatory agencies in the affairs of the industries they regulate, through licensing and control of their activities, acquiescence to employment discrimination would appear to represent a violation of the fifth amendment to the Constitution.⁴⁸

III. MINORITY GROUP OWNERSHIP AND MANAGEMENT OF REGULATED INDUSTRIES

A. Introduction

In this section, only the FCC and the ICC will be treated in detail. The industries over which they exercise jurisdiction—the radio, television, and motor carrier industries—are ones that offer substantial opportunities for entrepreneurship by individual minority group citizens or minority group organizations. The cost of purchase of a radio station or a trucking company, for example, is not so prohibi-

⁴⁷ *Television Corporation of Michigan v. Federal Communications Commission*, 294 F. 2d 730, 733-34 (D.C. Cir. 1961); *McIntire v. William Penn Broadcasting Co.*, 151 F. 2d 597, 599 (3d Cir. 1945).

⁴⁸ See Legal Appendix, for a discussion of the Constitutional issues involved in discrimination by regulated industries.

tive as to continue to bar minorities from taking part in this aspect of the business world. In these industries, which do not require enormous initial investments, many minority group members are in a position to seek new certificates or challenge existing licensees or holders of certificates of authority. In short, lack of sufficient capital investment is not the only reason minorities are not better represented in those industries. Failure of the FCC and ICC to change their institutional procedures to enable minority groups, barred from entry into ownership circles by decades of discrimination, to compete on an equal basis with existing licensees or certificate holders also explains their underrepresentation.

Because of the nature of the industries they regulate, the CAB and the FPC do not appear to have much opportunity to facilitate minority ownership of their regulated industries, such as gas and water power companies and airlines. These require an initial capital investment of many millions of dollars. In these industries there are few new or competing applicants—minority or majority group—in search of licenses or certificates of authority.

B. Interstate Commerce Commission and Federal Communications Commission

I. INTERSTATE COMMERCE COMMISSION⁴⁹

There are more than 15,000 certified motor transportation companies in the United States. There is no firm estimate of the number of certified motor carriers owned totally or in part by minority group members. The ICC does not maintain statistics on the racial or ethnic ownership of motor carriers. According to senior ICC staff, however, the number of minority owned motor carriers is extremely small.⁵⁰ The motor transport industry offers special opportunities for minority ownership. Entrance into this industry requires a relatively low capital investment—in some cases,

⁴⁹ This section on the ICC will deal only with the agency's regulation of motor carriers, which is more important for purposes of the Commission's study than inland water carriers or freight forwarders, which play a less significant economic role.

⁵⁰ Interview with Martin E. Foley, Managing Director of the ICC, Dec. 23, 1969. Jack Anderson's column in the Washington Post, Mar. 20, 1970, at D15, stated that there are only 18 motor carriers owned entirely or partly by minority group members.

as little as \$25,000 is sufficient—which frequently is available to individuals or groups either through savings or through loans under Government minority entrepreneurship programs.

The ICC's present policy, however, has the effect of maintaining the status quo and thus precluding minority ownership. The ICC requires applicants to show "public convenience and necessity" for their services, before a certificate is granted. The principal criterion on which the agency bases its evaluation of new applications, however, is not the need to provide service to the public, but rather, the need to guarantee the solvency of present certified motor carriers. Thus, the ICC interprets its duty to the public as requiring it to protect the existing certified motor carriers. As one commentator has observed:

In its decision, the Commission (ICC) emphasized repeatedly that where existing carriers have expanded their energy and resources in developing facilities to handle all available traffic and where their service is adequate, they are entitled to protection against the establishment of a new, competitive operation.⁵¹

As long as the certified motor carriers show economic solvency and necessary equipment, the ICC will bar any new competitors, even if they offer a service which is lower-priced, more efficient, and more responsive to the needs of the shippers.⁵²

The ICC policy is to allow entry only to those applicants whose presence would not create unreasonable competition for companies already certified, a policy that necessarily limits competition. Under this policy, it is unlikely that a program of increasing minority business ownership can be success-

⁵¹ Adams *A Critical Evaluation of Public Regulation by Independent Commission*. Vol XLVIII, Am. Econ. Rev., 529 (May 1958).

⁵² "Another difficulty for new carriers was an early ruling by the Commission that the offer of lower rates to shippers cannot be considered a factor in determination of adequacy and efficiency of existing service." Robert Nelson, *The Economic Structure of the Highway Carriers Industry in New England*, submitted to the New England Governors on Public Transportation, 31 (July 20, 1956).

Center for Study of Responsive Law, *Surface Transportation, The Public Interest and the ICC*, vol. III, 4-5 (1970). Chs. III, IV, V, and VI of the report give a detailed analysis of the impact on the industry and on the consumer of ICC's policy to limit competition.

fully implemented in the motor carrier industry. Minority groups, willing and able to enter the motor carrier industry, have an almost impossible burden of proof—to establish that the service they offer is so unique that they present no competition to existing certified carriers or that there are an insufficient number of carriers currently operating in their area—in order to acquire a certificate of authority.

The following example shows how the ICC's procedures make the entry of minority applicants into the motor carrier industry very difficult:

In November 1965, Joe Jones, a black trucker in Atlanta, Ga., who had obtained a Small Business Administration loan of \$25,000, was denied a motor carrier certificate of temporary authority because he could not show an "immediate and urgent need for his services."

Mr. Jones was a driver with many years of experience. He presented evidence to the ICC from two companies (Mayo Chemical and Sophie Mae Candy) to the effect that, if he was not granted a certificate, the companies would be forced to buy their own trucks. The ICC concluded, however, that this was not sufficient proof of the need for his service and that, therefore, his application did not meet the ICC's standard of "public convenience and necessity."⁵³

Although Mr. Jones proved that his services were needed, he was refused certification six times. Finally, after 2 years of personal effort and heavy pressure from the news media, the

⁵³ ICC No. MC-127 543 TA, filed Sept. 2, 1965, and denied by the entire Commission, Nov. 22, 1965. Under 49 U.S.C. 310a (pt. II of the Interstate Act-Motor Carriers) temporary authority will be granted by the ICC when the applicant can prove "an immediate and urgent need" for his service and that there is no existing carrier service capable of meeting such need. Transportation service rendered under such temporary authority will be subject to all applicable provisions of the Act, and to the rules and regulations of the ICC. Such temporary authority will be valid for such a time as the ICC sees fit to specify, but for not more than 180 days. The section states that the granting of a temporary authority "shall create no presumption that corresponding permanent authority will be granted thereafter."

ICC approved Mr. Jones' application for a permanent certificate of authority.⁵⁴

This example suggests that, unless the restrictive standards that bar entry to any possible threat to existing carriers are liberalized, minority group members will be unable to participate extensively in this important economic enterprise.⁵⁵

The ICC justifies maintenance of its restrictive standards, which tend to exclude minority entrepreneurs, on the ground that minority business enterprises should be judged by the same standards by which other applicants are judged. Its rulings, however, tend only to preserve the status quo—to protect those already in the motor carrier business, almost all of whom are members of the majority group—against fair competition from minority truckers who seek only a chance to compete on equal terms.⁵⁶ The agency's policies not only

⁵⁴ ICC No. MC-127681 (Sub. No. 1), Mar. 31, 1967.

⁵⁵ The ICC's position was set forth in a letter from its Chairman, George M. Stafford, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, July 23, 1970: "The Congressional purpose in enacting the Motor Carrier Act was to restrict entry by application of a common standard—public convenience and necessity" and not to "formulate a new policy favoring minority group applicants for authority." Such a policy would be contrary to the spirit and the legislative history of the act. All applicants, he stated, must be judged by the same standards. "Thus justification for any new grant of authority under the criteria of public convenience and necessity comprehends the submission of evidence that a new service is needed because existing carriers are unable to meet the reasonable transportation requirements of the public." To allow the ICC to grant certificates of authority by the mere fact that the applicant may offer services at a lower rate would create havoc to the national transportation system. Letter from George M. Stafford, *supra* note 41.

⁵⁶ The letter from the Chairman, George M. Stafford, to the U.S. Commission on Civil Rights stated that the ICC "has consistently awarded authority to meet the needs of minority groups where the proof was adequate to justify the grant of authority." He cited seven cases to substantiate his statement:

"*N.B.T.A. v. United States*, 284 F. Supp. 270, *aff'd*, per curiam, 391 U.S. 408 (1967); *Michigan Pickle Co., Common Carrier Application* 77 M.C.C. 549 (1958); *Illing Contract Carrier Application* 52 M.C.C. 79 (1950); *Bracero Transportation Co., Inc.,—Migrant Workers*, 78 M.C.C. 549 (1958); *Matura Trucking Corp. Contract Carrier Application*, 68 M.C.C. 766 (1956); *Martinez Common Carrier Application*, 78 M.C.C. 25 (1958); and *True Transport, Inc.* MC 133565 (Sub. No. ITA), (1969)."

restrict opportunities for minority entrepreneurs, but also prevent the public from gaining the benefits of lower prices and more efficient service that ordinarily result from free competition.

Recently an ICC examiner took a step to encourage minority ownership of motor carriers. The Cheetah Charter Bus Service Co., Inc., a minority owned enterprise in New York City, filed an application for a charter.

The company's three black stockholders have had experience in the operation of bus lines. The stockholders were long-time residents of the Harlem area of New York City. Based on opinions from various persons requesting bus service in the Harlem area and from black and Spanish-speaking citizens (Puerto Ricans) in other parts of New York City, there was a need for additional charter bus service. Cheetah's main purpose will be to serve the black and Puerto Rican population of Harlem, South Bronx, and other areas of New York City with minority group concentrations. The recommended departure point is 110th Street (Harlem) and the destination points include four counties in New Jersey and range throughout 19 other States.

The company was found to be "fit, willing and able to properly perform (charter interstate bus) service".⁵⁷ The examiner concluded

A review of these cases showed that only in three cases were the nationality or race of the owners specified: (a) A Puerto Rican couple who obtained a certificate of authority to transport Puerto Rican migrant workers; (b) a temporary certificate of authority was granted to a black trucker from New Jersey; and (c) a certificate of authority granted to an Italian-owned company in upstate New York to transport spaghetti goods to New York and environs. Mr. Stafford's letter does not deal primarily with the question of minority ownership, as does this report, but rather with service to minorities. It is distressing to note that in the cited cases, dealing with service for minority group individuals, the service was in most instances, to transport migratory workers.

⁵⁷ Cheetah Charter Bus Service Co., Inc., common carrier application with the Interstate Commerce Commission; examiner's opinion No. MC-13573 (Feb. 4, 1970). The original application was filed by Cheetah on March 19, 1969. Public hearings were held in New York City that fall. Thirty-seven witnesses appeared on behalf of Cheetah's application, and there was support from Congressmen and State legislators.

The examiner stated in his decision that: "A substantial number of the witnesses contend that authority

that the Cheetah Charter Bus Service could fill the gap which exists as a result of the insufficient charter bus equipment, now available to meet the needs of the Harlem community, particularly in the peak summer travel periods."⁵⁸

2. FEDERAL COMMUNICATIONS COMMISSION

Of the approximate 7,500 radio stations throughout the country, only 10 are owned by minorities.⁵⁹ Of the more than 1,000 television stations, none is owned by minorities. The importance of this almost total absence of minorities from ownership of radio and television stations lies not only in the lost opportunities for minority entrepreneurship, but also in the significance of radio and television in shaping the Nation's attitudes toward problems of racial injustice. The National Advisory Commission on Civil Disorders, for example, reported that the communications media had "not communicated" to the majority of their audience—which is majority group—a sense of the degradation, misery, and hopelessness of living in the ghetto.⁶⁰ Greater representation in these important communications industries of people who are familiar with ghettos and barrios and who are sensitive to the feelings of hopelessness and frustration of those who live there could contribute significantly to greater understanding on the part of majority white Americans.⁶¹

should be granted the applicant because it is black controlled and if granted authority will be black operated and this is important to the black community because the development of black business is essential for the black people to entering the mainstream of the economy, that a black operated bus company could better understand and meet the needs of the black community, and that it would serve as an inspiration, particularly among the black youth." *Id.*, at 28.

⁵⁸ In ICC's decision and order No. MC-133573, May 4, 1970, Cheetah Charter Bus Service Co. was granted a certificate of permanent authority.

⁵⁹ All are owned by Negroes. Interview with Robert Cahill, Secretary to the Federal Communications Commission, Nov. 6, 1969.

⁶⁰ *Report of the National Advisory Commission on Civil Disorders*, 210 (1968).

⁶¹ The FCC stated in a letter to the U.S. Commission on Civil Rights that it "cannot govern the racial makeup of its licensees." But the FCC does require that licensees, "whatever the racial composition of their ownership, serve the interests of all listeners and

Economics is by no means the sole reason for the lack of minority owned radio and television stations. Although the cost of purchasing an existing radio or television station can be high, and in the case of a television station, prohibitively high, most of the purchase price is not accounted for by the cost of the equipment but by the value of the license granted by the FCC. For example, the purchase price for an average existing television station can be as much as \$3 million. The price of the television equipment, however, can vary from as little as \$200,000 to \$250,000. For a radio station, equipment cost is generally between \$25,000 and \$50,000, but the purchase price of an existing AM radio station is as much as \$1 million.⁶²

In short, it is the license that sells at a high price. If an applicant is awarded a license through a competitive proceeding, rather than through purchase, he gains it at no cost. And once the license is awarded, it would not be difficult to obtain the funds necessary to operate the station. For example, on the strength of the license, banks would be willing to lend money toward the purchase of necessary equipment. A recent ruling by the FCC, however, tends to block new competition for licenses in favor of preserving the status quo.

On January 15, 1970, the FCC issued a policy statement, declaring that it would not entertain license challenges against radio and television stations that "substantially" meet the programing needs of their communities.⁶³ As in the case of the ICC, the FCC's ruling tends to preserve the status quo and continue the exclusion of minority groups from ownership of communications media outlets.

Prior to the policy statement, if a competitive application for a license was received at renewal time (3-year intervals) the FCC's apparent position was to award the license to the applicant that offered more challenging and

viewers." Letter from Ben F. Waple, Secretary, FCC to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 5, 1970.

⁶² Interview with Nathan Epstein, industry economist in the Broadcast Bureau, FCC, May 19, 1970.

⁶³ The basis of this ruling is that a broadcaster's past performance should be given more weight than the "promises" of challengers who seek to take over a license when it comes up for renewal.

deserving programing to the public.⁶⁴ On January 23, 1969, for the first time in the FCC's history, the agency denied the renewal application of an existing television station (WHDH-TV in Boston, Mass.) and granted the license to a competing applicant.⁶⁵ Legislation was introduced shortly after the decision to prevent the FCC from taking such action in the future.⁶⁶

⁶⁴ *WHDH-TV (channel 5)*, vol. 16 FCC 2d, 1 (Jan. 22, 1969); see generally the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d, 393, 1965.

The FCC has indicated that:

"Prior to the policy statement, as well as subsequent to its adoption, the Commission gave considerable weight to the past record of the existing licensee and did not deem the program proposals of the new applicant to be decisive. The FCC believes that its policy statement carries out the public interest in protecting only licensees, who are substantially serving their communities." Letter from Ben F. Waple, *supra* note 61.

⁶⁵ *Id.* FCC Commissioner Nicholas Johnson, in a concurring opinion, said the case opened the door ". . . to challenge media giants . . . at renewal time with hope of success . . ." He further indicated that the WHDH decision gave incentive to applicants presenting competitive proposals, but that before the WHDH decision, people were inhibited by the belief that they did not have a chance of winning.

Thus, with the WHDH decision, the competitive market was opened. The decision served as a tool for both applicants and licensed stations to compete before the FCC as to who offers a more challenging and deserving program to the general public. It would stimulate ideas in an already dormant and mediocre field.

⁶⁶ The bill, S.2004, introduced by Senator John O. Pastore (D. R.I.), provides that for the FCC to accept a competitive application, it would first have to deny the renewal to the existing licensee (something the FCC has never done with regard to a television station on the basis of its programing, in the absence of a competing application, during the FCC's 42-year history). This bill, which was passed by the House and is still pending in the Senate, has created heated arguments. The broadcasters claim that the uncertainty resulting from the WHDH-TV case would inhibit broadcasters from making long-term investments. Critics of the bill contend that the high profitability of major television stations and the comparatively low capital investments required will continue to make broadcasting financially attractive. See hearing on S.2004 before the Communications Subcommittee of the Committee on Commerce to Amend Communications Act of 1934, 91st Cong., 1st sess., ser. 18, pts. 1 and 2 (1969).

The strongest argument against the bill was stated by Representative Cellar (D. N.Y.). "The bill's passage would guarantee that mediocrity would be firmly entrenched; potentially superior service would be ruled out. The Commission may never know and would be

The FCC's policy statement of January 15, 1970, represented a compromise between the pending legislation and the WHDH decision.⁶⁷ According to the statement, community groups are permitted to file challenge applications against any broadcaster at renewal proceedings. If, however, an established broadcaster demonstrates that his programing served the public interest "substantially"—which the FCC defines as "solidly" or "strongly"—the challenge will be dismissed without reference to other issues.

Although the full significance of the agency's policy statement cannot yet be determined, it appears that it will necessarily discourage competition⁶⁸ and tend to exclude minority participation in the ownership of broadcasting stations.⁶⁹ FCC Commissioner Nicholas John-

precluded from finding out whether a superior prospective licensee exists." 115 Cong. Rec. 5283-84 (June 25, 1969).

⁶⁷ National Journal, vol. 2, No. 3, 123 (Jan. 17, 1970). Also see, *Petitions by Best*, CCC FCC 70-738, RM-1551, July 21, 1970 (Commissioner Johnson's dissenting opinion).

⁶⁸ Voice of Los Angeles, Inc. petitioned the FCC to withdraw its competing application to acquire station KNBC-TV after the issuance of FCC's policy statement on January 15, 1970. Voice of Los Angeles, Inc. decided that the agency's new policy effected a substantive change in FCC's comparative renewal standards, tending to stifle the desires of minority groups to challenge incumbent licensees. The FCC, in an unusual decision, reimbursed Voice of Los Angeles, Inc. for costs incurred during the initial portions of its comparative challenge, essentially on the grounds that the policy statement came as a surprise to the challenger and that, given the change in policy, it would be inequitable not to permit it to withdraw. *National Broadcasting Co., Inc.* (KNBC), FCC 70-691 (Docket No. 18602) released July 7, 1970.

⁶⁹ The Citizens Communications Center (CCC), a Washington, D.C. based organization devoted "to encouraging television and radio programing more responsive to the direct needs and interests of all segments of the broadcasting audience" has taken an active opposition to the Jan. 15, 1970 policy statement. The FCC, on Jan. 16, 1970, denied a petition from the CCC asking the FCC to enact the policy statement in rule form. By enacting it in rule form, the FCC would have been forced to ask the general public for comments approving or opposing the policy statement. The procedures governing the issuance of a policy statement do not require the FCC to ask for comments from the general public.

On Feb. 16, 1970, the CCC filed with the FCC a petition for reconsideration for repeal of the policy

son, dissenting from the policy statement, argued that "the American people have been deprived of substantial rights by our action today A broadcaster whose performance is merely satisfactory, will be protected from competition against a still better challenger."⁷⁰

The FCC action has come at a time when minority groups are demonstrating an increasing interest in entering the broadcasting industry. In the last year, a number of interracial groups have filed applications to acquire television broadcasting licenses. In addition to the action of Voice of Los Angeles, Inc. in filing for the license of station KNBC-TV,⁷¹ Forum Inc., a group that includes several blacks, has filed an application to acquire the license of station WPIX-TV in New York. In Washington, D.C., a group that includes several blacks is attempting to acquire the license of WFAN, channel 14, and AM radio station WOOK.⁷² This indicates the growing desire of minority groups to become involved in the communications industry.⁷³

As the economic and educational levels of minority groups increase, they will have further potential possibilities and opportuni-

statement and reconsideration of the order dismissing the petition for rulemaking. On July 21, 1970, the FCC rejected the petition for reconsideration (FCC 70-738, RM-1551). The FCC stated that "the policy statement was not a rule and did not have the force or effect of a rule; consequently . . . we must reject the contention that the adoption of the policy statement contravenes the rule making requirements of the Administrative Procedures Act."

Commissioner Nicholas Johnson in his dissenting opinion stated:

. . . the mere existence of the policy statement will deter groups that otherwise might have entered comparative contents. Between WHDH, Inc. and our policy statement, a number of applicants filed competing license challenges with the Commission. To my knowledge, not one TV application has been filed since Jan. 15, 1970—and one major applicant has even withdrawn on the basis of our policy statement. See *National Broadcasting Co., Inc.* (KNBC), FCC 70-691 (Docket No. 18602) (released July 7, 1970). In addition, our policy statement will doubtless be applied to future cases without exception."

⁷⁰ Vol. 22 FCC 2d, 424, 430 (1970).

⁷¹ The Voice of Los Angeles, Inc., recently withdrew its petition for competing application.

⁷² Cong. Q., 1799, Sept. 26, 1969.

⁷³ See Office of Communication, United Church of Christ, *Racial Justice in Broadcasting* (1970).

ties to compete for radio and television licenses, But unless the FCC modifies its procedures to facilitate minority group participation in ownership of radio and television stations, such opportunities will be largely lost.

A return to license awards on the basis of "competitive" proceedings could have an additional advantage to that of permitting entry into the broadcasting market by groups with new and innovative programming. "Competitive" proceedings can be an effective mechanism for bringing about greater racial and ethnic sensitivity in programming, nondiscriminatory employment practices, and other affirmative changes which otherwise might not take place.⁷⁴ If the licensees are adequately serving the needs of the community, they should not fear challenge at license renewal time. It is precisely the threat of competitive applications which will stimulate broadcasting stations to be more responsive to the community.⁷⁵

Currently, each broadcasting station must present to the renewal division of the Broadcast Bureau, 3 months prior to license expiration, a copy of a survey which will demonstrate how the licensee has ascertained the needs and interests of the community. The division's staff is charged with assuring that the applicants for licenses or license renewals demonstrate that their programming serves the needs and interests of the community. With a staff of three broadcast analysts evaluating from 300 to 400 renewal applications every 2 months,⁷⁶

⁷⁴In 1966, the District of Columbia Court of Appeals, in *Office of Communications of United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966) held that responsible representatives of the listening public had standing as parties in interest to contest renewals of broadcast licenses. The court went further and held that the FCC must hold evidentiary hearings to resolve public interest issues raised by claims of a broadcaster's racial, ethnic, on religious discrimination and oppressive overcommercialization by advertising announcements.

⁷⁵"The recent wave of license challenges . . . has without question raised the level of program aspiration in most major markets, and particularly in those where the jump applications were filed. There is on the whole discernably more local involvement, more community affairs and educational programming, more news and discussion and more showcasing of minority talent since the license challenges than there were before." *Variety*, 33, Aug. 20, 1969.

⁷⁶Interview with Evelyn Appley, former assistant to

it is unlikely that the regulations are being fully enforced.⁷⁷

This represents a serious flaw in the FCC's operations. If the renewal process is not adequately enforced and challenges are discouraged, little incentive appears to exist for self-improvement.

IV. DISCRIMINATION IN SERVICES AND FACILITIES BY REGULATED INDUSTRIES

Discrimination in services or facilities by the industries they regulate should be another civil rights issue of concern to the regulatory agencies. For example, railroads or bus companies, licensed by the ICC, may practice discrimination against passengers. By the same token, air or water carriers, licensed by the CAB or FMC, respectively, also may practice discrimination in their services. In addition, recreational facilities, which frequently are provided at hydroelectric projects licensed by the FPC, may exclude persons in a discriminatory manner or may provide access only on a racially segregated basis.

This section will be concerned with the ex-

the Director of the Renewal Division of the Broadcast Bureau, FCC, Nov. 5, 1969.

⁷⁷The FCC stated in a recent letter to this Commission that every renewal application is carefully reviewed by the FCC's Broadcast Bureau. As an example, the letter mentioned that "in the past license period involving 604 renewal applications of stations in Kentucky, Indiana, and Tennessee, the renewal staff wrote 216 letters of inquiry checking on matters contained in the applications." Letter from Ben F. Waple, *supra* note 61. However, see for example the following cases where the FCC renewed the license applications of various television and radio stations even though they were apparently violating the Communications Act of 1934:

"*Accomack-North Hampton Broadcasting Co., Inc.*, 8 FCC 2d 357 (1967); *Herman C. Hall*, 11 FCC 2d 344 (1968); *Lamar Life Broadcasting [WLBT]*, 38 FCC 1143 (1965); 14 FCC 2d 431, 442, 484 (1968); *In the matter of liability of WKRZ, Inc.*, FCC, 69-1273, FCC-69-1274 (Nov. 19, 1969); *In the matter of liability of Olivia T. Rennekamp*, FCC 69-1275 (Nov. 19, 1969); *Star Stations of Indiana, Inc. [WIFE]*, 19 FCC 2d 991 (1969); and *Letter to WKKO, Inc.*, FCC 70-739, July 8, 1970."

As stated earlier in the chapter (*supra* note 66), the FCC in its 42-year history has failed to deny a renewal application of a television station on the basis of its programming.

tent to which regulatory agencies have assumed responsibility for preventing such discrimination and, in those cases where responsibility has been assumed, with the manner in which it is carried out.

A. Prohibitions Against Discrimination in Services or Facilities

Of the five regulatory agencies under consideration, four have specifically recognized their responsibility to assure against racial or ethnic discrimination in the facilities or services provided by the industries they regulate and have taken some steps to carry it out. Only the FMC has failed to do so.

For example, the ICC, pursuant to its governing statute, which makes it unlawful for "any common carrier . . . to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .,"⁷⁸ has issued regulations prohibiting racial discrimination in the passenger service of interstate motor carriers.⁷⁹ Although the Interstate Commerce Act became law in 1887, it was not until 1949 that the ICC specifically recognized the application of the statutory prohibition to discrimination against minority passengers in service and terminal facilities.⁸⁰

⁷⁸ 49 U.S.C. 3(1) (italic added). This requirement applies equally to water and motor carriers. 49 U.S.C. 316(d), 904(d) and 905(c).

⁷⁹ 49 C.F.R. 1055.1-1055.5.

⁸⁰ 49 C.F.R. 1055.4, 1055.5. See *Henderson v. U.S.*, 816, 823 (1949). See also, *Mitchell v. United States*, 313, U.S. 8097 (1940); *NAACP v. St. Louis-San Francisco*, Reg. 297 ICC 335, Sept. 7, 1955.

On July 9, 1963, in a letter to Senator Warren W. Magnuson, Chairman of the Senate Committee on Commerce, the ICC, commenting on the pending civil rights bill (later enacted as the Civil Rights Act of 1964), said that the fact that the bill would bar private discrimination based on race, color, or national origin, ". . . would not appear to affect directly the jurisdiction or functions of this Commission or to impair our administration of the laws entrusted to us. In either case, however, the bill's passage into law . . . is . . . a matter of broad Congressional policy." 2 U.S. Code Cong. and AD News, 2388-2389 (1964).

The ICC's authority to prevent discrimination in the use of terminal facilities has been upheld by Federal courts' decisions. *Boynnton v. Comm. of Va.*, 364 U.S. 454 (1960); *U.S. v. City of Jackson, Miss.*, 318 F. 2d 1. (5th Cir. 1963); *State of Georgia v. United States*, 201 F. Supp. 813 (N.D. Georgia 1961); *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (M.D. Ala., 1961).

The CAB, on the basis of the following provision in the Federal Aviation Act, also has prohibited racial or ethnic discrimination in the operation of certified airlines:

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.⁸¹

Unlike the ICC, however, the CAB has not issued specific regulations barring racial and ethnic discrimination by air carriers, other than its Title VI regulations, which are applicable only to the small number of subsidized air carriers. Rather, the agency merely has informed each of the airline companies of this prohibition.⁸²

The FPC also has taken action to prevent discrimination in the use of recreational facili-

⁸¹ 46 U.S.C. 1374(b). In *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499 (2d Cir. 1956), the court stated that under sec. 404(b) of the Civil Aeronautics Act of 1938, prohibiting air carriers from practicing discrimination, the provision of "separate but equal" facilities for different races did not satisfy the requirements of the act.

The CAB supplies Federal financial assistance (\$40,917,000 for fiscal year 1970) to 13 small air carriers, nine local service carriers, e.g., Allegheny, Trans-Texas, Piedmont, and four carriers serving within Alaska and between Alaska and the Pacific Northwest. The operation of these airlines is therefore covered by Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs. The CAB promulgated formal regulations (14 C.F.R. 379) in 1964 pursuant to Title VI, which are applicable only to the subsidized air carriers (see ch. VI). The CAB has indicated, however, that a violation of Title VI would also be a violation of sec. 404(b) of the Federal Aviation Act and that the sanction that they would employ would be the one provided in the Federal Aviation Act. Interviews with John Russell, Director of the Office of Facilities and Operations, CAB, Sept. 28, 1967, and Oral D. Ozment, Deputy General Counsel, Sept. 29, 1967.

⁸² Interview with John Russell, Director of Facilities and Operations, CAB, Dec. 5, 1969. The courts have extended this prohibition to include airport facilities not under the control of the air carrier. See *U.S. v. City of Montgomery*, 201 F. Supp. 590 (M.D., Ala. 1962).

ties provided at licensed hydroelectric projects.⁸³

On April 27, 1967, the FPC issued an order in rule form, requiring that all members of the public be given unobstructed use of public recreational facilities at licensed projects, without regard to race, color, religion, or national origin.⁸⁴ The rule also states that the licensee shall make reasonable efforts to keep the public informed of the availability of project lands and waters for recreational purposes (such efforts include publication of notice in a local newspaper once each week for 4 weeks after the facility opens) and of the license conditions relating to public access to recreational facilities. Further, the rule states that all signs advertising recreational facilities must carry a statement that "the recreation facilities are open to all members of the public without discrimination".

Radio and television stations, licensed by the FCC, are required to develop programming that is responsive to community needs. The FCC, although it has not issued regulations concerning discrimination in programming, has taken action in this matter in individual cases. For example, on February 27, 1970, the agency deferred action on renewing the radio and television licenses of 28 Atlanta, Ga. stations. This was done at the behest of a local black

⁸³ Most of the hydroelectric projects licensed by the FPC are multiple purpose projects. The Federal Power Act specifically recognizes the need for considering all beneficial uses and provides:

"... that the project adopted ... shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefits of interstate or foreign commerce, for the improvement and utilization of water power development and for other beneficial public uses, *including recreational purposes*; . . ." 16 U.S.C. 803(a) (italic added).

Recognizing the mounting needs for improved recreational opportunities throughout the Nation, the FPC has placed emphasis on recreational planning at its licensed projects. The FPC has called for the filing of recreational use plans as a part of every application for major licenses. In some instances, this has meant supplementing recreational attractions already developed; in others it has involved the creation of new programs. At the end of fiscal year 1968, approximately 270 recreational use plans had been filed by licensees. Federal Power Commission, Recreation Opportunities at Hydroelectric Projects Licensed by the Federal Power Commission, 7 (June 1969).

⁸⁴ 18 C.F.R. pts. 8.1, 8.2, and 8.3.

citizens group which requested additional time to discuss with the stations a proposal to increase programming, as well as to improve the stations' hiring record. It was the first time the FCC had extended the regular time period for accepting citizens objections to a proposed license renewal. It also was the first time that all of the broadcasting stations in one city faced challenges based on their racial policies.⁸⁵

⁸⁵ The Washington Post, Feb. 28, 1970, at A2. The Community Coalition on Broadcasting, representing 20 black organizations, was seeking broad agreements for hiring more blacks, presenting a more representative view of the black community, and more involvement in black business affairs. The coalition was prepared to contest all the licensees on the grounds that the broadcasters were failing to comply with two FCC regulations: That broadcasting stations must be responsible to community needs and that broadcasting stations must develop an equal opportunity employment program. Id.

On Mar. 30, 1970, the Community Coalition on Broadcasting negotiated agreements with 22 of Atlanta's 28 radio and television stations. The coalition announced that it would actively oppose the relicensing of three radio stations and a UHF television station and the FCC granted another extension for further negotiation with two other radio licensees.

Details of the agreements between the coalition and the broadcasters varied with the size of the stations:

(1) All stations with their own news-gathering organizations pledged to improve coverage of the black community, and even the smaller stations promised to present information and documentaries about problems of the poor. Stations offering play-by-play reports of college sports events henceforth will cover black college events on an equal basis.

(2) Several stations agreed to place business with black-owned banks, advertising and public relations firms. None of the stations would agree to the coalition's demand for free advertising for new black business ventures, but some did promise to "spotlight" such businesses in their news coverage.

(3) The city's three major television stations will send one black reporter, each, for a 10-week program at the Columbia School of Journalism this summer, and they agreed to "encourage" use of black models in locally originated commercials.

(4) One of the major television stations is planning programs on black heritage, black problems, fashions for blacks and a black oriented children's program.

(5) Two of the television stations already are using black anchormen on weekend news programs.

(6) All of the 22 stations that have settled with the coalition have agreed to such items as monthly consultation with a coalition committee, public service announcements of black interest, and on-the-job training for black employees. The Washington Post, Mar. 31, 1970, at A 6, col. 1.

The FMC, like the ICC, CAB, and FPC, operates under a statute which prohibits discrimination. The statute provides as follows:

It shall be unlawful for any common carrier by water, or other person subject to this chapter (terminal and passenger and cargo services) either alone or in conjunction with any other person, directly or indirectly—

First, to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever⁸⁶

Unlike the other four agencies, the FMC has taken no steps of its own to implement this prohibition with respect to racial and ethnic discrimination. It has issued no regulations nor policy statements concerning this matter.⁸⁷

B. Actions to Implement Nondiscrimination Requirements:

Although four of the five regulatory agencies have taken positions—formerly or informally—against discrimination in services or facilities provided by their respective industries, none has taken affirmative actions to implement their stands. They all rely almost entirely on individual complaints for purposes of enforcement.

I. COMPLAINT PROCESSING

Complaint processing, traditionally, has been a relatively ineffective way of securing the right of minority group members to freedom from discrimination.⁸⁸

⁸⁶ 46 U.S.C. 815.

⁸⁷ Interview with John Mazure, former Acting Managing Director, FMC, and Leroy F. Fuller, Director, Bureau of Domestic Regulation, FMC, Feb. 16, 1970.

⁸⁸ There are several reasons why this is true:

Many minority group members do not know the agency to which their complaint should be addressed. This is especially so with respect to regulatory agencies, which tend to operate in a business world with which few minority group members have any familiarity.

Many minority group members have grown accustomed to discrimination, as being in the nature of things, and are reluctant to complain even in clear cases of overt discrimination.

So inured are minority group members to practices of discrimination that they are reluctant to exercise their right to use facilities and services which, by law, are supposed to be available without discrimination.

The experience of each of the regulatory agencies bears out this fact. In most cases, few complaints have been received. For example, neither the FMC nor the FPC has received any complaints alleging discriminatory practices in the facilities under their jurisdiction—port facilities and recreational facilities at hydroelectric plants, respectively.⁸⁹ The CAB has received a total of 14 complaints related to discrimination on the basis of race or ethnic and national origin.⁹⁰ The ICC maintains no data on the number of complaints it has received, but acknowledges that it has received some complaints relating to discrimination in passenger services and use of terminal facilities.⁹¹ The FCC is the one regulatory agency that has received a sizable number of civil rights complaints. During fiscal year 1969, the agency's complaint and compliance division re-

Complaint processing places the burden of proving discrimination upon the individual complainant. This is a burden that individuals often find difficult to sustain.

As this Commission pointed out in 1968:

"There is substantial unanimity among FEP (fair employment practices) commissions and professional sources, including a number of persons who have specialized for a lifetime in problems of administrative law, that complaint-oriented procedures to enforce nondiscrimination requirements, for various reasons, do not work. They cannot, in the light of two decades of experience, be expected to work."

Letter from Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights to Rosel H. Hyde, former FCC Chairman, Sept. 9, 1968.

Mr. Nassikas, Chairman of the FPC, indicated in his letter to the U.S. Commission on Civil Rights that there is no difficult burden on individuals who wished to place complaints before the FPC. He stated that "to initiate a proceeding, all that is required is that the complainant state 'facts forming the basis for the conclusion that there has been a violation of an Act administered by this Commission or of a rule, regulation, or order issued by the Commission'."

Letter from John N. Nassikas, Chairman, FPC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 7, 1970.

⁸⁹ Interview with William Webb, Public Information Officer, FPC, May 14, 1970; interview with James Mazure, former Acting Managing Director, FMC, Feb. 16, 1970.

⁹⁰ Interview with Richard O'Melia, Director of the Bureau of Enforcement, CAB, Jan. 20, 1970.

⁹¹ Interview with Martin Foley, Managing Director, ICC, Apr. 14, 1970.

ceived 180 complaints alleging racial or ethnic discrimination in programing.⁹²

The agencies' effectiveness in resolving received complaints vary, but in general they have not been markedly successful. Of the CAB's 14 complaints:⁹³

One complaint was satisfactorily resolved.

One complaint alleging discrimination because of sex and national origin was found not to be valid after an adequate investigation.

Eight complaints alleging racial discrimination were investigated and closed for lack of sufficient evidence or jurisdiction.

Two complaints were closed, one without adequate investigation, and the other for lack of jurisdiction.⁹⁴

Two complaints relating to South African

⁹² Sixty were against AM radio stations, 33 against FM stations, and 87 against TV stations. In addition, 66 complaints concerned employment discrimination by broadcasters. Interview with William B. Ray, Director of the Complaint and Compliance Division, FCC, Nov. 12, 1969.

⁹³ The complaint files of the CAB were analyzed by a Commission staff attorney in January 1970.

⁹⁴ The complaint dealt with a travel bureau's policy of refusing to accept blacks on its tours and was, in the Commission's view, improperly closed.

"The CAB has no direct supervision or jurisdiction over travel agents, except in cases where travel agents are alleged to have engaged in 'unfair or deceptive practices or unfair methods of competition in air transportation.' 49 U.S.C. 1542.

The complainants claimed that the travel agency violated the act which prohibits "deceptive practices" for failing to state in its brochures the discriminatory policy towards blacks. The CAB investigation documented that the travel bureau had a discriminatory policy towards blacks and that the brochure of the tour did not mention the bureau's discriminatory policy. The CAB, after its investigation, closed the case for lack of jurisdiction.

The CAB's rationale, as set forth in an Aug. 1, 1966 letter to the complainants, was that the section of the act forbidding "deceptive practices" did not apply to instances of racial discrimination. The CAB interpretation of its authority was unnecessarily narrow; just a little more than a year later, the Federal Trade Commission, interpreting essentially the same statutory provision, reached the opposite conclusion. It held that a landowner who would not rent or sell to Negroes, but who did not so indicate in his advertising, is as guilty of deceptive advertising as if he had affirmatively misled the public by what he wrote in his advertisements." See pp. 293-94 *infra*.

Airways apparently were closed on grounds that there was no discrimination and that, even if there were, the CAB has no power to prevent it.⁹⁵

The experience of the ICC suggests that another problem relates to the narrow view of the amount of evidence necessary to show discrimination.

In November 1967, attorneys from the Civil Rights Division of the Department of Justice reported to the ICC that waiting rooms in the Greyhound Bus Terminal in Greenville, Miss. were operated on a segregated basis. Although there were no signs requiring segregation of white and black customers, two separate waiting rooms were maintained, and one, in fact,

⁹⁵ The main issue in these complaints is whether, while South African Airways continues service on the New York-Johannesburg route, the CAB is taking appropriate measures to assure that South African Airways does not engage in discrimination against Negroes in air transportation in violation of sec. 404(b) of the Federal Aviation Act of 1958.

The U.S. Commission on Civil Rights sent a letter on Nov. 19, 1969, to the Chairman of the CAB, asking for an investigation to determine whether practices of the South African Airways violate sec. 404(b). The Feb. 12, 1970 CAB reply stated that the CAB conducted an informal investigation which disclosed no discrimination by the South African Airways in seating arrangements, service, or use of aircraft facilities in air transportation between the United States and South Africa. Even if the airline did practice discrimination with respect to international passengers at the airport in Johannesburg, CAB stated that it could not take remedial action.

It is the CAB's position that the South African Government's discriminatory practices are not isolated, but are part of the Government's general racial policy. The CAB's action to penalize the South African Government's designated carrier would constitute U.S. retaliation against South Africa for that Government's general racial policies. CAB believes this problem raises diplomatic and foreign policy questions which should be handled by the executive branch under the Department of State, absent enactment by the U.S. Congress of an overall Government program. Letter from Richard O'Melia, Director, Bureau of Enforcement, CAB, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Feb. 12, 1970.

The Commission has yet to review the adequacy of the investigation undertaken by the CAB, but believes that if South African Airways does discriminate, either in the terminal facilities offered in South Africa or in the seating arrangements on the planes, the CAB has jurisdiction to require the airline to cease discriminating or to prevent it from providing service in the United States.

was used exclusively by white customers and the other exclusively by black customers.⁹⁶ Staff of the U.S. Commission on Civil Rights reported a similar situation to the ICC in August 1969, concerning the Trailways Bus Terminal in Jackson, Miss.⁹⁷ The ICC's official position concerning these situations was outlined in a letter to this Commission dated August 27, 1969. The letter stated that in the absence of evidence that a carrier is "compelling" or "directing" the use of any particular space for persons of one race, color, or national origin, no corrective measures would be taken.⁹⁸

⁹⁶ Letter from John Doar, Assistant Attorney General, Civil Rights Division to Bernard A. Gould, Managing Director, ICC, Nov. 3, 1967.

⁹⁷ Letter from George C. Bradley, Assistant General Counsel, U.S. Commission on Civil Rights, to Bernard F. Schmidt, Managing Director, ICC, Aug. 19, 1969.

⁹⁸ Letter from Bernard Gould, Managing Director, ICC, to George Bradley, Assistant General Counsel, U.S. Commission on Civil Rights, Aug. 27, 1969.

This position appears to be at odds with recent court decisions which have held that violations of civil rights laws require an affirmative action by the party defendants to eliminate the effects of their past discrimination. *United States v. Louisiana*, 380 U.S. 145 (1965); *Green v. New Kent County School Board*, 391 U.S. 430 (1968); *Pullum v. Greene*, 396 F. 2d 251 (5th Cir. 1968); *Felder v. Harnett County Board of Education*, 409 F. 2d 1070 (4th Cir. 1969); *United States v. Gramer*, 418 F. 2d 692 (5th Cir. 1969).

In a recent case, *United States v. Boyd*, Civil No. 474 (S.D. Ga. 1970), the defendant was the owner of a restaurant which had two separate dining rooms, one for whites, the other for blacks. There were no signs posted after July 1967 in the restaurant designating the separate facilities. But the restaurant's "front room" and "back room," by which the dining areas were known, were undisguised euphemisms for "white room" and "Negro room." The court stated that:

"... the defendant's past actions consist of enforcing racially segregated dining rooms over the last 17 years, and rebuilding their restaurant with mutually inaccessible racially segregated dining rooms 4 years after the passage of the Civil Rights Act of 1964, and where the purpose and enforced usage of the dual dining facilities is renowned throughout the city of Statesboro, merely enjoining the defendants from enforcing their policy of segregation is not enough. Any relief ordered by this Court will be inadequate unless the defendants are also enjoined from maintaining racially separate facilities. Since the racial desegregations have become inexorably connected with the existing dual dining facilities at Vandy's Bar-B-Q, and continued operation of the two dining rooms as alternative eating facilities will, therefore, result in

The FCC, which has received a substantial number of complaints concerning discrimination in programming, maintains a complaints and compliance division to process them. The division is authorized only six field examiner positions and for significant periods of time within the last 12 months, had as few as three investigators.⁹⁹ With so small a staff, it appears impossible to adequately process the substantial number of complaints the FCC has received, especially those requiring field investigations. In fact, of the 180 complaints alleging discrimination in programming, none was subjected to field investigation. All were handled through correspondence.¹⁰⁰

continued racial use, the defendants may not continue to offer separate dining rooms to their customers as alternative eating facilities. (*Italic added*). *Id.*, at 8.

In addition, ICC's regulations pertaining to discrimination in terminal facilities are clear in its intention to terminate any type of direct or indirect discrimination.

"No motor common carrier . . . shall . . . provide, maintain arrangements for, utilize, make available, adhere to any understanding for the availability of, . . . any terminal facilities which are so operated, arranged, or maintained as to involve any separation of any portion thereof, or in the use thereof on the basis of race, color, creed or national origin." 49 C.F.R. 1055.4 (*italic added*).

The regulation does not mention the words "compelling" or "directing". The regulation clearly states that the carrier has the responsibility to maintain integrated terminal facilities. Even if there are no signs requiring a separation of races, the mere existence of two waiting rooms, one for black customers and another for white customers, enforces segregation. The carrier may not condone any terminal facilities which are "arranged or maintained" to keep segregated rooms. In this Commission's view, ICC should have ordered the motor carrier to maintain open only one waiting room. The use of two waiting rooms represents tacit approval of segregated facilities.

⁹⁹ William B. Ray, Director of the complaint and compliance division of the Broadcast Bureau, has requested a doubling of the size of his division's personnel and a tripling of the number of field examiners, with no apparent success. Ray interview, *supra* note 92.

The FCC letter to the U.S. Commission on Civil Rights stated that: "Persons from the complaints branch or the General Counsel's office are also utilized from time to time to take part in investigations." Letter from Ben F. Waple, Secretary, FCC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 5, 1970.

¹⁰⁰ According to Mr. Ray, most complaints in programming do not require a field investigation. Because of the nature of the violation, it is argued, it can easily

Complicating the matter is the fact that persons who wish to complain or otherwise challenge the practices of businesses before the regulatory agencies must carry the burden of obtaining and paying for legal services. In many cases, legal services are indispensable. For example, the issues concerning rate increases, mergers, or application approvals are complicated and if complainants are to have any hope of success, they must be adequately represented. None of the regulatory agencies currently provide free legal services¹⁰¹ which

be determined whether the complaint is valid and solutions usually can be achieved through correspondence. For example, if a television or radio program allows an attack on one race, it is not difficult for the FCC to check the validity of the complaint concerning the program. Ray interview, *supra* note 92. A staff of six, however, seems far too small even for this limited activity. This also assumes that the FCC should confine itself solely to complaint processing.

Moreover, field investigations are usually necessary when employment discrimination is alleged. It is very difficult to determine if discrimination exists through the mail due in part to the sophisticated ways used to violate the law. Indeed, depending on the nature of the complaint, a thorough and time-consuming investigation may be required. But because of the lack of an adequate number of personnel, it is likely that the complaints are not properly investigated.

According to the FCC's letter to the U.S. Commission on Civil Rights, the FCC has conducted field investigations involving both discrimination in employment and programming at a station in Greenville, S. C. (not the Bob Jones station). Letter from Ben F. Waple, *supra* note 99.

¹⁰¹The ICC has the authority to provide such legal services in 49 U.S.C. 16(11) but has not implemented its authority.

"The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for the proper representation of the public interest in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint . . . and the expenses of such employment shall be paid out of the appropriation for the Commission . . . The Commissioners are well aware of the pressing need for some means of consumer representative. Yet they abdicate responsibility by not creating some formal procedural mechanism (in the absence of other extra-agency government action) to meet this need." Center for Study of Responsive Law Report, *Surface Transportation, The Public Interest and the ICC*, vol. II, 23, 24 (1970).

The ICC recently refused to provide legal services for a consumer group appearing before that regulatory agency. The request stemmed from a proposed 17-percent increase in rail-freight ratio for meat shipments

necessarily inhibits those who may have legitimate grievances from complaining. Clearly indigent people and consumer groups, which frequently have few financial resources, are severely restricted unless legal services are provided to them.¹⁰²

A recent ruling by the Federal Trade Commission tends to point in the right direction, despite the limited scope of the decision. In the *American Chinchilla Corp.* case, the FTC dismissed a complaint against one of the respondents on the ground that the hearing examiner should have considered the respondent's request for free counsel because of his indigency, and that the failure to provide counsel deprived the respondent of protection of his rights.¹⁰³

The FTC's decision is limited in that respondents before regulatory agencies are usually not the parties requiring free counsel. Rather, it is consumer or civil rights groups who need legal representation if they are to have any hope of success in bringing challenges.

2. AFFIRMATIVE ACTIONS

The regulatory agencies are by no means limited to complaint processing as the only, or even principal, means of assuring compliance with their regulations and policies on nondiscriminatory access to services and facilities

from the West and Southwest to the Northeast. The ICC's rejection prevented the consumer group from becoming a full-fledged "party" to the investigation.

¹⁰²The Administrative Conference of the United States adopted in its secondary plenary session, held on Dec. 10-11, 1968, a recommendation asking all Federal agencies to engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views with respect to rulemaking that may affect them substantially. The recommendation urged the creation of a people's counsel which would represent the interests of the poor in all Federal administrative rulemaking substantially affecting them.

¹⁰³FTC docket No. 8774, Dec. 23, 1969. The proceeding before the FTC arose out of a complaint which named a corporation and several individuals as respondents to a charge of violating sec. 5 of the Federal Trade Commission Act (deceptive practices). It was the duty of the named respondents to answer the allegation or suffer default judgment to be entered against them. The FTC stated that where a named respondent could not answer and defend himself due to his indigency, he was compelled to surrender his rights under a cease and desist order without due process under the law.

ties. The burden of uncovering discriminatory practices properly should rest with the regulatory agencies, themselves, and, in fact, each has the power to initiate its own investigations.¹⁰⁴ There are also a number of additional steps which the agencies could take, individually or in concert with other agencies, not only to assure against discrimination, but also to give affirmative impetus to greater minority group utilization of industry services and facilities.

a. Interstate Commerce Commission, Civil Aeronautics Board and Federal Maritime Commission

All three agencies have responsibility for licensing and regulating those in the business of transportation. Of the three, however, the ICC, because of the nature of the industries it regulates, has greatest significance for minority group members. It licenses and regulates motor and rail carriers which, because their rates are inexpensive by comparison with those of air and water carriers, are the vehicles of transportation most often used by minority group travelers. Yet, the ICC has little way of knowing even the extent to which minority group members are subjected to discrimination in railroad and bus terminals and passenger services. Its last survey concerning this matter was done in the early 1960's.¹⁰⁵

All three agencies could take a variety of actions which include independent investigations by field examiners and investigators to seek out possible violations of nondiscrimination requirements. A basic step would be to hold meetings with minority group leaders across the country to learn more about the discrimination problems that exist and thus be in an informed position to meet them.

The ICC, FMC and CAB could also institute

¹⁰⁴ 49 U.S.C. 320(a) (Interstate Commerce Act); 49 U.S.C. 1377 (Federal Aviation Act); 16 U.S.C. 825(f) (Federal Power Act); and 47 U.S.C. 220 (Communications Act).

A bill is before Congress (90th Cong., S. 1720 and H.R. 8548) to amend Sec. 14 of the Natural Gas Act to enable the FPC to gather, publish, and disseminate information on all phases of the natural gas industry, similar to its power to gather, publish, and disseminate information from the electric companies.

¹⁰⁵ Interview with Martin E. Foley, Managing Director, ICC, Dec. 23, 1969.

regular and systematic meetings with representatives of the Department of Transportation to explore problems of civil rights concern other than overt discrimination—such problems as to whether railways, buses, and highway routes are planned to serve minority group populations adequately or whether they are designed principally to serve members of the majority group. Through an exchange of information, the three agencies would be in a position to determine whether new routes should be opened or whether existing routes should be expanded or curtailed.¹⁰⁶

b. Federal Power Commission

The FPC also could take a variety of actions to facilitate greater minority group utilization of the services and facilities provided by the industries it regulates. For example, the FPC could conduct surveys to determine the extent to which recreational facilities provided at licensed hydroelectric projects are being utilized by minority groups. If the surveys demonstrate a lack of use by minority group members, the FPC could examine its cause and be able to determine the kinds of actions necessary to remedy the situation.

But after decades of discrimination in access to recreational facilities, more than a formal change of policy is needed to bring about significant progress. Minority group members must first be made fully aware of the fact that recreational facilities, which previously were closed to them, now are in fact open. This requires advertising, particularly in minority newspapers and on minority-oriented radio and TV stations. In areas with large Spanish-speaking populations, advertisements and signs should be in both English and Spanish. Currently, the FPC does not require

¹⁰⁶ In addition, the three regulatory agencies could supply ideas and recommendations to the DOT. For example, the Department has major promotional programs in all fields of transportation and could cooperate with the CAB, FMC, and ICC to organize training programs for minority groups in skills which are important in the transportation area, i.e., pilots, administrators, mechanics, technicians, conductors, drivers, stewardesses, engineers. This would assist minority group individuals, lacking technical or manual skills, to enter into employment in carrier industries and eventually into the management and ownership categories.

advertising in minority newspapers or radio stations.¹⁰⁷

According to information recently supplied by FPC's chairman, the Agency staff includes a number of field examiners who regularly inspect licensed projects to assure compliance with FPC statutes, rules, and regulations and to observe the extent to which recreational facilities are used by minority group members.¹⁰⁸ The FPC should issue guidelines to its own field examiners specifically designed to assure compliance against both continuation of overt discrimination and against the more subtle practices which prevail. The FPC examiners should determine whether recreational facilities that are formally open to all, are geographically and economically accessible, to all. For example, recreational facilities such as boating marinas generally appeal only to the affluent, whereas facilities such as fishing piers and barges, hiking trails and picnic and camping areas, appeal to all economic classes.¹⁰⁹

¹⁰⁷ The FPC has issued a rule (18 C.F.R. pt. 8) stating that a licensee shall make reasonable efforts to keep the public informed of the existence of the recreational facility by requiring publication in a local newspaper once each week for 4 weeks after the facility is opened and placing a sign at the entrance of the recreational areas (pp. 284-85 supra). The FPC has not, however, issued any further orders or guidelines requiring licensees to insure themselves that minority group citizens are aware that the facilities are open on a nondiscriminatory basis. Interview with Drexel Journey, Deputy General Counsel, FPC, June 5, 1970. The FPC has the authority under 18 C.F.R. 8.1 to demand further advertising of the recreational facilities by the licensees.

"Following the issuance or amendment of a license, the licensee shall make reasonable efforts to keep the public informed of the availability of project lands and waters for recreational purposes Such efforts shall include but not be limited to the publication of notice in a local newspaper once each week for four weeks. . . ." (Italic added). *Id.*

¹⁰⁸ Letter from John N. Nassikas, Chairman, supra note 88. This Commission has no information concerning the depth of the inspections referred to by Mr. Nassikas.

¹⁰⁹ Interview with James Finch, legislative assistant to Lee White, former chairman, Nov. 19, 1969. However, Mr. Nassikas stated that the FPC "reviews recreational use plans to insure that recreation facilities are provided to meet public recreational needs without discrimination. Facilities are required to appeal to people of all classes." Letter from John N. Nassikas, Chairman, supra note 88.

The FPC also could determine the extent to which minority group members are being served by utility companies it regulates. Currently, the FPC maintains no statistical data to determine the houses which are supplied with electricity. The FPC could conduct a survey itself, or require annual statistics from the electrical power companies on the number and location of residences not served. The Agency then would be in a position to determine what causes lack of service and, where appropriate, take corrective action.

Little seems to be known about the relationship of rates charged to minority group members by utility companies. It has been alleged, for example, that inner-city residents, particularly the poor, are paying disproportionately high utility rates.¹¹⁰ The FPC, in cooperation with local utility commissions, could determine whether this charge is true and, if so, whether the rates are justified. In any case, the Agency, after learning the facts, would be in a position to correct these inequities.¹¹¹

c. Federal Communications Commission

Of the five regulatory agencies under discussion in this section, the FCC possesses the greatest potential for playing a key role in resolving problems of racial unrest. In its role as the regulator of the broadcasting industry, the FCC could take a number of steps on its own and could require and persuade the industry to take additional steps to transform radio

¹¹⁰ Address by Judge J. Skelly Wright, to the Committee on Federal Utility and Power Law of the Federal Bar Association, Dec. 4, 1968.

¹¹¹ The FPC, to date, has not been involved in these social issues. Journey interview, supra note 107.

The former chairman of the FPC, Lee C. White, praised Judge Wright's speech highly. He asserted that the issues raised by the speech should be of concern to the FPC. Interview with Lee White, former chairman, FPC, Feb. 17, 1970. It should be reiterated that the FPC's jurisdiction with respect to electric rates is limited to wholesale rates and does not embrace retail or local rates. However, as the Federal agency with jurisdiction over the power industry, the FPC has a close relationship with the electrical companies. It should use its influence to make evident to the utility industries the inequities which exist. See, "A Study Made by the National Association of Regulatory Utility Commissioners, in their Eighty-first Annual Convention," Sept. 16, 1969, in connection with the Proposed Model State Commission Rules Governing Establishment of Credit for Utility Services, in which the high deposits and their effect on the poor are analyzed.

and television into powerful instruments for salutary social change.

For example, the Agency could examine the impact of current television and radio programming on the aspirations and self-image of minority group members, so it would be in a position to recommend changes for improvement. It could encourage broadcasting stations to serve a more comprehensive community education function than they do now. Local stations could furnish information on such subjects as availability of job training programs, procedures to be followed in obtaining food stamps, or in finding assistance for health care. The stations could also be encouraged to initiate consumer education programs to help the general public develop a knowledge of how to make purchases economically and wisely.

Above all, radio and television stations could be stimulated to develop programming that would attract and appeal to all segments of the community. To an important extent, the broadcasting media help define the individual citizen's sense of belonging to the community and the programming they offer reflects his feeling of participation in community affairs. If disadvantaged and minority group families continue to be excluded from the programming concerns of the media, the stations are, in fact, failing to provide service to a substantial section of the community and are thereby violating the law. Aside from the illegality of this practice they are exacerbating problems which stem from a lack of communication among differing economic, racial, and ethnic groups and are intensifying the sense of alienation from mainstream America that racial and ethnic minorities already possess.¹¹²

As has been noted, in one case the FCC, on the complaint of a local black citizens group,

¹¹² *Report of the National Advisory Commission on Civil Disorders* (Kerner Report), 201-213 (1968). One of the main criticisms stated in the Kerner Report was:

"The news media have failed to analyze and report adequately on racial problems in the United States and, as a related matter, to meet the Negro's legitimate expectations in journalism. *Id.*, at 203. This statement is also clearly applicable to other minority groups in the United States."

See, Rosel H. Hyde, former FCC chairman, addresses before the National Association of Broadcasters, Apr. 2, 1968, and Mar. 26, 1969, urging broadcasters to give greater attention to the problems of minority groups.

deferred action on renewing the radio and television licenses of 28 Atlanta, Ga. stations.¹¹³ Among the grounds for the complaint was the lack of programming aimed at the minority community. The FCC could take similar actions in other localities, not only on the basis of complaints, but on its own initiative.

V. CURRENT AND POTENTIAL ROLE OF THE FEDERAL TRADE COMMISSION AND THE SECURITIES AND EXCHANGE COMMISSION

The regulatory agencies discussed above have responsibility for licensing or regulating specific industries. The FTC and SEC do not regulate specific industries. Nonetheless, they have broad powers that cut across industry lines and each could be a significant force in promoting the cause of civil rights.

A. Federal Trade Commission (FTC)

The statutory responsibilities of the FTC are twofold: consumer protection and antitrust enforcement. With respect to each, the Agency's sphere of regulation is wide, extending to most businesses regardless of the type of industry. By the same token, the FTC's discretionary power to define the scope of its activities also is wide. In carrying out its consumer protection responsibilities, the statutory mandate is to prevent "unfair and deceptive practices". With respect to its anti-trust activities, a principal statutory mandate is to prevent "unfair methods of competition". Neither term, however, is defined in the laws themselves. Congress, in effect, has left the FTC and the courts responsible for determining, on a case-by-case basis, what these terms mean.

The FTC has already taken some actions to use its wide jurisdiction and discretionary power to strengthen the cause of equal opportunity. Full realization of its potential civil rights role, however, lies in the future.¹¹⁴

¹¹³ See p. 285, *supra*.

¹¹⁴ The major portion of the information obtained on the FTC relates to situations prior to Jan. 12, 1970, when Caspar W. Weinberger assumed the chairmanship of the FTC. The FTC has apparently made significant efforts during the last 7 months in the field of consumer protection. Many of the recommendations

I. CONSUMER PROTECTION

In the following three instances, all involving the Washington, D.C. area, the FTC used its broad powers to assume an active civil rights role. In each case, however, the steps taken proved to be only tentative and partial and the end results disappointing.

a. *Deceptive Advertising in Housing*

Advertisements

On November 30, 1967, the FTC filed complaints of deceptive advertising against a number of Washington, D.C. area businessmen who failed to disclose that the land and housing they offered for sale or rent was not available to all persons regardless of race, religion, or national origin.¹¹⁵

On January 7, 1968, a public hearing on the charges set forth in the complaint was held before an FTC hearing examiner. On April 11, 1968, the Federal fair housing law was enacted and the course of the pending case before the FTC was changed.

The hearing examiner's April 24, 1968 decision¹¹⁶ granted an unopposed motion by respondents to dismiss the complaint on the ground that the issues in the proceedings were rendered moot by the enactment of the fair housing provisions of the Civil Rights Act of 1968.

The examiner's position as to mootness was overruled by the full Commission. Commissioner Philip Elman, writing for the FTC, said:

made by the American Bar Association Commission to study the FTC on Sept. 15, 1969, have recently been adopted by the FTC and are in various stages of implementation. Throughout this section, the significant changes made during the last few months by the FTC are noted, but no evaluation of their effectiveness has been attempted.

¹¹⁵ The FTC directed its staff to develop facts permitting the issuance of no less than four complaints in the District of Columbia area on the subject of deceptive advertising through failure to disclose material facts, i.e., the conditions under which the advertiser is willing to rent or sell. The investigations were conducted in the Washington, D.C. Metropolitan Area because it was thought appropriate to act first in the Federal city and because it was believed that this was the best method of attracting national attention. These investigations led to the November 30 complaints. Interview with Mary Gardiner Jones, Commissioner, FTC, Nov. 6, 1969.

¹¹⁶ See, *First Buckingham Community, Inc.*, FTC Docket No. 8750 (May 20, 1968).

. . . the enactment of the Civil Rights Act of 1968 does not render lawful any acts or practices which would otherwise be deemed unlawful under the Federal Trade Commission Act. Neither in its terms nor its legislative history does the Civil Rights Act disclose an intent by Congress to repeal or modify, in whole or in part, expressly or by implication, directly or indirectly, any provision of the Federal Trade Commission Act. Congress surely could not have intended, in passing the Civil Rights Act, to grant anyone a license to engage in false and misleading advertising that violates the Federal Trade Commission Act Conduct that violates one Federal statute does not become immune because it also violates another statute . . . we reject any contention that enactment of the Civil Rights Act of 1968 constitutes a mandate by Congress to cease and desist enforcement of the Federal Trade Commission Act in the area of false and misleading advertising of housing covered by the Civil Rights Act.¹¹⁷

Nevertheless, the complaint was dismissed by the FTC on the ground that the respondents stated in their motion to dismiss that there was "no real possibility that the alleged restrictions as to race, color, and national origin, which the respondents allegedly failed to reveal in advertising, can be continued."¹¹⁸ The FTC interpreted the respondents' statement "as a positive, unqualified affirmation that the respondents had discontinued and will not resume a policy of restricting the availability of their apartments on the basis of race, color, or national origin."¹¹⁹ Therefore, it appeared to the FTC that the allegedly illegal acts and practices were effectively terminated and that an order to cease and desist would serve no useful purpose.¹²⁰ There was no followup, however, to determine whether the real estate owners were complying with their promise to discontinue all forms of discrimination.¹²¹

So ended the first attempt in FTC's history to deal with an issue directly related to civil rights. The FTC essentially decided that it

¹¹⁷ Id., at 5, 6.

¹¹⁸ Id., at 6.

¹¹⁹ Id., at 6.

¹²⁰ Moreover, the FTC's only possible weapon under sec. 5 of its act, which deals with false and misleading advertising, is to demand that the advertisements of housing owners state; "We do not sell or rent to Negroes". Besides being bad policy for the FTC to demand such advertisements, once the Civil Rights Act of 1968 was enacted, such a statement would have been unlawful. See sec. 804(c) of the Civil Rights Act of 1968.

¹²¹ Interview with James M. Nicholson, former Commissioner, FTC, Oct. 28, 1969.

had no direct statutory authority to enforce integration. Once the Civil Rights Act of 1968 was enacted, the FTC decided that it would be advisable to leave the area of housing discrimination to the Federal agencies directly responsible for enforcement of fair housing law—the Department of Housing and Urban Development and the Department of Justice.¹²²

b. Washington, D.C. Consumer Protection Program

In 1968, the Report of the National Advisory Commission on Civil Disorders stated that the ghetto poor justifiably felt that they had been unfairly exploited by local white merchants.¹²³ Three years earlier, Senator Warren G. Magnuson, chairman of the Senate Commerce Committee, had suggested that the Federal Trade Commission initiate in the District of Columbia a “model program of policing those unfair deceptive practices to which the poor are particularly susceptible.”¹²⁴

The FTC’s special program came into effect in late 1966, and an office was opened at 1101 Pennsylvania Avenue NW. The District of Columbia consumer protection program was to develop in three directions:

(1) Corrective action and compliance activity on a case-by-case basis; (2) guidance and other liaison programs involving businessmen, consumers and local consumer protection and consumer education groups designed to inform consumers and businessmen as to practices deemed violative of the law and to facilitate the forwarding of complaints to the Commission on suspected law violations; and (3) study of economic and other aspects of these practices in order to provide Congress and the public with hard data respecting deceptive sales and credit practices of District of Columbia retailers.¹²⁵

In addition to the District of Columbia Consumer Protection Office, the FTC, through its Bureau of Economics, undertook a study designed to develop detailed information concerning the credit practices of retailers in the Metropolitan Washington, DC. area.¹²⁶ A report, based on the study, was published in

¹²² Id.

¹²³ *Report of the National Advisory Commission on Civil Disorders*, supra note 112, at 139.

¹²⁴ FTC, *Report on District of Columbia Consumer Protection Program*, 1, 2 (June 1968).

¹²⁵ *Report of the American Bar Association (ABA) Study of the Federal Trade Commission* 49, 50 (Sept. 15, 1969).

¹²⁶ Nicholson interview; supra note 121.

1968, under the title, “Economic Report on Installment Credit and Retail Sales Practices of D.C. Retailers”. Another study, undertaken at the same time, concerned food store pricing practices in low-income areas. This report was published in 1969, entitled, “Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco”. Both reports offered detailed information and valuable recommendations. The FTC has taken no action on the first economic report, but it has taken action on food store practices in low-income areas.¹²⁷

In addition, the only comprehensive and organized FTC effort to deal with retail marketing fraud began with the District of Columbia Consumer Protection program. As a result of this program, 108 investigations of sellers in the District of Columbia were opened leading to 36 final orders.¹²⁸ Several important opinions were decided by the FTC in connection with these complaints, which laid down landmark law on the legality of easy credit advertising.¹²⁹

However, the ABA report concluded that:

This program represents an embryonic effort at the type of study which the FTC needs in order to produce a unified plan of attack on consumer problems but it was conducted on too small a scale, and for too short a period of time to accomplish a sufficiently broad result.¹³⁰

FTC’s first venture in coping with the problems of the poor innercity residents appears to have been subject to serious limitations in its planning and execution. The first mistake was in setting up the District of Columbia Consumer Protection Office on Pennsylvania Avenue and 11th Street NW., a location not easily accessible to the poor community of

¹²⁷ Jones interview, supra note 115.

¹²⁸ FTC, *Report on Recent Developments in the Federal Trade Commission’s Consumer Protection Program* 2 (Jan. 1970).

¹²⁹ See, e.g., *In re Leon Tashof*, CCH Trade Reg. Rep., par. 18, 606 (FTC 1968); *Empico Corp.* 1965-1967 Transfer Binder, CCH Trade Reg. Rep., par. 17, 859 (FTC 1967). The American Bar Association report stated that “the knowledge gained as a result of the project influenced the drafting of the FTC’s guides on retail installment credit sales, and is said by FTC personnel to have influenced the enactment by Congress of the truth-in-lending legislation” ABA report, supra note 125, at 49.

¹³⁰ ABA report, supra note 125.

Washington, D.C.,¹³¹ precisely the community the project was designed to reach, protect, and educate. Second, the office was inadequately staffed, initially having only one attorney.¹³² Third, reliance for detection of deceptive practices rested primarily on complaints received from the aggrieved consumer. The office was limited to a case-by-case approach by processing individual complaints.¹³³ The one-man staff spent most of its time in the office on Pennsylvania Avenue waiting for complainants to appear. Attempts to seek cooperation from local consumer groups, community action program representatives, welfare rights organizations, Spanish language groups, OEO legal aid clinics, or any other group that represented the poor

¹³¹ Interview with Philip Elman, Commissioner, FTC, Nov. 14, 1969.

¹³² Jones interview, *supra* note 115. Months after it was opened the office's staff was increased to eight attorneys, four of whom were black. Prior to the FTC's reorganization, effective July 1, 1970, the District of Columbia Consumer Protection Office had only five attorneys. Interview with Robert B. Sherwood, Director, Division of Personnel, FTC, Feb. 10, 1970.

¹³³ *The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC*, by Edward Cox, Robert Fellmeth, John Schultz, 115 Cong. Rec. 1539 et. seq. (Jan. 22, 1969).

Mary Gardiner Jones, a commissioner has stated that the staff of the District of Columbia consumer protection program consulted the records of the District of Columbia Small Claims Court and developed a list of the companies where most complaints were received. In addition, a list was made of District of Columbia residents who had been the object of garnishment actions. Even though the FTC staff attempted to contact those aggrieved individuals to determine the cause of their complaints, she stated that "staff's experience was that the residents were fearful, also that it was impossible to contact these individuals at their jobs and that going to their homes in the evening met with considerable suspicion and outright hostility. The problem of eliciting complaints from the residents is not as easy as it appears. There has been established in the District (sic) the National Consumer Information Center, funded in part by the Meyer Foundation, whose sole concern is to develop complaints from the community and furnish the residents with medication and legal services where necessary. One of the major problems confronted by the center has been to develop the confidence of the community and to educate them sufficiently so that they are aware if they have a complaint as to where to go." Letter from Caspar W. Weinberger, Chairman, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, attached memorandum from Mary Gardiner Jones, Commissioner, July 31, 1970.

community of Washington, D.C., were limited in scope.¹³⁴ Among further developments growing out of the District of Columbia project was an education program developed by two FTC attorneys in which they spoke at high schools and colleges in the city and supplied audiences with pamphlets describing the FTC's history and powers.

After the FTC reorganization, effective July 1, 1970, the District of Columbia consumer protection program was disbanded. All District matters were turned over to the Washington area field office, in Falls Church, Va.,¹³⁵ even further away from the needs of the Washington inner-city.¹³⁶

Several of the recommendations in the American Bar Association report appear to have considerable merit. For example, the ABA recommended that the FTC establish special task force offices, to some extent comparable to the District of Columbia Consumer Office, in eight or 10 major urban areas, independent of the existing field offices.¹³⁷ The report also recommended particular activities for these offices:

[T]heir assignment would be to carry forward a model program to detect, proceed against and at the same time, study, classify and report on problems of localized fraud against consumers. These programs should be designed to protect consumers generally, but the emphasis should be on economic fraud and deception against particularly vulnerable groups—the poor, the uneducated, and the elderly.¹³⁸

According to the ABA report, project content would vary from city to city. In communities where either State, local, or private agencies are energetically pressing legal or administrative actions against economic ex-

¹³⁴ Elman interview, *supra* note 131. However, Miss Jones recently stated that the FTC "made every effort to seek the cooperation of local consumer groups." For example, FTC personnel worked with the Urban League and United Planning Organization representatives in the District of Columbia. Miss Jones' memorandum to Mr. Weinberger, *supra* note 133.

¹³⁵ Letter from Caspar W. Weinberger, Chairman, FTC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, attached memorandum from Paul A. Jamarick, Acting Director, Bureau of Consumer Protection, July 31, 1970.

¹³⁶ It is still premature to determine the effect of the FTC's decision to disband the District of Columbia Consumer Protection program as a separate entity and make it a part of the Washington area field office.

¹³⁷ ABA report, *supra* note 125 at 55.

¹³⁸ *Id.*, at 55-56.

plottation of consumers, the program's emphasis would be on coordinating these activities and establishing an education program. In other cities, however, the FTC emphasis would be on supplementing the enforcement efforts of other groups or agencies.¹³⁹

Pursuant to the ABA's recommendations, the FTC has recently taken a number of steps intended to make the Commission more responsive in the area of consumer protection and to establish closer contacts with the public, including minority groups. These have taken the form of reorganization of the FTC's field offices,¹⁴⁰ creation of consumer protection coordinating committees within each field office,¹⁴¹ and closer coordination and cooperation with local organizations.¹⁴² In a recent letter to the U.S. Commission on Civil Rights, Mr. Weinberger indicated that:

Since January, the Commission has worked to establish consumer protection coordinating committees in all of the cities in which its field offices are located. The first such committee was established in Chicago at the end of March and is now very much in operation. Other committees have been set up in New Orleans, Los Angeles, Philadelphia and San Francisco; it is anticipated that we will have committees in Boston and, I hope, New York by the end of the summer. These committees operate as one-stop complaint centers for consumers whereby a complaint submitted to any Federal, State or local consumer protection authority is immediately referred to the particular authority best equipped to deal with it without further effort by the complainant.¹⁴³

¹³⁹ Id., at 56.

¹⁴⁰ Letter from Caspar W. Weinberger, Chairman, FTC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, July 31, 1970.

¹⁴¹ Id.

¹⁴² The FTC has directed its field offices to establish and maintain close cooperation with local OEO legal service offices and community action programs, consumer protection organizations, Better Business Bureaus, welfare rights organizations, and with representatives of model cities programs. FTC, *Recent Developments in the Federal Trade Commission's Consumer Protection Program* January 1970, and Miss Jones' memorandum, supra note 133.

¹⁴³ Letter from Caspar W. Weinberger, Chairman, supra note 140.

Mr. Weinberger further indicated in his letter that private consumer boards, made up of representatives from consumer organizations, were created to assist the coordinating committees in the field offices. In order to assist these new developments, the FTC recruited 59 employees designated as consumer protection specialists. These new employees "have been

c. Joint Task Force for Washington, D.C.

As a measure to improve relations between persons of low-income in Washington, D.C. and the local merchants, and to keep a watch on consumer protection in general, District Mayor Walter E. Washington and the FTC organized a joint task force in July 1969. The task force is composed of one member each from the (1) corporation counsel's office; (2) U.S. Attorney's office; (3) United Planning Organization (the local antipoverty agency); (4) Neighborhood Consumer Information Center (NCIC), run by Howard University students; (5) Neighborhood Legal Services; (6) Post Office; and (7) Federal Trade Commission.¹⁴⁴

The group has met once a week since September 1969. The main function of the task force is to keep itself informed of the city's main consumer problems and the nature of the most prevalent complaints.¹⁴⁵ One of the major subjects of complaints has been the household moving companies, which allegedly refuse to serve inner-city residents or, if they do, charge them excessive prices. The task force recommended to the city government that it license moving companies so that it can have recourse to an administrative remedy, the power to revoke the license, if a company is found to discriminate in the provision of its services.¹⁴⁶

2. ANTI-TRUST ENFORCEMENT

The second function of the FTC is to pre-

trained to deal with people who have not had the advantage of a good education or any other training that could protect them from unethical and dishonest business practices." In addition to the 59 new employees, Mr. Weinberger stated that the FTC's attorney recruitment program "was geared to acquire employees who would have a definite commitment to consumer protection." Advance commitments were made to 26 graduating attorneys, 12 of whom belong to minority groups. Id.

¹⁴⁴ Interviews with William E. McMahon, FTC's representative on the Washington, D.C. Joint Task Force and John A. Delaney, former Acting Executive Director, FTC, Dec. 11, 1969.

¹⁴⁵ Id.

¹⁴⁶ Id. The ICC, the Federal regulatory agency which licenses household moving companies, has taken no affirmative action to determine whether any of their licensees engage in patterns of discrimination against minority group citizens. Interview with Martin E. Foley, Managing Director, ICC. Dec. 23, 1969.

vent unfair methods of competition¹⁴⁷ and to prevent mergers and other business relationships that may have the effect of substantially lessening competition or tend toward monopoly.¹⁴⁸ Here, too, the agency's wide jurisdiction and discretion and, above all, its position as the principal Federal agency concerned with the competitive activities of the business community, present the FTC with the opportunity to promote progress in civil rights and to further social and economic justice. This opportunity is presented through the FTC's express statutory duties as well as through the exercise of its broad investigatory powers and use of its prestige in the business community.

a. Mergers

Section 7 of the Clayton Act gives the FTC

¹⁴⁷ Some of the practices which have been found to be violations of sec. 5 of the Federal Trade Commission Act, secs. 41-46, 15 U.S.C. secs. 47-48 (1914), prohibiting "unfair methods of competition" in commerce are:

"1. Combinations or agreements of competitors to raise or otherwise control prices, tamper with the price structure, or divide sales territories or curtail competitors' sources of supply;

"2. Restriction by a seller on the freedom of customers of his product to deal in competing products;

"3. Payment of excessive prices for raw materials for the purpose of eliminating weaker competitors dependent on the source of supply;

"4. Boycotts or combinations to force sellers into giving preferential treatment to some businessmen over their competitors;

"5. Agreements among competitors to restrict exports or imports;

"6. The knowing receipt of discriminatory allowances or payments by a customer from his suppliers;

"7. Inducing breach of contract between competitors and their customers;

"8. Secret bribery of buyers from employees or customers."

¹⁴⁸ The Clayton Act, secs. 12-21, 15 U.S.C. secs. 22-27 (1914) covers the following specific practices:

"1. Price discriminations that illegally favor one customer over his competitor;

"2. Exclusive dealing agreements and tying contracts;

"3. Mergers of corporations where the probable effect would be to lessen competition or tend to monopolize; and

"4. Interlocking directorates of competing corporations."

The Robinson-Patman Act, sec. 13 c, 15 U.S.C. (1936), strengthened the Clayton Act by outlawing several forms of favoring particular buyers over their competitors and by prohibiting the inducement of illegal price favoritism.

responsibility to prevent illegal corporate mergers.¹⁴⁹ Currently, when the FTC investigates the probable effect of incipient mergers, it examines only economic data concerning the companies involved. Its interest is in whether the merger will strengthen or weaken competition. At least one FTC Commissioner believes that the Agency's interest should extend to social concerns as well.¹⁵⁰ Corporate decisions, such as where the merged companies will be located, whether company outlets will be maintained or removed from their present locations, and the impact of the merger on employment patterns of the two companies affect the lives of people in ways other than their effect on competition. For the poor, and particularly the minority group poor, these decisions frequently affect their vital interests. For example, mergers that result in reducing or eliminating needed services in inner-city areas can have a crippling effect on these areas, creating unemployment, and depriving neighborhoods of vital business enterprise. These factors are currently considered by the FTC only to the extent that they bear on the matter of competition.¹⁵¹ Moreover, the FTC, which has substantial investigative and research facilities, has made no effort to determine the extent to which mergers or other corporate activity have had this effect.¹⁵²

b. Franchises

Franchising has become big business. Under this form of business transaction, a company with an established national name permits

¹⁴⁹ Sec. 130, 15 U.S.C. 22-27 (1936).

¹⁵⁰ Jones interview, *supra* note 115. The Acting Director of the Bureau of Consumer Protection has written that even though there are no inaccuracies involved in Miss Mary Gardiner Jones' view that social concerns should be taken into consideration by the FTC, he believed, in concurrence with Wilner L. Tinley, acting general counsel, that sec. 7 of the Clayton Act failed to give the FTC specific jurisdiction over social matters. "The acts under which this Agency functions do not delegate such a role, specifically, they do not call for in-depth consideration of such items as social factors that may result from mergers. We believe that, had Congress intended us to consider such matters, it would have said so in the law, and of course, may still say so in future legislation or amendments." Paul A. Jamarick memorandum, *supra* note 135.

¹⁵¹ Interview with Harry Garfield, attorney advisor to Mary Gardiner Jones, Commissioner, May 23, 1970.

¹⁵² *Id.*

local businessmen to use the name and provides necessary financing for the franchise. The business, however, is owned and operated by local entrepreneurs. While franchisors, to protect their national name, are permitted to exercise control over matters such as the cleanliness of the establishment and the quality of products sold by the franchisees, they are restricted under antitrust laws with respect to the conditions they may impose on franchisees. For instance, they may not control the prices charged nor may they restrict franchisees in decisions concerning those to whom they sell or those from whom they purchase.

Franchising offers excellent opportunities for minority business ownership. Opportunities also are presented for exploitation of would-be minority franchisees. For example, franchisors, recognizing the limited opportunities for business ownership open to minority group businessmen, may seek to impose greater restrictions on minority entrepreneurs than they ordinarily impose on majority group franchisees.

According to a Federal official concerned with the Government's minority enterprise program, franchisors may seek to involve minority businessmen in franchises which it knows are economically unsound.¹⁵³ The FTC can play a constructive role in facilitating new business opportunities for minority group members and should, in its examination of franchising problems, focus on means of preventing malpractices.¹⁵⁴

c. Broadened Use of Investigatory Powers

Under Section 6 of the Federal Trade Commission Act, the FTC has broad investigatory powers "to gather and compile information

¹⁵³ Interview with Arthur McZier, Assistant Administrator for Minority Business, Small Business Administration, June 5, 1970.

¹⁵⁴ The FTC is now involved in preventing monopolistic and descriptive advertising of franchises, but it is not focusing its attention on its effects on minority entrepreneurs. Garfield interview, *supra* note 152. However, Paul A. Jamarick, Acting Director, Bureau of Consumer Protection, stated in his memorandum to Mr. Weinberger that "the FTC is very definitely focusing attention on the effects that descriptive advertising has on minority enterprises through an active project in the Division of General Litigation, Bureau of Consumer Protection." Paul A. Jamarick's memorandum, *supra* note 135.

. . . of any corporation engaged in interstate commerce."¹⁵⁵ Under its powers, the FTC has authority to investigate practices of inner-city companies that exploit ghetto residents and, in many cases, the Agency can take appropriate legal steps to prevent them.

An example of the use of the FTC investigatory powers for this purpose was its recent review of the pricing patterns and impact on competition in the Washington, D.C. area of food stores owned and operated by the Safeway and Giant Food Companies. Each controls 30 percent of the food market in the Washington, D.C. area—the area with the highest food prices in the Nation. An FTC staff memorandum stated:

"The thrust of this investigation is what is believed to be an actual monopolization of this market by a few dominant firms, a monopolization that is reflected in excessive concentration and prices that exceed competitive levels If all the allegations under investigation are proven, the staff intends to seek . . . divestiture of stores of Giant and Safeway."¹⁵⁶

The FTC has broadened its inquiry of food store practices beyond the Washington, D.C. area. The agency has issued subpoenas for the profit statements of four chain stores in each metropolitan area with a population of more than 500,000 persons.

d. Use of Prestige and Discretionary Power

In addition to its formal statutory powers and responsibilities, the FTC has available to it discretionary powers and a reservoir of prestige which could be brought to bear upon some of the pressing problems facing minority group residents and others confined to the inner-city. Existing business establishments in the inner-city tend to hold monopoly positions because companies that could offer strong, healthy competition, to the benefit of inner-city residents, refuse to locate there. The FTC could convene meetings and conferences with manufacturers, retailers, and trade associations, calling their attention to the opportunities that exist in the inner-city and urging them to offer their goods and services to its residents on a competitive basis.¹⁵⁷

¹⁵⁵ 15 U.S.C. 46 (a).

¹⁵⁶ The Washington Post, Dec. 17, 1969, at A15.

¹⁵⁷ The FTC does not now have a policy planned to influence businessmen to enter into the inner-cities as a means of offering healthy competition. Jones interview, *supra* note 115. Miss Jones has been most inter-

The FTC also could take steps to help the inner-city community assume a stronger competitive position by providing instruction on organizing buyer associations or cooperatives to take advantage of the lower prices afforded to those who buy in large quantities. Further, the Agency could promote minority business entrepreneurship by offering advice on business organization and on banking and investment practices. The Clayton Act also offers the FTC sufficient flexibility to permit special arrangements to facilitate minority entrepreneurship. On one case, the FTC took advantage of the flexibility afforded it for that purpose. Under a 1968 FTC advisory opinion an apparel manufacturer was permitted to provide extended credit terms to one class of his customers and was advised that this would not contravene the antitrust laws.¹⁵⁸ Under this opinion, extended credit terms could be given if:

1. The business is a newly established business located in an urban ghetto-type area;

2. The proprietor or principal owner of the business is a resident of the urban inner core, ghetto-type area within which the business is located;

3. In light of its ownership, management, and location, the business stands a reasonable chance of survival.¹⁵⁹

One year after its advisory opinion the FTC received a followup report from the manufacturer. According to the report, 41 stores had been opened under the program, 14 were to be opened in the near future, and 34 additional stores were being contemplated. Of the 41 stores opened, many were so successful that they were able to repay some of their invoices and avoid the necessity for extended credit.

ested in this area and has indicated in various speeches the valuable role the FTC could play. Addresses by Mary Gardiner Jones, Commissioner, *The Revolution of Rising Expectations: The Ghetto's Challenge to American Business*, annual meeting of the National Association of Food Chains, Oct. 16, 1967; *The Urgent Need for Consumer Protection in our Inner Cities*, Twin Cities Federal Executive Board, May 24, 1968; *Our Most Urgent Task: To Protect the Consumer Needs of our Poverty-Stricken Families*, Greater Miami Section National Council of Jewish Women, Inc., Apr. 22, 1966.

¹⁵⁸ FTC Advisory Opinion No. 253, May 25, 1968.

¹⁵⁹ *Id.*

B. Securities and Exchange Commission (SEC)

The SEC administers several statutes dealing with securities, all enacted for the protection of investors and the public. Two of its statutory duties have important civil rights implications: (1) disclosure of relevant financial information by companies offering stock or other securities to the public; and (2) SEC rules and regulations permitting stockholders to use the proxy mechanism to raise issues relevant to the management of the corporation.

I. DISCLOSURE OF INFORMATION

The Securities Act of 1933 and the Securities Exchange Act of 1934 require full and fair disclosure of all pertinent facts by any company wishing to sell stock to the public.¹⁶⁰ To facilitate the disclosure required by the act, the Securities and Exchange Commission has drawn up forms which describe the format in which information must be given to investors.

Among the items on the forms is a "description of business" which appears as item 9 on SEC's form S-1.¹⁶¹

¹⁶⁰ The Securities Act of 1933 and Securities Exchange Act of 1934 were designed to facilitate informed investment analysis and prudent and discriminating investment decisions by the investing public. It is the investor, not the SEC, who must make the ultimate judgment of the worth of securities offered for sale. The SEC is powerless to pass upon the merits of securities, and assuming proper disclosure of financial and other information essential to informed investment analysis, the SEC cannot bar the sale of securities which such analysis may show to be of questionable value.

The SEC is the repository of information for companies who issue bonds or shares of stocks across State lines. It makes certain, through its laws and regulations, that pertinent financial information is disclosed to it for the use of the general public. The SEC, therefore, does not directly regulate the purchase or sale of bonds or stocks, as opposed to other regulatory agencies which actually regulate the performance, rates, licenses, et cetera, of different industries. Interview with Meyer Eisenberg, staff attorney, General Counsel's office, SEC, Mar. 11, 1970.

¹⁶¹ Item 9 reads:

"(a) Briefly describe the business done and intended to be done by the registrant and its subsidiaries and the general development of such business during the past 5 years, or such shorter period as the registrant may have been engaged in business. . . .

"(c) If a material part of the business of the reg-

Item 9(c) of form S-1 requires that ". . . if a material part of the business of the registrant and its subsidiaries is dependent upon a single customer, or a very few customers, the loss of any one of which would have a materially adverse effect on the registrant . . ." such facts must be included within the prospectus.¹⁶² The release also requires, in the case of such customer, disclosure of "other material facts with respect to their relationship." This would seem to require the company to disclose any facts in its knowledge which could result in the termination of its contract with this customer. These provisions for disclosure also would seem to require a company to disclose the status of its compliance with Federal contracting requirements, including those related to equal employment opportunity.

At present, the registrant company is responsible for determining what facts should be disclosed in the registration statement. The SEC offers no specific guidance with respect to civil rights related issues which should be reported. There is a need for the Agency to issue such guidelines setting forth the types of action to be reported, including, but not limited to, judicial or administrative actions in the civil rights area against the registrant.

Under these guidelines, the SEC could insist

istrant and its subsidiaries is dependent upon a single customer, or a very few customers, the loss of any one of which would have a materially adverse effect on the registrant, the name of the customer or customers and other material facts with respect to their relationship, if any, to the registrant and the importance of the business to the registrant shall be stated." Release No. 4988, Securities Act of 1933, July 14, 1969.

¹⁶² Id. In addition, instruction 4 to item 9 of form S-1 requires that: Appropriate disclosure shall be made with respect to any material portion of the business which may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government.

Further, item 12 of form S-1 requires disclosure with respect to material pending legal proceedings. A key term in the instructions to item 12 is "material" which is defined by rule 405 under the Securities Act as follows:

"The term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered" (italic added).

that a registering company with substantial Government contracts, which has been debarred or otherwise subject to sanctions under Executive Order 11246, disclose this information in its registration statement.¹⁶³ By the same token, disclosure of a Department of Justice pattern or practice suit brought under section 707 of the Civil Rights Act of 1964, an EEOC finding of employment discrimination, or a law suit filed by a private party under section 706 of the Civil Rights Act of 1964, also should be required. For example, the Duke Power Co. has been in litigation since 1968 for allegedly violating Title VII of the Civil Rights Act of 1964.¹⁶⁴ The company's latest registration statement, filed with the SEC under the Securities Act of 1933, fails to disclose the pending legal proceeding.¹⁶⁵ In addition, if the ICC, the CAB, or the FPC should issue a rule prohibiting employment discrimination by their regulatees, as the FCC has done, a regulatee found to be in noncompliance with the rule should be required to disclose this fact to the SEC. Indeed, the action which a regulatory agency can take is much more significant than the mere loss of a contract. It involves the basic right of the company to continue in business.

These civil rights violations are "material" under item 12 of form S-1 and must be disclosed in order to inform "an average prudent investor"¹⁶⁶ of the possible financial repercussions that such legal or administrative proceedings would have on the companies.¹⁶⁷

¹⁶³ This is not the present policy of the SEC. When asked whether the SEC would adopt such a policy, Charles Shreve, former Director, Division of Corporation Finance, SEC, indicated to Commission staff that the SEC would take this matter under advisement. Interview with Charles Shreve, Feb. 12, 1970. At the present time, the SEC has not passed on this Commission's suggestion, mainly due to staff changes in SEC's Division of Corporation Finance. As of June 1970, the SEC still had the matter under its consideration. Interview with Alan B. Levenson, Director, Division of Corporation Finance, SEC, June 4, 1970.

¹⁶⁴ *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (D.C.N.C. 1968), rev'd, 420 F. 2d 11225 (4th Cir. 1970), certiorari granted June 29, 1970.

¹⁶⁵ SEC Form S-7, Registration No. 2-37953, filed July 10, 1970.

¹⁶⁶ Rule 405, Securities Act of 1933.

¹⁶⁷ The SEC, has indicated that ". . . it may well be, that not every proceeding pursuant to the Civil Rights

Disclosure by companies debarred or subjected to other sanctions under Executive Order 11246, Title VII of the Civil Rights Act of 1964, or nondiscrimination rules of regulatory agencies, not only could be of assistance in assuring compliance with nondiscrimination requirements, but is necessary to protect the public investor. For example, as noted earlier,¹⁶⁸ the Federal Power Commission issued an order on September 8, 1969, granting a petition filed by the California Rural Legal Assistance (CRLA) to intervene in the application proceedings for a license to construct a hydroelectric plant by the Pacific Gas & Electric Co. (P.G. & E.). CRLA alleged that the company's application for a license should be denied because of its failure to provide equal employment opportunity. It is likely that the project for which the license was sought is economically substantial and that the earning potential of P.G. & E. would be affected by a denial of the license. Furthermore, all future license applications of P.G. & E. would be affected by this review of the company's equal employment status. A stockholder or potential stockholder of P.G. & E. should be entitled to know of the action pending against the company.

Similarly, in 1968, the Office of Federal Contract Compliance issued notices warning seven companies of impending Government debarment action. Three of the companies—Timkin Roller Bearing, Bemus Paper, and Bethlehem Steel—reached the stage of debarment hearings. During the public hearings, Timkin Roller Bearing and Bemus agreed to comply with Executive Order 11246. The Bethlehem Steel case is still pending and its registration statement at the SEC fails to disclose OFCC's debarment action.¹⁶⁹ If any of these companies went through a public stock offering after they were warned of possible debarment action, potential investors were entitled to know

Act of 1964 or Executive Order 11246 would be deemed material as that term is defined under rule 405 for purposes of disclosure in registration statements. In such cases, the Commission has no authority to require such disclosure." Letter from Hugh F. Owens, Commissioner, SEC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, July 24, 1970.

¹⁶⁸ See note 15, at p. 270 *supra*; and note 41, at p. 275 *supra*.

¹⁶⁹ SEC, form S-7, registration No. 2-37104, filed Apr. 17, 1970.

that sanctions might be imposed on the companies.

2. STOCKHOLDERS' ABILITY TO RAISE MANAGEMENT ISSUES

A stockholder may bring to the attention of other security holders, by utilization of a stockholder's proxy proposal, issues which he deems relevant to the management of a corporation. In order to preclude abuses by persons seeking personal ends to the detriment of stockholders and the corporation, and to facilitate the submission of stockholder's proposals at shareholder meetings, the SEC adopted rule X-14A-7. The regulation limits the subject matters which may be raised by stockholders. As adopted on December 18, 1942, the rule specifies that the proposal must be a "proper subject for action". Throughout the years, the SEC has limited its definition of "proper subject". Specifically excluded from the meaning of that term are "general economic, political, racial, religious, social, or similar causes".¹⁷⁰

The restriction prohibiting use of proxy mechanisms for the purpose of promoting "general economic, political, racial, religious, social, or similar causes" substantially limits the freedom of stockholders to challenge corporate employment and other policies.¹⁷¹ To some extent, this SEC restriction is an anachronism. It is a holdover from a time when social considerations were considered irrelevant or inconsistent with the vital interests of business. In recent years, however, many of the Nation's leading business organizations and trade associations have recognized the need to become closely involved in problems of social and economic injustice. In the deepest sense, these companies have recognized that if they are to thrive economically, they can no longer ignore the problems that underlie social unrest and racial alienation.

¹⁷⁰ 17 C.F.R. 240.14a-8(c)(2). However, the SEC indicated in its letter to the U.S. Commission on Civil Rights that rule 14-8 "does not automatically prohibit inclusion in proxy material of shareholder proposals relating to employment practices of a company subject to the rule." Letter from Hugh F. Owens, Commissioner *supra* note 167.

¹⁷¹ See, letter from Donald F. Schwartz, professor of law, Georgetown University Law Center, to the Division of Corporation Finance, SEC, Mar. 10, 1970, for a comprehensive discussion on the subject of stockholders' ability to raise management issues.

In addition, there are sound financial reasons for abolishing this prohibition. Title VII of the Civil Rights Act of 1964 provides an individual with a right to sue employers, labor organizations, and others for discriminatory employment practices. The prospect of litigation is of legitimate concern to an investor or stockholder. A proposal which would require management to be an equal opportunity employer and to take steps to overcome the effects of its past discrimination by establishing an affirmative action program, therefore, would be relevant and a "proper subject."¹⁷² Yet, in at least

¹⁷² Rule 14a-8 has been challenged in two cases: *Peck v. Greyhound Corp.*, and *Medical Committee for Human Rights v. SEC. Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951) involved a challenge to the segregated seating system which Greyhound maintained in the South. The stockholder proposed that the company's proxy material include "A Recommendation That Management Consider the Advisability of Abolishing the Segregated Seating System in the South." The SEC determined that the primary motive of the stockholder was to undo the segregated system maintained by Greyhound. Although the proposal was germane to the business of the company, the fact that the stockholder was motivated by social conscience precluded the inclusion of the stockholder's proposal in management's proxy material. The suit brought by James Peck challenged the SEC's refusal to demand that Greyhound include the proposal in its proxy material.

The district court refused to issue a temporary injunction and the matter ended there. The basis upon which the district court denied Peck's claim was that he had not exhausted his administrative remedies and therefore the issue of whether or not the SEC may constitutionally prohibit stockholders' proposals on racial issues was not reached.

Medical Committee for Human Rights v. Securities and Exchange Commission, C.A. No. 23105 (D.C. Cir. July 8, 1970). The medical committee, one of Dow Chemical Co.'s shareholders, requested that a resolution be submitted to Dow shareholders authorizing Dow's board of directors to amend the company's charter to prohibit the sale of napalm by Dow to any buyers refusing to give assurances that the napalm would not be used on or against human beings. Answering brief of the SEC, respondent, at 3.

Dow notified the SEC of the medical committee's proposal and advised both the Commission and the medical committee that it had decided to omit the proposal from its proxy materials. The proposal was omitted on grounds of ". . . promoting a general political, social or similar cause," and as solely consisting of a recommendation ". . . with respect to . . . the conduct of . . . (Dow's) ordinary business operations. . . ." *Id.*, at 4.

The SEC, on Mar. 24, 1969, ". . . determined to

one case the SEC has ruled that requesting a company to hire on an equal opportunity basis is not a proper subject for a proxy.¹⁷³

If the SEC should liberalize its current definition of "proper subject" to permit socially motivated stockholders to introduce proposals of civil rights importance, the potential impact could be overwhelming. The issues susceptible to resolution through use of the stockholder proxy mechanism are far-reaching. For example, companies that are abandoning inner-city ghetto areas could be directed by their stockholders to relocate there and provide additional goods and services to ghetto residents. Companies could be directed to institute training programs to expand employment opportunities for minority group members. Companies also could be directed to invest in the inner-city and seek other means of assisting in the creation of a sound economy in the ghetto. These are

raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights." The SEC also denied the request of counsel for the medical committee to be heard by the Commission. On May 29, 1969, the medical committee filed a petition for review in the court of appeals. The SEC, in its brief, argued entirely on procedural grounds.

On July 8, 1970, the Washington, D.C. Court of Appeals ruled the corporate shareholders have the right to be involved in corporate policy decisions that have social impact and that they be allowed to vote on many of these issues by proxy or at shareholders' meetings. The court did not flatly order inclusion of the napalm resolution, but told the SEC to reconsider its ruling in light of the court's own finding that corporate proxy rules cannot be employed as "a shield to isolate such managerial decisions from shareholder control." *Medical Committee For Human Rights v. Securities and Exchange Commission*, No. 23 105 (D.C. Cir. July 8, 1970).

¹⁷³ On Feb. 17, 1970, an organization named "Project on Corporate Responsibility," popularly known as Campaign GM, delivered to the General Motors Corp. nine stockholders' proxy proposals to be included at their annual meeting of shareholders to be held on May 22, 1970. The ninth proposal asked GM for an implementation of nondiscriminatory policies in selecting dealers and hiring employees. On Feb. 27, 1970, the General Motors Corp. determined that the nine proposals were the subject of unlawful proxy solicitation under rule 14a-8, and not a "proper subject for action." Letter from George W. Combe, Jr., secretary, General Motors Corp., to SEC, Feb. 27, 1970. The SEC determined on Mar. 18, 1970 not to take any enforcement action should General Motors omit proposals and proposals 4 through 9 from its proxy statement.

but a few examples of the kinds of proposals which might emanate from stockholders if the SEC were to remove its restrictions on the types of issues that may be raised through the mechanisms of stockholders proxies. Further, even in those cases where such proposals are not adopted by the stockholders, the introduction and full discussion of their merits could stimulate greater corporate concern and activity.¹⁷⁴

¹⁷⁴The SEC has taken several limited actions of potential benefit to minority group members. The SEC Washington, D.C. regional office, for example, has created a program with Howard University which should serve as an example to other regulatory agencies.

Members of the SEC staff met with members of the Howard University Law School in order to create a symposium in Federal securities laws. The SEC members were distressed to find that Howard University Law School did not offer courses in security laws. This is an area, they believe, which is of prime importance to all minority groups. All minority groups must learn to understand the security law, its meaning and application, so as to make their entry into the world of securities easier.

The Commission's regional office plans to offer the symposium every year. Their next step should be to stimulate other SEC regional offices to establish similar programs. The FMC, FTC, FCC, CAB, FAC, and ICC should follow the SEC's example and offer lectures on their pertinent laws and regulations. This will not only be a public relations vehicle for each agency, but it will also stimulate minority group law students to become interested in fields of law which their curriculum presently ignores and possibly a few of them will seek employment with a regulatory agency. Interview with Alex Brown, Regional Administrator, Washington, D.C. office, SEC, Mar. 12, 1970.

The SEC and other Federal regulatory agencies' efforts should not be limited to law students. The regulatory agencies should extend their courses to groups of minority leaders, entrepreneurs, consumer protection groups, so as to familiarize a wider section of the community with their laws.

In addition, the SEC has adopted regulation A, pursuant to an act of Congress, to provide exemptions from the registration requirement as an aid primarily to small business. The law provides that offerings of securities not exceeding \$300,000 may be exempted from registration, subject to such conditions as the Commission prescribes for the protection of investors. 15 U.S.C. 77c.(b). In addition, the SEC's regulation A permits certain domestic and Canadian companies to make exempt offerings not exceeding \$300,000, provided certain specified conditions are met, including the prior filing of a simple "Notification" with the appropriate regional office and the use of an offering circular con-

VI. SUMMARY

Over the past 80 years, Congress has created a number of regulatory agencies and provided them with authority to control the activities of specific industries. For example, the Interstate Commerce Commission regulates railroads and motor carriers; the Federal Communications Commission regulates radio and television stations, and telephone and telegraph companies; the Federal Power Commission regulates gas and electric companies; the Civil Aeronautics Board regulates airlines; the Federal Maritime Commission regulates water carriers.

Congress also has created regulatory agencies with responsibility for controlling specific business practices, rather than particular industries. For example, the Federal Trade Commission has responsibility for preventing deceptive business practices and unfair competition, regardless of the industries in which these practices occur. By the same token, the Securities and Exchange Commission has responsibility for protecting investors and the public by requiring full disclosure of financial information by companies offering stock or other securities. The SEC's authority also extends across industry lines.

The common standard governing all of these regulatory agencies is that of serving the public interest. There are a number of civil rights issues that necessarily arise in connection with the activities of the industries they regulate and, by close adherence to the standard of serving the public interest, the agencies could contribute substantially to furthering the cause of civil rights and contributing to social and economic justice.

taining certain basic information in the sale of securities.

Regulation A, even though it was adopted to aid small business, is a complicated registration form. In order to be effectively used by small businessmen, regulation A must be rearranged so as to make it easier to understand and be used by minority entrepreneurs. The Washington, D.C. regional office, for the past several months, has been drafting a simpler type of prospectus which could be filed under regulation A. The new prospectus will apply only within the jurisdiction covered by the Washington, D.C. regional office and is geared for the benefit of minority groups. Id.

Once a final draft is acceptable, the form should then be translated into Spanish in order to facilitate the use of the prospectus by Spanish-speaking minorities.

For example, nearly all of the business enterprises they regulate are subject to the equal employment opportunity requirements provided under Title VII of the Civil Rights Act of 1964. Many also are Government contractors and, by virtue of that status, are subject to the equal opportunity requirements of Executive Order 11246. In view of the degree of control exercised by the agencies over the industries they regulate, the agencies could be a significant force for promoting the cause of equal employment opportunity.

In some industries, excellent opportunities are presented for enabling minority group members to participate in business ownership and management. For example, the motor carrier industry and the radio and television industry both require relatively small capital investments. By virtue of the licensing authority of the ICC and the FCC, these agencies could contribute measurably to facilitating greater minority business entrepreneurship. Moreover, minority participation in radio and television could be of special help in creating greater understanding within the majority community of the deep-seated injustices which minority group members experience. The agencies could also play a key role in eliminating discrimination or segregation of services and facilities provided by members of the industries they regulate.

The agencies, in most cases, have ignored their civil rights responsibilities. In those cases where they have accepted these responsibilities, their performances have been disappointing.

For example, only one of the five agencies that regulate specific industries—FCC—has taken steps to assure against employment discrimination by the members of its industry. The FCC has issued a rule against such discrimination by radio and television stations and is planning to issue a similar rule regarding telephone and telegraph companies. None of the other four agencies under consideration in this chapter has given indication of taking a similar step. Some of the FCC's actions, such as license renewals of radio stations that apparently discriminate in their employment policies, have suggested that the agency does not consider its antidiscrimination rule to have a high priority.

Neither the ICC nor the FCC has taken advantage of the special opportunities afforded

them to promote a greater minority participation as owners and managers in the industries they regulate. In fact, the standards used by the two agencies in approving license applications tend to exclude new entrepreneurship in favor of protecting those already entrenched in the industry.

Further, while most of the agencies operate under statutes which prohibit discrimination in facilities or services offered by industry members, few have even taken rudimentary steps to carry out their responsibility of enforcing the statutory prohibitions against overt discrimination. Little, if anything, has been done to eliminate the more subtle forms of discrimination in their industries, such as programing policies of FCC-licensed radio and television stations and recreational facilities provided at FPC-licensed hydroelectric plants. Nor have any of the agencies even attempted to inform themselves of the extent to which minority group members are participating in industry-provided services and facilities.

The five agencies charged with responsibility for regulating specific industries have barely joined in the civil rights effort being carried out by other Federal departments and agencies. To the extent they have adopted rules and policies against discrimination, they generally enforce them solely through the processing of complaints. Only the FCC has adopted an affirmative program to assure against discrimination. None has taken even the basic step of establishing a staff or single staff member with direct responsibility for implementing the agency's civil rights functions. Thus, such important matters as devising affirmative civil rights programs, coordinating the agency's civil rights responsibilities, establishing liaison with other departments and agencies having similar civil rights functions, and proposing new ideas for strengthening the agency's civil rights performance, are largely ignored insofar as no one is given specific responsibility for handling them.

The Federal Trade Commission and the Securities and Exchange Commission, although they do not regulate specific industries, are charged with responsibilities that carry significant civil rights implications. For example, the FTC, in carrying out its responsibility to prevent deceptive practices, could be an affirmative

force for protecting the ghetto poor from unscrupulous businessmen who exploit them. Indeed, the FTC has recognized the need to act in this area. Its one effort, however, involving creation of a Washington, D.C. task force, generally failed because of inadequate staff and lack of imaginative implementation. In carrying out its responsibility to enforce antitrust laws, the agency should, in appropriate cases, be concerned with the effect of incipient mergers on the economy of ghetto areas, including such matters as unemployment, price levels, and the quality of goods and services that will be available. Currently, the FTC does not view its functions with sufficient breadth to take these matters into account.

The SEC, in carrying out its responsibility of assuring full disclosure of information by registering companies, could contribute to more effective civil rights enforcement. For example, the Agency could require registering companies to disclose the fact that sanctions are being imposed for violation of Federal contract requirements under Executive Order 11246, of pending lawsuits under Title VII of the Civil Rights Act of 1964, and findings of employment discrimination by the Equal Employment Opportunity Commission. In addition, if the ICC, the CAB, or the FPC issue rules prohibiting employment discrimination by their regulatees, as the FCC has done, a regulatee found to be in noncompliance with the rule should be required to disclose this fact to the SEC. The requirement of

public disclosure not only would tend to strengthen enforcement of equal employment opportunity laws, but also would be of legitimate interest to potential stockholders who are concerned over possible loss of important contracts or pending litigation against companies in which they are thinking of investing. Currently, the SEC does not require the disclosure of such information.

Further, stockholders, by way of the proxy mechanism, could be in a position to bring an end to discriminatory practices by the companies in which they own stock and to transform these companies into instruments of social progress. The SEC, however, currently prohibits use of the proxy mechanism for the purpose of promoting "general economic, political, racial, religious, and social" causes, thus preventing socially motivated stockholders from even suggesting changes in company policy related to any of these matters.

Each of the regulatory agencies considered in this chapter can play a significant role in promoting the cause of civil rights. None has made more than a half-hearted effort to do this. Some of the agencies have failed to recognize that they have civil rights responsibilities. In this Commission's view, only after all of these agencies have acted forcefully and affirmatively to promote civil rights and end social and economic injustice can they truly proclaim themselves to be protectors of the public interest.

CHAPTER 6

THE CIVIL RIGHTS POLICY MAKERS

I. INTRODUCTION

In a number of the civil rights areas discussed in earlier chapters, mechanisms exist to coordinate and focus the efforts of departments and agencies having civil rights responsibilities in common. In housing, HUD is charged by statute with the duty of coordinating the activities of all other agencies that operate programs and activities relating to housing and urban development and of providing leadership in the Government-wide effort to further the purposes of fair housing. The Department of Justice has responsibility, under Presidential Executive order, to coordinate the Title VI activities of the large number of Federal agencies that administer the variety of loan and grant programs covered by that law. The Civil Service Commission is responsible, also by Presidential Executive order, for coordinating the effort to assure equal opportunity in Federal employment. And in the area of private employment, a loose-knit arrangement among the three agencies principally concerned with preventing private employment discrimination—OFCC, EEOC, and Justice—serves this function.

There also are coordinating mechanisms that function across subject area lines, and there are agencies whose authority—directly or indirectly—extends beyond coordination to decisions on overall civil rights policy and uniform methods of assuring compliance with all civil rights laws. The duties and scope of authority of these across-the-board civil rights coordinating mechanisms differ widely. Some have no role in the formulation of civil rights policy and programs. Their function is to see that Federal programs are understood at the local level and that Federal policy is carried out effectively in the field. Thus, the Federal Executive Boards, consisting of regional representa-

tives of a large number of Federal agencies, have responsibility for disseminating information on the many social and economic welfare programs operating in the various cities and metropolitan areas in which they are located to assure effective and coordinated implementation.

Other agencies, in addition to serving an across-the-board civil rights coordinating function, also play a significant role as civil rights advocate, either as Government spokesman for minority group members generally or for particular minority groups. The Community Relations Service, part of the Department of Justice, serves as a needed link between the minority community and the Federal bureaucracy and tries to make the Federal Government more responsive to the needs of the Nation's ghettos and barrios. The Cabinet Committee on Opportunity for the Spanish-Speaking, recently given a legislative mandate, performs a similar advocate function in stimulating the Federal Government to protect Spanish surnamed Americans against denials of civil rights and to assure their equitable participation in the benefits of Federal programs.

Although these agencies and mechanisms have authority to coordinate or press for more effective implementation of Federal laws and programs, they are in no position to determine overall civil rights policy or to make binding decisions on how departments and agencies shall implement civil rights and related laws. There are agencies and mechanisms, however, that do have such authority. They are key parts of the decisionmaking process that determines Government-wide civil rights policy and influences the manner in which all Federal agencies carry it out.

The Department of Justice, in addition to its

title VI and equal employment coordinating functions, plays a broader and more determinative role in the Government's overall civil rights program. As the Government's principal litigator, the Department can be the key to determining strategies and priorities in civil rights enforcement. As the President's chief legal adviser, it can be instrumental in determining how broadly or how narrowly civil rights and related laws are interpreted. Through its legal interpretations, it can either stimulate greater compliance and enforcement activities by other Federal departments and agencies or set severe limits on these activities.

Within the Executive Office of the President, two mechanisms exist which have great potential utility in directing the course of civil rights policy and enforcement. The Bureau of the Budget, through its functions of reviewing budgetary submissions by all Federal departments and agencies and planning and evaluating Federal programs, can stimulate greater civil rights compliance activity by urging the allocation of additional resources for civil rights enforcement and more efficient program evaluation systems to assure that minority group members are receiving the benefits of civil rights and other Federal programs as intended.¹

The President's own staff of White House assistants also can play a major role in bringing about needed Government-wide changes in civil rights policy and practice. Although they possess no formal authority over operating departments and agencies, the close working relationship with the President that many of them enjoy affords them unusually persuasive leverage to bring about such changes on a significant scale. In addition, the ready access of some White House staff members to the President provides them with special opportunities to generate sweeping Government-wide changes in civil rights laws and policies through Presidential directive.

The current and potential role of each of these mechanisms and agencies is discussed in the following sections of this chapter.

¹The Bureau was reorganized in July 1970, and the President has indicated that the focus of its activities will be on management rather than budget.

II. FEDERAL EXECUTIVE BOARDS

A. Background

Upon taking office in January 1961, President Kennedy voiced concern that policy formulated in Washington was not being adequately implemented or coordinated in the field. A study team verified that this was in fact the situation; that many Federal agency directors in major centers were not even acquainted with each other or with the programs of the other agencies.²

As a consequence, in November 1961, the President ordered the establishment of Federal Executive Boards, under the supervision of the Civil Service Commission and the Bureau of the Budget, in the Nation's largest metropolitan areas. The Boards were initially designed primarily as a vehicle for rapid communication of Presidential concerns to the field and to facilitate coordination among various agencies in a particular locale. Their focus was altered in 1966, when they were charged by the Civil Service Commission with identifying critical urban problems and coordinating programs and policies to deal with those problems. Although never given specific civil rights duties, they have been involved in a general way in such civil rights matters as equal employment opportunity and fair housing programs and, more specifically, in programs designed to serve the poor and minority groups such as minority entrepreneurship and summer youth programs.

B. Organization

The Federal Executive Boards are organizations composed of the top agency officials located in specified metropolitan areas.³ Initially, 10 FEB's were established in 1962, in cities in which Civil Service Commission regional of-

²Interview with Bernard Rosen, Deputy Executive Director, and Gene Rummel, Staff Assistant, Civil Service Commission, Apr. 7, 1970.

³The FEB's were antedated by Federal Business Associations and Federal Executive Associations which concerned themselves with community relations, employee recognition, and like matters. Unlike FEB's, the latter, which still exist in some 90 cities that do not have FEB's, are voluntary associations open to all Federal managers in the area. Rosen, Rummel interview, *supra* note 2.

ices were located.⁴ Five more were created during the next 6 years.⁵ Pursuant to recommendations made to President Nixon by the Civil Service Commission and the Bureau of the Budget,⁶ FEB's are currently being established in 10 additional metropolitan areas of significant Federal activity.⁷ Thus, FEB's will operate in 25 metropolitan areas.

Members of the Federal Executive Boards are the highest officials of their agencies in their particular locale and are designated by the head of the agency in Washington. Although members are usually Agency regional directors, the ambit of concern of the FEB's does not extend to the entire region but is limited to the particular metropolitan area in which the office is located. The size of the FEB's varies from 40 to 70 members.⁸ Officers, i.e., chairmen and vice chairmen, and a five or six-man policy committee, are chosen by the members. The FEB's meet only on a quarterly basis, but the policy committees convene monthly.⁹

Past operational procedure has included the appointment of standing committees and subcommittees to deal with matters of special concern to the FEB's, e.g., employee development and cost reduction. Committee assignments frequently were unrelated to a member agency's own program involvement. This, coupled with a proliferation of committees, lessened the flexibility and effectiveness of the FEB's.¹⁰ As a result of a July 1969 joint BOB-CSC evaluation, FEB's will be reorganized along the lines of three broad areas of responsibility;¹¹ greater

reliance will be placed on ad hoc assignments; and the lead agency concept will be followed in selecting project chairmen.¹²

Organizationally, FEB's also suffered from the lack of permanent, full-time staff and budget. Although present and past Board chairmen have cited the need for permanent staff and budget to improve continuity and effectiveness,¹³ neither has been provided to the FEB's.

In the past, responsibility for furnishing guidance to the Boards resided both in the Civil Service Commission and the Bureau of the Budget. It was the Civil Service Commission, however, which was the focal point for distributing information to the Boards and channeling to appropriate agencies problems and recommendations submitted by them.¹⁴ However, responsibility for liaison, guidance, and technical support recently was shifted to a secretariat in the Bureau of the Budget in order "to offer a better opportunity to inter-relate FEB's to other recently organized field coordinative mechanisms."¹⁵

C. Implementation

Initially FEB's were assigned four broad areas of responsibility: liaison with Washington and among agency heads in the field; management improvement and cost reduction; improvement in relating to State and local governments; and identification and referral of problems to Washington.¹⁶ According to Civil Service Commission officials, FEB's enjoyed some success, during their initial years, in carrying out these functions, particularly in disseminating administration policy and improving communication channels between Washington and the field.¹⁷

Following the 1965 riot in Watts, the focus of the FEB's was redirected. They were asked

community, and improving the quality of Federal Government operations.

¹² Joint Study, *supra* note 10, at 10, 11. A lead agency is the agency which supplies the staff, the finances, and leadership for a particular assignment.

¹³ *Id.*, at 12.

¹⁴ Rosen, Rummel interview, *supra* note 2. This function was vested in the office of the chairman and was actually assigned to the deputy executive director.

¹⁵ Joint study, *supra* note 10, at 17.

¹⁶ *Id.*, at 3, 5.

¹⁷ Rosen, Rummel interview, *supra* note 2.

⁴ The 10 were established in Atlanta, Boston, Chicago, Dallas, Denver, New York, Philadelphia, San Francisco, Seattle, and St. Louis.

⁵ Kansas City and Los Angeles were added in 1963; Cleveland, Honolulu, and Minneapolis-St. Paul in 1968.

⁶ Memorandum for the President from Robert P. Mayo, Director, Bureau of the Budget, and Robert E. Hampton, Chairman, U.S. Civil Service Commission, "Evaluation of Federal Executive Boards" 1, July 22, 1969.

⁷ The cities include: Albuquerque, Baltimore, Buffalo, Cincinnati, Detroit, Miami, Newark, New Orleans, Pittsburgh, and Portland, Ore.

⁸ Rosen, Rummel interview, *supra* note 2.

⁹ *Id.*

¹⁰ Joint study by the Bureau of the Budget and the U.S. Civil Service Commission, "Evaluation of Federal Executive Boards," 9, 10 July 1969.

¹¹ See "Implementation," p. 308 *infra*. The roles are implementing Government-wide policies, service to the

by the Civil Service Commission to assume a coordinative role in relation to urban problems and Federal programs designed to deal with these problems. To carry out this role, the FEB's established Critical Urban Problems Committees charged with the following duties: identifying urban needs; devising and implementing interagency and intergovernmental efforts to solve critical problems; and improving coordination among the burgeoning number of Federal programs affecting metropolitan areas.¹⁸

Because urban problems necessarily meant involvement with the poor and with minorities in inner-city areas, the FEB's became involved in civil rights concerns such as equal employment, consumer protection, minority entrepreneurship, and fair housing, although they were never charged with specific civil rights duties.¹⁹ The FEB's were ill equipped to assume this new role.

Despite several successful efforts—most notably, the Philadelphia Plan, which was launched in 1967 by the Philadelphia FEB,²⁰ and a 1968 study of Federal program delivery in Oakland undertaken by the San Francisco Board²¹—the FEB's proved to be poor vehicles for coordination of civil rights and related Federal programs in urban areas, particularly as a source of program innovation and coordination.²² Lack of money and staff, infrequency of meetings, as well as absence of continuity in direction and leadership account for part of the failure.²³ More specifically, however, the FEB's, as constituted, were inherently incapable of playing a key role in coping with the critical problems of metropolitan areas. Among other things, they suffered from a lack of decision-making power, wide differences in authority among the members of the Board with respect

to their own agencies, inability to provide sustained attention to problems, and restriction of their activities to metropolitan areas, although many of the problems they dealt with were regional in scope.²⁴

As a consequence, in 1969, the role of the FEB's again was redefined. A new coordinating mechanism—Federal Regional Councils—was established to deal with severe urban problems, and the civil rights role of the FEB's was accordingly restricted. The Boards, which will continue to operate without money, staff, or decisionmaking authority, will concentrate on three areas: implementation of Government-wide policy in such areas as equal opportunity in Federal employment and contract compliance; improving Federal service and management; and taking part in community service activities, e.g., blood drives, United Fund drives, and the like.²⁵

The coordinative functions of the FEB's have been assigned to 10 Federal Regional Councils²⁶ composed of the Regional Directors of HUD, HEW, OEO, and the Manpower Administration of the Department of Labor.²⁷ These agencies were chosen because of their involvement in the human resources area and their program impact on urban problems. The three basic functions of the Federal Regional Councils are: identification of conflicting agency policies and programs; coordination of agencies' actions to improve effectiveness of Federal programs; and direction of program managers to improve coordination.²⁸ The Councils, which will meet monthly, will have full-time support of senior level personnel from the participating agencies, will receive staff assistance from and be coordinated by the Bureau of the Budget, and will have regional authority, thus overcoming most of the deficiencies that impaired FEB performance as a coordinative mechanism.²⁹ Established late in calendar year

¹⁸ Joint Report, supra note 10, at 6.

¹⁹ Interview with Kenneth Kugel, Director, Operational Coordination and Management Systems staff, Bureau of the Budget, Apr. 17, 1970.

²⁰ Rosen, Rummel interview, supra note 2.

²¹ Oakland Task Force, San Francisco Federal Executive Board, *Analysis of Federal Decisionmaking and Impact: The Federal Government in Oakland*, Aug. 1968.

²² Interview with Andrew M. Rouse, Deputy Executive Director, President's Advisory Council on Executive Organization, Apr. 9, 1970.

²³ Id.

²⁴ Joint report, supra note 10, at 6-7.

²⁵ Id., at 7-9.

²⁶ The Councils correspond to the 10 regional areas established by President Nixon in March 1970. Bureau of the Budget, *The Federal Regional Councils*, Jan. 14, 1970.

²⁷ The Regional Directors of the Department of Transportation will also become members when departmental regional offices are established.

²⁸ *The Federal Regional Councils*, supra note 26.

²⁹ Kugel interview, supra note 19.

1969, it is still too early to evaluate their effectiveness as a coordinator of Federal programs, in general, or their potential impact in the area of civil rights, in particular.

III. COMMUNITY RELATIONS SERVICE

A. Introduction

The idea of an agency like the Community Relations Service, specializing in resolving racial conflicts, was conceived at least as early as 1957,³⁰ but did not become a reality until the Civil Rights Act of 1964 was passed. The Community Relations Service was created principally as a means for dealing with the volatile reaction that was expected as a result of desegregation of public accommodations under title II of the 1964 act.³¹ CRS, made a part of the Department of Commerce by the act, was to function as a peacemaking body by providing assistance in the resolution of racial conflicts that impair constitutional rights or that affect interstate commerce.³² It was authorized to move into disputes at the request of State or local officials, or to offer its services on its own initiative.³³ It was directed, however, to seek and utilize the cooperation of appropriate State or local, public and private agencies in carrying out its functions.³⁴

B. Staffing and Organization

According to former Attorney General, Ramsey Clark, as a result of the massive voluntary

³⁰ In 1957, Lyndon B. Johnson, then Senate Majority Leader, drafted a bill creating a Federal Racial Mediation Service. It was not introduced. R. Evans and R. Novak, *Lyndon Johnson: The Exercise of Power* 126, 377 (1966).

³¹ Civil Rights Act of 1964, Title X. See Memorandum for the President From the Vice President on Recommended Reassignment of Civil Rights Functions, 2, 3, Sept. 24, 1965. Sec. 204(d) of the Civil Rights Act of 1964 gives a court discretion to refer a public accommodations case to CRS for informal settlement whenever the court feels there is a reasonable chance of obtaining voluntary compliance with Title II. The Service may investigate such a referred complaint and hold closed hearings, if necessary.

³² Civil Rights Act of 1964, sec. 1002.

³³ *Id.*

³⁴ Civil Rights Act of 1964, sec. 1003(a). Sec. 1003(b) requires CRS operations to be conducted in a confidential manner, and any breach of confidentiality by an officer or employee of CRS is a misdemeanor.

compliance by businessmen with the Public Accommodations title of the act³⁵ and the President's desire to make the Attorney General the focal point for the Federal civil rights effort, the President transferred CRS from the Commerce to the Department of Justice early in 1966.³⁶ Until the transfer, the staff of CRS had been kept very small, having only 25 professionals.³⁷ Shortly after coming to the Justice Department, CRS began to increase steadily in size. In fiscal year 1969, it had achieved a total staff of 130, of whom 70 were professionals.³⁸ The fiscal year 1970 appropriation provides CRS with a staff of 180; the 1971 budget request contemplates a staff of 275.³⁹

The Community Relations Service is a Division of the Department of Justice.⁴⁰ It is administered by a Director,⁴¹ who holds the rank

³⁵ Memorandum to the President from the Vice President, *supra* note 31. Only seven public accommodations cases were referred to CRS by courts in 1965 and none thereafter. This was only a fraction of the caseload that had been expected.

³⁶ Interview with Ramsey Clark, former Attorney General, Mar. 30, 1970. The transfer was made pursuant to Reorganization Plan No. 1 of 1966.

³⁷ Interview with George Culberson, Deputy Director, CRS, Oct. 17, 1969.

³⁸ *1969 Annual Report of the Community Relations Service*, at 29.

³⁹ Budget of the U.S. Government, appendix, 1971, p. 1031. The appropriation for fiscal 1966 was \$1,300,000; for fiscal 1968, \$2 million, and for fiscal 1969, it was \$2,275,000. For fiscal 1971, however, the budget request is for \$4,995,000. Most of the increase requested will go into an expanded field staff.

⁴⁰ The Community Relations Service operates relatively independently from the rest of the Justice Department. There are a variety of factors which contribute to this. Perhaps the most fundamental is that the Agency, unlike the other Divisions in the Department, is not a law enforcement body. Its operations are confidential, and it is relatively new to the Department. CRS's location in a separate building also has heightened the sense of independence. Moreover, there is a conscious philosophy in CRS that the Agency represents the community, not the Government, and there is an element of pride among the staff about the independent and non-bureaucratic nature of the Service.

⁴¹ There have been three Directors of CRS. LeRoy Collins, former Governor of Florida, headed CRS while it was in the Commerce Department. The transfer of the Service to the Justice Department coincided with Mr. Collins' promotion to the Under Secretary level at Commerce, and Roger W. Wilkins, a Negro, was named to succeed him. Mr. Wilkins served as Director until January 20, 1969, when he resigned. The present

of Assistant Attorney General, and a Deputy Director.⁴²

The activities of CRS are carried on by two principal divisions, the Division of Field Services and the Division of Support Services.

The Division of Field Services supervises the program activities of the five CRS regional offices in Atlanta, Chicago, New York, San Francisco, and Dallas.⁴³ The regional directors, in turn, oversee the activities of the 27 CRS field offices.⁴⁴ The Division of Support Services is responsible for providing technical assistance to field representatives, indigenous groups, the news media, and public officials.⁴⁵ The Division has three main units which specialize in eco-

Director, Benjamin F. Holman, also a Negro, has held the position since April 1969. Mr. Holman had been Assistant Director in charge of the highly regarded Media Relations Office at CRS from 1965 to 1968.

⁴²The Deputy Director, George W. Culberson, has been with CRS since May 1965, was appointed Deputy Director on May 23, 1966, and oversees the day-to-day operations of the Service.

⁴³The Director of the Division of Field Services is Harry T. Martin, a Negro. A regional office has an average of 12 professionals called field representatives. The position of field representative was created in 1965. For a brief period thereafter all field supervision was based in Washington. Now, all of the field staff work out of the regional or field offices. The field staff, which is composed of more than 50 percent minority group members, is considered the heart of the CRS operation and was described by one senior CRS official as "dedicated, hip, and relevant." Interview with Irving Tranen, Chief, Community Development Section, CRS, Oct. 17, 1969. Also see, interview with Dr. James Laue, former Director of Program Evaluation and Development, CRS, Feb. 5, 1970; interview with Martin A. Walsh, Program Officer, Communications Section, CRS, Oct. 16, 1969.

⁴⁴The field offices are in Baltimore, Kansas City, Mo., Albuquerque, Wilmington, Little Rock, Louisville, Buffalo, San Diego, Seattle, San Antonio, Hartford, Gary, Ind., Boston, Cincinnati, Cleveland, Denver, Detroit, Houston, Los Angeles, Miami, Milwaukee, Newark, New Orleans, Philadelphia, Pittsburgh, St. Louis, and Washington, D.C. Field representatives are assigned to cover 35 urban centers either in pairs or singly; and, occasionally, one representative will cover two cities. With the expected increase in personnel, CRS hopes to be able to place a team of field representatives in each city. Whenever a team of field representatives is utilized, every effort is made to ensure that it is biracial or biethnic.

⁴⁵The director of the division is Edward Kirk. This Division is made up of the Communications Section, the Community Development Section, and the State and Local Agencies Section.

conomic development and housing, education and police-minority relations, and communications among groups.⁴⁶ The Division of National Services has two sections: the Special Minorities Projects Section and the Private Organization Liaison Section.⁴⁷

C. Program Activities

I. 1965-1968

The focus of CRS operations during the first years of operation was on maintaining peaceful race relations in communities across the country. The Agency was essentially crisis-oriented, acting in response to disturbances as they occurred.⁴⁸ The Agency was heavily Southern-oriented⁴⁹ and operated largely as a conciliation service, attempting to keep channels of communication open between hostile groups in racial controversies.⁵⁰

In 1966, CRS began to shift its focus to urban areas, most of which are outside the South. Accompanying this geographic change in orientation was a change in emphasis in the nature of CRS activities. The early experience of CRS in the South had convinced the agency that short-term conciliation of community problems tended to favor the status quo. While playing primarily a "firefighting" role, CRS also began to help organize community resources for change.⁵¹ It was at this time that representatives were placed in the field to serve cities. Finally, CRS began to assist communities

⁴⁶The Division does not have a section which works on problems of equal employment opportunity. The economic development specialists only tangentially touch on this area in that they are basically concerned with minority entrepreneurship. Tranen interview, supra note 43.

⁴⁷This Division is headed by Gilbert Pompa, a Mexican American. It deals with national organizations and develops innovative projects on a national basis for CRS.

⁴⁸Clark interview, supra note 36.

⁴⁹In its 1965 annual report, CRS listed 564 "community difficulties," by region, which it had serviced; 409 of these were in the South, and 65 more in border States. Of the 178 communities in which CRS had worked, 116 were Southern, and 24 were border areas. *1965 Annual Report of the Community Relations Service*, at 19-23.

⁵⁰CRS activity in the South was described by one knowledgeable individual as "a straight cool-it function." Laue interview, supra note 43.

⁵¹Walsh interview, supra note 43.

in developing substantive programs, such as job training, model cities, police-community relations, education, and media relations, which it felt were important to minority groups.

In addition, the Agency did much work in response to civil disorders, a role it "fell into" in 1965.⁵² It became an adviser to the Attorney General and the White House staff on the causes of ghetto unrest and possible methods of preventing it.⁵³ Its field representatives were on the scene at almost all actual and potential major outbreaks of racial violence, from those in Selma, in 1965, to the disturbances following the death of Dr. Martin Luther King Jr. in 1968.

During this period of time, the field representatives work remained almost entirely crisis-oriented, in line with the overall program of CRS. A field representative would concentrate on whatever issue seemed most pressing in a community at a given time. Often the field representative would sense the issue through his contacts in the community, but he would also work on crises as they were defined by newspapers and other media. Once the trouble had abated there was virtually no followup in an area.⁵⁴

⁵² Culberson interview, supra note 37.

⁵³ Interview with Roger Wilkins, former Director, CRS, Jan. 3, 1970. Mr. Wilkins, then Assistant Director, accompanied Attorney General Clark to Los Angeles during the Watts riot in 1965 and was consulted on the Federal response to each of the disorders which occurred thereafter. Id.

⁵⁴ Tranen interview, supra note 44; interview with Phillip Mason, former field representative, Dec. 2, 1969. The following are examples of the type of activities engaged in by representatives: CRS became involved when Indians in a Western State contended that State hunting regulations violated their treaty rights and brought about an armed confrontation with State officials. A field representative met with tribal leaders, convinced them to use the courts to attack the State laws, contacted civil liberties lawyers, and assisted in the formation of a permanent organization of tribal members to deal with long-standing grievances; *1966 Annual Report of the Community Relations Service*, at 15. CRS went into a populous Western city where relations between the Mexican American minority and the police were strained, and organized a committee of community leaders and police officials who arranged for the city's first communitywide conference between the police and the Mexican American minority; grievances were aired, positions were clarified, and a program of followup developed; *1967 Annual Report of the Community Relations Service*, at 5. CRS performed a number of functions relative to the Poor

The media relations program of CRS was one of its most successful undertakings in the Agency's early years. CRS staff sponsored or helped organize local and regional workshop meetings for news media representatives, minority group spokesmen, public officials, and human relations specialists in more than 45 cities. Topics covered at the conferences included reporting racial crises, sensationalism in the media, news reporting on a day-to-day basis, recruitment of minority group employees, and the impact of the mass media and its role in the current urban crisis. Work was done with professional associations and with local and national newsmen to help them to get a better grasp of the daily suffering of minority group citizens in the ghettos and barrios of America's cities.⁵⁵

2. 1969 TO THE PRESENT

There was a growing feeling in CRS that the efforts of the field representatives were too response-oriented and diffuse to have long-run constructive value.⁵⁶ In the summer of 1968, Mr. Wilkins, then the Director, met with the Attorney General in an attempt to analyze the effectiveness of CRS and to determine what changes in its operations were necessary. As a result of this meeting, an agencywide reevaluation was undertaken and a new program emphasis developed.⁵⁷

The current program of CRS is based on the premise that there must be constructive social change, and this involves increasing the influence of minority groups within and upon majority institutions. CRS believes that its proper role in this process is to give technical advice and support to minority groups to assist

People's Campaign, including visits by staff to 57 cities in order to reduce the possibility of friction and violence between campaigners and local citizens and officials on the route to Washington; *1968 Annual Report of the Community Relations Service*, at 3.

⁵⁵ Interview with Carol Watkins, Training Officer, CRS, Oct. 14, 1969; Laue interview, supra note 43. See *1965, 1967, 1968 Annual Reports of the Community Relations Service*.

⁵⁶ Laue, Walsh, and Culberson interviews, supra notes 43, 43, and 37. Mr. Culberson indicated that CRS could not merely have "60, 80 or 100 individuals running around doing good" if it were to continue as a viable agency worthy of being funded by Congress. Culberson interview, supra note 37.

⁵⁷ Wilkins, Laue interviews, supra notes 53 and 43.

them in achieving the specific goals which they desire.⁵⁸ Therefore, the emphasis of the Agency is now on development of particular program areas, rather than on ad hoc concern with crisis-oriented situations. In addition, the program activities of CRS have become more equitably divided geographically, with priority given to large cities with sizeable minority group populations.

This new approach has radically altered the function of the field representative, who is now expected to spend 70 percent of his time on programmatic work. His remaining time is to be used for unstructured activities, such as assisting in the solution of local crises and aiding indigenous groups in any project he feels is significant.⁵⁹ In each city where CRS seeks to provide continuing service, the field representative conducts a comprehensive survey of problems in the Agency's five priority areas (economic development, education, police-minority relations, housing, and communications). From this survey the field representatives outline methods whereby CRS will attempt to marshal resources (local, State, and Federal) to help resolve the problems. The Support Services Division provides technical assistance in the service cities both in CRS program development and implementation.⁶⁰

Although CRS can provide consultants to work with the community,⁶¹ it has no authority to award grants to communities for program development and enforces no civil rights laws. Its present emphasis is on working with the minority community for such purposes as establishing and improving self-help and self-

determination projects; assisting communities in identifying their social problems; communicating to Federal agencies its impression of the operation of their programs on a local level; and facilitating delivery of Federal programs which affect social and economic conditions of minority citizens. To carry out these programs, CRS necessarily has become involved, on a systematic basis, with the programs of other Federal agencies.

Before this change in programs emphasis, CRS efforts at working with Federal agencies were on an ad hoc basis and, according to CRS officials, were not always productive.⁶² Model cities was the only program with which CRS was deeply involved. When the program was first passed, CRS performed capability analyses of cities expected to apply for model cities grants. Subsequently, CRS reviewed grant applications to check the accuracy of the cities' self-descriptions.⁶³ CRS made no significant

⁵⁸ Interview with Nathan Greene, program officer, Division of Support Services, CRS, Oct. 17, 1969; Walsh and Watkins interviews, supra notes 43 and 55. At one point, CRS established a Federal liaison office with two staff members. Now the units of the Division of Support Services have expertise in substantive Federal programs and develop agency liaison with appropriate Federal agencies.

Under Roger Wilkins' directorship, dealings with Federal agencies were often at a high level and were on a personal basis. Mr. Holman has been attempting to develop more structured ties with other Federal departments and agencies. He has been meeting with individuals at the Under Secretary level in other agencies. At these meetings, he explains CRS, its programs, and discusses areas of possible coordination with the agency in question. Further relationships with the agency then are to be conducted on the staff level. Culberson and Greene interviews, supra notes 37 and 62.

⁶³ Greene interview, supra note 62. Mr. Green feels that CRS raised questions of basic policy, such as open housing, which officials of the model cities program would not deal with at the time and have not yet faced. At present, CRS has a representative on the model cities inter-agency team in Washington, and the regional directors sit on the regional inter-agency teams. CRS's present chief concern with the model cities program is to assure adequate citizen participation and to provide technical assistance for community groups in areas with model cities' projects. Id.

A recent CRS memorandum on model cities stresses that this program should be given agency wide attention. CRS feels that since the model cities program may become a "vehicle for the eventual funneling of all Federal money into our cities," it has a "potential

⁵⁹ Wilkins, Walsh interviews, supra notes 53 and 43.

⁶⁰ Walsh, Laue, and Culberson interviews, supra notes 43, 43 and 37.

⁶¹ Memorandum from Lawrence S. Hoffheimer, Chief Counsel and Special Assistant to the Director, CRS to David L. Norman, Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, Aug. 25, 1970, appended to a letter from Jerris Leonard, Assistant Attorney General, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 25, 1970.

⁶² Tranen interview, supra note 43. Lists of consultants have been prepared in some subject areas. About 35 education specialists had been selected, together with approximately 15 specialists in the economic development field, and the same number in the housing area. The number is expected to grow as the staffs of the various units are organized. Id.

attempt to evaluate the impact of other Federal programs on minority groups. Nor did it make any evaluation of the civil rights aspects of Federal programs other than model cities.⁶⁴ Under the provisions of Section 808(e)(4) of the Civil Rights Act of 1968, the Office of Housing Opportunity of HUD is assigned to cooperate with CRS in the effort to eliminate discriminatory housing practices. Exploratory meetings were held last winter between HUD officials and the CRS program development officer. It was concluded that CRS could have only minimal impact in this area due to its meager resources compared to those of HUD. Further discussions, however, are contemplated.⁶⁵

The program focus of current CRS activities has led it to seek closer contact with other Federal agencies. For example, as part of its efforts to improve police-community relations, CRS has begun to develop a formal relationship with officials of the Justice Department's Law Enforcement Assistance Administration.⁶⁶ The primary motivation of the CRS effort in dealing with LEAA is to promote the use of LEAA funds for such innovative purposes as experimental programs to create harmonious relations between minority groups and police forces and law reform projects, rather than solely for materials such as riot control equipment.⁶⁷ CRS is

impact upon CRS constituents which is both profound and constant." Memorandum from the Director, CRS, to CRS professional staff, CRS Policy on the Model Cities Program, Sept. 2, 1969.

⁶⁴ Id.; Walsh interview, supra note 43. CRS's dealings with agencies like HEW, the Agriculture Department, OEO, and EEOC, have been sporadic. With none of these has there been any sustained cooperation. Tranen interview, supra note 43.

⁶⁵ Memorandum from Lawrence S. Hoffheimer, supra note 60, at 2.

⁶⁶ Interview with Roscoe R. Nix, Chief, State and Local Agencies Section, Support Services Division, CRS, Oct. 15, 1969.

⁶⁷ Id. In a Sept. 4, 1969 memorandum from the Director of CRS concerning liaison with LEAA, it was stated that CRS should work at the State and local levels to help these jurisdictions to request and use LEAA funds effectively. CRS feels that LEAA cannot do this itself, because of the very limited control which the Justice Department is statutorily permitted to exercise over the use of the funds. As part of its efforts in this field, CRS plans to work toward making State councils, and local and regional advisory councils, more representative of minority groups. It has reviewed

making similar efforts to cooperate with officials of the Small Business Administration, the Economic Development Administration of the Department of Commerce and the Office of Education of HEW.⁶⁸

Although CRS and the Civil Rights Division are both heavily involved in civil rights concerns, relations between these two Divisions of the Justice Department have not been especially close.⁶⁹ However, in crisis situations, representatives of both branches of the Justice Department have worked well together. Otherwise, continuing liaison is not systematically maintained.⁷⁰

State plans submitted to LEAA for 1969, and will make recommendations to that agency on the basis of its review. Memorandum from the Director, CRS, to CRS Professional Staff, CRS Liaison with LEAA, Sept. 4, 1969.

⁶⁸ Id. Tranen interview, supra note 43. See, 1969 *Annual Report of the Community Relations Service*. At the time of the Commission review, CRS was still in the transition stage of the switch in program emphasis. The field representatives had chosen priority areas for their cities, and were in the process of preparing the actual programs. The Washington staff was also at the developmental stage of its new activities. Therefore, the coordination and evaluation efforts which CRS expects to make were not sufficiently under way for Commission staff to evaluate.

⁶⁹ Mason interview, supra note 54. Interview with Frank Schwelb, Chief, Housing Section, Civil Rights Division, Nov. 13, 1969; interview with J. Harold Flannery, former Chief, Coordination and Special Appeals Section, Civil Rights Division, Nov. 14, 1969. In meetings between representatives of the Civil Rights Division and CRS field representatives in 1969, some CRS participants expressed their disapproval of what they termed the lack of relevance, slowness and conservatism of the Division. Id. The Community Relations Service recently indicated to this Commission the extent of its relationship with the Civil Rights Division.

"The Civil Rights Division and CRS have established a cooperative working relationship. This began in 1968 when, at CRS's request, the Civil Rights Division prepared a comprehensive compilation of Federal civil rights remedies for CRS staff utilization. This was followed up by a meeting between CRS lawyers and CRS field representatives . . . where CRS's role and policies were explained. In January 1969, a meeting was held between CRS Regional Directors and CRD Section Chiefs . . . (at which) an exchange of maps and telephone numbers was made Memorandum from Lawrence S. Hoffheimer, supra note 31, at 2.

⁷⁰ Culberson and Tranen interviews, supra notes 37 and 43. This is true even though the Special Assistant to the Director, the Regional Director for the Northeast and the Chief of the Community Development Section of

The posture and program of the Community Relations Service are quite different from those of most Federal departments and agencies, for it is neither a policymaker, a distributor of Federal benefits, nor a law enforcement body. In the past, CRS has played an important role in promoting peaceful race relations by opening lines of communication between conflicting racial and ethnic groups. Its new program of encouraging and assisting local minority efforts for self-improvement and the attainment of social and economic influence is a logical outgrowth of its earlier efforts. At a time of minority alienation and animosity regarding the Federal establishment, CRS serves as a valuable communication link between minority groups and Federal agencies.

In this way, it is similar to the Cabinet Committee on Opportunity for the Spanish-Speaking.⁷¹ Yet its growing field staff and its representation of all minority groups set it apart even from the Cabinet Committee. It can, in the long run, prove to be an invaluable instructor, not only to the minority community, but to the Federal bureaucracy as well. In the short run, it may succeed in improving the flow of Federal benefits to many of those most in need. To insure the success of this effort, however, it needs to develop a staff in Washington as conversant with Federal programs as its field staff is knowledgeable about the sense of powerlessness and frustrated aspirations of those in this Nation's ghettos and barrios.

IV. CABINET COMMITTEE ON OPPORTUNITY FOR THE SPANISH-SPEAKING⁷²

A. Introduction

Although most of the efforts of Federal agen-

the Support Services Division are all former Civil Rights Division attorneys. Cooperation was achieved at such times as the Poor Peoples March and in the disorders following the death of Dr. Martin Luther King, Jr.

⁷¹ See p. 315 *infra*. For a discussion of the Cabinet Committee on Opportunity for the Spanish-Speaking.

⁷² The Cabinet Committee was not established until Dec. 30, 1969, and is still not fully operational. Its predecessor organization, however, the Inter-Agency Committee for Mexican American Affairs, was in operation for 2½ years. Thus, most of the material in this section will relate to the Inter-Agency Committee.

cies to end discrimination have been taken on behalf of the black community, this does not mean that other minority group citizens are not subject to similar and equally reprehensible discrimination. One group that suffers heavily from this is the Nation's second largest minority group, the Spanish-speaking community of Mexican Americans, Puerto Ricans, Cubans, and other Latin Americans.⁷³ Here, language barriers and cultural differences have joined with overt discrimination on the part of the majority to keep many people with Spanish backgrounds out of the American social and economic mainstream.

This point was emphatically made to President Johnson and his staff by Mexican American leaders after the conclusion of the June 1966 conference, "To Secure These Rights", which dealt almost exclusively with the problems of discrimination faced by Negroes. As a result, the President created a task force to determine the feasibility and objectives of a similar conference relating to problems of Mexican Americans.⁷⁴ However, the initial result of the task force meetings was not a conference, but the formation of a special Presidential committee.⁷⁵

⁷³ See, e.g., U.S. Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* (1970); *Hearing Before the U.S. Commission on Civil Rights*, San Antonio, Tex., Dec. 9-14, 1968; F. Schmidt, *Spanish-Surnamed American Employment in the Southwest*, a study prepared for the Colorado Civil Rights Commission under the auspices of the EEOC (1970). T. Carter, *Mexican Americans in School: A History of Educational Neglect* (1970). Only 2.8 percent of the Federal work force is Spanish surnamed. Also see generally ch. 1 of this report.

By latest estimate, there are more than 9.2 million persons in the United States who identify themselves as being of Spanish origin, of whom 55 percent are Mexican American and almost 16 percent are mainland Puerto Ricans. Of the 9.2 million figure, more than 4.6 million consider Spanish their basic language. Bureau of Census, *Current Population Reports*, p. 20, No. 195, "Spanish American Population: Nov. 1969", Feb. 20, 1970.

⁷⁴ Interview with David North, former Executive Director, Inter-Agency Committee on Mexican American Affairs, Feb. 3, 1970.

⁷⁵ *Id.* Two preliminary sessions were held between the administration's task force and members of the Mexican American community in October and November of 1966. A third session was held with members of the Puerto Rican community shortly thereafter. After the sessions ended, the task force submitted a series of recommendations and alternatives to the President.

B. Inter-Agency Committee on Mexican American Affairs

By Executive memorandum on June 9, 1967, President Johnson created the Inter-Agency Committee on Mexican American Affairs. The Committee consisted of the heads of seven major executive departments and agencies.⁷⁶ Its Chairman was Vicente Ximenes, who was confirmed as a Commissioner of the Equal Employment Opportunity Commission in June 1967. The Committee's mandate was: to insure that Mexican Americans were receiving the Federal assistance they needed; to promote new programs to deal with the unique problems of the Mexican American community; to establish channels of communication with Mexican American groups; and to suggest how the Federal Government could best work with State and local governments, with private industry, and with Mexican Americans, themselves, in solving the problems facing Mexican Americans throughout the country.⁷⁷

The Presidential mandate was short and general, leaving the responsibility of establishing budget, staff, and policy to the secretaries and staff of the Chairman of the Committee. In theory, the Committee members, appointed by the President, would meet as the need arose and the policymaking decisions were to be shared by the Chairman and the staff director. In the nearly 2 years of Mr. Ximenes' tenure, the Inter-Agency Committee met only three times.⁷⁸

An initial problem, which continued to plague the Committee, was its lack of congressional funding. Since it owed its existence to a

President Johnson, after his experiences with previous conferences, which had brought about criticism from the general public and the press, did not favor a Mexican American conference. A compromise was reached between the administration and the Mexican American community with the creation of the Inter-Agency Committee for Mexican American Affairs.

⁷⁶ Memorandum from the President to the Secretaries of the Departments of Labor, HEW, Agriculture, and HUD, the Director of OEO and Vicente Ximenes, member, EEOC, June 9, 1967. The Department of Commerce was added to the Committee in August 1967. David North, a member of the task force, from the Labor Department, was chosen Executive Director.

⁷⁷ Id.

⁷⁸ Interview with EEOC Commissioner Vicente Ximenes, Chairman of the Inter-Agency Committee on Mexican American Affairs, Dec. 11, 1969.

Presidential directive, it had to derive its financial resources from the departments and agencies which comprised its membership. This dependence for monetary support on agencies which it might criticize remained a difficult and time-consuming problem until it was resolved by Congress in December 1969.⁷⁹ The fiscal year 1969 budget of the Inter-Agency Committee was roughly \$485,000 and its staff for that period consisted of 20 persons.⁸⁰

1. THE EL PASO CONFERENCE

Most of the early efforts of the Chairman and staff of the Committee went into preparing for a Mexican American Conference, which was held in El Paso, Tex., in October 1967.⁸¹ The conference was in the form of a hearing, in which representatives of the more than 1,500 Mexican Americans who attended told the President's Cabinet Secretaries about the problems of the "barrio." Three recurring complaints emerged:

(1) The lack of bilingual and bicultural policymakers, administrators and community workers in the Federal Government;

(2) The failure to accept bilingualism as a fact of life in all phases of public activities, especially education; and

(3) The failure of Government to make a commitment in good faith which produced action.⁸²

The conference was the first significant attempt by the Committee to fulfill the mandate of the President. It also offered the Cabinet members their first opportunity to be faced directly with the problems of the chicanos.⁸³ The

⁷⁹ Id. On that date Congress passed the bill establishing the Cabinet Committee on Opportunity for the Spanish-Speaking. The new Committee is funded by Congress.

⁸⁰ North interview, supra note 74.

⁸¹ Ximenes interview, supra note 78. Initial White House opposition to the conference was overcome by the Chairman with the assistance of Secretary of Labor Willard Wirtz, and the Director of the Office for Economic Opportunity, Sargent Shriver. Id.

⁸² Statement of Vicente Ximenes, Commissioner, Equal Employment Opportunity Commission, hearings on S.740 to establish an Inter-Agency Committee on Mexican American Affairs, before the Subcommittee on Executive Reorganization of the Committee on Government Operations, 91st Cong., 1st sess., at 1970 (1969).

⁸³ "Chicano" is an increasingly accepted name for

fact that the conference gave ranking Federal officials a new perspective and awareness, made it a success in the view of the Committee officials.⁸⁴

In addition, a memorandum was sent to the President on January 25, 1968, which suggested solutions to some of the more acute problems raised by Mexican Americans at the conference. The proposals covered education, housing, Federal employment, manpower training, health, welfare, administration of justice, poverty, and rural programs.⁸⁵

2. COORDINATION WITH FEDERAL AGENCIES

After the El Paso conference, the Committee began the difficult task of implementing the suggestions made to the President. Since the Committee had no enforcement power and was not even congressionally sanctioned, the success of its efforts with other Federal agencies depended, to a great extent, on the personal relationship between the Chairman and the President's forceful support, and amicable relations between the Chairman and the Cabinet members.

Although the Committee spent much of its time working with the complaints of individuals and opening employment opportunities for Mexican Americans within the Federal establishment,⁸⁶ its activities touched a wide range of subject areas and Federal programs. For example, it was significantly involved in getting

Mexican Americans, particularly among the younger, more active members of that community.

⁸⁴ Ximenes and North interviews, *supra* notes 78 and 74. See generally, "Testimony Presented at the Cabinet Committee Hearings on Mexican American Affairs," El Paso, Tex. (Oct. 26-28, 1967).

⁸⁵ Memorandum from Vicente Ximenes, Chairman, and the members of the Inter-Agency Committee on Mexican American Affairs, to the President, Re: Summary of suggested solutions to problems raised at the El Paso Conference, Jan. 25, 1968. No response was made to the memorandum by the White House. Ximenes interview, *supra* note 78.

⁸⁶ North interview, *supra* note 74. See, e.g., letter from John Macy, Chairman, U.S. Civil Service Commission to Vicente Ximenes, Chairman, Inter-Agency Committee on Mexican American Affairs, June 20, 1969. The letter outlines steps the Civil Service Commission took or planned to take to increase employment of Mexican Americans in the Federal service. A similar letter was received from Assistant Postmaster General Richard J. Murphy on Jan. 2, 1968.

the Bureau of the Census to include a question in the 1970 census questionnaire which permits persons of Spanish heritage to identify themselves;⁸⁷ it unsuccessfully attempted to get the Economic Development Administration of the Commerce Department to focus more of its efforts on the Southwest;⁸⁸ it participated with HUD in the process of selecting municipalities for Model Cities grants;⁸⁹ it unsuccessfully urged introduction of a home ownership concept into HUD's Urban Renewal program;⁹⁰ it established communication with the Chairman of the Selective Service System concerning the small number of Mexican Americans serving on local draft and appeal boards in the Southwest;⁹¹ it dealt on a regular and fairly successful basis with HEW on a number of issues;⁹²

⁸⁷ Letter from A. Ross Eckler, Director, Bureau of Census, to Chairman, Vicente Ximenes, May 23, 1969. This question concerning origin, in addition to the question regarding languages other than English used in the respondent's childhood home, will make possible the first accurate nationwide count of Spanish-speaking Americans. It will now be easier for Spanish-speaking groups to demand, on the basis of statistics, more equitable treatment by Federal program officials. Prior to the 1970 census, when there was no way to determine how many Spanish-speaking Americans were in the country, some Spanish-speaking communities were denied participation in the federally assisted programs, e.g., HUD's Model Cities, HEW's education grants, and OEO's Community Action Programs.

⁸⁸ Ximenes interview, *supra* note 78.

⁸⁹ *Id.* After cities were selected, including 17 with large Mexican American concentrations, the Inter-Agency Committee continued to act as an adviser to the Model Cities staff. In San Antonio and Albuquerque, for example, important Mexican American "barrios" had not been included in the original Model Cities boundaries. The omissions were discussed with HUD and, in both cases, the oversights were corrected. Letter from Robert C. Weaver, Secretary, HUD, to Vicente Ximenes, Chairman, Inter-Agency Committee on Mexican American Affairs, Apr. 4, 1969. The Inter-Agency Committee, however, was not always successful. The Spanish-speaking community in Oakland, Calif., felt the neighborhood designations for the Model Cities program did not include a significant Mexican American area. This was discussed with HUD officials but the boundaries were not changed. *Id.*

⁹⁰ *Id.*

⁹¹ Letter from Lewis B. Hershey, Director, Selective Service System, to Vicente T. Ximenes, Chairman, Inter-Agency Committee on Mexican American Affairs, Feb. 20, 1968.

⁹² Ximenes and North interviews, *supra* notes 78 and 74. In cooperation with the Inter-Agency Committee, HEW (1) created an Office of Spanish-Speaking Affairs

it unsuccessfully urged that the Labor Department ban "green card holders," i.e., Mexican citizens who obtain U.S. visas (green cards), cross the border daily to pursue their employment (usually at lower wages than paid to domestic workers) and return to their established homes in Mexico in the evening, thereby depriving Mexican Americans of employment;⁹³ it was instrumental in convincing the Agriculture Department to buy grazing land in the Southwest and to encourage Mexican Americans to come and work on it;⁹⁴ and, finally, it worked closely with OEO to make that agency's programs more responsive to Mexican Americans.⁹⁵

The Inter-Agency Committee devoted comparatively little time to working with State or local governments.⁹⁶ Further, its activities were not focused on any Spanish-speaking group other than the Mexican American.⁹⁷ For example, during the existence of the Committee, it had very little communication with the Puerto Rican community;⁹⁸ the committee had had only

at the Secretary's level, whose main purpose was to coordinate all HEW's programs dealing with Mexican American needs; (2) a Mexican American Affairs Unit was created in the Office of Education to serve the education needs of Mexican Americans. Its role was basically the same as that of the Inter-Agency Committee: To serve as an ombudsman, coordinator, and in-house lobbyist for all problems pertaining to Mexican Americans in the field of education. In addition, the Social Security Administration began a broad recruitment program aimed at hiring Mexican Americans.

⁹³ Ximenes interview, supra note 78. Secretary of Labor Wirtz, did, however, issue an order banning "green card holders" from working on farms where workers were on strike. Mr. Ximenes was not able to convince the Johnson administration to support collective bargaining for farmworkers. Id.

⁹⁴ Id.

⁹⁵ Id., North interview, supra note 74.

⁹⁶ North interview, supra note 74.

⁹⁷ Id. The former staff director of the Committee, David North, indicated that President Johnson's main concern, as a Texan, was the Mexican American community. The Inter-Agency Committee was the President's creation and he determined its goals and scope.

⁹⁸ Of the more than 1,500 persons who attended the conference in El Paso, Tex., in October 1967, only six were Puerto Ricans. Manuel Diaz, Deputy Commissioner, Manpower and Career Development Agency, Human Resources Administration, city of New York, stated before the Senate's Subcommittee on Executive Reorganization in 1969:

"We were well received by our Mexican friends but it was not our conference. I suggested to Mr. Ximenes

one Puerto Rican employee and the two publications the committee produced did not provide adequate coverage of Puerto Rican affairs."⁹⁹

that a similar conference be organized in New York or in Chicago where urban issues could be addressed by Puerto Ricans in a city readily accessible to them. He was sympathetic to the idea, and he is an honorable man, but to date, there has been no further action in this direction," Hearings before the Subcommittee Executive Reorganization, supra note 82, at 204.

The Inter-Agency Committee on Mexican American Affairs held a 1-day conference—the Midwest Conference on Mexican American and Puerto Rican Affairs—in Detroit, Mich., on Oct. 19, 1968. The main purpose of the conference was said to be to bring together Mexican Americans and Puerto Ricans from Michigan, Illinois, Indiana, Ohio, Iowa and Wisconsin, so that they could present to high-level officials from Federal, State and local government and leaders from business, industry, labor and universities, recommendations for solutions to the problems of the Spanish-speaking people of the Midwest. The conference was attended by approximately 500 Mexican Americans and Puerto Ricans and dealt primarily with education and employment problems. According to Mr. North, out of the 500 attendants only 20 to 25 percent were Puerto Ricans. The conference was an outgrowth of the meeting in El Paso, Tex. It was an attempt by the Inter-Agency Committee to establish stronger ties with the Mexican American community in the Midwest, and to explore the main problems of the Mexican American community in that area. The Puerto Rican community was, again, inadequately represented. See Inter-Agency Committee for Mexican American Affairs, press release, Oct. 17, 1968; North interview, supra note 74.

⁹⁹ The Inter-Agency Committee issued two publications: (1) *Spanish-Surnamed American College Graduates* (1968); and (2) *A Guide to Materials Relating to Persons of Mexican Heritage in the United States* (1969).

The Spanish-Surnamed American College Graduates is a valuable informational booklet. It provides the names of colleges and graduates from California, Colorado, Nevada, New Mexico, Texas, Wyoming, and New York. The six southwestern States are thoroughly documented; but the State of New York is only partly covered. The committee failed to gather information from Fordham and St. John's Universities and some of the branches of the City University of New York, which many Puerto Ricans attend.

The second publication, as indicated by its title provides materials relating only to persons of Mexican heritage. No similar publication has been prepared for Puerto Ricans, Cubans, or other Latin Americans.

A third publication, *Testimony Presented at the Cabinet Committee Hearings on Mexican American Affairs*, held in El Paso, Tex. (Oct. 26-28, 1967) deals solely with the hearing, which was concerned almost exclusively with problems of Mexican Americans.

C. Creation of the Cabinet Committee on Opportunity for the Spanish-Speaking

Beginning in late 1968 Mr. Ximenes spent a great deal of time attempting to convince the President and his staff of the need to put the Inter-Agency Committee on a permanent basis,¹⁰⁰ to improve its funding arrangement, to add more Cabinet members to it, and to provide it with a full-time chairman.¹⁰¹ A bill incorporating these suggestions was introduced in Congress and was passed on December 30, 1969.¹⁰² The principal provisions of the law are: (1) change of the name from "Inter-Agency Committee on Mexican American Affairs" to "Cabinet Committee on Opportunity for the Spanish-Speaking,"¹⁰³ thus clearly giving the committee responsibility for dealing with Puerto Ricans, Cubans, and other Latin Americans; (2) legislative authorization for the committee, with provision for appropriations through the ordinary budget process; (3) the addition of Federal agencies to the committee; the Secretary of the Treasury, the Attorney General, the Administrator of the Small Business Administration, and the Chairman of the Civil Service Commission;¹⁰⁴ (4) a prohibition against the chairman of the committee concurrently holding any other office or position of employment with the United States, and a requirement that he serve in a full-time capacity as the chief officer of the committee;¹⁰⁵ (5) the creation of an advisory council on Spanish-speaking Americans, to be composed of nine members appointed by the President from among individuals who are representative of the Mexican American, Puerto Rican, Cuban American, and other elements of the Spanish-speaking community in the United States;¹⁰⁶

¹⁰⁰ Ximenes interview, supra note 78. Having been created through a Presidential memorandum, the committee had no stability and its life could have been terminated at the whim of the President.

¹⁰¹ Id. Mr. Ximenes noted that it was almost impossible for him to adequately perform his two full-time jobs as Chairman of the Committee and Commissioner of the Equal Employment Opportunity Commission.

¹⁰² Public Law 91-181.

¹⁰³ Sec. 2(a).

¹⁰⁴ Sec. 2(b).

¹⁰⁵ Sec. 2(d)(1).

¹⁰⁶ Sec. 7(a) and (b). As of mid-June 1970, no appointments to the Council had been made. Interview

and (6) expiration of the committee in December 1974.¹⁰⁷

D. Activities of the Cabinet Committee

Martin Castillo, who had been Chairman of the Inter-Agency Committee from May 28, 1969, until it was abolished by the statute creating the Cabinet Committee,¹⁰⁸ is the present Chairman of the Committee. He has a staff of 27 and a budget for fiscal year 1970 of \$510,000.¹⁰⁹ Since Mr. Castillo became chairman, the activities of the committee have continued along the same lines as those undertaken by his predecessor. Its main efforts have been to act as a lobbyist within the Federal Government; to improve the Federal allocation of funds to the Mexican American community; to increase the number of Mexican Americans employed within the Federal Government; and to seek to resolve individual complaints.¹¹⁰

More specifically, among the actions taken by the committee are: meetings with the Chairman of the Civil Service Commission and representatives of the Departments of HUD, HEW, Transportation, Treasury, and OEO, to discuss recruitment and placement of Spanish-speaking personnel throughout the Federal Government;¹¹¹ meeting with SBA regarding minority entrepreneurship;¹¹² cooperation with the Department of Labor in creating manpower training programs for Spanish-speaking people and

with Henry Quevedo, Executive Director, Cabinet Committee on Opportunity for the Spanish-Speaking, June 15, 1970.

¹⁰⁷ Sec. 12.

¹⁰⁸ Mr. Castillo also served as Deputy Staff Director of the U.S. Commission on Civil Rights from Apr. 22, 1969, to June 7, 1970.

¹⁰⁹ Quevedo interview, supra note 106. One member of the staff is Puerto Rican and another is Cuban.

¹¹⁰ Interview with Martin Castillo, Chairman, Cabinet Committee on Opportunity for the Spanish Speaking (CCOSS) and Henry Quevedo, Executive Director, CCOSS, Nov. 5., 1969.

¹¹¹ Letter from Henry Quevedo, Executive Director, CCOSS, to Martin Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Mar. 18, 1970. The Committee has created a placement referral system complete with a depository of Federal employment applications filed by Spanish-speaking citizens.

¹¹² Id. The Committee is compiling a list of Spanish-speaking contractors who are interested in working on Federal contracts. Cabinet Committee on Opportunity for the Spanish-Speaking, newsletter, vol. II, No. 3, Mar. 1970, at 2.

assistance in accelerating OEO grants to barrios;¹¹³ meetings with HEW officials, which led to the issuance of an HEW policy defining the requirements that school districts provide equal educational opportunity to national origin minority group children who are deficient in English language skills.¹¹⁴

In addition, the Cabinet Committee persuaded the Census Bureau to prepare a pamphlet entitled "We, the Mexican Americans," to stimulate interest among the Spanish-speaking people of the need and importance of being counted in the census.¹¹⁵ One final example of the type of work done by the Cabinet Committee, is that Mr. Castillo assigned several staff technicians to consult with five organizations in Washington, D.C., which are primarily interested in meeting the heretofore neglected problems of the more than 75,000 Spanish-speaking people in the Nation's Capital.¹¹⁶

The Cabinet Committee on Opportunity for the Spanish-Speaking and its predecessor, the Inter-Agency Committee on Mexican American Affairs, have engaged in a significant number of worthwhile projects which might never have been undertaken but for their efforts. After decades of neglect, activities in the interests of Spanish surnamed Americans are needed and must be expanded. Yet there are several limits on the capacity of a body such as the Cabinet Committee, whose work is essentially that of a broker and lobbyist on behalf of Spanish-speaking people, to bring about immediate and dramatic results when so much of its work depends upon the sufferance of other Federal agencies. In any event, while Congress, as a

¹¹³ Id.

¹¹⁴ Quevedo interview, *supra* note 106. See memorandum from J. Stanley Pottinger, Director, Office for Civil Rights, HEW, to School Districts With More than 5 Percent National Origin-Minority Group Children, Re: Identification of Discrimination and Denial of Services on the Basis of National Origin, May 25, 1970.

¹¹⁵ Inter-Agency Committee on Mexican American Affairs, newsletter vol. II, No. 1, Jan. 1970, at 2. The committee distributed the pamphlets to its entire mailing list and to all Spanish-speaking organizations and individuals who requested it. The pamphlet, however, should have been named "We, the Spanish-Speaking Americans". In this same regard, the committee sought the assistance of broadcasters with Spanish-speaking abilities to publicize the importance of the census through radio and TV spots. Id.

¹¹⁶ Id., at 3.

matter of statutory authorization, has expanded the committee's responsibilities to include all Spanish-speaking groups, it is up to the committee, itself, to develop its activities in such a way as to assure that the rights of all are, in fact, protected.

V. THE DEPARTMENT OF JUSTICE

A. Introduction

The Department of Justice and the Attorney General hold a central position in the formulation of domestic policy and in determining how it will be carried out. As the Government's lawyer, the Department represents most agencies of the executive branch in court and is key to determining the Government's litigation policy and practice. Further, the legal opinions provided by the Attorney General are relied upon as ultimate legal authority by the agencies and often have served to set the limits of agency authority. In addition, of great practical importance is the fact that recent Attorneys General have been men with considerable personal influence with the President and their views have had an important bearing on decisions and issues of great national importance.¹¹⁷

In the area of civil rights, the role of the Department of Justice is even more significant than it is in other areas of domestic policy concern. Here, the Department controls what, thus far, has been the most effective civil rights sanction—law suits; it is the initiator of civil rights legislation; it coordinates Title VI enforcement activity; it is the final arbiter on questions concerning the scope of authority under various civil rights laws; and it is the traditional pace setter for the entire Federal civil rights effort. Yet in the years following passage of the Civil Rights Act of 1964, during which the Department has assumed a central role of civil rights leadership for the entire executive branch, it has been unable to generate effective Government-wide civil rights compliance and enforcement.

¹¹⁷ This could be said of Herbert Brownell and William P. Rogers in the Eisenhower Administration; Robert Kennedy in the Kennedy Administration; Ramsey Clark in the Johnson Administration; and John N. Mitchell in the Nixon Administration.

B. The Department of Justice and Civil Rights

1. THE CIVIL RIGHTS DIVISION

The Department of Justice has maintained a unit dealing with civil rights matters since 1939 when a civil rights unit was established in the Criminal Division.¹¹⁸ The Civil Rights Act of 1957 created a separate Civil Rights Division within the Department, and provided it with limited jurisdiction to bring lawsuits in matters involving voting discrimination.¹¹⁹ Since that time, the Division, by virtue of the civil rights legislation enacted in 1964, 1965, and 1968, has received authority to file suit in a variety of areas, including discrimination in public accommodations,¹²⁰ public facilities,¹²¹ schools,¹²² employment,¹²³ and housing.¹²⁴ It also has received expanded litigative and administrative powers to cope with voting discrimination¹²⁵ and additional authority to act against those who interfere with the civil rights of others.¹²⁶ Finally, the Division is empowered to enforce the 13th, 14th, and 15th amendments to the Constitution.¹²⁷

Weaknesses in the Civil Rights Division, the principal civil rights arm of the Justice Depart-

ment, go to the heart of the Department's failure to exercise more effective executive leadership in this vital area. Although it has expanded consistently, the size of the Division has always been much too small in relation to the scope of its responsibilities. In 1953, the civil rights unit had eight attorneys;¹²⁸ in 1958, it had 14 attorneys;¹²⁹ in 1961, it had 32;¹³⁰ in 1965, it had 72;¹³¹ and in 1969, the number of authorized attorneys was 114,¹³² out of a total of 274 authorized positions in the Division.¹³³ The growth of the Division has not kept pace with the vast new responsibilities assigned to it in the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968. The Division is less than half the size of the Antitrust Division, less than two-thirds the size of the Tax Division and is considerably smaller than either the Criminal and Civil Divisions.¹³⁴ Furthermore, the Division has not

¹¹⁸ Address by Arthur B. Caldwell, Chief, Civil Rights Section, to civil rights class of the University of Pennsylvania, July 16, 1953 (mimeo. copy revised 1957).

¹¹⁹ U.S. Commission on Civil Rights, *Justice* 272 (1961).

¹²⁰ *Id.*

¹²¹ U.S. Commission on Civil Rights, *Law Enforcement* 113 (1965).

¹²² Civil Rights Division organization chart, Sept. 24, 1969.

¹²³ Hearings on the Departments of State, Justice, and Commerce Appropriations for 1970 before a Subcommittee of the House Committee on Appropriations, 91st Cong., 1st sess., pt. 1, at 223-224.

In 1958, the Division's budget was \$185,000; Justice, supra note 126, at 272; in 1965, it was \$2,034,000. *Law Enforcement*, supra note 128, at 113. By fiscal 1969, this had increased to \$3,265,000, subcommittee, supra note 133. The budget request for fiscal 1970 is \$4,400,000 and the fiscal 1971 budget contemplates a total of \$5,398,000 with 340 total positions including 159 attorneys.

¹³⁴ The following breakdown indicates the relative size of the various divisions, in terms of appropriations for fiscal 1969 (adapted from hearings), supra, note 133, 221-22, 223-24:

Division	Positions	Budget
Antitrust	614	\$8,352,000
Tax	459	5,655,000
Civil	393	5,525,000
Criminal	311	4,256,000
Lands	215	3,953,000
Civil Rights	274	3,265,000
CRS	138	2,252,000
Internal Security	108	1,336,000
Office of Legal Counsel	43	681,000
Solicitor General	28	656,000

¹¹⁸ Order of the Attorney General No. 3204, Feb. 3, 1939. The civil rights unit in the Criminal Division was concerned with violations of certain noncivil rights matters, such as the Hatch Act and Corrupt Practices Act. Its civil rights responsibilities were limited to enforcement of then existing civil rights laws, such as those dealing with slavery and peonage, 18 U.S.C.A. 1581, 1583, and 1584, and those statutes prohibiting police brutality and conspiracies to deprive citizens of their constitutional rights, 18 U.S.C.A. 241 and 242.

¹¹⁹ 71 Stat. 637. The Division was formally set up by order of the Attorney General, No. 155-57, Dec. 9, 1957.

¹²⁰ Civil Rights Act of 1964, Title II.

¹²¹ Civil Rights Act of 1964, Title III.

¹²² Civil Rights Act of 1964, Title IV.

¹²³ Civil Rights Act of 1964, Title VII.

¹²⁴ Civil Rights Act of 1968, Title VIII.

¹²⁵ Voting Rights Act of 1965.

¹²⁶ Civil Rights Act of 1968, Title I.

¹²⁷ The Department may well also have the power to initiate action under the so-called "general civil rights laws" of 1866. 42 U.S.C. sec. 1981 et. seq. See memorandum from Louis F. Claiborne, Assistant to the Solicitor General, to the Attorney General, "On The Implications of *Jones v. Mayer Co.*," June 24, 1969. *Jones v. Mayer Co.* was a case brought by a private party to enforce his right to purchase property pursuant to 42 U.S.C. sec. 1981.

been fully staffed in recent years.¹³⁵ Former Attorney General Clark recently described the severe limits on Division activities caused by staff shortage: "Until 1968 there was not enough manpower in the Civil Rights Division to enforce all the civil rights laws in any one State or any one civil rights law in all the States."¹³⁶

The size of the Division has a direct effect on the number of lawsuits in which it can participate.¹³⁷ For example, the Chief of the Employment Section of the Division indicated in November 1969, that, in the coming year, his unit could file 20 to 25 new cases.¹³⁸ Inadequate as this number is in light of the magnitude of the problem of employment discrimination, it is unlikely that the Division will file even that many suits. As of mid-June 1970, it had filed only four new cases.

Another weakness relates to the system of priorities that governs the Division's activities and its failure to turn its attention to problems before they reach crisis proportions. The Division's efforts prior to 1968 were concentrated almost exclusively on the South. It was not until the riots in the North persisted and gained in intensity that the Division reorganized and devoted substantial staff resources to dealing with the severe problems of racial discrimination in that part of the country. To a large extent, however, the Division's heavy concentration on the South was a reflection of its desire to devote its limited staff resources to areas where civil rights problems were per-

ceived as being most severe. The Division also has failed to devote sufficient resources to combat discrimination against Mexican Americans, Puerto Ricans, and American Indians.¹³⁹ The staff of the Division has indicated an awareness of the need to devote more attention to the problems of these groups and attempts are being made to develop more cases on their behalf.¹⁴⁰

According to former Attorney General Clark, until mid-1967, the Division not only did not maintain a system of priorities but it lacked even a sense of a need for priorities.¹⁴¹ This undoubtedly accounted in large part for its failure to foresee some major problem areas within its jurisdiction and act to remove the causes of injustice. To some extent, the Division's failure to develop systematic priorities can be accounted for by the need to respond to the many crises of the mid-1960's. In any event, it was not until 1968 that the Division established written priorities pursuant to a departmentwide requirement. Its program memorandum for fiscal year 1969¹⁴² proposed that the resources of the Division be allocated among its sections in the following manner: Employment, 27 percent; education, 17 percent; criminal, 17 percent; housing, 17 percent; voting

¹³⁵ Clark interview, supra note 136.

¹⁴⁰ For example, Division supervisors met with representatives of the Mexican-American Legal Defense Fund in March 1970 to discuss discrimination against Mexican Americans and what the Division should do in this area. The Division has also opened an office in Houston, Tex., with a Mexican American attorney in charge. On May 26, 1970, the Division intervened in a suit against the Sonora, Tex. School District, which alleged discrimination against Mexican American students. In addition, the Division is a party in suits against five school districts in Texas alleging discrimination against Mexican American students.

¹⁴¹ Clark interview, supra note 136. The Division did have informal priorities. Prior to the Voting Rights Act of 1965, the Division's announced priority was voting. The reason given for the establishment of this priority was that other rights would naturally flow to Negroes if they were able to exercise the franchise and thus participate in the political process. B. Marshall, *Federalism and Civil Rights* (1964). Mr. Marshall was a former Assistant Attorney General of the Civil Rights Division. After the Voting Rights Act, the Division turned its attention to school desegregation matters and by 1968, most Division resources were focused on problems of employment discrimination.

¹⁴² At the time this report was written, the fiscal year 1970 program memorandum was not available.

¹³⁶ Interview with David L. Norman, Deputy Assistant Attorney General, Civil Rights Division, Feb. 11, 1970.

¹³⁷ Interview with Ramsey Clark, former Attorney General, Mar. 30, 1970. One Bureau of the Budget official noted that when asked why he did not ask for a doubling of his staff instead of requesting a small increase, Assistant Attorney General John Doar indicated that he could not effectively handle such a large staff. Interview with James V. DeLong, senior staff member, Office of Program Evaluation, Bureau of the Budget, Apr. 23, 1970. This appears to be in line with a criticism of the Division made by former Attorney General Clark, who stated that the Division, for most of its existence, was run like a small private law firm and not a Federal law enforcement office. Clark interview, supra note 136.

¹³⁸ Interview with Frank E. Schwelb, Chief, Housing Section, and John M. Rosenberg, Chief, Criminal Section, Civil Rights Division, Nov. 13, 1969 and Nov. 7, 1969, respectively.

¹³⁹ Interview with David L. Rose, Chief, Employment Section, Civil Rights Division, Nov. 12, 1969.

and public accommodations, 14 percent; and coordination, special appeals, and Title VI, 8 percent. Although the memorandum discussed in detail the priorities within each subject matter category, little consideration was given to the overall rationale underlying the structure of the Division's program.

The Civil Rights Division still does not appear to order its priorities within the context of the national need for improved civil rights enforcement. Despite its central role in the Federal civil rights enforcement effort, the Division's goals are limited to those within the confines of its statutory mandate and bear little relation to the development of national and civil rights goals in this area. Periodic Division reviews of the total civil rights picture (which would include learning about the activities of private groups and other Federal agencies, noting the areas of progress, and assessing the major problem areas) would enable it to program its activities to complement and further existing private and Government efforts.

The priorities of the Division also remain almost exclusively confined to the narrow focus on law enforcement through litigation. The Division has virtually ignored use of its non-litigative powers.¹⁴³ The Department has the capacity to serve as a catalyst to stimulate increased efforts by other Federal departments and agencies. In addition, acting through the Division or through U.S. attorneys, it may also generate action by State and local agencies, private organizations, and private individuals. For example, the Criminal Division has stimulated a massive advertising campaign to prevent auto theft and narcotics addiction. In these efforts the Criminal Division has enlisted the support

¹⁴³ The Justice Department has indicated that the Civil Rights Division has expended substantial energies trying to solve problems by informal means. For example: there is the joint undertaking of the Department of Justice, HEW, the Cabinet Committee, the White House staff, and the State Advisory Councils, toward the solving of school desegregation problems. "From the President on down, no effort so dramatically illustrates our nonlitigative and cooperative approach to this especially sensitive civil rights area. This approach which stresses reasonableness, cooperation, and firmness, *might* well be applied to other areas as well." (*Italic added.*) Letter from Jerris Leonard, Assistant Attorney General, Civil Rights Division to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Appendix, Aug. 25, 1970.

of numerous agencies, both Federal and private, and private businesses and persons. The Civil Rights Division, however, has tended to concentrate on its traditional litigative activity and, for the most part, has not sought to enlist the aid of others in its effort to assure equal rights.¹⁴⁴

In addition, the Division's priorities have been established without benefit of any systematic effort to identify and rank outstanding civil rights problems. Little assistance was sought or provided by the staffs of other agencies or nongovernmental experts. Attempts have not been made to evaluate, quantitatively or qualitatively, the effects of its past litigation nor the probable results of its present litigation program.

A further problem has been the Division's overly cautious approach in carrying out its civil rights responsibilities.¹⁴⁵ It also has been contended that cases often require much less proof than that the Division believes it must submit.¹⁴⁶ On occasion, the Division also has

¹⁴⁴ In the period immediately prior to the effective date of the Public Accommodations Law, Civil Rights Division officials met with numerous business and community leaders in order to insure the orderly implementation of the statute. In addition, in 1965, Division personnel gave a large number of speeches to business groups interpreting the provisions of Title VII, the fair employment section, of the Civil Rights Act of 1964. Another example of the Civil Rights Division acting in concert with private parties is the liaison it maintains with the NAACP Legal Defense Fund, the Lawyer's Committee for Civil Rights Under Law, the Lawyer's Constitutional Defense Committee of the American Civil Liberties Union, and other private legal groups.

¹⁴⁵ Interview with Roger W. Wilkins, former Director, Community Relations Service, Department of Justice, Jan. 3, 1970. The Department of Justice has indicated that:

"It is Division policy and practice to conserve litigation energy whenever possible. A thorough study of the cases in which the Division has been involved over the past 18 months would demonstrate this point. That study would also demonstrate that the Division has encouraged, not opposed, 'Departmental participation in litigation involving important principles of civil rights law.'" Letter from Jerris Leonard, *supra* note 139a.

¹⁴⁶ Wilkins interview, *supra* note 145. The reason given by the Division for providing voluminous evidence in support of its arguments in court suits is that civil rights cases are so important that it cannot afford to lose any of them, thereby establishing "bad law" which may be cited by other courts in future cases.

opposed Department participation in litigation involving important principles of civil rights law. For example, the Division opposed Justice Department participation in the landmark case of *Jones v. Mayer and Co.*,¹⁴⁷ at the trial court, court of appeals, and Supreme Court levels. The Department ultimately did file an amicus curiae brief and presented oral argument at the Supreme Court level, but only because Division attorneys were overruled by the Attorney General at the request of the Solicitor General's office.¹⁴⁸ Even after the Supreme Court decision, the Division has not utilized the *Jones* decision in subsequent litigation.¹⁴⁹ In addition, the recent positions taken by the Division on school desegregation have been unreasonably restrictive.¹⁵⁰

2. THE ATTORNEY GENERAL AS LEADER OF THE FEDERAL CIVIL RIGHTS EFFORT

Despite these significant problems—lack of sufficient civil rights staff, inadequate priorities, narrow view of its civil rights role, and overly cautious approach to carrying out its litigation function—the Department of Justice consistently has been the Government's civil rights focal point and the Attorney General consistently has been the single most important figure in the Government's civil rights program during the decade of the 1960's. There are several reasons

¹⁴⁷ 392 U.S. 409 (1968). In that case, a provision of the Civil Rights Act of 1866, which grants to Negro citizens the same rights as white citizens to rent or purchase property, was construed by the Supreme Court to prohibit racial discrimination in the sale or leasing of all housing, private as well as public.

¹⁴⁸ Clark interview, supra note 136.

¹⁴⁹ Interview with Louis Claiborne, Deputy Solicitor General, Jan. 15, 1970.

¹⁵⁰ See, U.S. Commission on Civil Rights, *Federal Enforcement of School Desegregation* Sept. 11, 1969. Statement of U.S. Commission on Civil Rights concerning the "Statement By the President on Elementary and Secondary School Desegregation", Apr. 12, 1970.

For other criticisms of the Justice Department, see for example, *Justice*, supra note 126; *Law Enforcement*, supra note 128; U.S. Commission on Civil Rights, *Political Participation* (1968); U.S. Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* (1965); U.S. Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* (1970); U.S. Commission on Civil Rights, *The Voting Rights Act: The First Months* (1965); R. Harris, *Justice: The Crisis of Law, Order and Freedom in America* (1970).

why the Justice Department has assumed this key role. First, Presidents have sought to reduce the number of individuals with whom they must confer to obtain information and advice. According to Joseph A. Califano, Jr., former Special Assistant to President Johnson, it was decided, that overall civil rights responsibility should be vested in a single agency head and that, since the Department of Justice possessed the most civil rights "clout", the Attorney General should have responsibility for coordinating the entire Government effort to protect the rights of minority citizens.¹⁵¹ Second, the President wished to insulate himself from the criticism that was bound to come either from the conservative or from the liberal spokesmen, depending on the aggressiveness of the enforcement effort undertaken. Therefore, it was deemed desirable to place the civil rights coordinating responsibility in the Department of Justice—a logical agency somewhat removed from the President or his Executive Office.¹⁵² An additional factor was that the Department of Justice traditionally takes the lead in drafting the President's legislative proposals in the civil rights field and in working with Congress to enact them.¹⁵³

Despite these justifications, the plain fact is that the Attorney General has not been able to coordinate Federal civil rights activity successfully even in the one area—Title VI—where he has been assigned specific responsibility by Executive order.¹⁵⁴ Former Attorney General Clark has expressed the opinion that the Attor-

¹⁵¹ Interview with Joseph A. Califano, Jr., Special Assistant to President Johnson, Mar. 24, 1970; see also, interview with Charles L. Schultze, former Director, Bureau of the Budget, Apr. 11, 1970; Clark interview, supra note 136.

¹⁵² Califano and Schultze interviews, supra note 151. For example, these were the reasons given for transferring the responsibility for coordinating Title VI activities from the President's Council on Equal Opportunity to the Justice Department. See p. 334, infra.

¹⁵³ Interview with Stephen J. Pollak, former Assistant Attorney General, Civil Rights Division, Nov. 8, 1969. Legislative proposals are cleared with the Deputy Attorney General after the Assistant Attorney General and his staff draft them. The Assistant Attorney General solicits suggestions for new legislation from all departments and agencies and, on occasions, has formed task forces of agency personnel to review problem areas and draft legislative proposals. Id.

¹⁵⁴ See ch. 4 supra for discussion of the activities of the Department of Justice as a coordinator of Title VI.

ney General should not be the President's top adviser on civil rights. The powers of the Department of Justice, he said, are too limited and the perspective of Attorneys General is too narrow.¹⁵⁵ Indeed, there is considerable factual basis for the former Attorney General's conclusion. The Attorney General, while an important Cabinet member, is only one of 12 such Cabinet members. While he can advise his Cabinet colleagues on civil rights, he cannot order them to follow his advice on specific civil rights actions. In some instances, the result has been that his advice is ignored. For example, despite repeated discussions with the Secretary of Agriculture concerning discrimination in his Department and specific suggestions for remedial steps, little action was taken by that Department to rectify the situation.¹⁵⁶ In such a case, where a Cabinet member chooses not to abide by the civil rights advice of the Attorney General, the Attorney General's only recourse is to appeal to the President—a course of action which, as a practical matter, can be taken only on matters of the first importance.

Further, the civil rights perspective of the Civil Rights Division, the unit traditionally looked to by the Attorney General for advice on civil rights matters, in fact has been a narrow one. The Division has tended to view problems strictly in terms of litigable legal issues.¹⁵⁷

In addition, as the law firm for the executive

¹⁵⁵ Clark interview, *supra* note 136. Mr. Clark stated that Attorneys General are generally lawyers who have practiced law in the private sector and have no experience in the civil rights field. He added that in a position as demanding as that of the Attorney General, on the job training is impossible.

¹⁵⁶ *Id.* See pp. 34–35 *infra*, for a further reference to this situation. Mr. Clark indicated that in a large agency there is great difficulty in even getting the cooperation of bureaus within the agency. For example, the FBI promised him that it would have 100 black special agents on board by early 1968. As of August 1970, it only had 47. Similar difficulty existed in trying to get the Bureau of Prisons to increase the number of black correctional employees at its institutions.

The FBI has indicated that it:

“ . . . is not aware of any request on the part of Mr. Clark that this Bureau have 100 Negro Special Agents on its rolls by early 1968 and accordingly, never made any promise to that effect. In fact, the FBI never has had a special set quota concerning Negro Special Agents.” Letter from Ferris Leonard, *supra* note 143.

¹⁵⁷ See ch. 4, *supra* for a discussion of this point.

branch, the Justice Department necessarily has become involved in a number of cases in which allegations have been made that Federal agencies have participated in the discriminatory operation of federally assisted programs.¹⁵⁸

The Department, recognizing the awkwardness of its position, has for the most part attempted to argue these cases on procedural grounds, rather than defend them on their substantive merits. It has not, however, systematically undertaken to determine if the allegations made in civil rights law suits against Federal agencies are justified and, where indicated, required the agency involved to take prompt remedial action.¹⁵⁹ This approach undoubtedly undermines the Department's position as leader of the Federal civil rights effort.

The Justice Department, despite its past inadequate performances, remains a logical place in which to vest civil rights leadership responsi-

¹⁵⁸ For a thorough treatment of this significant problem, see memorandum from Morton H. Sklar, attorney, Office of Coordination and Special Appeals, Civil Rights Division, to J. Harold Flannery, Chief, Office of Coordination and Special Appeals, Dec. 3, 1969. The memorandum, in establishing the extent of the problem, sets forth a sampling of the cases brought against the Federal Government:

“In the housing area, the city of Bogalusa, La., and the Department of Housing and Urban Development have been sued to enjoin the further allocation of Federal funds to support the construction of low-rent public housing units according to a site selection pattern that is alleged to encourage and perpetuate racial discrimination. *Hicks v. Weaver*, E. D. La., No. 68–986. An injunction has also been sought against HUD for unlawfully approving the Model Cities Plan submitted by the city of Chicago, despite the fact that it allegedly did not provide for adequate participation by low income residents in the planning and carrying out of projects as required by the Model Cities statute. *Coalition for United Community Action v. Romney*, N.D. Ill., No. —, Aug. 6, 1969.

“A wide variety of suits have been brought against Federal agencies in the field of employment. Cases have been filed against the Secretary of the Treasury to enjoin disbursement of Federal funds to Federal contractors on the ground of their discriminatory employment policies (see, e.g., *Noble v. Kennedy*, W.D.N.Y., No. 1969–324); the Department of Labor, for failure to enforce nondiscrimination requirements applicable to the employment referral practices of the Ohio Employment Service (*Jamar v. Ohio Bureau of Employment Security*, —); and the Civil Service Commission, for failure to enforce equal employment (*Hobson v. Hampton, et al.*, D.C., No. 2603–69).” *Id.*, at 2, 3:

¹⁵⁹ *Id.*, at 5, 6.

bility. It must take a more active role and develop a broader perspective if it expects other agencies to cease treating civil rights as a minor responsibility to be carried out passively and reluctantly. In short, the Attorney General not only must offer clear, continuous, and visible guidance to the agencies, but must make his Department an example of imaginative and aggressive enforcement of laws prohibiting discrimination against citizens because of their race, color, national origin, or sex.

VI. THE BUREAU OF THE BUDGET

A. Introduction

One leading expert on the Presidency has written, "[T]he Bureau of the Budget . . . serves the President as an 'administrative general staff' Without it the President could not begin to do his job as Chief Executive."¹⁶⁰ The Bureau is an extension of the Presidency and its function is essentially to provide him with staff service to promote the effective and economical administration of the Federal Government.¹⁶¹

As the President's task of managing the executive branch has become more complex, the responsibilities and the power of the Bureau have grown commensurately. One of the functions which has expanded significantly is that of overseeing executive management. This role includes making studies and offering proposals for the reorganization of executive departments and agencies; coordinating Government programs and policies; keeping the President informed of the performance of executive departments and agencies and seeing that they are responsive to Presidential priorities and policies.

These duties, plus its fiscal, legislative, and statistical functions, make the Bureau of the Budget one of the most powerful institutions in the Federal bureaucracy, and one which can have vital impact on the governmental effort to protect the rights of the Nation's minorities.¹⁶² Through its central role in the budget submis-

sion process, the Bureau has a direct voice in determining the amount of staff and other resources that will be made available for civil rights compliance and enforcement activities. Through its authority to review and clear all legislative proposals, the Bureau can play a significant role in assuring adequate legislative consideration of the civil rights implications of various bills concerned with social and economic welfare as well as promoting more effective civil rights legislation. And through its responsibility for approving agency proposals for data collection, the Bureau can be the key to the institution of Government-wide systems of racial and ethnic data collection to determine the extent of minority participation in Federal programs and to help measure progress under civil rights laws. Thus far, however, the Bureau has not geared its functions specifically to civil rights goals, nor has it even fully recognized the important civil rights functions it can perform.

B. Background and Responsibilities

Until 1921, executive agencies submitted their individual budget requests directly to Congress. In that year, however, Congress decided that a single executive budget to be submitted by the President was desirable and passed the Budget and Accounting Act of 1921,¹⁶³ placing responsibility for coordinating the budget submission process in a new agency, the Bureau of the Budget. At first, the Bureau was placed in the Treasury Department, although directly responsible to the President. In 1939, the Executive Office of the President was created and the Bureau of the Budget was shifted to the Executive Office.¹⁶⁴ The activities

¹⁶⁰ 31 U.S.C. 1, as amended. Section 209 of the act provided the Bureau with the basic charge for its management responsibilities. It indicates that, upon the request of the President, the Bureau shall conduct studies into the organization, methods of operation, and appropriations of the various agencies.

¹⁶¹ Plan 1 of the Reorganization Act of 1939 (Public Law 79-19). The shift had been advocated by the Brownlow Committee (President's Committee on Administrative Management) and submitted to Congress in 1937 but not favorably acted upon until April 1939. Two of the five major recommendations of the Committee dealt with the President's office. They were: (1) That the White House staff be expanded so as to keep the President in closer touch with the affairs of his administration and provide him with faster access to the

¹⁶² C. Rossiter, *The American Presidency* 98, 99 (1956).

¹⁶³ P. Brundage, *The Bureau of the Budget* (1970).

¹⁶⁴ The following discussion is of the Bureau of the Budget as it operated until its reorganization on July 1, 1970. The reorganization and its potential effect on civil rights will be treated at the end of this section.

of the Bureau were defined in Executive Order 8248, which was issued immediately after the Bureau moved into the Executive Office.¹⁶⁵ The Bureau's duties fall under five broad headings: (1) Preparation and execution of the Budget; (2) improvement of Government organization and management; (3) improvement of accounting and other phases of fiscal management; (4) legislative analysis and review; and (5) coordination and improvement of Federal statistical policies.¹⁶⁶

The Bureau is responsible solely to the President and its effectiveness is dependent on his support. Its staff size, although it increased from 40 in 1939 to more than 500 in 1969, is still considered grossly inadequate by knowledgeable observers.¹⁶⁷ Despite its small size, the Bureau of the Budget has tremendous influence with Government agencies. This can be attributed to its relationship to the President, its control over purse strings, and the fact that it, alone among Federal agencies, is concerned with the full spectrum of Federal activities.

The Bureau staff at present is divided into six Divisions and five Offices. The six Divisions¹⁶⁸ are the normal channels through which

information necessary for executive decisions; and (2) strengthen the managerial arms of Government, especially those dealing with budget and planning.

¹⁶⁵ Executive Order 8248, sec. II. 2 (1939).

¹⁶⁶ *Id.* The order lists eight duties of the Bureau, the last of which reads:

"To keep the President informed of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government; all to the end that the work programs of the several agencies of the executive branch of the Government may be coordinated and that the money appropriated by the Congress may be expanded in the most economical manner possible with the least possible overlapping and duplication of effort." *Id.*, at (h).

¹⁶⁷ P. Brundage, *supra* note 161, at 56; interview with Andrew M. Rouse, Deputy Executive Director, President's Advisory Council on Executive Organization, Apr. 9, 1970. Mr. Brundage was Director of the Bureau of the Budget from April 1956 to March 1968: Mr. Rouse was formerly Director, Resources Planning Staff, Bureau of the Budget. The budget for the Bureau was \$8,813,000 in fiscal year 1967; \$9,500,000, in fiscal year 1968; \$10,050,000 in fiscal year 1969; and estimated at \$12,141,000 in fiscal year 1970. *Budget of the United States*, fiscal year 1971, 53.

¹⁶⁸ (1) The Economics, Science, and Technology Programs Division relates to such agencies as the Depart-

the Bureau maintains its working relationship with the Federal agencies. Among the duties of the Divisions are the review of agency programs and budget requests; the development of recommendations on the budget; the analysis of proposed legislation and Executive orders; the stimulation of improved agency management and organization; and work on special projects involving long-range budgetary and organizational improvements in the coordination of agency programs.

The five Offices deal with Government-wide problems of a specialized character and provide guidance to the Divisions.¹⁶⁹ For example, the Office of Legislative Reference coordinates the Bureau review of agency proposals for legislation and agency views on pending legislation. The Office of Program Evaluation appraises Federal programs, prepares Government-wide program overviews which show costs and benefits of programs and characteristics of beneficiaries, and leads in the formulation of major program issues that must be analyzed for the budget.

C. The Bureau and Civil Rights

There are a large number of problems which face the Bureau of the Budget in its efforts to develop a rational budget, reduce duplication, and maintain a uniform Government legislative program. The number and complexity of Federal programs have manifoldly increased over

ment of Commerce, the Security and Exchange Commission, the Department of Transportation, the National Science Foundation and the Civil Aeronautics Board; (2) the Human Resources Program Division relates to the programs of agencies such as HEW, OEO, HUD, and Department of Labor; (3) the General Government Management Division deals with agencies like the Department of Justice, the Civil Service Commission, the Post Office Department, the General Services Administration; (4) the Natural Resources Programs Division works with such agencies as the Department of the Interior, TVA, Army Corps of Engineers, and the Department of Agriculture; (5) the International Programs Division is concerned with such agencies as the Department of State, AID, Peace Corps, and USIA; (6) the National Security Programs Division relates to the programs of the Department of Defense. Bureau of the Budget Director, April 1969. See Brundage, *supra* note 161.

¹⁶⁹ The Offices are the Office of Budget Review, Office of Executive Management, Office of Legislative Reference, Office of Program Evaluation, and the Office of Statistical Standards.

the last 30 years and new issues have demanded and obtained national action. In most cases, the Bureau has been able to adapt to each of these new demands. One of the latest areas demanding Bureau attention has been the Federal civil rights effort, which has, over the last decade, presented all of the problems involved in other Federal programs. Here, however, the Bureau has not yet adapted itself to the need. According to former Bureau Director Charles L. Schultze, Bureau of the Budget involvement in the civil rights field has so far been limited to its participation in the legislative process.¹⁷⁰

In each of its major roles, the Bureau of the Budget has the opportunity and responsibility for exerting leadership over agency civil rights programs. Yet, basic steps to enable the Bureau to fill that civil rights leadership role have not been taken. There is no locus of responsibility for civil rights matters in the Bureau, nor has it acknowledged any formal civil rights coordinating role.¹⁷¹ No instructions have ever been issued to Bureau personnel indicating the type of program that agencies should develop to carry out their civil rights responsibilities. BOB staff has received no civil rights training, nor has the Bureau issued any memoranda or other documents explaining what its civil rights role should be.¹⁷²

¹⁷⁰ Interview with Charles L. Schultze (June 1965–Jan. 1968), Apr. 7, 1970; see also interview with Carl H. Swartz, Jr., Director, Arthur Kaller, Assistant Director, Luman N. Rensch and Eugene B. Tryck, Budget Examiners, General Government Management Division, June 8, 1970.

Mr. Schultze indicated that the Bureau of the Budget did not have the expertise to take a leadership role in civil rights, and that he believed that it was the responsibility of the Justice Department. Another reason may be that as a staff arm of the President, the Bureau reflects the priorities which exist or are perceived to exist at the White House. *Id.*

¹⁷¹ *Id.* For example, no memoranda have been sent to budget examiners indicating that they should make an effort to be aware of civil rights problems when they conduct field program studies.

¹⁷² *Id.* The BOB manual for budget examiners is silent on civil rights matters. When asked if he thought that the Budget Bureau should become more involved in Title VI enforcement, the Special Assistant to the Attorney General indicated ambivalent feelings. He felt they could be of great hypothetical assistance because of the important voice budget examiners have in the operation of an agency. However, he added that examiners had shown no inclination for involvement in civil rights work and that the Bureau's reviews of

In the budget review process, carried on by the budget examiners of the various Divisions, civil rights concerns are included only to the extent that an individual examiner happens to have an interest or concern in the problem. For example, one Bureau examiner, because of his personal concern for a more effective contract compliance program, made repeated and ultimately successful efforts to stimulate OFCC to conduct its compliance activities on the basis of industrial priorities.¹⁷³ No systematic review is made of agency civil rights programs to determine if there is sufficient funding to meet the mandates of particular civil rights requirements, such as, Title VI of the Civil Rights Act of 1964, Executive Order 11246, Title VIII of the Civil Rights Act of 1968, or to determine if the funds allocated for civil rights purposes are being efficiently utilized.¹⁷⁴

The Bureau is in charge of Federal statistical data policies and typically encourages Federal agencies to collect a wide variety of data for the purpose of determining how effectively programs are working. Yet it has not required agencies to collect racial or ethnic data.¹⁷⁵ Nor has the Bureau even established Government-wide guidelines concerning the collection of such data although it is clearly essential in view of the confusion which exists as to whether the Government can collect racial and ethnic data, and if so, in what form it should be collected.¹⁷⁶

This has permitted inconsistent approaches within the Government and has made it impossible for the Bureau and others to determine

agency operations was not of sufficient depth to get to the root problems. Interview with David Rose, Special Assistant to the Attorney General for Title VI, Mar. 5, 1969. One of the possible reasons for this apparent insensitivity to civil rights concerns is the Bureau's own employment patterns. There are no minority group budget examiners, and of the more than 300 professional positions in the Bureau only eight above the GS-12 level are filled by minorities; six Negroes and two Orientals. Interview with George F. Mills, Manpower Statistics Division, U.S. Civil Service Commission, June 23, 1970.

¹⁷³ Interview with David Kleinberg, Examiner, Human Resources Program Division, June 22, 1970.

¹⁷⁴ Swartz interview, *supra* note 170; interview with Ralph R. Mueller, Assistant Director, Human Resources Program Division, June 6, 1970.

¹⁷⁵ *Id.*

¹⁷⁶ Interview with Carol B. Kummerfeld, former staff member, Office of Statistical Standards, June 22, 1970.

if Federal assistance programs are reaching minority group citizens in proportion to their eligibility for such assistance.¹⁷⁷

The Office of Statistical Policy, which is responsible, among other things, for giving approval to agency requests for data which are being sent to more than 10 people, has taken a limited view of its function in civil rights matters. According to one former Bureau staff member, the view of the office was that its primary function is reviewing proposed agency forms. Even those reviews directly related to civil rights have tended to concentrate on traditional data questions such as how long it will take to fill out the form, rather than on key questions such as whether all necessary data are being collected, of what specific use is the data in reaching compliance decisions, and whether the data are part of an effective system.¹⁷⁸ Rarely are efforts made to determine if the forms are, or should be, part of a coordinated interagency program or whether their use has been coordinated between agency civil rights personnel.¹⁷⁹ The Office has established an Advisory Council on Federal Reports which it consults in passing on forms submitted to it which are being sent to the business community. The Council consists entirely of representatives of industry; no comparable council of civil rights leaders or minority group spokesmen exists.¹⁸⁰

When the Bureau is asked to review draft legislation involving such matters as housing or education which have important civil rights implications although not designated as civil rights bills, it usually neither inquires specifi-

¹⁷⁷ Interview with James V. DeLong, senior staff member, Office of Program Evaluation, Apr. 11, 1970. The Office of Program Evaluation is beginning to develop a pilot Governmentwide analysis of where and to whom Federal assistance goes. The categories they are using are: region of the country, urban-rural-suburban, race, and age level. This effort has been handicapped by a lack of agency-collected racial data and thought is being given to requiring each agency to make such an analysis each year. Id.

¹⁷⁸ Interview with Karen Nelson, former staff member, Office of Statistical Policy, June 23, 1970. The Bureau was assigned this responsibility under the Federal Reports Act of 1942.

¹⁷⁹ Id. Budget examiners rarely attend meetings called to discuss proposed forms. Kleinberg interview, supra note 173.

¹⁸⁰ Id.

cally into the civil rights aspects of the legislation nor requests the comments of agencies that have special civil rights expertise.¹⁸¹ For example, in 1967, this Commission requested the Bureau that it be given the opportunity to comment on possible civil rights implications of a variety of categories of draft bills dealing with social and economic welfare, such as housing, community development, poverty, welfare, and education.¹⁸² Despite the Bureau's assurance that the Commission would be afforded this opportunity, it has forwarded to the Commission for comment only one draft bill in the 3 years since the request was made—the draft Housing and Urban Development Act of 1968.

The Bureau has taken some action which relates to civil rights. The General Government Management Division has collected data on the civil rights budgets and staffing of the various agencies. However, the information provided to it has not always been accurate¹⁸³ and significant use has not been made of the data. Occasionally studies have been conducted of programs, which to a large degree, service minority group citizens¹⁸⁴ and the Bureau, according to its former Director, Charles Schultze, has an orientation toward programs for the disadvantaged.¹⁸⁵ Yet, BOB has engaged in no continuing review of the long-range impact of Federal programs or policies on racial problems and it has done little to foster increased or improved agency activity in the civil rights field.

¹⁸¹ Id. Interview with Donald Kummerfeld, former Budget examiner, Human Resources Program Division, BOB, Jan. 25, 1967.

¹⁸² Letter from William L. Taylor, Staff Director, U.S. Commission on Civil Rights to Wilfred Rommel, Assistant Director, BOB, Jan. 25, 1967.

¹⁸³ Swartz interview, supra note 170. For example, the manpower and budget data provided to BOB in past years by the Agriculture Department was inflated and BOB was informed of the fact by the Justice Department. Rose interview, supra note 170.

¹⁸⁴ Schultze interview, supra note 170. For example, BOB conducted a study of types of recipients of funds under Title I of the Education Act, in an effort to insure that the funds intended to assist school districts with large numbers of poor families did not go to wealthy school districts that merely wanted to shift some of the cost of running the schools to the Federal Government.

¹⁸⁵ Id.; Swartz interview, supra note 170.

D. Reorganization of the Bureau of the Budget

On April 5, 1969, President Nixon established an Advisory Council on Executive Organization with a mandate to conduct a thorough review of the organization of the executive branch. The first area the Council turned to was the Executive Office of the President.¹⁸⁶ The Council found that the preparation and administration of the Budget by BOB dominated that agency's attention to the detriment of its other functions. Thus, the Bureau never achieved its other principal goal—that of being the principal management arm of the President. It was found that the Bureau's program reviews were not of sufficient quantity or quality to effectively coordinate or evaluate the effects of the numerous Federal programs, nor was it felt that the Bureau did enough in the way of issuing guidelines and rules to standardize interagency activities. The Bureau's failure in these important areas, it was concluded, prevented Presidents from receiving timely and coherent information about the operation of those programs.¹⁸⁷

As a result of the Council's efforts, a reorganization plan was announced, which transfers to the President all functions vested by law in the Bureau of the Budget and redesignates the Bureau as the Office of Management and Budget.¹⁸⁸ The President has announced that he will delegate all of the functions of the Bureau to the new Office.¹⁸⁹ The size of the Office will be enlarged and its Director will be authorized, subject to the approval of the President, to ap-

¹⁸⁶ Statement by the President, to the Congress of the United States Accompanying Reorganization Plan No. 2 of 1970, Mar. 12, 1970.

¹⁸⁷ Id. See Briefing Outline—Reorganization Plan—Executive Office of the President, undated; The White House Press Conference of Roy L. Ash, Chairman, President's Advisory Council on Executive Organization; Walter N. Thayer, member; Murray Comarow, Executive Director; and Robert P. Mayo, Director, Bureau of the Budget, Mar. 12, 1970.

It was asserted that the level of program review at BOB is minimal and that since budget examiners spent only 5 percent of their time in the field and do not have adequate information systems, they are not able to judge how programs really operate on the local level. Rouse interview, *supra* note 167.

¹⁸⁸ Reorganization Plan No. 2 of 1970, p. I, sec. 101 and 102.

¹⁸⁹ Presidential Statement of Mar. 12, 1970, *supra* note 186, at 4.

point six additional officers at level V of the Executive schedule.¹⁹⁰ The principal concern of the new Office will be nonbudgetary matters; it will particularly focus on "program evaluation and coordination, improvement of executive branch organization, information and management systems and development of executive talent".¹⁹¹

Although indicating that program evaluation remains basically a responsibility of each agency, the President has stated that the interagency nature of some program areas makes it impossible to rely merely on the evaluation performed by the individual agencies. Furthermore, the President acknowledged that White House perspective in evaluating programs may well differ from that of an agency.¹⁹² Essentially, the new Office of Management and Budget will focus on the means of implementing national policy and evaluating the results of agency efforts in carrying out their program assignments.

The reorganization does not go into effect until July 1970, subsequent to the writing of this report. Therefore, it is not possible to determine in detail what specific new procedures and actions the Office will initiate. It is clear, however, that from the point of view of accelerating delivery of Federal benefits to minority group citizens and improving the effectiveness of enforcement of civil rights laws, the reorganization offers an opportunity for significant improvement over the former BOB structure. An enlarged program evaluation effort, accompanied by a sensitivity to the unique problems of the minority groups in America could

¹⁹⁰ Id. Reorganization Plan No. 2 of 1970, p. I, sec. 102. A level V on the Executive schedule is equivalent to a Commissioner of the Equal Employment Opportunity Commission or the Staff Director of the Commission on Civil Rights. The plan also creates a White House-based Domestic Affairs Council, which is discussed on pp. 337-38, *infra*.

¹⁹¹ Presidential Statement of Mar. 12, 1970, *supra* note 186, at 4.

¹⁹² Id. A key phrase used by the President in referring to the type of evaluation he desired is "assessing the extent to which programs are actually achieving their intended results, and delivering the intended services to the intended recipients." Id.

Another matter assigned to the Office of Management and Budget is the responsibility for assisting agencies in their attempts to coordinate interagency field activities.

produce dramatic changes in agency policies in a reasonably short period of time. It remains for the Director and staff of the proposed Office of Management and Budget to make civil rights problems a priority issue of concern and to shape the mechanisms necessary to uncover the problems neglected for so many years by its predecessor and the other Federal agencies.

VII. THE WHITE HOUSE

A. Introduction

"The executive Power shall be vested in a President of the United States of America [H]e shall take care that the Laws be faithfully executed" ¹⁹³ Thus the Constitution grants the full power of the executive branch of Government to one person—the President. Our President is more than an enforcer of laws. He is intimately associated with the legislative process, generating most of the important legislation Congress acts upon and, even more importantly, he is looked to as the moral as well as the political leader of the people.¹⁹⁴ As in other areas, the exercise of Presidential power and leadership is vital to the cause of civil rights.

Previous chapters have dealt with the limited successes and the inadequacies of efforts made by the departments and agencies of the executive branch to enforce the mandates of the Constitution, the laws passed by Congress, and the Executive orders of the President in the field of civil rights. In the final analysis, it is the President who has responsibility for the success or failure of those efforts. It is the President who appoints the heads of executive agencies, provides them with direction, can remove them, and for whom they act. The resolute commitment of the President to the principles of equal opportunity for all Americans is essential if

¹⁹³ U.S. Constitution art. II, secs. 1 and 3. Article II, sec. 1 (8) sets forth the Presidential oath of office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States."

¹⁹⁴ For a general discussion of the roles of the President, see C. Rossiter, *The American Presidency* (1956), where some of the roles of the President are listed as: Chief of State, Chief Executive, Chief Diplomat, Commander in Chief of the Armed Forces, Chief Legislator, Chief of Party, and Chief Spokesman of the People.

Government is to take an affirmative role in advancing the cause of civil rights.¹⁹⁵ Even with Presidential commitment, the task of harnessing the Federal bureaucracy so that it carries out his civil rights policies is a difficult one. The President's control over the Federal establishment, as a practical matter, is far from absolute. The number and geographical distribution of the members of the executive branch,¹⁹⁶ the long tenure of many Federal employees,¹⁹⁷ and the limited amount of time the President can devote to each of the diverse and complex issues that constantly are presented

¹⁹⁵ As has been demonstrated in this report, the Federal Government has, in the past, been an integral part of the economic and social systems of this country that discriminate against some of our citizens because of their race or ethnic background. The Federal Civil Service was segregated. Federal assistance, in areas such as housing and health care facilities, was openly provided to segregated groups and institutions, and, in fact, was used to promote segregation. See ch. 2, 3 and 4, *supra*, for a further discussion of these points.

¹⁹⁶ There are at present more than 2.9 million Federal civilian employees who work for 125 agencies, boards, and commissions, spread across every major city in the Nation. The President appoints fewer than 1 percent of these officials. Cong. Rec. E 1521, Mar. 3, 1970.

¹⁹⁷ One Presidential scholar has written about the obstructionist tendencies of the bureaucracy:

"A more reliable restraint is to be found in the Federal administration—in the persons and politics and prejudices of, let us say, the top 20,000 civil and military officials of the Government of the United States. Were the Presidents of the last 50 years to be polled on this question, all but one or two, I am sure, would agree that the "natural obstinacy" of the average bureau chief or commissioner or colonel was second only to the "ingrained suspicions" of the average congressman as a check on the President's ability to do either good or evil.

". . . [o]ur Federal civil servants are no less anxious than he to get on with the business of good and democratic government. But his idea and their idea of what is "good" or "democratic" must often be at stiff odds with one another, especially when he is pushing some untried and unconventional policy, even more especially when they have the support of strong men and groups in Congress. . . .

"I think, in this instance, of all the written and spoken directives of our last three Presidents aimed at eliminating racial discrimination in the civil service and the Armed Forces, and I wonder how many thousands of times some stubborn or fainthearted official has made a mockery of the President's good intentions."

Rossiter, *supra* note 194, at 43, 44. Also see statement by President Franklin D. Roosevelt in M. Eccles, *Beckoning Frontiers* 336 (1951).

to him,¹⁹⁸ make it impossible for the President, alone, to assure that his civil rights policies are being carried out uniformly and aggressively. Mechanisms outside the control of the bureaucracy are needed to serve the President in assuring that his civil rights programs and policies are being carried out with maximum effectiveness. At a minimum, these mechanisms must serve the following functions: (1) provide the President with accurate and prompt information on what is happening around the country and in Government; (2) convey information to the bureaucracy concerning administration civil rights policy; and (3) evaluate agency action and stimulate more forceful action to carry out that policy. One place where Presidents have sought to locate these mechanisms is the White House itself.

B. Past Presidential Mechanisms for Coordinating Civil Rights

I. SUBCABINET GROUP

Although over the years there have been

¹⁹⁸ See, R. Neustadt, *Presidential Power* (1960) for a general discussion of the limits on the power of the President. More specifically, a former aide to President Franklin D. Roosevelt wrote:

"Half a President's suggestions, which theoretically carry the weight of orders, can be safely forgotten by a Cabinet member. And if the President asks about a suggestion a second time, he can be told that it is being investigated. If he asks a third time, a wise Cabinet officer will give him at least part of what he suggests. But only occasionally, except about the most important matters, do Presidents ever get around to asking three times." J. Daniels, *Frontier on the Potomac* 31, 32 (1946).

Robert F. Kennedy, in discussing the intended removal of American missiles from Turkey, wrote:

"The President believed he was President and that, his wishes, having been made clear, would be followed and the missiles removed. He therefore dismissed the matter from his mind. Now he learned that the failure to follow up on this matter had permitted the same obsolete Turkish missiles to become hostages of the Soviet Union." R. Kennedy, *Thirteen Days*, 95 (1969).

Most recently, Bill D. Moyers, Appointments and Press Secretary to former President Johnson, indicated:

"Many Cabinet officers are men who are not well known to the President prior to his inauguration. They also become men with ties to their own departments, to the bureaucracy, to congressional committees, rather than exclusively to the President. . . ." H. Sidey, "The White House Staff v. the Cabinet," an Interview with Bill Moyers," *The Washington Monthly* 2, 3 (Feb. 1969).

individuals at the Cabinet or White House staff levels committed to promoting equal opportunity for racial and ethnic minorities, no permanent body ever was set up under White House aegis to review civil rights policies until President Kennedy created a Subcabinet Group on Civil Rights in 1961.¹⁹⁹ The Subcabinet Group was a loosely structured organization, which operated under the leadership of White House assistants. Initially, ranking representatives from key agencies attended the monthly meetings of the Subcabinet Group, but eventually the size of the group became unwieldy and ceased to function effectively.²⁰⁰ The Subcabinet Group, which was, for the most part, a discussion group, dealt with a wide spectrum of issues, including such matters as equal employment opportunity in the Federal Government; the appearance of Federal officials before segregated meetings; discrimination in the military services; the inclusion of a nondiscrimination clause in the Federal Merit Employment Standards agreements (which applied to six State-administered Federal assistance programs); the collection of racial and ethnic data; and the development of Executive Order 11063, prohibiting discrimination in the sale of housing with mortgages insured or guaranteed by the Federal Government.²⁰¹ The Subcabinet Group also started a rudimentary reporting system whereby agencies reported monthly progress in areas of concern to the group. Agencies often presented oral reports at the Subcabinet Group meetings but, as a rule, none was criticized, even if its reports demonstrated a lack of activity.²⁰²

¹⁹⁹ Prior to the 1960 election, it was expected that John F. Kennedy, if elected, would form a White House Office on Civil Rights; however, as a result of the narrow margin of his election, and the advice of some of his advisers, no such office was set up during his administration. Interview with William L. Taylor, former Secretary to the Subcabinet Group, Apr. 23, 1970.

²⁰⁰ Id.

²⁰¹ Id. See "Meetings of Subcabinet Group, 1961-64."

²⁰² An October 1961 report of the Agriculture Department, for example, indicated:

"*Extension Service*

"Seven States have removed the word "Negro" from the title of extension employees and others may follow; six States where a salary disparity exists have narrowed the gap by raising salaries for Negro agents more than for whites, and in five States titles have

The Group's most important function was to serve as a clearinghouse for disseminating information, exchanging ideas, and exerting pressure on agencies.²⁰³ One of the major failings of the Group was that it lacked policymaking authority and, in fact, several of its policy recommendations on important issues were rejected by the President or his senior staff.²⁰⁴ Although White House staff members who were responsible for civil rights served as Chairmen of the Group, the important policy decisions were made by another set of Presidential advisers, who became involved with civil rights only when critical decisions needed to be made.²⁰⁵

2. PRESIDENT'S COUNCIL ON EQUAL OPPORTUNITY

The second major effort to develop a mechanism for coordinating the civil rights activities

been established for all workers which result in uniform salaries irrespective of race. [But reports indicate that Agriculture is seeking salary equalization first, leaving (sic) more difficult problem of desegregation for later.]”

Memorandum from William L. Taylor, Secretary, Subcabinet Group, to Harris Wofford, Special Assistant to the President, “Summary of October Reports of Department and Agencies,” Oct. 27, 1961. It is disheartening to note that as of 1970, salary disparities and segregated service patterns still exist in Extension Service offices.

²⁰³ Taylor interview, *supra* note 199. The meetings enable officials to go back to their agencies and state “this is what the White House wants us to do.”

²⁰⁴ For example, there was strong feeling in the Subcabinet Group favoring adoption of a policy prohibiting discrimination in Federal assistance programs. (This requirement, which is the essence of title VI of the Civil Rights Act of 1964, had been previously suggested by the Commission on Civil Rights in 1962.) Memorandum from William L. Taylor, Secretary, Subcabinet Group to Lee C. White, Assistant Special Counsel to the President, “Executive Action to Deal with Massive Resistance,” Oct. 26, 1962. The President refused to support this proposal of the Subcabinet Group.

²⁰⁵ The White House aides most associated with the Subcabinet Group were Harris Wofford, Frank Reeves, and Lee White, whereas, the real decisionmakers during President Kennedy's administration were White House Aide Theodore Sorenson and Attorney General Robert F. Kennedy. Interview with Lee C. White, former Special Counsel to the President, Apr. 23, 1970; Taylor interview, *supra* note 195; W. Taylor, “*Executive Implementation of Federal Civil Rights Laws: An issues paper for the Leadership Conference on Civil Rights*” 7, 8 (1968).

of the executive branch came shortly after the passage of the Civil Rights Act of 1964, with the establishment of the President's Council on Equal Opportunity.²⁰⁶

The Vice President served as Chairman of the Council whose membership consisted of the top officials of 16 Federal agencies.²⁰⁷ The council's purpose was to review and assist in coordinating the activities of all departments and agencies of the Federal Government which had civil rights responsibilities. It did not have power to set policy. Rather, its function was to collect information and make reports to the President on the need for new laws, Executive orders, policies, and changes in administrative structure of the agencies.²⁰⁸

The Council was in existence for only 6 months—from March to September, 1965. By the time it was totally staffed, had appointed Committees, had begun a reporting system, and laid the groundwork for broad participation in the Federal civil rights effort, it was abolished.²⁰⁹ It had begun to get involved in a number of matters, such as working with the emerging Equal Employment Opportunity Commission;

²⁰⁶ Executive Order 11197 (1965). See ch. 4, for another treatment of the Council.

²⁰⁷ *Id.*, at sec. 2, (1) and (2). The members of the Committee were the Vice President as Chairman, the Secretary of Defense, the Attorney General, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health, Education, and Welfare, the Chairman of the Civil Service Commission, the Administrator of the Housing and Home Finance Agency, the Director of the Office of Economic Opportunity, the Chairman of the Commission on Civil Rights, the Chairman of the Equal Employment Opportunity Commission, the Administrator of General Services, the Commissioner of Education, the Director of the Community Relations Service, the Chairman of the President's Committee on Equal Opportunity in Housing.

Each agency was to appoint an official at a rank not lower than Deputy Assistant Secretary to act as liaison with the Council. *Id.*, at sec. 8.

²⁰⁸ *Id.*, at sec. 4. The Council was also authorized to hold conferences with Federal, State, and local governments and groups to promote and coordinate the equal opportunity efforts of these groups. *Id.*

²⁰⁹ The Council did not actually meet until March 1965, did not get its Executive Director until April, and was abolished by Executive Order 11247 on Sept. 24, 1965. Interview with Wiley Branton, former Executive Director, President's Council on Equal Opportunity, Apr. 6, 1970; interview with David Filvaroff, former General Counsel, President's Council on Equal Opportunity, June 19, 1970.

developing a plan for the collection of racial and ethnic data; evaluating new school desegregation in guidelines; drafting coordination plans under Title VI of the Civil Rights Act of 1964 for agencies with the same recipients; and working with local communities to accelerate the flow of poverty funds.²¹⁰ Although the Vice President maintained an active interest in the affairs of the Council, its ties to the President's staff were not close, and conflicts soon arose.²¹¹ The official reason for the abolishment of the Council was that it was no longer necessary—that the remaining problems in civil rights enforcement could best be handled by the Justice Department and the program agencies.²¹² The sudden demise of the Council left those agencies and agency personnel that had come to look to it

²¹⁰ Id. There were, however, only four meetings of the Council and its Executive Director, though indicating that agency reaction to Council guidance was good, stated that the Council "never got off and running." Branton interview, supra note 209.

²¹¹ For example, the Council's Executive Director was in Los Angeles at the time of the Watts riot, and was asked by the Vice President to conduct an investigation of the causes of the riot and report to the Council. The report was prepared, but the President canceled the Council meeting and sent his own investigating team to Los Angeles. Other problems of coordination between the Council and the White House related to school desegregation guidelines and jurisdiction for the pending civil rights conference "To Secure These Rights". Branton interview, supra note 209.

²¹² Memorandum for the President From the Vice President on Recommended Reassignment of Civil Rights Functions, Sept. 24, 1965. The memorandum read in part:

"In short, I believe the time has now come when operating functions can and should be performed by departments and agencies with clearly defined responsibility for the basic program, and that interagency committees and other interagency arrangements would now only diffuse responsibility."

It has been contended that the Vice President never saw the memorandum until the morning it was released. Branton interview, supra note 209; A. Phillip Randolph Institute, *The Reluctant Guardians: A Survey of the Enforcement of Federal Civil Rights Laws* (prepared for the Office of Economic Opportunity) 2-10, 11 (1969). From this and like experiences, knowledgeable observers have concluded that a Vice President can never successfully operate a civil rights coordinating function. Branton interview, supra note 205; interview with Charles Schultze, former Director, Bureau of the Budget, Apr. 9, 1970; interview with Joseph A. Califano, Jr., former Special Assistant to President Johnson, Mar. 24, 1970.

for leadership and support without any White House-level office to relate to on civil rights matters or from whom to receive guidance on a regular basis.

3. COORDINATION ON AN AD HOC BASIS

a. 1965-1968

The Executive order abolishing the President's Council transferred to the Department of Justice the responsibility for coordinating the enforcement efforts of the 22 agencies with Title VI programs.²¹³ According to former Attorney General Ramsey Clark, the Department lacked the stature, inclination, and manpower to fulfill this mandate adequately.²¹⁴ Other vital areas of civil rights concern which had been within the Council's jurisdiction, such as discrimination in the private employment sector, were no longer subject to any specific coordination or policy direction.

During the last 3 years of President Johnson's administration, White House staff was not systematically involved in the Federal civil rights program. It became involved only when an important problem arose, when a major new policy was to be enunciated, or when action was desired on a particular matter.²¹⁵ In cases where the White House staff intervened in civil rights matters involving particular departments, department heads (either because they did not agree with the position of the White House staff or because they felt that the proposed course of action was not politically feasible) sometimes would disregard the requests for

²¹³ Executive Order 11247 (1965). Top advisers to President Johnson have indicated that one of the reasons civil rights duties were focused in the Department of Justice was the President's respect for Attorney Generals Katzenbach and Clark. Califano and Schultze interviews, supra note 212.

²¹⁴ Interview with Ramsey Clark, Mar. 30, 1970. For a discussion of how the Department of Justice is fulfilling its responsibilities under the Executive order, see ch. 4, supra.

²¹⁵ Clark and Califano interviews, supra notes 214 and 212. White House staff members who dealt with civil rights questions were Joseph A. Califano, Jr., Special Assistant to the President, and Harry C. McPherson, Jr., Special Counsel to the President. During their tenure on the White House staff, Lee C. White, Special Counsel to the President and Clifford L. Alexander, Jr., Deputy Special Counsel to the President, also worked on civil rights questions.

action.²¹⁶ No regular meetings were held between White House staff and Government civil rights officials, and no reporting system was developed to provide the President and his staff with information on the state of the Federal civil rights enforcement effort.²¹⁷ Decisions were made on the basis of ad hoc advice from the Attorney General, Presidential assistants, and private individuals outside the Government family, with little provision for followup.²¹⁸

Thus no mechanism was developed to replace the President's Council on Equal Opportunity. The vacuum created by the demise of the Council was not adequately filled either by the White House staff, the Bureau of the Budget, or the Justice Department. Agency civil rights staffs were left largely to fend for themselves in the effort to assure that civil rights received priority attention.²¹⁹

b. 1969—June 1970

Although the assignment of White House personnel to deal with civil rights matters currently is more structured²²⁰ than it previous-

²¹⁶ Califano interview, *supra* note 212. For example, the White House staff raised questions with Cabinet Secretaries about rampant discrimination in the Department of Agriculture's Federal Extension Service and the building trade unions which are closely tied to the Department of Labor. Yet no significant action was taken by Secretary Freeman to enforce Title VI with regard to the Extension Service and the action taken by Secretary Wirtz to break the discriminatory patterns of the building trade unions was highly inadequate to cope with the pervasiveness of the problem. *Id.*

²¹⁷ *Id.*

²¹⁸ White interview, *supra* note 205.

²¹⁹ As a result of the conflict in agency priorities, which the injection of civil rights issues often causes (e.g., the job of a contracting officer has traditionally been to obtain goods at the cheapest price with the fastest delivery date and not to ensure that the low bidder employs a fair percentage of minority group individuals; a grant program administrator generally has been concerned only with getting his assistance out to the public, not requiring that everyone, regardless of race or ethnic background, receive an equitable share of the assistance) most of the Federal civil rights programs atrophied. There is some reason to doubt, however, that the President or his top staff were aware of this fact.

²²⁰ The top staff member with civil rights responsibilities is Leonard Garment, Special Consultant on Civil Rights, Voluntary Action, and the Arts, who ordinarily reports to John D. Ehrlichman, Assistant to the President for Domestic Affairs. Mr. Garment has an executive assistant, Bradley H. Patterson, Jr. Robert J. Brown, a Negro, is Special Assistant to the President

ly was, some of the deficiencies of the past still exist. Five White House staff members spend all or most of their time dealing with issues and programs relating to minority group citizens.²²¹ Two of them are utilized almost exclusively in promoting the Administration's minority entrepreneurship and equal opportunity in Federal employment programs, working on special projects and handling correspondence.²²² The chief civil rights official on the White House staff, Leonard Garment, and his assistant, however, have a number of duties in addition to civil rights, and are assigned to special projects and committees which require significant amounts of their time.²²³ Although these various other

and reports to both Mr. Ehrlichman and Mr. Garment. His assistant, Thaddeus V. Ware, a Negro, is a Staff Assistant to the President. The last person assigned to civil rights matters is Bruce Rabb, also a Staff Assistant to the President. Mr. Rabb is formally on the staff of Mr. Ehrlichman, but works closely with Mr. Brown and Mr. Garment.

²²¹ Messrs. Brown, Ware, and Rabb all spend full-time on minority group affairs. Interview with Robert J. Brown, Special Assistant to the President, Mar. 17, 1970. Interview with Bruce Rabb, Staff Assistant to the President, Mar. 4, 1970. Both Mr. Garment and Mr. Patterson spend the overwhelming percentage of their time on civil rights matters. Interview with Bradley H. Patterson, Jr., executive assistant to Leonard Garment, Apr. 22, 1970.

²²² Interview with Robert J. Brown, Special Assistant to the President, Apr. 9, 1970. Mr. Brown indicated this was also true of Mr. Ware and himself. Examples of the types of special assignments Mr. Brown is assigned to is work that he performed in the summer of 1969 evaluating the various types of day care centers that the Government could fund and the work he performed with Federal agencies to develop or restructure assistance programs to make them more relevant to the needs of predominantly black colleges.

²²³ A recent newspaper story concerning Mr. Garment set forth his duties in the following manner:

"His assignments quickly multiplied, soon justifying his description of himself as the administration's "odds and ends" man. As special consultant, he is the President's liaison officer for cultural affairs in the State Department, Indian affairs in the Interior Department, minority business enterprise in the Commerce Department, civil rights (all departments); he is director of the National Goals Research Staff and is White House agent with the Civil Rights Commission, the Equal Employment Opportunity Commission, the President's Committee on Equal Opportunity in Housing, the President's Council on Youth Opportunity, the Indian Claims Commission, the National Foundation on the Arts and the Humanities, the Commission on Fine Arts, the Smithsonian Institution, the Joseph H. Hirschhorn

demands on the time of White House civil rights staff are, for the most part, related to minority group affairs, they are not related to compliance or enforcement of civil rights laws and policies.

Two types of information systems are used by White House aides. The first is a formal one: the filing by the agencies of monthly reports concerning significant civil rights activities and the holding of periodic meetings with agency officials.²²⁴ The second information system is informal, consisting of following events reported in the press, reading reports issued by the Commission on Civil Rights or private civil rights groups, and speaking with minority group leaders and Government officials.²²⁵

The monthly reports requested are narrative and the agency determines what to include and what not to include. This system makes it almost impossible to evaluate agency performance on an accurate and objective basis or to determine what an agency should be doing that it is not doing. In any event, no evaluation of the reports is made.²²⁶ The basic purpose of the periodic meetings is to disseminate information. No attempt is made to use the meetings for policymaking purposes, or for making critical appraisals of agency efforts.²²⁷ Rather, the

Museum and Sculpture Garden, the National Council on Indian Opportunity and the Bicentennial Commission. In addition, he is responsible for administration programs on voluntary action, voting rights, problems of the aging and women's rights and responsibilities.

"Garment spent nearly all his time for 2 months this spring assembling a lawyers's brief for the President on the whole question of school desegregation. After the statement was completed, the President put him on a special commission on school desegregation headed by the Vice President."

The Washington Post, Potomac Magazine, June 7, 1970, at 17, 29, 30. Brown interview, supra note 222.

²²⁴ Brown interview, supra note 222.

²²⁵ Patterson interview, supra note 221.

²²⁶ Interview with Thaddeus V. Ware, Staff Assistant to the President, Mar. 17, 1970. A representative number of the reports were reviewed by Commission staff and found to vary significantly from agency to agency, with material in almost all cases being quite superficial.

²²⁷ Brown interview, supra note 221. There are 28 agencies which are invited to send representatives to the meetings. The U.S. Commission on Civil Rights has not been asked to participate in them. However, another White House source has indicated:

"Reports that are made at the meetings are made not only to inform the other members of the particular subject matter being discussed, but also to provide an

agenda for the meetings usually consists of a discussion by a Presidential aide or agency representative either explaining a new policy or an action taken in furtherance of a program considered of national importance, e.g., the minority enterprise program or the Philadelphia Plan.

A number of efforts in the area of civil rights have been undertaken by White House staff on an ad hoc basis. A sample of these efforts includes: accompanying Department of Defense civil rights officials on visits to certain military installations;²²⁸ working with various agencies, especially the Office of Emergency Preparedness, to develop mechanisms to assure that Federal disaster relief is provided on a nondiscriminatory basis;²²⁹ meeting with Federal Executive Boards to describe the Administration's minority entrepreneurship program;²³⁰ visiting various parts of the country to talk with minority group leaders and other local

opportunity for criticisms and recommendations by the other people present. In addition, the meetings also include a period for discussing issues not included in the agenda which those present think should be raised.

"Opportunities to appraise agency efforts, moreover, are not limited to the agency officials who attend the meetings on a regular basis. At the Mar. 5, 1970, meeting, for example, the assistant director of the National Urban League was invited at his request to discuss ways in which the Federal agencies could help achieve a more accurate count of minorities in the 1970 census. Memorandum from Bruce Rabb to Leonard Garment, 2, Aug. 24, 1970, appended to a letter from Leonard Garment to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 25, 1970."

²²⁸ Rabb interview, supra note 221. According to a White House official, the visits were one aspect of an effort on the part of White House staff to determine the causes of rising racial tension in the Armed Forces and to develop means for eliminating the causes. Memorandum from Bruce Rabb, supra note 227, at 3.

²²⁹ Id. As part of this effort White House staff went to Mississippi and Louisiana after Hurricane Camille and visited Texas after it was struck by Hurricane Celia.

²³⁰ Brown interview, supra note 221. White House staff has also worked:

". . . in the development of the contract compliance program, and have stepped in where necessary to assure compliance with that program, as in the case of the major contracts to Ingalls Shipbuilding Co. in Pascagoula, Miss. (May 1969) and to Newport News Shipbuilding and Dry Dock Co. (June 1970).

Memorandum from Bruce Rabb, supra note 227.

minority group citizens; and working on HEW's school desegregation guidelines.²³¹

Despite this increased activity by White House staff, there still is no systematic effort to insure that the enforcement efforts of the Federal Government agencies are evaluated, or that their civil rights activities and policies are coordinated.²³² This, coupled with the failure of the Bureau of the Budget, the other principal staff arm of the President, to evaluate agency civil rights activities, has an adverse effect on the amount and accuracy of information

²³¹ Brown and Patterson interviews, *supra* note 221. In the area of school desegregation:

"... [m]onths of White House senior staff time ... was given over to researching, drafting, defending, and explaining the President's whole series of statements and actions concerning school desegregation ..."

Specifically, the staff worked on:

"[T]wo brief and one very long policy statements, the creation and staffing of a special Cabinet Committee, the appointment of seven biracial State Advisory Councils, a personal Presidential meeting with each, an additional Presidential meeting with the seven chairmen and co-chairmen, a special Presidential trip and news briefing to New Orleans ... Memorandum from Bradley H. Patterson, Jr. to Leonard Garment, 2, Aug. 25, 1970 which is appended to a letter from Leonard Garment to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, Aug. 25, 1970."

²³² Indeed, White House staff members have indicated that they believe that this is not the proper function of the White House staff:

"... regular, systemwide program review is simply not the role of personal White House Staff under any presidency; it indeed is the role of the Executive Office of the President and as I understand it will be one of the major roles of the Office of Management and Budget.

"Personal White House executive assistants ... are always ad hoc, always delving into specific issues, one by one, as these issues face the President. They may prod the President, inform the President, help the President, amplify the President's decisions but their quintessential usefulness is in their intimacy with the President and their flexibility to his needs. They know where in Government to go to get information, know how to use the organized, systematic staffs of the Government's departments and agencies and parts of the Executive Office—but they themselves are neither departments nor the continuing Executive Office ... A staff of personal White House assistants organized on any other principle, especially attempting systematic, structured monitoring of agency operations, always gets into trouble. ..."

Memorandum from Bradley H. Patterson, Jr., *supra* note 231.

which is provided to the President. Furthermore, no goals or priorities have been set by the White House for the agencies. These continuing weaknesses result, in part, from the inadequate number of White House staff devoted to civil rights and the failure to develop a structure or system to deal with civil rights problems of national import, which cut across the jurisdiction of the Federal agencies.

C. White House Reorganization

As indicated earlier, on March 12, 1970, the President announced a reorganization plan establishing an entirely new entity, the Council on Domestic Affairs, to coordinate policy formulation in the domestic area.²³³ The mandate of the Council is purposefully general; it is designated to perform such functions as are assigned to it by the President.²³⁴ Its members include the President, Vice President, and the heads of all Cabinet Departments, except the Departments of State, Defense, and Post Office.²³⁵ The plan also provides for the appointment by the President of an Executive Director of the Council, who directs its staff.²³⁶

The Council is intended to serve as a coordinator of Executive policy. Its concern will be with what the Federal Government should do. It will be the duty of the Office of Management and Budget (formerly the Bureau of the Budget) to determine how policies should be carried out.²³⁷ Creation of the Council has the

²³³ Reorganization Plan No. 2, of 1970 (Mar. 12, 1970). The Plan went into effect on July 1, 1970. For a discussion of the impact of the plan on the Bureau of the Budget, see pp. 330-31 *supra*.

²³⁴ *Id.*, at sec. 202.

²³⁵ *Id.*, at sec. 201(b). The Cabinet heads who are members of the Council are: the Attorney General, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Health, Education, and Welfare, the Secretary of Housing and Urban Development, the Secretary of the Interior, the Secretary of Labor, the Secretary of Transportation, and the Secretary of the Treasury. The President indicated his intention to add to the Council the Postmaster General and the Director of the Office of Economic Opportunity. Statement by the President to the Congress of the United States Accompany Reorganization Plan No. 2 of 1970, 2 Mar. 12, 1970.

²³⁶ *Id.*, at sec. 203. Assistant to the President for Domestic Affairs, John D. Ehrlichman, was named Executive Director of the Council on June 11, 1970.

²³⁷ Presidential Statement of March 12, *supra* note 235, at 2.

effect of structuring and institutionalizing many important functions that previously were performed by the President's personal staff. It is anticipated that the Council will proceed to define national needs, goals, and priorities; develop alternative methods of achieving the goals; provide the President with prompt advice on important domestic issues; and review, from a policy standpoint, the conduct of ongoing programs. Most of the Council's work will be accomplished by a series of temporary committees which will be staffed by agency personnel supplemented by staff of the Council as well as that of the Office of Management and Budget.²³⁸ The staff of the Council is expected to consist of approximately 50 professionals, although it may run as high as 70.²³⁹

The Domestic Council will advise the President on total domestic policy and will be a vital link between the agencies and the President, disseminating the President's policies to the agencies and communicating agency positions to the President. The Council will bring together, under one roof, many of the resources necessary for conducting research on long-range goals, developing an integrated domestic policy and designing specific new programs. The Council, itself, is not intended to meet often, but its committees will meet as often as necessary to fulfill the assignments given to them.²⁴⁰

The creation of an institutionalized structure in the Executive Office of the President presents great potential for increased White House involvement in the Federal civil rights effort. An adequately staffed Subcommittee of the Council, dealing solely with civil rights policies and enforcement, would be a first step toward providing the type of overall coordination that is so necessary. Working closely with the evaluative arm of the President, the Office of Management

²³⁸ Id., at 3. The Council will absorb the Council for Urban Affairs, the Cabinet Committee on the Environment, the Council for Rural Affairs, and the Committee on National Goals.

²³⁹ Interview with Andrew M. Rouse, Deputy Executive Director, President's Advisory Council on Executive Organization, Apr. 9, 1970.

²⁴⁰ Id.; Press conference of Roy L. Ash, Chairman, President's Advisory Council on Executive Organization (PACEO); Walter N. Thayer, member, PACEO; Murray Comarow, Executive Director, PACEO, and Robert Mayo, Director, Bureau of the Budget, Mar. 12, 1970.

and Budget, and the various governmental units charged with specific coordinative functions, the Subcommittee of the Council could provide the President with the quantity and quality of information that he must have to make the decisions and take the actions that are essential to fulfilling his executive responsibility.

VIII. SUMMARY

In several of the specific subject areas covered by civil rights laws, provision has been made for mechanisms to coordinate the activities of agencies that have compliance and enforcement responsibility. In housing, HUD is charged with this responsibility by statute. Coordination of Title VI activities is the responsibility of the Department of Justice, pursuant to Presidential Executive order. In Federal employment, the Civil Service Commission has this responsibility, also by virtue of Presidential Executive order. And in private employment, a loose-knit arrangement among OFCC, EEOC, and the Department of Justice serves this function.

Mechanisms that cut across subject area lines also have been established to coordinate agency civil rights and related activities. Some of these mechanisms, such as the Federal Executive Boards, are limited in function to disseminating information concerning Federal programs on the local level and assuring that they are carried out in a coordinated manner. Others, such as the Community Relations Service and the Cabinet Committee on Opportunity for the Spanish-Speaking, also serve as advocates for minorities in general or for particular minority groups, and seek to make the Federal Government more responsive to the needs of the minority community. These agencies and mechanisms play little role in determining overall civil rights policy and they have no authority to make binding decisions on how departments and agencies carry out particular civil rights and related laws.

There are agencies and mechanisms, however, that play important roles, at the highest level of Government, in determining across-the-board civil rights programs and policies, and whose functions involve decisions that can directly influence the compliance and enforcement activities of departments and agencies having various civil rights responsibilities. The Depart-

ment of Justice, through its functions as the Government's litigator and chief legal advisor, can be key to devising strategies and priorities in civil rights enforcement and to determining how broadly or narrowly departments and agencies construe their civil rights responsibilities. The Bureau of the Budget, through its functions of reviewing budgetary submissions by all Federal departments and agencies and planning and evaluating Federal programs, can stimulate greater civil rights compliance activities. And the President's own White House staff, through the close association and direct access that many of its members have with the President, possesses the persuasive leverage necessary to induce significant changes in overall civil rights policy and in the way departments and agencies carry it out.

Federal Executive Boards (FEB's)

As previously noted, Federal Executive Boards were established in 1961 as vehicles for rapid communication of administration policy to the field and to facilitate coordination among the regional offices of the various agencies located in particular cities and metropolitan areas. Although never given specific civil rights duties, the FEB's have become increasingly involved in civil rights and related matters, particularly in the period following the 1965 riot in Watts.

The FEB's, while they have enjoyed some success—most notably, the Philadelphia Plan concerning equal employment opportunity in the construction trades, which was initiated in 1967 by the Philadelphia FEB, and a 1968 study of Federal program delivery in Oakland, which was undertaken by the San Francisco FEB—have proved to be poor vehicles for coordination of civil rights and related Federal programs in urban areas, particularly as a source of program innovation and coordination. There are several reasons for their relative ineffectiveness. Lack of money and staff, infrequency of meetings, and lack of continuity in direction and leadership account for part of the failure. In addition, they have suffered from lack of authority to make decisions binding on particular agencies or programs. Further, their activities have been restricted to the particular metropolitan areas in which the regional offices of the agencies represented are located. Many

of the problems with which they have had to deal, however, are regional in scope. They also have suffered from unwieldy size, with membership ranging from 40 to 70 members.

In 1969, the civil rights role of FEB's was restricted and a new coordinating mechanism, the Federal Regional Councils, was established to be the primary coordinating mechanism dealing with urban problems. The Federal Regional Councils have several advantages over the FEB's. First, their membership is limited to the regional directors of only four Federal agencies—HUD, HEW, OEO, and the Manpower Administration of Labor—which are those most concerned with human resources and urban problems. Thus, the problem of the unwieldy composition of FEB's is not present with the Federal Regional Councils. Second, the Councils, unlike the FEB's, will have full-time support of senior level personnel from the participating agencies and will receive staff assistance and be coordinated by the Bureau of the Budget. Third, it will have regional, as opposed to local, jurisdiction. Like the FEB's, however, the Federal Regional Councils will not have authority to make decisions binding on the participating agencies. The Councils were established late in 1969 and it is still too early to evaluate their effectiveness as a Federal programs coordinator in general or their potential impact in the area of civil rights.

Community Relations Service (CRS)

The Community Relations Service was created as part of the Civil Rights Act of 1964 principally as a means for dealing with the volatile reaction that was expected as a result of desegregation of public accommodations under another provision of the 1964 act. Originally, a part of the Department of Commerce, it was to function as a peacemaking body by providing assistance in the resolution of racial conflicts. In early 1966, it was transferred to the Department of Justice and its Director holds the rank of Assistant Attorney General.

In its early years, CRS was essentially crisis-oriented and its program, heavily concentrated in the South, operated largely as a conciliation service, attempting to keep channels of communication open between hostile groups in racial controversies. In 1966, CRS began to shift its focus to Northern urban areas. It also began

to change the emphasis of its activities from efforts at short-term conciliation to assistance to communities in developing substantive programs capable of bringing about long-range changes. Special emphasis was placed on the agency's media relations program, working with professional associations and with local and national newsmen to help them get a better understanding of the daily suffering of minority group citizens in the ghettos and barrios of our cities.

The emphasis of CRS activities currently has shifted even further away from crisis-orientation to program development. CRS has designated two groups of goals which govern the activities of its field representatives. The first is the building of minority institutions and consists of economic development and land use, (housing and planning). The second is aimed at changing establishment institutions and is composed of education and police-community relations. To carry out its programs, CRS necessarily has become involved on a systematic basis with the programs of other Federal agencies. For example, it has begun to establish a formal relationship with officials of the Justice Department's Law Enforcement Assistance Administration, and is making similar efforts to work closely with officials of the Small Business Administration, the Economic Development Administration, and HEW's Office of Education.

The activities of CRS differ decisively from those of most Federal departments and agencies. It is neither a policymaker, a dispenser of Federal benefits, nor a law enforcement agency. Rather, it serves as a valuable communication link between minority groups and Federal agencies. At a time of minority alienation toward the Federal establishment, CRS potentially can be a valuable instructor, not only to the minority community but also to the Federal bureaucracy. It also serves as an advocate for minorities, seeking to make the Federal Government and Federal programs more responsive to minority needs and more sensitive to their hopes and aspirations.

Cabinet Committee on Opportunity for the Spanish-Speaking

The emphasis of nearly all Federal agencies concerned with civil rights has been on meeting

the problems of black Americans. One agency exists, however, with activities relating exclusively to the problems of another minority group, subject to equally severe discrimination. This is the Spanish-speaking community, consisting of Mexican Americans, Puerto Ricans, Cubans, and other Latin Americans.

In the face of demands for increased attention to the problems of Mexican Americans, President Johnson, in 1966, formed the Inter-Agency Committee on Mexican American Affairs. The Committee consisted of the heads of seven major departments and agencies. Its mandate was to assure that Mexican Americans were receiving the Federal assistance they needed, to promote new programs dealing with the unique problems of Mexican American groups, and to suggest ways of meeting the problems facing Mexican Americans throughout the country.

The Committee's first major effort to fulfill this mandate took the form of a conference held in October 1967, in El Paso, Tex., at which representatives of the more than 1,500 Mexican Americans who attended told Federal department and agency heads about the problems they were facing. Several months later, Vicente T. Ximenes, Chairman, sent a memorandum to the President suggesting solutions to some of the more acute problems raised at the conference, such as education, housing, manpower training, health and welfare, and the administration of justice.

The work of the Committee covered a broad spectrum of subject areas and Federal programs. For example, it was involved in discussions with the Bureau of the Census resulting in the addition of a question in the 1970 census questionnaire permitting persons of Spanish heritage to identify themselves. It participated with HUD in the process of selecting municipalities for model cities grants, and it attempted to persuade the Economic Development Administration to focus more of its efforts on the Southwest. It also worked with the Departments of Labor and Agriculture, and the Office of Economic Opportunity in an effort to make the programs of those agencies more responsive to the needs of Mexican Americans.

Several problems limited the success of the Committee. One was funding. Since the Committee owed its existence to a Presidential di-

rective it had to derive its financial resources from the departments and agencies which made up its membership. Its staff was extremely limited, consisting of 20 persons during fiscal year 1969. Since the Committee had no enforcement power and was not even sanctioned by Congress, the success of its efforts with other Federal agencies depended largely on the personal relationship between the Chairman and the President, the President's support, and the good relations between the Chairman and the heads of agencies. In addition, its activities were not directed to any Spanish-speaking group except the Mexican American.

In December 1969, Congress enacted legislation giving the Committee a statutory base and expanding the scope of its jurisdiction. The name was changed to the "Cabinet Committee on Opportunity for the Spanish-Speaking", and provision was made for appropriations for the Committee through the ordinary budget process. The Committee still has no enforcement authority and serves primarily as an advocate and lobbyist on behalf of Spanish-speaking people to improve the conditions of their life by working with various Federal agencies.

Despite the severe limits on the authority of the Cabinet Committee and its predecessor, the Inter-Agency Committee, the two units have engaged in significant projects on behalf of their constituency and have contributed substantially to making the Federal Government more aware of the problems of Spanish-speaking Americans and more responsive to their needs.

The Department of Justice

The Department of Justice holds a key position in the formulation of domestic policy and in determining how it will be carried out. The Department is the Government's lawyer and, as such, plays a major role in determining the Government's litigation policy and provides legal opinions on important matters of statutory and constitutional authority. In the area of civil rights, the Justice Department plays a particularly significant role. It possesses the most important civil rights legislation; it coordinates Title VI enforcement activity; it is the authority concerning questions of legal interpretation; and it has been the traditional pace-setter for the entire civil rights effort.

The major arm of the Department in this important area is the Civil Rights Division, which was established in 1957. The responsibilities of the Division include litigation in such areas as discrimination in public accommodations, public facilities, voting, schools, employment, and housing. The Civil Rights Division has consistently been understaffed. For example, it is less than half the size of the Antitrust Division of the Justice Department. The Division's staff shortage has not only limited the number of suits that it could participate in, but also has restricted its ability to become adequately involved in all matters of importance in the civil rights area.

Until recently, the Division did not have written priorities and still does not appear to order its priorities within the context of the national need for improved civil rights enforcement. The priorities of the Division are heavily focused on law enforcement through litigation and insufficient attention has been provided to the use of nonlitigative powers.

The Attorney General has become the most important single figure in the Government's civil rights program. However, he has not been able to coordinate the Federal civil rights effort effectively. He has no authority over other Cabinet members and represents a Department whose view of civil rights has been a relatively narrow one which tends to view problems strictly in terms of litigation. The Attorney General remains the logical individual to assume a coordinative role but he must require that his Department develop a broader perspective and set an example of imaginative and vigorous enforcement of civil rights laws if he expects other agencies to cease treating civil rights as an insignificant responsibility which can be passively carried out.

Bureau of the Budget

The responsibility of the Bureau of the Budget is to provide the President with staff service to promote effective and economical administration of the Federal Government. Its function of overseeing executive management and assuring that executive departments and agencies are responsive to Presidential priorities and policies make it one of the most powerful institutions in the Federal bureaucracy and one which can have a significant impact on the Government's

civil rights effort. Specifically, its central role in the budget submission process, its authority to review and approve all legislative proposals, and its responsibility for approving agency data collection proposals afford the Bureau significant opportunities for improving the effectiveness of civil rights compliance and enforcement.

The Bureau's involvement in civil rights has so far been largely limited to its participation in the legislative process.

In each of its major roles the Bureau has the opportunity for exerting leadership over agency civil rights programs. Yet basic steps to enable the Bureau to fill that civil rights leadership role have not been taken. The Bureau has not acknowledged that it has any civil rights coordinating role, nor has its staff received any civil rights training. Civil rights concerns are not systematically included in the budget review process but are considered only when individual examiners happen to have an interest in civil rights. No systematic review is made of agency civil rights programs to determine if there is sufficient funding to meet the requirements of particular civil rights laws.

Although the Bureau encourages Federal agencies to collect a wide variety of data for the purpose of determining how effectively programs are working, it has not recommended Governmentwide collection of racial or ethnic data, nor has it established Governmentwide guidelines concerning the kind and form of such data. This has permitted inconsistent approaches within the Government and has made it impossible for the Bureau and others to determine if Federal assistance programs are reaching minority group citizens in proportion to their eligibility.

In its review of legislation having important civil rights implications, such as housing or education, the Bureau usually neither inquires specifically into the civil rights aspects nor requests the comments of agencies that have special civil rights experience.

Recently, the President announced a reorganization plan, transferring to him all functions vested in the Bureau of the Budget and redesignating the Bureau as the Office of Management and Budget. The President has announced that he will delegate all of the Bureau's functions to the new Office. The principal con-

cern of the new Office will be nonbudgetary matters, including program evaluation and coordination. Essentially, the Office will focus on the means of implementing national policy and evaluating the results of agency efforts to carry out their program assignments. The reorganization offers an opportunity for greater Bureau involvement in improving the effectiveness of agency civil rights compliance and enforcement. Enlarged program evaluation efforts accompanied by an increased sensitivity to the problems of minority groups could produce dramatic changes in agency policies. It remains for the Director and staff of the proposed Office of Management and Budget to make civil rights a priority issue of concern and to shape the mechanisms necessary to uncover the problems neglected for so many years by its predecessor.

The White House

The Constitution vests the full power of the executive branch of Government in the President. In the final analysis, it is the President who has responsibility for the success or failure of departments and agencies in carrying out their civil rights responsibilities. It is difficult, however, for the President to maintain full control over the decisions and actions of the various agencies that have civil rights responsibilities. Mechanisms, outside the control of the Federal bureaucracy, are needed to serve the President in assuring that civil rights programs and policies are being carried out with maximum effectiveness. One place where Presidents have sought to locate these mechanisms is the White House itself.

In 1961, President Kennedy created the first White House unit—the Subcabinet Group on Civil Rights—to review civil rights policy and practices. The Group, consisting of ranking representatives of key agencies, limited itself largely to discussion of a variety of civil rights matters. Its most important function was to serve as a clearinghouse for disseminating information, exchanging ideas, and exerting pressure on agencies. The Cabinet Group lacked policymaking authority and, in fact, several of its policy recommendations on significant civil rights issues were rejected by the President or his senior staff.

The second major effort to develop a White House mechanism for coordinating agency civil

rights activities, was the establishment of the President's Council on Equal Opportunity shortly after passage of the Civil Rights Act of 1964. The Council, consisting of top officials of major Federal agencies had, as its Chairman, the Vice President. It did not have the power to set policy. Rather, its function was to collect information and make reports to the President on the need for new laws, Executive orders, policies, and changes in administrative structure of the agencies. During its 6 months of existence it became involved in a number of important civil rights matters, such as developing plans for the collection of racial and ethnic data and evaluating school desegregation guidelines. It was abolished by the President in September 1965 and its functions related to Title VI of the Civil Rights Act of 1964 transferred to the Department of Justice. Other civil rights matters with which it had been concerned, however, were no longer subject to specific coordination.

During the last 3 years of President Johnson's Administration, civil rights coordination was handled on an ad hoc basis. Decisions were made on the advice of the Attorney General, Presidential assistants, and private individuals, with little provision for followup. In short, the vacuum created by the demise of the Council was not filled and agency civil rights staffs were left largely to themselves in the effort to assure that civil rights received priority agency attention.

Currently, White House involvement in civil rights matters is more structured than it previously was. Five White House staff members spend all or most of their time dealing with issues and programs relating to minority group citizens. They receive civil rights information through monthly agency reports and periodic meetings with agency officials, and through informal meetings, such as discussions with mi-

nority group leaders and Government officials. Nonetheless, the current system shares some of the deficiencies of the past. Some of the White House staff members assigned civil rights responsibilities have a number of duties in addition to their civil rights commitments which take up significant amounts of their time. Further, the agency reports consist of material which the agencies choose to include, making it almost impossible to evaluate agency performance accurately or to determine what an agency should be doing that it is not doing. No evaluation of the reports is made. White House staff has undertaken a number of ad hoc projects concerning civil rights but there is still no systematic effort made to evaluate the enforcement activities of Federal agencies, to coordinate their civil rights efforts, or to set goals or priorities for the agencies.

The President's recently announced reorganization of the Executive Office established a new White House entity—the Council on Domestic Affairs—which will have authority to coordinate policy formulation in the domestic area. The Council, which will have an Executive Director and a staff, is intended to serve as a coordinator of Executive policy. Its concern will be with what the Federal Government should do. The Office of Management and Budget will determine how policies should be carried out and how well they are carried out. Establishment of the Council offers an opportunity for bringing about additional structure to the coordination of civil rights activities. Through an adequately staffed Civil Rights Subcommittee, necessary overall coordination of civil rights policies and enforcement can be achieved. This Subcommittee could provide the President with the quantity and quality of information necessary for him to take the civil rights actions that he must take to fulfill his executive responsibility.

GENERAL FINDINGS

The Federal civil rights arsenal consists of legislation, Presidential Executive orders, and court decisions, outlawing racial or ethnic discrimination in almost every aspect of American life. It represents a powerful instrument for assuring equal opportunity for all citizens. A variety of problems common to most agencies with civil rights responsibilities, however, has prevented full utilization of these laws and has virtually impeded them from achieving their goals.

1. Without exception, all agencies with civil rights responsibility lack sufficient staff to carry them out at an acceptable level of effectiveness.

2. In most agencies, the official in charge of civil rights responsibilities lacks the status, authority, and position in the administrative hierarchy to make certain that civil rights needs and goals are accorded an appropriate priority among agency activities.

3. In most cases, agencies either have failed to state the goals of their civil rights programs with sufficient clarity and specificity or have defined them too narrowly. This has hindered the setting of strategic priorities for civil rights activities and the development of programs capable of attacking the problem of discrimination on a broad scale.

4. Many agencies operate their substantive programs in isolation from civil rights compliance and enforcement programs and without regard to their civil rights implications. Few agencies offer civil rights training to their program officials.

5. Some agencies have failed to recognize that they have any civil rights responsibility. Others, while recognizing the applicability of nondiscrimination laws and policies, have

failed to take any action implementing these laws and policies.

6. The agencies have not been adequately concerned with the civil rights problems of such groups as Spanish surnamed Americans, American Indians, and women.

7. The agencies have failed to collect, maintain, and evaluate racial and ethnic data to determine compliance and to measure the impact of substantive and civil rights programs.

8. Many agencies have adopted a passive role in carrying out their civil rights responsibilities. They have relied mainly, or entirely, upon the receipt of complaints as the indicator of civil rights compliance and have exhibited reluctance to initiate compliance actions, such as instituting compliance reporting systems and conducting onsite compliance reviews.

9. Failure to make sufficient use of the sanctions available to enforce civil rights laws has placed undue emphasis on voluntary compliance. This often results in delays and interminable negotiations. Sanctions such as fund termination and debarment have been used so rarely as to undermine the credibility of the Government's civil rights effort.

10. There has been a failure to coordinate and focus the Federal civil rights enforcement effort adequately. Agencies having civil rights responsibilities in the same area have tended to operate independently—with different goals, different orientations, and different levels of compliance activity—even where specific coordination mechanisms have been provided. There also has been a failure to provide overall coordination of and direction to the Federal civil rights enforcement efforts.

FINDINGS IN SPECIFIC SUBJECT AREAS

I. EMPLOYMENT

A. Federal Employment

1. The Federal Government, with nearly 3 million civilian workers, is the largest single employer in the Nation. Despite recent improvements, minority group members remain underrepresented in the Federal employment ranks.

(a) Disparities are most pronounced at higher grade levels. In nearly all Federal agencies the proportion of Negroes, Spanish surnamed Americans, and American Indians decreases at each grade level above GS-3 or its equivalent.

(b) Minority underrepresentation is more pronounced at the regional than the central office level.

2. Over the past year, the Civil Service Commission, responsible under a Presidential Executive order for supervising the Federal equal employment opportunity effort, has taken up its equal employment opportunity duties with increasing vigor and imagination. CSC has reorganized, centralized, and strengthened its equal opportunity office to facilitate carrying out the affirmative action program of minority employment called for by the President in his 1969 Executive order.

3. CSC has initiated innovative programs and has made energetic efforts to increase minority employment in the Federal service. Among the steps CSC has undertaken are:

(a) Increased efforts to recruit more minority employees;

(b) Continuing reappraisal of civil service examinations to weed out bias and to eliminate employment tests that tend to exclude minority group applicants;

(c) Revision of Federal merit procedures to reduce the possibility of deliberate or inadvertent discrimination and to facilitate more rapid promotions for minority group employees;

(d) A requirement that all first-line super-

visors undergo training to make them aware of and sensitive to equal opportunity problems;

(e) Increased attention in CSC inspections to equal employment aspects of agency programs;

(f) Revision of discrimination complaint procedures to facilitate resolution of problems on an informal basis;

(g) Modernization of the system for collecting and maintaining Federal employment data by race and ethnic origin, with recommendations for adoption by all Federal agencies.

(h) Increased efforts to promote communication between Federal agencies and private groups and individuals concerning issues of equal employment opportunity.

4. Of great potential significance is a recent CSC guideline which emphasizes specific goals in the Federal equal employment opportunity effort. In the past, CSC has discouraged agencies from listing specific numerical or percentage goals in their equal employment opportunity plans of action. The recent guideline suggests that these earlier restrictions may be modified.

5. Despite the recent affirmative steps taken by CSC, weaknesses remain in the effort to increase employment opportunities in the Federal service for minority group members.

a. Some Federal agencies have not adopted adequate procedures for collecting and maintaining racial and ethnic data on Federal employment, necessary to provide them with an accurate picture of progress being made. Further, use of broad categories, such as "Spanish American" or "Spanish surnamed American," precludes a more accurate assessment of problems affecting ethnic groups within these categories, such as Mexican Americans, Puerto Ricans, and Cubans.

b. Although currently there is greater emphasis on training supervisors in becoming aware of and sensitive to civil rights problems,

training to facilitate advancement of lower- and middle-grade employees and to permit full utilization of their talents remains inadequate.

c. Positions at the executive level usually are filled by promotion from the ranks of senior level personnel already in the Federal service, most of whom are majority group members.

6. Rigid adherence to the existing merit system by CSC and other Federal departments and agencies has impeded achievement of the goal of equitable representation of minorities in the Federal service.

B. CONTRACT COMPLIANCE

Office of Federal Contract Compliance (OFCC)

1. Federal efforts to require Government contractors to follow nondiscrimination in their employment practices began nearly 30 years ago and culminated in the issuance of Executive Order 11246 in 1965, under which leadership responsibility was assigned to the Office of Federal Contract Compliance (OFCC) in the Department of Labor. Until recently, OFCC had failed to adopt and implement policies and procedures that would produce vigorous compliance programs in the Federal agencies immediately responsible for contract compliance.

a. OFCC and the contracting agencies were grossly understaffed and, despite recent increases, remain so.

b. OFCC monitoring of compliance agency enforcement activities—a key ingredient to an effective contract compliance program—was haphazard, consisting of a series of ad hoc efforts which did not have lasting effects. For example, OFCC was not systematically informed of the number, kind, and adequacy of compliance reviews of Government contractors conducted by the agencies, nor was there a method of evaluating the reviews of compliance agencies.

c. OFCC had to deal with a large number of compliance agencies, which were assigned responsibility for equal employment opportunity on the basis of the amount of the contracts each held with particular companies.

d. OFCC failed to define what was meant by the “affirmative action” requirement of the Executive order, leaving compliance agencies and contractors in doubt as to what steps were called for to satisfy the requirement.

e. Efforts to establish an effective compliance

program in employment by federally assisted construction contractors failed to produce significant results.

f. Effective OFCC liaison with the Department of Justice and EEOC, which also have significant responsibilities in the equal employment opportunity area, was not achieved. For example, between 1965 and 1970, OFCC referred only eight cases to the Department of Justice for litigation.

2. Recent OFCC actions show promise of overcoming some of these past weaknesses.

a. Early in 1970, OFCC expanded its regulations dealing with the nature of the affirmative action requirement of the Executive order, to require contractors to establish plans which include specific numerical goals and timetables to correct deficiencies in minority utilization.

b. OFCC recently improved its capacity for monitoring the activities of compliance agencies by reorganizing its own structure and reducing the number of compliance agencies from 26 to 15. Compliance agency responsibility now is assigned on the basis of particular industries rather than individual contractors.

c. OFCC has established a firm basis for a Governmentwide construction compliance program through the Philadelphia Plan which establishes numerical goals of minority employment by federally assisted contractors. This stimulates community-developed plans, or “home-town solutions,” which set goals for all construction in a given community.

3. A continuing weakness in the contract compliance program is OFCC's consistent failure to impose the sanctions of contract termination or debarment on noncomplying Government contractors. The failure to use these sanctions lessens the credibility of the Government's compliance program and weakens the contract compliance effort.

Compliance Agencies

1. Of the 15 departments and agencies currently assigned contract compliance responsibility, the Department of Defense, the major Federal contracting agency, is the most important. Until 1970, the Department did not perform effectively in this respect.

a. In two 1969 contract compliance matters, involving southern textile mills and a large aircraft manufacturer, the Department of De-

fense failed to follow its own compliance procedures.

b. Its compliance review efforts have been inadequate. Only a small fraction of its contractors are reviewed at all. Although non-compliance frequently is found, followup reviews to determine whether violations have been corrected are almost never done.

2. Since exposure in 1970 of noncompliance by a multi-billion-dollar aircraft manufacturer, the Department of Defense has made significant changes to strengthen its compliance program. The Department has assisted in developing a model compliance plan by the aircraft contractor and has issued "show cause" notices (the first formal step leading to the imposition of sanctions) to more than 35 contractors.

3. The other 14 compliance agencies, including agencies such as HUD and GSA which are responsible for billions of dollars in Government contracts and federally assisted construction contracts, have failed to take the steps necessary to assure compliance with equal opportunity requirements.

a. The compliance agencies do not have sufficient staff to carry out contract compliance responsibilities and frequently assign staff to contract compliance duties on less than a full-time basis.

b. Only a small percentage of contractors are reviewed by the compliance agencies. When deficiencies are found, few followup reviews are conducted to determine whether corrective action has been taken.

c. None of the compliance agencies has taken more than rudimentary steps to implement OFCC's recent guidelines on affirmative action.

d. Lesser sanctions, such as passing over non-complying low bidders for construction projects and temporary suspension of contractors, rarely have been used. In no case have they been used systematically and consistently as compliance tools. In most case where agencies have determined noncompliance, they take no action themselves, but forward the cases to OFCC. The sanctions of contract termination or debarment never have been imposed by compliance agencies.

e. The compliance agencies do not collect adequate information to measure the impact of the contract compliance program. Consequently, they are unable to plan effective compliance

programs or evaluate the extent of progress in minority employment.

C. Equal Employment Opportunity Commission

1. The Equal Employment Opportunity Commission (EEOC), charged with responsibility for administering Title VII of the Civil Rights Act of 1964 prohibiting private employment discrimination, has not had sufficient budget and staff resources to carry out its responsibilities with anything approaching maximum effectiveness. It has not been able to process the large number of employment discrimination complaints it receives expeditiously and has been unable to devote adequate attention to its other responsibilities.

2. The effectiveness of EEOC has been adversely affected by a rapid turnover and long vacancies in key agency positions, such as Chairman, Commission members, Executive Director, General Counsel, and Director of Compliance. This has resulted in a lack of continuity and direction in the agency's program.

3. In carrying out its functions, EEOC, limited by statute to enforcement by "conference, conciliation, and persuasion", has further restricted its effectiveness by adopting a passive role, placing heavy emphasis on the processing of individual discrimination complaints received. EEOC has made relatively little use of its initiatory capabilities, such as public hearings and Commissioner-initiated charges, to broaden its attack against job bias.

4. Although EEOC has placed primary emphasis on processing individual complaints, it has failed to establish mechanisms necessary to process them with dispatch. A discrimination charge currently takes the Commission approximately 16 months to 2 years to process. This delay has the effect of rendering cases moot, making respondents less willing to conciliate, and requiring reinvestigations by the Department of Justice in cases which it wishes to litigate. New procedures have been developed, however, designed to accelerate the complaint process.

5. No system of priorities has been developed in EEOC complaint processing by which cases of greater importance are handled on an expeditious basis. Efforts have not been made to broaden EEOC investigation beyond the in-

dividual complaint or to secure relief that would benefit persons in addition to the individual complainant.

6. EEOC has not made effective use of the affirmative action mechanisms available to it.

a. Technical assistance and cooperation with State and local fair employment practices commissions have, for all purposes, operated in a vacuum, all but unrelated to EEOC compliance functions.

b. Public hearings have not been coordinated with the activities of other Federal agencies concerned with equal employment opportunity—OFCC, Department of Justice, compliance agencies—nor have they been followed up in a systematic fashion.

c. In collecting racial and ethnic data concerning employment, EEOC has had difficulty in processing the data quickly. Thus, studies based on these data tend to be outdated by the time they are published which severely hampers use of the data for compliance purposes.

D. Department of Justice

1. The Employment Section of the Civil Rights Division, which carries out the Department of Justice's litigation role in enforcing the equal employment opportunity provisions of Title VII of the 1964 Civil Rights Act and Executive Order 11246, has 25 authorized attorney positions, thereby making it the largest unit in the Division. However, this number is not sufficient to make a significant impact on existing discriminatory employment practices.

2. Employment cases brought by the Department have been largely limited to those involving discrimination against Negroes. To date, it has brought few cases in which Spanish surnamed Americans, American Indians, or women are the major victims of employment discrimination.

3. The Department has failed to coordinate its law suits into a total Government effort to eliminate employment discrimination. It also has failed in effectively coordinating its non-litigative activities with EEOC and OFCC.

E. Coordination

1. Despite overlapping legal jurisdiction and inadequate staff, EEOC, OFCC, and the Department of Justice have not yet effectively coordinated their efforts.

a. Each has independently developed its own goals, policies, and procedures which are not watched with those of its sister agencies and sometimes reflect inconsistencies.

b. Until recently, no systematic efforts were made to share data or findings based on complaint investigations or compliance.

c. Employers occasionally have been reviewed by two or three different Federal agencies and inconsistent demands have been made upon them.

d. An Interagency Staff Coordinating Committee, consisting of representatives of EEOC, OFCC, and the Department of Justice, formed in July 1969, to deal with problems of coordination among the three agencies, has made little overall progress in resolving these problems.

2. The lack of successful coordination in meeting problems of discrimination in employment has resulted, in large part, from the fact that responsibilities are split among three separate agencies, each having different orientations and goals.

II. HOUSING

A. Department of Housing and Urban Development (HUD)

1. HUD, which has fair housing responsibilities under Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, and Executive Order 11063, is the only Federal Department other than the Department of Justice whose chief civil rights officer is at the Assistant Secretary level.

2. HUD lacks sufficient staff to carry out its fair housing responsibilities with maximum effectiveness.

3. Although HUD is restricted in its methods of enforcing fair housing laws, it has not made full use of the enforcement tools at its command, nor has it made most effective disposition of available resources.

(a) The Department has emphasized processing of individual complaints almost to the exclusion of other potentially more effective means of furthering the cause of fair housing.

(b) Although HUD has begun to assume a leadership position under Title VIII in attempting to focus the entire Federal housing effort toward promoting the purposes of fair housing, it has been less vigorous in shaping its own pro-

grams to that end. For example, although it previously had urged Federal financial regulatory agencies to require mortgage lending institutions to maintain racial and ethnic data on loan applicants to implement the prohibition against discrimination in mortgage lending, HUD did not decide to collect such data regarding its own programs until April 1970, and as of August 1970, did not yet actually collect the data. Similarly, HUD urged GSA and agencies that maintain major installations to establish site selection criteria that would assure open housing available to lower-income employees in determining locations for Federal installations. But in its own programs, decisions on site selection criteria had not yet been made as of August 1970.

(c) HUD has done little systematically to carry out their other Title VIII responsibilities such as publishing and disseminating reports and giving technical assistance to public and private agencies concerned with fair housing.

(d) Under Title VI and Executive Order 11063 (1962), there has been little activity by HUD. As of April 1970, the basic step of establishing complaint procedures had not yet been taken.

B. Department of Justice

1. The Department of Justice, which has responsibility under Title VIII for bringing lawsuits in cases involving patterns and practices of violations, has undertaken an aggressive enforcement program.

(a) Within its staff limitations, the Department has brought a comparatively large number of law suits on the basis of criteria involving size of city and extent of minority group population.

(b) Justice has sought to establish a close working relationship with HUD to assure effective coordination of the activities of the two Departments.

2. Justice's fair housing activities suffer from a serious staff shortage, limiting the number of lawsuits in which it can be engaged.

3. The Department has been insufficiently concerned with problems of housing discrimination against minority groups other than Negroes.

C. Veterans Administration (VA) and Federal Housing Administration (FHA)

1. VA and FHA relied almost entirely on complaint processing as a means of assuring against discrimination in housing provided under their loan guaranty and mortgage insurance programs. They have received relatively few complaints and have been of assistance to minority group members in only the comparatively small number of cases brought to their attention.

2. In the few cases in which builders have been debarred for discrimination, neither VA nor FHA impose requirements for reinstatement other than the builder's renewed agreement that he will not discriminate, an agreement he already has violated.

3. VA rarely has taken the initiative in adopting civil rights requirements, usually following the lead of FHA, or lagging behind that agency.

(a) FHA has eliminated the exemption of one- and two-family owner occupied housing from coverage under Executive Order 11063. VA retains that exemption.

(b) FHA requires a certification of nondiscrimination before it will insure loans on property carrying racially restrictive covenants. VA does not require such a certification.

(c) In the important area of collection of data on racial and ethnic participation in programs, however, VA preceded FHA in officially recognizing the need for such data.

D. Federal Financial Regulatory Agencies

1. Federal agencies that supervise and benefit the majority of the Nation's mortgage lending institutions (savings and loan associations, commercial banks, and mutual savings banks) have failed to institute mechanisms—such as the requirement that the institutions maintain racial and ethnic data on loan applications for examination—necessary to monitor compliance by mortgage lending institutions with the Title VIII requirement of nondiscrimination in mortgage finance. Instead, the agencies have agreed to send questionnaires to member institutions for the purpose of determining current policy of mortgage lenders and the extent to which the problem of discrimination exists.

2. The agencies have failed to institute pro-

cedures by which member mortgage lending institutions would include nondiscrimination clauses in their agreements with builders, as a further tool to assure against housing discrimination.

E. General Services Administration and Site Selection for Federal Installations (GSA)

1. The General Services Administration, responsible for acquiring space for most Federal agencies, in 1969 instituted a policy of avoiding sites for the location of Federal installations which lack adequate low- and moderate-income housing in reasonable proximity to the site. This policy has not yet been fully implemented and is silent on the matter of assuring access to housing for minority group members.

2. In February 1970, the President issued an Executive order which, in effect, extended GSA's policy announcement to all Federal departments and agencies. The Executive order also is silent on the matter of racial discrimination.

3. HUD recently has initiated a series of meetings with major departments and agencies aimed at establishing uniform site selection policy for Federal installations dealing both with the need for housing for lower-income families and for minority group families. As of June 1970, however, no such uniform policy had been established.

F. Department of Defense and Off-Base Housing

1. The Department of Defense program of equal opportunity for military personnel in off-base housing, which operates mainly through the submission of nondiscrimination assurances by landlords, was initiated several years ago and has substantially improved housing opportunities around participating military installations.

2. Although almost all landlords have signed such nondiscrimination assurances, a review of statistics on the number of housing facilities subject to such assurances which are in fact integrated indicates that the degree of integration is still low.

3. Military base officials generally have not consulted with minority personnel to determine the extent and nature of the problem of unequal

housing opportunity in the surrounding communities.

III. FEDERAL PROGRAMS

A. Title VI and Federally Assisted Programs

1. Title VI of the Civil Rights Act of 1964, that directs all Federal departments and agencies which administer programs involving Federal financial assistance by way of loans or grants to adopt measures to prevent discrimination in the programs' operations, can have a significant impact on ending the overall problem of racial and ethnic discrimination in the country.

2. Although most agencies which have programs subject to Title VI have issued uniform regulations approved by the President, some agencies still have not issued regulations covering Title VI loan and grant programs. No uniform substantive amendments designed to strengthen the Title VI regulations have ever been promulgated despite the clear need for revision.

3. No Title VI agency has sufficient staff to carry out its responsibilities under that law with maximum effectiveness. Further, the position of the official in charge of Title VI compliance is, in most cases, disproportionately low when measured by his title, grade, and rank in the administrative hierarchy.

4. Few agencies provide adequate civil rights training to civil rights or program personnel whose work involves Title VI and related matters.

5. Methods by which most Title VI agencies seek to achieve and monitor compliance need strengthening.

(a) Some agencies rely solely on the receipt of assurances of compliance, making no effort to determine for themselves whether compliance is, in fact, being achieved.

(b) Some agencies have never conducted on-site visits to determine whether recipients are in compliance. Of those that do, most reach only a small fraction of their total recipients. Many of the onsite reviews that are conducted are perfunctory and superficial.

(c) Despite the fact that in many cases, including those involving construction of highways, public housing, and various public works

projects, it is necessary to determine compliance before the financial assistance is made and the projects are built, such preapproval reviews are rarely undertaken.

(d) Many agencies, rather than undertaking action on their own initiative to monitor compliance, such as onsite compliance reviews, rely on the receipt of complaints as the yardstick of compliance. Further, some agencies have failed to develop adequate complaint procedures and complaint investigations are often of poor quality.

6. There is little sustained collection and use of racial or ethnic data to determine whether program benefits actually are reaching minority group beneficiaries on an equitable basis.

(a) Most agencies do not collect racial or ethnic data on a continuing basis, nor do they use data that are collected for purposes of evaluating the effectiveness of their programs.

(b) Many agencies do not require recipients to submit compliance reports indicating, on a racial and ethnic basis, use of their services and facilities. Where compliance reporting systems have been developed, the information often is not elicited with sufficient frequency and reports are not subjected to evaluation.

7. Most agencies have been reluctant to impose sanctions as a means of enforcing the non-discrimination requirements of Title VI.

(a) Some agencies have emphasized voluntary compliance as the principal method of enforcement and have permitted protracted negotiations and interminable delays on the part of recipients while continuing to provide Federal financial assistance.

(b) The sanction of fund termination, authorized under Title VI with procedural safeguards, has rarely been used by the agencies. Some agencies have never imposed this sanction.

(c) Litigation by the Department of Justice, which can be of value as a supportive mechanism to fund termination proceedings, is being used at present as an alternative to termination proceedings, thus lessening the force of Title VI.

8. The Department of Justice, responsible under Presidential Executive order for fulfilling the need for coordinating enforcement of Title VI by the more than 20 Federal departments and agencies having Title VI responsibilities, has not done an effective coordination job.

(a) The status of the official responsible for carrying out the Title VI coordinating function of the Department of Justice has been systematically downgraded. Originally it was carried out by a Special Assistant to the Attorney General, who, although housed in the Civil Rights Division, reported directly to the Attorney General. It is now carried out by a relatively junior attorney in the Civil Rights Division.

(b) The amount of staff assigned to the Title VI unit in the Civil Rights Division is inadequate.

(c) The Civil Rights Division views its Title VI coordinating responsibility narrowly, focusing on litigation rather than on assuring effective administrative enforcement by the various Federal agencies.

(d) Liaison with agencies is not systematic, but is primarily done on an ad hoc basis.

(e) In some instances, the Department of Justice's recommendations to other departments and agencies calling for increased enforcement activity have not been acted upon.

B. Insurance and Guaranty Programs

1. Federal programs involving financial assistance solely in the form of insurance or guaranty are expressly exempted from the effectuating provisions of Title VI. Although most agencies that administer insurance and guaranty programs have issued nondiscrimination requirements, either through Presidential Executive order or on their own initiative, these requirements lack the support of specific legislation.

2. The mechanisms for implementing and enforcing nondiscrimination in programs of insurance and guaranty have been deficient.

(a) No agency requires compliance reports from intermediaries such as lending institutions. Many agencies do not collect racial and ethnic data concerning program participation and, to the extent that they do, the data are frequently inadequate to inform the agency whether minority group beneficiaries are participating on an equitable basis.

(b) None of the agencies conduct onsite compliance reviews to determine firsthand whether lending institutions and other intermediaries are following nondiscriminatory policies and practices. Sole reliance, most frequently, is placed on receipt of complaints. Further, com-

plaint procedures have rarely been set down formally, nor have specific guidelines been drawn up governing investigations and resolutions of complaints.

(c) Little information is provided to the public or to Federal officials responsible for assuring compliance with nondiscrimination requirements concerning the existence of these requirements or the procedure to be followed when discrimination occurs.

C. Direct Assistance Programs

1. Discrimination in direct assistance programs which involves benefits flowing directly from the Federal Government to individual beneficiaries is clearly prohibited by the fifth amendment to the Constitution, but neither Congress nor the executive branch has established specific regulations or procedures to assure against such discrimination.

2. Currently, little in the way of mechanisms exists to assure equal opportunity in direct assistance programs.

a. Compliance reviews are not conducted.

b. Data on racial or ethnic participation frequently are not collected at all and, when collected, are not adequately used.

c. There are no complaint procedures specifically concerned with racial or ethnic discrimination, nor are personnel given special guidance on how such complaints are to be investigated or what steps should be taken to eliminate discrimination when found.

IV. REGULATED INDUSTRIES

A. Industries such as broadcasting, motor and rail transportation, airlines, and power, which are regulated by independent agencies—Federal Communications Commission (FCC), Interstate Commerce Commission (ICC), Civil Aeronautics Board (CAB), and Federal Power Commission (FPC), respectively—can contribute to the cause of equal opportunity through opening opportunities for employment to minorities and assuring nondiscriminatory delivery of their services. The agencies, through issuing appropriate rules and orders can assure that the industries they regulate do make such a contribution.

B. Despite uniformly poor employment records in these industries, only the Federal Com-

munications Commission has issued rules prohibiting employment discrimination.

C. The FCC and ICC regulate industries [broadcasting and trucking] which, because of the relatively low capital investment necessary to enter them, offer substantial opportunities for minority entrepreneurship. Because of the agencies' cumbersome procedures regarding issuance of licenses, which serve mainly to protect the economic interest of existing licensees, many minority group members are effectively barred from entry into these industries and are prevented from competing on an equal basis with existing licensees.

D. Many minority group members are unable to challenge proposed agency actions by the high cost of such challenges and the lack of needed legal assistance. None of the four regulatory agencies offers free legal services to individuals or groups who wish to challenge a license renewal or other proposed agency action but do not possess the financial means to do so.

E. Although all four agencies have recognized the requirement of nondiscrimination in services and facilities by the industries they regulate, none has instituted the mechanisms necessary to assure against such discrimination.

1. All rely basically on receipt of complaints as the indicator of noncompliance. Complaint processing has been inadequate.

2. None has instituted affirmative actions to promote greater minority utilization of industry services and facilities.

F. The Federal Trade Commission (FTC), through its authority to protect consumers and to assure fair business competition, can contribute to protecting the rights of minorities.

1. Although the FTC has taken some actions, such as the consumer protection program in Washington, D.C., to protect the ghetto poor from exploitation by unscrupulous businessmen, the agency has not assigned enough staff to such activities and has not carried out the responsibility with sufficient vigor or imagination.

2. In carrying out its responsibility to enforce antitrust laws, the FTC has not been concerned with the effect of corporate actions, such as mergers, on the social and economic life of ghetto areas.

3. In the area of franchising, the FTC has not sufficiently exercised its authority to pro-

tect minority businessmen from investing in economically unsound franchises.

G. The Securities and Exchange Commission (SEC), in carrying out its statutory responsibility of assuring full disclosure of pertinent information by registering companies, can contribute to more effective civil rights enforcement.

1. The SEC leaves the decision to registering companies of what information must be disclosed to potential investors and does not require specific disclosure when sanctions are being imposed for violation of Federal contract requirements under Executive Order 11246 (1965) or when lawsuits are pending under Title VII of the Civil Rights Act of 1964, although such public disclosure would tend to strengthen enforcement of equal employment opportunity requirements and would be of legitimate interest to potential stockholders.

2. SEC regulations, which currently prohibit stockholders from raising questions involving "general, economic, political, racial, religious, and social" considerations, prevent socially motivated stockholders from suggesting changes in company policy that would permit corporate enterprises to play a more significant role in contributing to the resolution of civil rights problems.

V. THE CIVIL RIGHTS POLICYMAKERS

A. Federal Executive Boards (FEB's)

1. Federal Executive Boards, consisting of the regional directors of a large number of Federal agencies, were established to provide rapid communication of administration policy to the field and to facilitate coordination of programs of the various agencies located in particular cities. Although they have enjoyed some successes, they have been largely ineffective in coordinating civil rights and related programs in urban areas, because of such obstacles as insufficient staff, unwieldy membership, limited jurisdiction, and lack of authority.

2. Federal Regional Councils, recently established to replace the FEB's as the primary coordinating mechanism dealing with urban problems, offer several advantages over their predecessors in that they will have staff, more manageable membership, and broader jurisdiction: Like the FEB's, however, Federal Regional

Councils will not have authority to make decisions binding on the agencies.

B. Community Relations Service (CRS)

1. The Community Relations Service, which originally was crisis-oriented and sought to keep channels of communication open between hostile groups, now serves as a valuable communication link between minority groups and Federal agencies.

2. CRS, which neither dispenses Federal benefits nor enforces civil rights laws, plays an important educational role, not only for the minority community, but also for the Federal bureaucracy, instructing it on the needs and desires of minority group members.

C. Cabinet Committee on Opportunity for the Spanish-Speaking

1. Both the Cabinet Committee on Opportunity for the Spanish-speaking and its predecessor, the Inter-Agency Committee on Mexican American Affairs, which have served primarily as advocates on behalf of Spanish-speaking people, have engaged in significant projects on behalf of their constituency and have contributed substantially to making the Federal Government more aware of the problems of Spanish surnamed Americans and more responsive to their needs.

2. The Cabinet Committee, which recently replaced the Inter-Agency Committee, has several advantages over its predecessor.

a. The Cabinet Committee has a statutory base and is able to obtain funds through appropriations from Congress, while the Inter-Agency Committee, which was created by Presidential order, had to obtain its funds from its member agencies.

b. The jurisdiction of the Cabinet Committee is wider than that of the Inter-Agency Committee, covering not only Mexican Americans but all Spanish surnamed Americans, including Puerto Ricans and Cubans.

c. Like the Inter-Agency Committee, however, the Cabinet Committee has no enforcement authority.

D. Department of Justice

1. The Civil Rights Division, which is the major civil rights arm of the Department of Justice, having responsibilities in such areas as

voting, schools, employment, housing, public facilities, and public accommodations, has been unable to carry out all of these activities with maximum effectiveness.

a. The Division has been consistently understaffed, which limits the number of lawsuits in which it can participate and restricts its ability to become involved in all areas of importance.

b. Until recently, the Division had not established a system of written priorities. Currently, its priorities are ordered in terms of its own statutory mandate rather than in terms of the national need for improved civil rights performance.

c. The Division focuses its activities on law enforcement through litigation and pays insufficient attention to its nonlitigative powers.

2. The Department of Justice, which has been the focal point of the Federal civil rights enforcement effort over recent years, has not been able to establish effective coordination of the civil rights activities of other departments and agencies.

a. The Attorney General has no authority to direct other Departments and agencies to take specific actions. On occasion, his advice on civil rights has been ignored by these agencies.

b. The Department has tended to view civil rights issues in terms of litigation and has been insufficiently concerned with the need for more effective Governmentwide administrative enforcement.

E. Bureau of the Budget

1. Although the Bureau of the Budget—through its central role in the budget submission process, its authority to review and comment on all legislative proposals and its responsibility for approving agency data collection proposals—can play a significant role in improving the effectiveness of civil rights compliance and enforcement, it has failed to do so.

a. The Bureau has not officially acknowledged that it has any civil rights coordinating role, nor has its staff received any civil rights training.

b. Civil rights concerns are not systematically included in the budget review process, but are considered only when individual examiners happen to have an interest in civil rights.

c. No systematic review is made of agency civil rights programs to determine if there is

sufficient funding to meet the requirements of particular civil rights laws.

d. Although the Bureau encourages Federal agencies to collect a wide variety of data for the purpose of determining how effectively their programs are working, it has not recommended Governmentwide collection of racial or ethnic data to permit the Bureau and the agencies to determine if Federal assistance programs are reaching minority group citizens on an equitable basis.

e. In its review of substantive legislation having important civil rights implications, the Bureau usually neither inquires specifically into the civil rights aspects of the legislation nor requests the comments of agencies that have civil rights expertise.

2. The Office of Management and Budget, which will replace the Bureau of the Budget under the President's recent reorganization plan, will focus on implementing national policy and evaluating the results of agency efforts to carry out its program assignments. This will permit the new Office to become more deeply involved in agency activities implementing national civil rights policy, including evaluation of the civil rights implications of agency programs and coordination of agency civil rights efforts.

F. The White House

1. Despite the efforts of White House civil rights units established over the years, such as the Subcabinet Group on Civil Rights and the Council on Equal Opportunity, White House coordination of civil rights is still not conducted on a systematic and comprehensive basis.

(a) Although there are specific White House staff members currently assigned to civil rights enforcement, some have other duties which impinge significantly on their time.

(b) Reports received at the White House from agencies on their civil rights activities are inadequate for purposes of accurate evaluation of agency performance. Further, no systematic effort to evaluate these reports is made.

(c) White House staff has undertaken a number of ad hoc projects concerning civil rights, but no systematic effort has been made to evaluate the enforcement activities of Federal agencies, to coordinate their civil rights

efforts, or to set goals or priorities for the agencies.

2. The White House Council on Domestic Affairs, established under the President's recent reorganization, is intended to serve as a coordinator of executive policy. The Council on

Domestic Affairs, through establishment of a civil rights Subcommittee, and the new Office of Management and Budget can work in cooperation to develop national civil rights goals and priorities and assure that the agencies work effectively to carry them out.

GENERAL RECOMMENDATIONS

The responsibility for seeing that civil rights laws, as well as all other laws, operate with maximum effectiveness lies with the President. To carry out this responsibility, the President is entitled to and must have the full cooperation and support of all executive departments and agencies that serve under his direction. The Commission believes a vehicle outside the Federal bureaucracy is needed, responsible to the President, to provide the assistance he needs in setting national civil rights goals and priorities and assuring that the activities of Federal agencies serve to achieve them. For this purpose the newly created mechanisms in the President's Office—the Council on Domestic Affairs and Office of Management and Budget—can be utilized effectively.**

**Among the recommendations that have been made to strengthen the overall Federal civil rights enforcement effort is the creation of a Cabinet-level Department of Human Rights. See *Ripon Society Magazine*, Feb. 1969. See also R. Nathan, *Jobs and Civil Rights* (prepared for the U.S. Commission on Civil Rights) 245-63 (1969).

Under this proposal, all civil rights enforcement responsibility would be transferred to a new Department whose sole functions would pertain to civil rights. This proposal has the attraction of elevating considerations of civil rights to the highest councils of Government and creating a single civil rights chief of Cabinet status. In addition, this proposal, by consolidating all civil rights enforcement responsibilities in one agency, undoubtedly would contribute substantially to eliminating existing problems of inadequate coordination among the various agencies with civil rights responsibilities.

One principal problem with this proposal is that the Secretary of Human Rights would be, at best, the coequal of a number of other Cabinet Secretaries whose departments would continue to operate programs having important civil rights implications. He would not have the authority to order his Cabinet colleagues or other agency heads to take specific civil rights actions. If conflicts should arise, he would have to rely, as does the Attorney General under the existing structure, on Presidential intervention which, as a practical matter, he could call for only in the most crucial matters. Further, removal of civil rights enforcement responsi-

1. The President should establish a special Civil Rights Subcommittee of the White House Council on Domestic Affairs, with the following responsibilities:

(a) To identify civil rights problems, develop specific national goals, and establish Governmentwide priorities, policies, and time-tables for their achievement.

(b) To establish, with the assistance of the Office of Management and Budget and Federal departments and agencies, such mechanisms and procedures as are necessary to expeditiously implement the policies and achieve the goals.

(c) To determine the need for additional civil rights legislation and Executive orders or for strengthening of existing civil rights laws and Executive orders.

2. The President should instruct the Director of the Office of Management and Budget to establish a Division on Civil Rights within his office, which would work closely with the Civil Rights Subcommittee of the Council on Domestic Affairs, and provide civil rights guidance and direction to OMB examiners and other appropriate OMB units.

3. The Director of the Office of Management and Budget should direct appropriate office units and Budget examiners to give high priority to civil rights considerations in their dealings with Federal departments and agencies,

bility from existing departments and agencies would tend to lower the priority accorded to civil rights in their decisions on substantive program operation.

If the Secretary of Human Rights were provided with authority to order his Cabinet colleagues or other agency heads to take specific actions, such as terminating Federal financial assistance under programs covered by Title VI, additional problems would arise. Removal of the right to determine the operation of their own programs from other Cabinet members and agency officials undoubtedly would lead to institutional resentment of the new Department and its Secretary and would deter the full cooperation that is necessary if substantive programs are to be harnessed for purposes of promoting civil right goals.

subject to the guidance and direction of the OMB Division on Civil Rights. Among their specific duties should be:

(a) To assist agencies in developing civil rights goals of sufficient breadth and specificity and in establishing program priorities and policies to promote achievement of these goals.

(b) To evaluate existing compliance and enforcement mechanisms, such as compliance reports, collection of racial and ethnic data on program participation, onsite compliance reviews, complaint procedures, and imposition of sanctions, utilized by agencies having civil rights responsibilities and, where necessary, to recommend appropriate changes to assure vigorous and uniform civil rights implementation.

(c) To evaluate the extent of coordination between the operation of substantive programs and civil rights enforcement efforts and recommend such changes as are necessary to promote more effective coordination.

4. In furtherance of national civil rights goals, priorities, and policies established by the Council on Domestic Affairs, all agencies should, in cooperation with the Office of Management and Budget, establish specific civil rights goals toward which their programs and activities would be directed. They should specifically delineate the steps and procedures by which these goals will be achieved. These should include reference to the overall results to be achieved,

a timetable for their achievement, the way in which substantive programs will be geared to the effort, and the compliance and enforcement mechanisms that will be utilized.

5. The President should direct the head of every Federal department and agency to elevate the position of chief civil rights officer to a level equal to that of officials in charge of agency programs. To the extent legislation is necessary to accomplish this, as in the case of establishing assistant secretary positions, Congress should enact such legislation.

6. The President should direct the heads of all Federal departments and agencies to submit proposals for increased staff and financial resources necessary to carry out their civil rights responsibilities with maximum effectiveness. These proposals should be evaluated by the Office of Management and Budget and, where necessary, adjustments should be made based on a realistic assessment of agency civil rights responsibilities and the staff and other resources necessary to fulfill them. The President should request appropriations legislation to provide the necessary resources and Congress should enact such legislation.

7. All agencies with civil rights responsibilities should increase their compliance and enforcement activities significantly to assure adequate attention to the civil rights problems of such groups as Spanish surnamed Americans, American Indians, and women.

RECOMMENDATIONS IN SPECIFIC SUBJECT AREAS

I. EMPLOYMENT

A. Federal Employment

1. The Civil Service Commission should clarify its current policy, emphasizing specific goals in the Federal equal employment opportunity effort and develop a Governmentwide plan designed to achieve equitable minority group representation at all wage and grade levels within each department and agency. This plan should include minimum numerical and percentage goals, coupled with specific target dates for their attainment, and should be developed jointly by CSC and each department or agency.

2. CSC and all other Federal agencies should develop and conduct large-scale training programs designed to develop the talents and skills of minority group employees, particularly those at lower grade levels. Congress should amend the Government Employees Training Act, as necessary, and should appropriate sufficient funds to permit these programs to operate with maximum effectiveness.

3. Existing procedures concerning complaints of discrimination should be strengthened in the following ways:

(a) Free legal aid should be provided on request to all lower grade employees who require it. In this connection, CSC should take the lead in establishing a Governmentwide pool of attorneys who are prepared to volunteer their services in discrimination complaint cases or adverse actions involving minority group employees.

(b) Agencies should take appropriate disciplinary action against supervisors or administrators who have been found guilty of discrimination.

(c) Adequate compensation, such as retroactive promotion and backpay, should be provided to employees who have been discriminated against in promotion actions. To the extent legislation is necessary for this purpose, Congress should enact it.

4. CSC should direct all Federal departments and agencies to adopt new procedures it has developed for collection and maintenance of racial and ethnic data on Federal employment. CSC should use the expanded data basis to produce studies and reports to provide public information concerning such matters as recruitment efforts, training, rates of hiring, promotions and separations by race and ethnicity, and other significant facts concerning Federal personnel practices.

5. Increased efforts should be made to increase substantially the number of minority group members in executive level positions by recruiting from sources that can provide substantial numbers of qualified minority group employees, such as colleges and universities, private industry, and State and local agencies.

B. Contract Compliance

OFCC, with the assistance of the 15 compliance agencies, in implementing OFCC's recent regulations on affirmative action requirements, should develop a comprehensive equal employment opportunity plan, on an industry-by-industry basis, aimed at obtaining equitable representation of minority group members in all industries and at all job levels. The plan should include the following elements:

1. Establishment of numerical and percentage employment goals, with specific timetables for meeting them and procedures describing the means by which they will be met.

2. Development of uniform data collection and compliance reporting systems and procedures for evaluating and following up on the information submitted.

3. Development of uniform onsite compliance review systems containing procedures for establishing priority of reviews, frequency of reviews, and review techniques.

4. Prompt imposition of the sanctions of contract termination and debarment where non-

compliance is found and not remedied within a reasonable period of time.

C. Equal Employment Opportunity Commission

1. Congress should amend Title VII of the Civil Rights Act of 1964 to authorize the Equal Employment Opportunity Commission to issue cease and desist orders to eliminate discriminatory practices through administrative action.

2. EEOC should emphasize initiatory activities, such as public hearings and Commissioner charges, as opposed to the essentially passive activity of processing individual complaints, to facilitate elimination of industrywide or regional patterns of employment discrimination.

3. EEOC should amend its complaint procedures to make more effective enforcement use of the complaint processing system. Priority should be assigned to complaints of particular importance, complaints should be consolidated wherever possible, and emphasis should be placed on processing complaints involving classes of complainants rather than individuals.

D. Coordination

The President should issue a reorganization plan transferring the contract compliance responsibilities of OFCC and the litigation responsibilities of the Department of Justice to EEOC, so that all responsibilities for equal employment opportunity will be lodged in a single independent agency.

II. HOUSING

A. Department of Housing and Urban Development (HUD)

1. Congress should amend Title VII of the Civil Rights Act of 1968 to authorize HUD to issue cease and desist orders to eliminate discriminatory housing practices through administrative action.

2. HUD should establish specific fair housing goals, governing its efforts under Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, and Executive Order 11063. These goals should be of sufficient breadth not only to facilitate the successful resolution of individual complaints, but to provide substantially expanded housing opportunities throughout metropolitan areas for minor-

ity group members and to reverse the trend toward racial and economic separation.

3. HUD should establish program priorities and policies governing the administration of its programs of housing and urban development as well as its fair housing programs to facilitate achievement of these goals. Based on an analysis of racial and ethnic data on program participation, HUD should adjust its program priorities and policies to facilitate achievement of fair housing goals.

4. HUD should strengthen its efforts as leader of the entire Federal fair housing effort to assure that all other departments and agencies that have programs and activities relating to housing and urban development administer them in a way to facilitate achievement of fair housing goals.

(a) HUD should assign staff to monitor key programs of particular departments and agencies.

(b) HUD should convene periodic meetings with other departments and agencies to discuss progress made in furthering the cause of fair housing.

5. HUD should strengthen its efforts under nonenforcement provisions of Title VIII, such as rendering technical assistance to public and private fair housing agencies and convening conferences on a local, State, and national basis to promote the purposes of fair housing and to stimulate cooperative efforts of industry and fair housing groups in achieving them.

B. Veterans Administration (VA) and Federal Housing Administration (FHA)

1. VA and FHA should require aided builders to advertise housing and develop marketing policies and practices aimed at attracting minority as well as majority group purchases.

2. VA and FHA should undertake a program of onsite compliance reviews to monitor the activities of aided builders.

3. VA and FHA should require that as a condition of reinstatement aided builders, debarred for discriminatory practices, must agree to additional affirmative actions, such as submission of periodic compliance reports showing the number of houses sold to minority group families. Reinstatement also should be conditioned on the achievement of specific goals in sales of housing to minority group families.

C. Federal Financial Regulatory Agencies

1. To implement Title VIII's prohibition against discrimination in mortgage financing, the agencies which supervise and benefit mortgage lending institutions (savings and loan associations, commercial banks, and mutual savings banks) should require these institutions to maintain racial and ethnic data on loan applications—those rejected as well as those approved—and develop instructions and procedures for examiners that will enable them to detect patterns of discriminatory practices by these institutions.

2. The agencies should develop procedures for the imposition of sanctions against institutions in violation of Title VIII. These sanctions should include issuance of cease and desist orders and, in appropriate cases, termination of Federal insurance or charters.

3. To assist in assuring compliance by builders and developers with Title VIII obligations, the agencies should require mortgage lending institutions to include nondiscrimination clauses in their agreements with builders, including appropriate penalties for violations, such as acceleration of payment.

D. Site Selection for Federal Installations

The President should amend Executive Order 11512 (1970) concerning the selection of sites for Federal installations, in accordance with this Commission's recommendations in its report, "Federal Installations and Equal Housing Opportunity", to assure that communities are, in fact, open to all economic groups and to racial and ethnic minorities, as a condition of eligibility for location of Federal installations.

III. FEDERAL PROGRAMS

A. Title VI and Federally Assisted Programs

1. All agencies, that administer programs subject to Title VI, should strengthen their compliance systems by assuring that the following minimum compliance activities are carried out.

a. Systematic onsite reviews of recipients should be conducted to assure that all recipients are reviewed at frequent intervals.

b. Comprehensive guidelines for compliance reviews should be developed by Title VI agen-

cies, with the assistance of the Department of Justice, to assure thoroughness and, where appropriate, uniformity of review.

c. Preapproval compliance reviews should be conducted by agencies that administer programs involving construction of facilities, such as public housing projects, recreational facilities, and highways, to assure that these facilities, through location and design, will serve minority group members on an equitable basis.

d. All agencies should establish compliance reporting systems, including collection of data on racial and ethnic participation in agency programs. These data should be subjected to evaluation and, where possible discrimination is indicated, onsite compliance reviews should be conducted.

2. Agencies should place specific limits on the time permitted for voluntary compliance and should make greater use of the sanction of fund termination.

3. Litigation by the Department of Justice should be used as a mechanism in support of fund termination proceedings rather than as a substitute for such proceedings.

4. The Department of Justice should establish an adequately staffed Office of the Special Assistant to the Attorney General for Title VI coordination, housed in the Office of the Attorney General and reporting directly to him.

5. Justice should concentrate its Title VI activities on assuring effective administrative enforcement by the various Federal agencies having Title VI responsibilities rather than on litigation.

6. The President should amend Executive Order 11247 (1965) to authorize the Attorney General to direct departments and agencies to take specific compliance and enforcement actions, including fund termination proceedings.

B. Insurance and Guaranty Programs

Agencies that administer programs of insurance and guaranty should institute mechanisms to determine compliance with existing nondiscrimination requirements of lending institutions and other intermediaries between the Federal Government and borrowers. The mechanisms should include compliance reporting systems, onsite compliance reviews, and specific procedures for processing discrimination complaints.

C. Direct Assistance Programs

Agencies which administer programs of direct Federal assistance should issue regulations and establish specific mechanisms to assure against racial and ethnic discrimination by Federal officials that operate these programs. The regulations and mechanisms should provide for a system of periodic reviews of agency offices, procedures for complaint investigations, and procedures for gathering and evaluating racial and ethnic data. Appropriate disciplinary action should be taken against Federal officials found to have practiced such discrimination.

IV. REGULATED INDUSTRIES

A. The Interstate Commerce Commission (ICC), the Civil Aeronautics Board (CAB), and the Federal Power Commission (FPC) should join the Federal Communications Commission (FCC) in issuing rules prohibiting employment discrimination by their licensees and in implementing such employment opportunity rules by instituting appropriate mechanisms. These should include compliance reports from licensees, onsite compliance reviews, and requirements under which licensees would be required to demonstrate that they are taking affirmative actions to increase minority employment.

B. The FCC and the ICC should amend their procedures concerning issuances of licenses, which currently tend to protect the economic interests of existing licensees, to facilitate minority group entrance as entrepreneurs and to permit them to compete for licenses on an equal basis with existing licensees.

C. To facilitate challenges of proposed agency actions concerning such matters as license renewals, the four agencies should provide free legal services to individuals or groups who wish

to challenge the proposed agency action but cannot afford the legal assistance necessary to do so effectively.

D. To implement existing requirements of nondiscrimination in services and facilities by the industries they regulate, the FCC, ICC, CAB, and FPC should abandon reliance on complaint processing and establish affirmative compliance mechanisms.

E. The Federal Trade Commission (FTC) should expand its efforts to protect the ghetto poor from unscrupulous businessmen and should work in close cooperation with local consumer groups, community action representatives, welfare organizations, and other public and private groups concerned with preventing exploitation of the poor. FTC should also impose the sanctions available to it, such as the imposition of penalties, when exploitation is found.

F. In carrying out its responsibilities to enforce antitrust laws, the FTC should broaden the scope of its investigations of mergers and other corporate actions to include matters concerning the potential impact on the social and economic life of ghetto areas.

G. The Securities and Exchange Commission (SEC), in carrying out its statutory responsibility of assuring full disclosure of information by registering companies, should establish guidelines requiring companies to disclose facts concerning possible imposition of sanctions for violation of Federal contract requirements under Executive Order 11246 or pending law suits under Title VII of the Civil Rights Act of 1964.

H. The SEC should amend its regulation to remove the prohibition against stockholders raising questions involving "general, economic, political, racial, religious, and social considerations," as a means of stimulating greater concern and activity by corporate enterprises in civil rights and related areas.

CONCLUSIONS

The basic conclusion of this report is that the great promise of the civil rights laws, Executive orders, and judicial decisions of the 1950's and 1960's has not been realized. The Federal Government has not yet fully prepared itself to carry out these legal mandates of equal opportunity.

The Federal arsenal of civil rights protections is impressive. In nearly every aspect of life—voting, jobs, housing, education, access to places of public accommodation and facility, and participation in the benefits of all Federal programs—equal opportunity is guaranteed to every American as a matter of legal right. In many areas, however, the Government has not yet developed the mechanisms and procedures necessary to secure this right in fact as well as in legal theory.

To some extent, the failure to fulfill the promise of equal opportunity can be traced to impediments in the civil rights laws under which Federal agencies must operate. Coverage, while generally broad, is not always all-encompassing. For example, in the areas of housing and private employment, there are statutory exceptions which exclude millions of jobs and homes from the ambit of civil rights protection. Similarly, the remedies provided under some of these civil rights laws are inadequate to secure in fact the rights that are guaranteed by law. Often, the only recourse available to persons discriminated against is litigation, which can be a time-consuming and expensive method of securing relief.

Impediments in coverage and enforcement provided under the laws themselves, however, have not been the major obstacles to more effective administration of civil rights laws. Rather, the principal impediment has been the failure of departments and agencies having civil rights responsibilities to make maximum use of the procedures and mechanisms available to them. As a result, there is danger that

the great effort made by public and private groups to obtain the civil rights laws we now have will be nullified through ineffective enforcement. The focus of civil rights must shift from the halls of Congress to the corridors of the Federal bureaucracies that administer these laws.

The Federal Government is not a monolith. It consists of a large number of departments and agencies that administer a wide variety of programs and carry different sets of responsibilities. By the same token, the civil rights problems facing these departments and agencies are not all the same and the techniques necessary to meet them often vary depending upon the kind of program the agency administers and the kind of civil rights law it carries out. Further, implementation of civil rights laws by these agencies has, by no means, been a total failure. Some agencies have had marked success in carrying out their civil rights responsibilities. Some agencies have been successful in carrying out certain aspects of their responsibilities but unsuccessful in carrying out others. Nonetheless, the Commission's study has revealed a number of fundamental weaknesses and inadequacies in civil rights compliance and enforcement that are common to most agencies, regardless of the programs they administer or the civil rights laws they enforce. Among these shared weaknesses are:

- Inadequate staff and other resources to conduct civil rights enforcement activities with maximum effectiveness.
- Lack of authority and subordinate status of agency civil rights officials.
- Failure to define civil rights goals with sufficient specificity or breadth.
- Failure to coordinate civil rights and substantive programs.
- Undue emphasis on a passive role, such as reliance on receipt of complaints, in

carrying out civil rights compliance and enforcement responsibilities.

- Undue emphasis on voluntary compliance and failure to make sufficient use of available sanctions to enforce civil rights laws.
- Failure to provide adequate coordination and direction to agencies having common civil rights responsibilities.
- Failure to collect and utilize racial and ethnic data in planning and evaluating progress toward goals.

Some of these weaknesses may be the result of the trial-and-error efforts of agencies attempting in good faith to meet responsibilities in a relatively new area of concern. The Commission has made detailed findings and recommendations concerning each of the subject areas examined in its report, suggesting ways in which agencies can strengthen existing avenues of compliance and enforcement.

Many of these weaknesses, however, also reflect more deep-seated problems—problems of hostile bureaucracies that view civil rights as a threat to their prerogatives and programs, problems of inadequate or misordered priorities which cannot be resolved solely through modification of specific compliance and enforcement mechanisms. For example, the failure to make sufficient use of strong sanctions, such as fund termination and contract cancellation, is less a reflection of inadequate enforcement mechanisms than it is the triumph of program bureaucrats in the artificial conflict between the exercise of program responsibilities and civil rights responsibilities. Rather than combining civil rights and substantive programs in a joint effort to achieve social and economic justice, in most agencies the two have been separated and civil rights programs have operated in isolation from those that provide substantive benefits.

By the same token, the failure to provide sufficient resources for civil rights enforcement and the subordinate position in which civil rights officials are placed in agency hierarchies, undoubtedly are less a result of a lack of understanding of what is necessary for effective civil rights enforcement than a reflection of the deeper problem of misordered agency priorities in which civil rights is relegated to a position of secondary importance.

These problems suggest that more is needed than a strengthening and modification of compliance and enforcement mechanisms utilized by particular agencies. They suggest that the most serious flaw in the Federal civil rights enforcement effort has been the failure to provide overall direction and coordination—that the basic mechanisms that have been lacking have been those necessary to develop a cohesive, Governmentwide civil rights policy and to assure that this policy is faithfully carried out.

In fact, a total civil rights policy has not been developed, nor have overall national civil rights goals and priorities been established to govern the component parts of the Federal civil rights effort. Agencies have operated independently with little recognition or understanding of what the Government's total civil rights program is or the role they should play in carrying it out. For the most part, they have been only dimly aware of their responsibilities in their own areas of concern. No substantial attempt has yet been made to coordinate the various civil rights laws and policies into a total, coordinated Federal civil rights effort. The Commission also has addressed itself to this problem and has made recommendations to facilitate development of national civil rights goals and policies and to permit effective coordination of the entire civil rights program as well as its separate parts.

This report has dealt primarily with problems of structure and mechanism in the Government's efforts to enforce civil rights laws. The Commission recognizes, however, that achievement of civil rights goals and the full exercise of equal rights by minority group members will involve more than adjustments in civil rights enforcement machinery. It will require dedication and resolve on the part of Government officials and the American people alike. The Commission's recommendations in this report are addressed only to ways in which the mechanisms of civil rights enforcement can be strengthened, not to ways in which national will and resolution can be inspired.

In the Government, this is the responsibility of each Cabinet Secretary or agency head, who must take the steps necessary to assure that his subordinates honor and support the principle of equality. It also is the responsibility of

public and private groups—groups that labored hard and successfully to get civil rights laws passed, that pushed for needed Executive orders, and that won the crucial court decisions that established the principle of equality as basic constitutional doctrine. They must now undertake the more difficult task of seeing that these laws are faithfully and vigorously carried out.

In the final analysis, achievement of civil rights goals depends on the quality of leadership exercised by the President in moving the Nation toward racial justice. The Commission is convinced that his example of courageous moral leadership can inspire the necessary will and determination, not only of the Federal officials who serve under his direction, but of the American people as well.

LEGAL APPENDIX

This appendix is in two parts. Part I examines the constitutional obligation of Federal regulatory agencies to prohibit discriminatory practices by the industries and other private parties which they regulate. Part II discusses the similar duty which the same constitutional provisions impose upon Federal departments and agencies in administering programs of federally insured and guaranteed loans.

I. FEDERAL REGULATORY AGENCIES

At present, many regulatory agencies are statutorily required to prohibit discrimination in the facilities or services provided by those under their jurisdiction.¹ Under judicial inter-

¹The five regulatory agencies under consideration in this report all operate under statutes that prohibit discrimination in the facilities or services provided by the industries they regulate. Four of the five agencies have issued rules to that effect. Also significant is the obligation of the regulatory agencies to issue rules and regulations prohibiting discrimination in employment by the respective licensees, which has been largely ignored.

The ICC has issued regulations prohibiting discrimination in passenger service of interstate motor carriers, 49 C.F.R. 1055.1-1055.3, and in passenger or terminal facilities of railroads and bus companies, 49 C.F.R. 1055.4, 1055.5. The CAB, unlike the ICC, has not issued specific regulations barring discrimination by air carriers. Rather, the agency merely has informed each airline company of the agency's statutory provision which prohibits discrimination in the operation of certified airlines. The FPC also has taken action to prevent discrimination in the use of recreational facilities provided at licensed hydroelectric projects. Under the authority of 16 U.S.C. 803(a) the FPC has called for the filing of recreational use plans as part of every application for major licenses. The FCC, although it has not issued regulations concerning the matter of discrimination in programing, has taken action along this line in individual cases. For example, on Feb. 27, 1970, the agency deferred action on renewing the radio and television licenses of 28 Atlanta, Ga., stations. Finally, the FMC operates under a statute which prohibits discrimination, 46 U.S.C. sec. 815; yet,

pretation of the fifth and 14th amendments, it also appears that the Constitution imposes a legal obligation upon Federal agencies to assure nondiscrimination in all aspects of the operations of regulated industries and practices, including facilities, services, and employment practices.

A. Parallel Requirements of the Fifth and 14th Amendments

The 14th amendment provides, in part, that no State shall deny to any person the equal protection of the laws. Federal courts have ruled that the due process clause of the fifth amendment imposes upon the Federal Government an equivalent prohibition against racial discrimination. This principle was first enunciated clearly by the Supreme Court in 1954:

The fifth amendment . . . does not contain an equal protection clause as does the 14th amendment which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of the law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this court has recognized, discrimination may be so unjustifiable as to be violative of due process.²

Further, specifically with regard to racial discrimination, the Court said:

In view of our decision that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of the law guaranteed by the fifth amendment to the Constitution.³

unlike the other four agencies, the FMC has taken no steps of its own to carry out this prohibition.

² *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

³ *Id.* at 500. See also, *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Hurd v. Hodge*, 334 U.S. 24 (1948); and *Bolton v. Harris*, 395 F.2d 642, 644 (1968).

Thus, it seems clear that discriminatory practices which, on the State level, violate the equal protection clause are also prohibited by the due process clause of the fifth amendment. Consequently, the Federal Government is bound by the substance of the 14th amendment equal protection mandate.⁴

B. State Action Under the 14th Amendment

Although there must be some degree of State involvement in otherwise private conduct before the 14th amendment is applicable, there is no requirement that the State directly sponsor an activity in order for the constitutional restriction to apply.

Court cases have delineated the type and amount of State involvement needed to constitute "State action". One of the most significant of these, *Burton v. Wilmington Parking Authority*,⁵ involved a restaurant in a building owned and operated by a State agency, which refused to serve black persons. In considering the question of how to determine the existence of State action, the Court stated: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."⁶

In *Burton*, a State agency owned and operated the building, and had leased the space for the restaurant. There was no nondiscrimination provision in the lease, and the court found that:

The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the 14th amendment.⁷

The plaintiffs in *Simkins v. Moses H. Cone*

⁴ See: 2 Am. Jur. 2d sec. 193 Administrative Law (at 25-26): "While the fifth amendment contains no equal protection clause and restrains only such discriminatory acts of the executive as amount to a denial of due process, in the exercise of every State power emanating from the people there enters the constitutional command of equal protection of the laws, which means equal rights for all similarly situated . . ."

⁵ 365 U.S. 715 (1961).

⁶ Id. at 722.

⁷ Id. at 725.

*Memorial Hospital*⁸ were black physicians, dentists, and patients who sued two private hospitals for denying staff privileges to black doctors and denying or limiting admission to black patients. Each hospital had received substantial sums of Federal funds. The court of appeals approached the case in terms the Supreme Court had outlined in *Burton*:

In our view the initial question is, rather, whether the state or the Federal Government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either their instrumentality or their agent in a strict sense.⁹

In holding that the necessary amount of State participation, "in the broad sense, including Federal,"¹⁰ was present, the court relied upon more than involvement through substantial amounts of Federal funds. The distribution of Hill Burton grants was pursuant to a publicly made survey of all health needs within the State. The hospitals participated because of the assessment of the public need. This participation subjected them "to an elaborate and intricate pattern of governmental regulations, both State and Federal . . ."¹¹

In addition to cases, such as *Burton* and *Simkins*, which have determined the existence of State action on the basis of State involvement, another approach which courts have taken is to decide whether or not the function at issue is a municipal one. Thus, in *Marsh v. Alabama*,¹² the 14th amendment was held to apply to a privately owned "company town" on the grounds that it was a municipality to the same extent as is a "public" town.

Similarly, delegation of part of the electoral process to a private group does not exempt that group from 14th amendment limitations.¹³ A park managed by private trustees "for whites only", which previously had been a city park for many years, was held to be in violation of the 14th amendment's provision against racial discrimination.¹⁴ In so ruling, the Supreme

⁸ 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964).

⁹ 323 F. 2d at 966.

¹⁰ Id. at 967.

¹¹ Id. at 964.

¹² 326 U.S. 501 (1946).

¹³ *Smith v. Albright*, 321 U.S. 649 (1944).

¹⁴ *Evans v. Newton*, 382 U.S. 296 (1966).

Court considered both the past history of the park, and the fact that the service rendered ". . . even by a private park of this character is municipal in nature."¹⁵ The Court concluded that: "the public character of this park requires that it be treated as a public institution subject to the command of the 14th amendment regardless of who now has title under State law."¹⁶

The duty of nondiscrimination under the 14th amendment thus is imposed not only upon State-owned and operated activities and facilities, but upon those enterprises which perform an essentially public function or with which the State has some measure of involvement or interdependence.

C. Applicability of Constitutional Requirements of Nondiscrimination to Regulatory Agencies

By virtue of their close involvement with and control over the activities of the private entities with which they deal, Federal regulatory agencies fall within the ambit of the fifth amendment due process requirement and are prohibited from permitting discrimination in their fields of regulation. Furthermore, many of the areas subject to Federal regulation, both because of their nature and the amount of Federal assistance they receive, are virtually public in nature. This clarifies even further the applicability of the fifth amendment to the regulated practices.

In 1952, the Supreme Court ruled that a privately owned transit corporation and a privately owned communications corporation which were regulated by a federally created commission were subject to the due process requirements of the fifth amendment.¹⁷

The Court imposed this constitutional obligation on the basis of the "sufficiently close relation between the Federal Government and the . . . service."¹⁸

In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such Federal authorization, Capital Transit

now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort, and convenience were not impaired thereby.¹⁹

The Public Utilities Commission in *Pollak* had no more extensive involvement with its regulated companies than do Federal regulatory agencies, and it had not acted extraordinarily in that case.

In exercising their statutory mandates,²⁰ the Federal agencies have maintained extensive control over their respective industries. They issue them licenses or certificates of authority and require the industries to follow strict rules and regulations. In exchange, the industries enjoy an exclusive right to use part of the public domain. Often they receive Government subsidies for their operations and are free from outside competition. As a result, it has become well established that a licensee is a "trustee" for the public.²¹

¹⁹ *Id.*

²⁰ The Federal Communications Commission was created by the Communications Act of 1934 (47 U.S.C. secs. 151-609). The Federal Power Commission operates under the Federal Power Act as amended (16 U.S.C. sec. 791a et seq.) and the Natural Gas Act was amended (15 U.S.C. secs. 717-717w). The Civil Aeronautics Board was established under the Civil Aeronautics Act of 1938 as amended (49 U.S.C. sec. 1301 et seq.). The Interstate Commerce Commission was created by the Interstate Commerce Act of 1887 (49 U.S.C. secs. 1-22, 25-27). The Federal Maritime Commission was established by Reorganization Plan 7, effective Aug. 12, 1961 (75 Stat. 840).

²¹ *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C., 1966) in which now Chief Justice Warren Burger said (at 1003):

"A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the single fact that a broadcast license is a public trust subject to termination for breach of duty."

See also, *Television Corp. of Michigan v. FCC*, 294

¹⁵ *Id.* at 301.

¹⁶ *Id.* at 302.

¹⁷ *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

¹⁸ *Id.* at 462.

A reading of the agencies' statutory responsibilities and citation to a few regulations passed under their rulemaking powers indicates a substantial degree of agency involvement in the activities of the industries they oversee.²²

F. 2d 730, 733-34 (1961); *McIntire v. William Penn Broadcasting Co.*, 151 F. 2d 597, 599 (1945).

²² An examination of the statutory duties of the FPC, ICC and CAB illustrate the extensive involvement which regulatory agencies have with their areas of regulation.

Under its statutory authority the Federal Power Commission (1) issues certificates authorizing natural gas pipelines to construct, extend, acquire or operate transportation and storage facilities for the transportation of natural gas in interstate commerce and for the sale of natural gas in interstate commerce for resale; (2) investigates the need for and, when appropriate, directs pipelines to sell natural gas to local distributors, investigates and regulates the rates, charges, and services for natural gas transported or sold for resale in interstate commerce; (3) authorizes abandonment of facilities or discontinuance of service subject to Commission jurisdiction; (4) promulgates and enforces a uniform system of accounting to assure that natural gas pipelines accurately report their financial position; (5) assures nondiscriminatory transportation and purchase of gas in submerged lands of the Outer Continental Shelf; (6) regulates the rates and services of public utilities selling electricity in interstate commerce at wholesale; (7) issues and administers permits and licenses for the planning construction, and operation of nonfederal hydroelectric projects on waters or lands subject to Federal jurisdiction; (8) promulgates and enforces a uniform system of accounting for interstate public utilities; (9) regulates certain issuance sales of securities by electric public utilities; (10) regulates the merger or consolidation of electric public utilities and their disposition or acquisition of electric facilities; (11) reviews and approves proposed rates for the sale of electric power from certain Federal and international hydroelectric projects; and (12) authorizes the exportation of electricity and natural gas to a foreign country and issues permits for maintaining facilities at international borders for their transmission. Under its rulemaking and regulatory powers, the Federal Power Commission has required the development of recreational facilities by its licensees, and provision for use of such facilities on a nondiscriminatory basis. The Commission has also insisted on regulatory safety inspections of facilities. Most other regulations detail the proper forms to use when submitting applications and other requests, or set forth the exact accounting procedures to be followed.

The Interstate Commission regulates railroads, motor carriers, water carriers, and freight forwarders. Under its statutory authority, the Commission passes upon virtually every important economic policy of the industries it oversees. For example, the Commission is authorized (1) to adjust rates and

Although the extent and kind of this Federal regulatory activity varies from agency to agency, several common categories of regulation emerge. Thus, most issue licenses or certificates of public convenience and necessity exercise a ratemaking function, require approval for changes in ownership or mergers, enforce standardized reporting and accounting practices, and require certain standards of safety and quality in the delivery of the industry's service or product.

routes for motor carriers and freight forwarders; (2) to establish joint rates and routes; (3) to pass upon the extension or abandonment of any line; (4) to prescribe the form for posting, publishing, and filing schedules; (5) to approve agreements between carriers relating to pooling and division of traffic, service, or earnings; (6) to approve the issuance of securities by the carriers and the modification of railroad financial structures; (7) to require detailed reports and a uniform system of accounting; and (8) to require safety devices and systems. Under its rulemaking powers, the Commission has filled three volumes of the Code of Federal Regulations 49 CFR pts. 1000-1339 (1970). Most of these rules amplify and detail the procedures and requirements authorized in the statute. For example, instructions to railroad companies on maintaining accounts cover 825 separate items. Other regulations concern more specialized matters such as use of super-highways by motor carriers, special or chartered parties, nondiscrimination in services and facilities of interstate common carriers, surety bonds and policies of insurance, and transportation of household goods.

Under its statutory authority the Civil Aeronautics Board acts primarily as an economic regulator of the airline industry. The Board issues licenses or certificates of public convenience and necessity enabling air carriers to engage in air transportation. The Board retains the power to alter, suspend, or revoke these certificates, and no carrier may abandon any route granted without Board approval. It has special authority to provide for the carriage of mail. The CAB must pass upon changes in rates charged by the industry for the transportation of persons, property, and mail. The Board also regulates the industry's accounting and reporting procedures, changes in ownership of a particular airline, the grant of any loan or financial aid by the Government, and the method of competition adopted by air carriers. There is even broad authority to investigate the management of the business of any air carrier. The CAB, under its rulemaking authority, has extended its power over the airline industry to include such diverse subjects as charter trips and special services, realistic flight scheduling, a uniform system of accounts and reports, nondiscrimination in federally assisted programs administered by the Board, and visual in-flight entertainment and service of alcoholic beverages.

It can be safely asserted that while the industries remain largely in private hands and management retains many prerogatives, the economic regulatory power of the agencies is, in theory, sufficient to control the ability of any particular company to survive. The pervasive presence of the agency in the most vital economic matters which a company must face—profit margin, ability to borrow, issue stock, and merger—cannot be denied and should satisfy any test based on sufficiency of contacts.

Analysis of the relationship between the agencies and the regulated industries to determine the substantiality of the former's involvement with the latter represents one approach to establishing a constitutional duty on the part of the agencies to enforce and the industries to follow nondiscriminatory practices. Another approach would turn from an examination of the contacts between agency and industry and instead would focus on the failure of the agency to issue nondiscriminatory practice rules. It can be argued that whatever the contacts between agencies and industries, the agencies must exercise their power to issue such rules because failure to do so involves them in discriminatory practices through inaction. One of the key factors in *Burton* was the State's failure to include a nondiscrimination clause in the lease. The Court condemned this failure: "[b]y its inaction . . . the State has . . . made itself a party to the refusal of service."²³ In another context, a district court has held a State contracting authority responsible for insuring nondiscrimination by those awarded contracts: "[W]here a state . . . undertakes to perform essential government functions with the aid of private persons it cannot avoid the responsibilities imposed on it by the 14th amendment by merely ignoring or failing to perform them."²⁴ In the case of Federal agencies and regulated industries it can be argued that the agencies are under an affirmative duty to end any discriminatory practices (including employment) of their own and that this obligation extends to all who deal with the agency whether the relationship be grantee, contractor, or regulated licensee. When the agency undertakes the essentially governmental function of regulation,

²³ 365 U.S. at 725.

²⁴ *Ethridge v. Rhodes*, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

it cannot fail to impose nondiscriminatory rules on the private parties who come within its jurisdiction.

It is important to note that at least one Federal administrative agency has taken the position that it is not only prohibited from discriminating on the basis of race, but also from sanctioning such discrimination.²⁵

In addition, on July 5, 1968, upon the recommendation of the United Church of Christ, the U.S. Civil Rights Commission, and others, the Federal Communications Commission issued a policy statement prohibiting employment discrimination in the broadcasting industry.²⁶

The FCC policy statement was adopted as a rule on June 4, 1969. The rule currently applies only to broadcasters and it remains for the FCC to issue a similar rule for common carriers.²⁷ Likewise, other regulatory agencies have yet to issue such a policy statement or rule.

Based on this analysis of the constitutional prohibitions against racial discrimination contained in the fifth and 14th amendments, it appears that Federal regulatory agencies are so closely involved in the practices of the private entities within their jurisdiction as to bring such practices within the scope of the fifth amendment. These agencies are therefore constitutionally required to make efforts to assure nondiscrimination in the fields they regulate.

²⁵ The National Labor Relations Board has rescinded the certification as bargaining representative under the National Labor Relations Act of labor unions which have engaged in racial discrimination. Holding that it was constitutionally required to take this action, the Board stated:

"Specifically, we hold that the Board cannot validly render aid under section 9 of the act to a labor organization which discriminates racially when acting as a statutory bargaining representative."

Independent Metal Workers Union, Local No. 1, 147 NLRB 1573, 1577 (1964).

²⁶ See fuller discussion in text, *supra*.

²⁷ In addition to the rule prohibiting employment discrimination by broadcasting stations, the FCC adopted on Nov. 19, 1969, a "Notice of Proposed Rule-making," stating that its policy prohibiting employment discrimination would also be extended to the common carriers (telephone and telegraph companies). The FCC statement indicated that the same considerations of public policy which prompted its rule regarding broadcasters were applicable to common carriers subject to their jurisdiction. As of April 1970, the policy statement had not yet been adopted.

II. PROGRAMS OF INSURANCE AND GUARANTEE

Just as the Constitution imposes a duty on Federal regulatory agencies to assure nondiscrimination, so it obligates the Federal Government not to permit discrimination through its programs of insured and guaranteed loans. The standards of nondiscrimination imposed upon the Federal Government by the fifth and 14th amendments are applicable in any situation in which there is a sufficient link between the Government and the "private" activity. With programs of insured and guaranteed loans, the extent of Federal involvement with the private sector is less readily apparent than it is in the case of regulatory agencies. Yet it is extensive enough to bring these programs within the ambit of the fifth amendment, under the reasoning of *Burton and Bolling v. Sharpe*.

The Federal Government administers a large number of programs in which the form of assistance is insurance and guarantee of loans obtained from private lenders. Unlike grant programs, the beneficiary does not receive Federal financial aid. Rather, he obtains a loan from a private lender, which is guaranteed against loss by the Federal agency administering the program. The agencies issue regulations and guidelines which determine eligibility for programs of insured and guaranteed loans, and they also have the authority to approve or reject individual applications.

The best known of these programs are insured and guaranteed loans for home ownership, administered by the Federal Housing Administration and the Veterans Administration. However, there are a multiplicity of others, most of which are under the direction of five departments and three independent agencies.²⁸ The financial involvement of the Federal Government in these programs is substantial. The value of all loans insured or guaranteed will amount to approximately \$40 billion in 1971.²⁹ The total value of all Government insured and guaranteed loans outstanding is approximately

²⁸ Departments of Agriculture (FMHA); Commerce (EDA and FMA); Health, Education, and Welfare, Housing and Urban Development; Interior; Veterans Administration; Small Business Administration; and Export-Import Bank.

²⁹ *The Budget of the United States Government, 1971 Special Analyses*. (1970) at 69.

\$145 billion.³⁰ The Federal Government also plays a major role in the areas in which it provides insurance and guarantees through the criteria it establishes for eligibility for an insured loan, and through the conditions it imposes upon the beneficiary (the recipient of the loan) and the intermediary (the lending institution). Finally, these Federal programs have a significant impact upon the social and economic development of the country, just as regulatory agencies help shape the industries within their jurisdiction.

The programs of insurance and guarantee in the field of housing are an excellent example of the close involvement between the administering agency and the area of the private sector which it services.³¹ The individual home loans insured by FHA and VA³² enable persons to buy houses who might otherwise be unable to do so, since loans are for a long period of time, reducing the amount of monthly payments. Also, banks are more willing to make loans if the risk of nonpayment is removed. Finally, these programs encourage housing construction, since builders are more sure of finding a market for their houses.

In addition to insuring loans, the FHA is involved in the planning and construction of both single family and multifamily projects in connection with approval of an insured loan. Typically, the FHA requires the execution of a regulatory agreement in which the owner-mortgagor acknowledges that he will "comply with the requirements of the National Housing Act and the regulations adopted by the Commissioner pursuant thereto."³³

³⁰ *Id.* at 78.

³¹ A Federal district court described the role of Government insurance and guarantees as follows:

"The involvement of the Government (through FHA and VA) in the construction of a housing community . . . consists of a guarantee to various banks and lending institutions that money advanced by them to purchasers of individual properties will be repaid, incidental to which guarantee and for the purpose of minimizing the risk of loss to the Government is the prescribing of the conditions upon which the Government will undertake to guarantee the loans."

Johnson v. Levitt & Sons, Inc., 131 F. Supp. 114, 116 (E.D. Pa. 1955).

³² 12 U.S.C. sec. 1709, 38 U.S.C. secs. 1810, 1814. The Farmers Home Administration administers a similar program in rural areas, 42 U.S.C. secs. 1484, 1487.

³³ FHA Form No. 2466 (rev. Feb. 1963).

For both single and multifamily projects the Commissioner has established standards regarding such matters as planning, construction, heating, plumbing and sanitation, electricity, and site improvements. Consequently, from the inception of these projects, through their construction and continuing into their operation, the FHA is not only involved, but exercises substantial control.

Many of the programs of insurance and guarantee in areas other than housing give the Federal Government an influential role. The existence of insurance and guarantees spurs development, whereas lack of them can make development more costly and, therefore, slower.

The Farmers Home Administration of the Department of Agriculture administers programs of insurance and guarantee for such diverse projects as the acquisition and development of grazing land, soil and water conservation, and the development of recreational facilities.³⁴ For all of these, the recipient must make monthly progress reports to the FMHA county supervisor for the first year after he has received the insured loan, and submit books for an annual audit in following years.³⁵

The Department of Health, Education, and Welfare insures student loans or postsecondary education under the Higher Education Act of 1965.³⁶ In 1969, more than 780,000 such loans, valued at approximately \$60 million were made.³⁷ In connection with these insured loans, HEW requires that educational institutions compile semi-annual reports on the status of students who have received such loans, and that participating lending institutions submit quarterly reports of the loans outstanding under the program.³⁸ Thus, HEW assumes a monitoring function over both the participating

student's activity and the financial institution. The program, as indicated by its volume, enables many persons to go to college who would not otherwise be able to do so.

A final illustration of the significance of programs of insurance and guarantee are those administered by the Small Business Administration. The insurance and guarantee of loans for rental of property, purchase of equipment, working capital, and the general needs of low-income businesses³⁹ serve to keep this part of the economy viable.

Thus, programs of insurance and guarantee involve the Federal Government in a number of significant ways with the lending institution and the loan recipient. In all instances, the administering agency exercises control over the intermediary and beneficiary of the program, in the form of preaward conditions, periodic reports, and audits. No program of insurance or guarantee involves only a financial commitment by the Federal Government. Rather, there is always some control over the purpose and quality of the project for which the loan is used. Furthermore, programs of insurance and guarantee have been a major stimulus to areas such as housing construction, development of rural areas, private entrepreneurship, and higher education. They have had a direct impact on American economic and social development.

This involvement of the Federal Government is extensive enough to make applicable the fifth amendment's prohibition against discrimination in any aspect of a program of insurance or guarantee, under judicial interpretation of this constitutional provision. Following the reasoning of the Court in *Burton* that a State cannot abdicate its responsibility to guarantee nondiscrimination by ignoring that duty,⁴⁰ it is clear that Federal agencies are under an obligation to assure nondiscrimination by intermediaries or beneficiaries in connection with programs of insurance and guarantee.

³⁴ 7 U.S.C. sec. 1926.

³⁵ OEO Catalog of Federal Domestic Assistance (1970) secs. 10.408, 10.409, 10.412.

³⁶ 20 U.S.C. sec. 1071.

³⁷ *The Budget of the United States Government, 1971. Appendix.* 426-27.

³⁸ OEO Catalog, supra n. 35, sec. 13.460.

³⁹ 15 U.S.C. secs. 636, 687, 692-94; 42 U.S.C. secs. 2901, 2902, 2905, and 2906.

⁴⁰ See note 23, supra.

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