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Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of “Program”

Title VI of the Civil Rights Act of 1964\(^1\) provides a powerful method by which the federal government can deny financial support to any activity or program which results in discrimination on the grounds of race, color or national origin. The Act sets forth a detailed administrative process whereby compliance with the requirement of nondiscrimination in federally funded programs is to be achieved.\(^2\) The ultimate sanction, a termination of federal funds for the program, may result if, after a hearing on the record, a finding of discrimination is made by the agency involved.\(^3\)


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.


Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

In order to best serve the purpose of Title VI, nondiscrimination in federally financed programs, the administrative agencies must be able to use the threat of fund termination in its most effective manner. To do so, the threatened termination must be directed toward an appropriate entity, consonant with congressional intent to force the aid recipient into compliance with the Act. Yet on the critical point of what constitutes a "program," the statute is conclusory and unenlightening. It is, for example, unclear whether the cutoff should encompass funding for an entire state, a city, a school system or school district, a single school, a housing district, one housing project or the recipients of one grant. A useful definition of the term "program" for Title VI purposes is therefore necessary. This note will focus on such a definition, one that is flexible in scope and is most likely to lead to an end to discrimination in federally financed programs.

Title VI is necessarily written in general terms because it applies to all recipients of federal aid, a widely varied group. To properly enforce the terms of the statute, agencies and courts which review agency action must have some flexibility in defining the term "program" to fit the needs of each situation. Trying to impose a single definition of a Title VI "program" on administrative processes adapted to a variety of needs will inevitably frustrate underlying policy considerations. For example, many cases seeking to enforce Title VI have dealt with discrimination in educational systems and housing developments, but there have also been instances of the Act's application to eliminate discrimination in mental health facilities and police departments. There has, as well, been an

Dirksen substitute for the Civil Rights Act of 1964 which was introduced to help insure passage in the Senate when it became obvious that the House version could not pass. Comment, Title VI of the Civil Rights Act of 1964—Implementation and Impact, 36 Geo. Wash. L. Rev. 824, 836 (1968).


Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

The Administrative Procedure Act, 5 U.S.C. § 702 (1970), also gives a general right to review:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.


E.g., Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972). See notes 56-64 infra & text accompanying.

Marable v. Alabama Mental Health Bd., 297 F. Supp. 291 (M.D. Ala. 1969). A finding was made that all mental health institutions in the state were segregated on the basis of race.
attempt to cut off federal financing of a city's new sewer system and outdoor wildlife preserve because of discrimination by the city in other parts of its operations. To the extent these programs are not administered in a uniform fashion, decisionmaking regarding the termination of funding under the Act cannot be approached on a single level.

Courts have found different meanings for the word "program" with no degree of consensus. Although they appear to believe that a single definition is proper and have attempted to harmonize their definitions, they have been largely unsuccessful. Divergent judicial interpretations are not necessarily cause for concern, however, insofar as they serve to effectuate the ultimate legislative purpose of eliminating discrimination. A discussion of the various positions taken by the courts on the meaning of the term "program" will show that a variable definition best effectuates the legislative intent.

The Act provides for the termination of federal funding if a finding of discrimination is made. The drastic action of termination is not, however, the first step taken subsequent to such a finding. The first step is to require that the recipient of aid cease the discriminatory activity and redress the resulting injury. For example, the practice in school

"Several provisions of the Code of Alabama require or contemplate that patients be assigned and treated separately upon basis of their race and color." Id. at 293. Furthermore, facilities and treatment were not only separate but generally inferior for blacks. The institutions received an average of $200,000 per year from federal grants and another $200,000 per year in surplus food commodities under federal programs. A few attempts were made to desegregate but were countered by the Governor of Alabama. Id. at 294-96.

After an investigation, HEW recommended removal of all federal assistance until the institutions came into compliance with Title VI. The court ordered a desegregation plan to be put into effect which would permit the state "to become eligible again for federal assistance in the full range of its mental health program." Id. at 298.

United States v. City of Chicago, 395 F. Supp. 329 (N.D. Ill. 1975). The federal government cut off all revenue sharing funds for the city of Chicago on the basis of a finding that the city's police department, which received part of these funds, practiced discrimination. The city claimed that not all funds should be affected, citing Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972). See notes 48-53 infra & text accompanying.

The court held that since 75 percent of the revenue sharing funds went to the police and the city may have been liable for $135 million already improperly distributed, the federal government was correct in not disbursing any more such funds to prevent further liability.

Evans v. Lynn, 537 F.2d 571 (2d Cir. 1975), rehearing en banc, 537 F.2d 589 (1976). The court first found standing for the nonresident plaintiffs to sue in an attempt to terminate federal financial assistance for a new sewer system and outdoor wildlife preserve because the city had failed to assess the racial impact which the allocation of funds for these purposes would have on housing patterns. However, after the Supreme Court's decision in Warth v. Seldin, 422 U.S. 490 (1975), on the subject of standing, the Second Circuit determined en banc that plaintiffs here lacked standing to raise a question under Title VI as they could not show they sustained an injury as a result of appellees' actions.


The Supreme Court has said, in discussing the role of a federal district court where state involvement in racial discrimination has been found that the courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminatory effects in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). The Court has also required that all available remedial techniques be considered in desegregation cases. See, e.g., North Carolina Bd. v. Swann, 402 U.S. 43, 46 (1971); Recent Decisions 65 ILL. B. J. 164, 165 (1976).
desegregation cases since Brown v. Board of Education$^{12}$ and the enactment of the 1964 Act is for the Department of Health, Education and Welfare (often aided by court intervention) to order the offending party to integrate,$^{13}$ with the threatened loss of funds hanging in the background.$^{14}$

$^{12}$U.S. 483 (1954).

$^{13}$E.g., Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (where a policy of deliberate segregation was proved for a significant part of a school system, the burden was on the school board to prove that similarly segregated schools were not also the result of a segregative intent or the district court had the authority to order a desegregation decree to cover all the schools so affected); Wright v. Council of Emporia, 407 U.S. 451 (1972) (where Emporia changed from a town to a city in order to withdraw its children from the county school system which was operating under a desegregation plan; the district court was to be guided by the effect of the officials' action and not their motivation and was justified in concluding that the city's establishment of a separate school system would impede the progress of desegregating the county schools; the court therefore did not abuse its discretion in enjoining respondents from pursuing their plan to set up a separate school system); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (after the school board defaulted in its obligation to offer an acceptable plan for desegregation, the district court could use broad powers to assure a unitary system, including appointment of an expert and ordering the adoption of his plan, a limited use of a racial ratio as an indicia of segregation, altering of attendance zones and busing); Green v. County School Bd., 391 U.S. 430 (1968) (where a “freedom of choice” plan for students would offer a real chance of producing a unitary school system, it might be acceptable but where other speedier, more effective methods exist, as here, such plan was not acceptable and the district court was obligated to retain jurisdiction until the state-imposed segregation was ended); Griffin v. County School Bd., 377 U.S. 218 (1964) (an injunction against local school officials preventing them from closing county schools to avoid desegregating them, while at the same time providing tuition grants and tax credits to assist white children to go to private schools was appropriate); Haney v. County Bd., 410 F.2d 920 (8th Cir. 1969) (although state law did not require school districts to be racially segregated, as an earlier law required schools to be, the fact that reorganized districts were divided racially was considered more than coincidental, and the school board was ordered to submit a workable plan to effectuate a nonracial school system to be approved by the district court for the next school year).

The remedial action in these and other cases, dealing with racial and other suspect class discrimination not only in the schools but wherever found, was often triggered by examination of the impact of the laws or policies on the suspect class. An inference arose that an invidious discriminatory purpose existed if the impact was more severe on one class than another. However, the Supreme Court has recently amended this position:

Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.


At the very least, the Court's discussion raises a question of how school, housing and other discrimination cases will be handled in the future. See id. at 245-45 & 244, n.12. Apparently, a discriminatory purpose rather than merely discriminatory impact must be shown before strict scrutiny is required; it remains to be seen what proof of such purpose will be accepted.

$^{14}$Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, has recently made known his department's intention to take full advantage of this power. See N.Y. Times, Feb. 20, 1977, § E, at 5, col. 5.


However, proposed rules under this order were not printed in the Federal Register until July 29, 1976, see 41 Fed. Reg. 31, 550 (1976). A new subsection was added to 28 C.F.R. §§42.1-
Resolution of housing cases has followed similar lines under the guidance of the Department of Housing and Urban Development. Under section 602

42.308 on December 1, 1976, see 41 Fed. Reg. 52, 669 (1976), implementing the order, effective January 5, 1977. The agencies still have primary responsibility for enforcing Title VI; they are to submit enforcement programs to the Attorney General rather than the President for approval. Each agency is also to publish Title VI guidelines. The agencies themselves are to submit lists of programs which are covered by Title VI. These new regulations, as well as the rest of Nondiscrimination; Equal Employment Opportunity; Policies and Procedures 28 C.F.R. §§42.1-42.308, and Guidelines for the enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. §50.3 (1976), have the potential of providing a reasonable route for proper enforcement of Title VI. As always, however, the success of that venture will depend on the zeal with which it is pursued. If the new Secretary of HEW is speaking for this administration's stand on nondiscrimination in all federally financed programs, perhaps compliance with Title VI will be forthcoming.

The only definition of "program" in the new regulations is in 28 C.F.R. § 42.402(c): "'Program' refers to programs and activities receiving federal financial assistance of the type subject to Title VI." Earlier in the regulation, 28 C.F.R. § 42.102(d) (1976), the definition is as follows: "The term 'program' includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals . . . or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals. . . ." The agencies will need a more practical definition than is found in the regulations. It seems reasonable that Congress used this general terminology in the regulations because it was expected that each agency would have its own definition, depending on the way that agency works.

See also discussion infra note 68.

15E.g., United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) (suit was allowed against local zoning officials where they adopted an ordinance which prohibited construction of new multi-family dwellings and which effected the segregation of low-income blacks from all white neighborhoods); Otero v. New York Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (a housing authority had the burden of showing a claimed intent of preventing a "tipping" effect in a new housing project when it limited the number of apartments rented to nonwhites); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972) (denial of building permits to exclude low-income blacks from obtaining apartments in a tract already zoned for apartments was found to be a violation of the equal protection clause); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (a city was not allowed to suddenly declare a moratorium on the building of new subdivisions and tying in to the sewer system when a low-income housing project was proposed); Gautreaux v. Chicago Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967) (all blacks and tenants in or applicants for public housing had standing to challenge the validity of the site selection policy of a housing authority); El Cortez Heights Residents & Property Owners Ass'n v. Tucson Hous. Auth., 10 Ariz. App. 132, 457 P.2d 294 (1969) (a housing authority could not choose sites for federally funded housing projects which effectively resulted in a segregated racial composition in the area).

Commentators have reacted in other ways, with suggestions that the usual remedies do little to prevent the ultimate effect of "white flight" from the inner cities and that primary forces such as suburban exclusionary land use policies should be attacked. See, e.g., Ragsdale, Constitutional Approaches to Metropolitan Planning, 5 URA. LAW. 447, 451-52 (1972). Also, site selection of public housing projects is seen to be an important factor in controlling entrenchment of segregation in the center cities and acceleration of racial transition on the fringes of a ghetto. Id. at 464-67.

Most recently, the Supreme Court has carried its decision in Washington v. Davis, 426 U.S. 229 (1976), see note 10 supra, into effect as promised therein, 426 U.S. at 244 n.12. The Court reiterated that the lower courts could not take racially discriminatory impact alone as sufficient proof of a motive to discriminate, such motive being required to show a violation of the equal protection clause of the fourteenth amendment. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977). The village, which has only twenty-seven blacks out of 64,000 residents, refused to rezone an area to accommodate a low and middle-income housing development. The Court said that there must be a stark pattern of racial discrimination before impact alone would be sufficient for a finding of a violation of the
of the Act the government is charged with seeking voluntary compliance with an acceptable integration plan before considering termination of funding.\textsuperscript{16} Eliminating funds is not an automatic sanction. Indeed, one district court has recently stated that the government must go to great lengths to seek voluntary state compliance with the Act before moving to cut off federal funds.\textsuperscript{17} On that basis relatively few cases actually reach a point of eliminating federal financial assistance.\textsuperscript{18} Because the intention of the Act is to prevent or to end segregation and not to cause financial hardships,\textsuperscript{19} Title VI gives relatively vague guidelines regarding the cutoff of funds. An examination of the pertinent cases in light of the legislative history reveals the difficulty the courts have encountered in construing section 602 of the statute.

\textbf{Current Treatment of the Problem}

\textit{A Common Beginning to Analysis: Legislative History}

Courts have sought support for their varying analyses in the legislative history of the Act. However, because each court has cited only those parts of the Congressional Record which support its preconceived definitions,\textsuperscript{20} the legislative history has not proved to be very enlightening. Congress seems to have glossed over the problem of defining “program” in their haste to read the crucial issue of discrimination.\textsuperscript{21} One Representative in his discussion of section 602 hinted that a “program” referred to loan or grant money.\textsuperscript{22} He suggested that the bill could “provide that recipients of Federal financial assistance, as a condition to receiving the grant or loan, must enter into an enforceable undertaking against discrimination in the administration of the program.”\textsuperscript{23} This, equal protection clause. The other evidence that the Court suggested might be examined included the historical background of the decision, the specific sequence of events leading up to the decision, any procedural or substantive departures from routine, and the legislative or administrative history. \textit{Id.} at 564-65. The Court determined that the respondents (plaintiffs below)

simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory “ultimate effect” is without independent constitutional significance. \textit{Id.} at 565. The case was remanded for the lower court to deal with the statutory claims made. It seems likely that there will be a heavier burden on future plaintiffs to prove a violation of the equal protection clause of the fourteenth amendment. It remains to be seen exactly what effect this will have on Title VI actions.

\textsuperscript{18}See discussion infra note 68.
\textsuperscript{22}Id. at 2425 (Remarks of Rep. George Meader).
\textsuperscript{23}Id.
however, is merely one opinion, and there is no way of knowing whether it is truly representative of the other Congressmen who voted for the Act.\textsuperscript{24} This Representative's beliefs were emphasized, however, in a minority report of the bill made part of the legislative history. The report included an extensive list of "programs" which could theoretically be affected by a termination of funds.\textsuperscript{25} The object was obviously to present a "parade of horribles"; all of these "programs" could be denied funding under the Act, depriving a massive number of people of deserved local funds and services. The listed "programs" were particular grants or loans.

It appears from the legislative history that Congress focused on "pinpointing\textsuperscript{26}" the cutoff of funds to those recipients who used federal money to perpetuate discriminatory practices.\textsuperscript{27} Congress did not intend for discrimination in school programs to result in the termination of federal funding for unrelated programs such as highways or welfare.\textsuperscript{28} In response to those who feared that discrimination in one school district might cause a loss of funds for an entire state's educational programs, the original bill was amended to pinpoint the termination of funds to the offending program and political entity.\textsuperscript{29} Unfortunately, congressional concern for particular interests does not help to "pinpoint" an appropriate definition of "program" for practical application.

\textit{The Narrow View: Primary and Secondary Education}

Some courts have taken the approach that section 602, notably the "pinpoint provision,"\textsuperscript{30} should be read narrowly when applied to elementary and secondary schools; only the aid recipient most limited in size which was discriminating would have its funds terminated. Moreover, funds only indirectly tied to discriminatory acts would not be affected.

A case that defined "program" narrowly was \textit{Board of Public Instruction v. Finch}.\textsuperscript{31} A county had been receiving federal money under three

\textsuperscript{24}For a brief discussion of the difficulties of depending on legislative history, see Note, \textit{Board of Public Instruction v. Finch: Unwarranted Compromise of Title VI's Termination Sanction}, 118 U. Pa. L. Rev. 1113, 1117 (1970), citing Witherspoon, \textit{Administrative Discretion to Determine Statutory Meaning: "The High Road"}, 35 Tex. L. Rev. 65, 74 (1956).


\textsuperscript{26}The pinpoint provision of section 602 reads:

\begin{quote}
[B]ut such termination or refusal [of federal financial assistance] shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . .
\end{quote}

\textsuperscript{27}110 Cong. Rec. 7059, 7067 (1964).


\textsuperscript{29}The text of the pinpoint provision is found in note 26 supra.

\textsuperscript{30}141 F.2d 1068 (5th Cir. 1966).
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grants. Each one had its own objective, required separate plans and administrative approval and had individual provisions for appellate review.\textsuperscript{32} HEW terminated all three federal grants because the county board had failed to make satisfactory progress toward student and faculty desegregation. Parties affected by the breadth of the agency's action sought judicial review.\textsuperscript{33} HEW claimed that the term "program" was not meant to be construed so narrowly that each grant had to be judged separately by the agency.\textsuperscript{34} The court disagreed. Judge Goldberg, speaking for the court, held that "[s]chools and programs are not condemned en masse . . . the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own 'day in court.' "\textsuperscript{35} He also noted that even if HEW were correct in assuming that "program" was meant to encompass anything so broad as all educational activities administered by the county board, the statutory phrase "or part thereof" in section 602\textsuperscript{36} must carry some meaning, \textit{viz.}, the individual grants given to a school board for separate activities.\textsuperscript{37} Thus, HEW was not permitted to cut off funds for such programs as adult education and supplementary educational centers without findings that each program was either administered in a discriminatory manner or could not be separated from a discriminatory environment.

Another recent case giving the term "program" a narrow scope is Mandel v. HEW.\textsuperscript{38} In Mandel, governmental officials were enjoined from cutting off funds to Maryland colleges and universities and Baltimore city schools on the ground that HEW had not first sought voluntary compliance with the Act.\textsuperscript{39} The court severely reprimanded the agency for refusing to specify to city and state officials which educational programs were found discriminatory, and cited \textit{Board of Public Instruction v. Finch}\textsuperscript{40} with approval.\textsuperscript{41} The district court opined that it was virtually impossible

\textsuperscript{32}One grant was for education of children from low-income families, one for supplementary educational centers and one for adult education. \textit{Id.} at 1074 nn. 5-9.

\textsuperscript{33}Not all the cases discussed herein present the same procedural posture as \textit{Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969)}, \textit{i.e.}, a request for judicial review of an agency decision to terminate federal funds. Some are suits by citizens requesting equitable relief to compel an agency to act in conformance with Title VI and expedite the integration process, \textit{see} Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); some are suits against the federal agency itself for discriminating in its policies, \textit{see} Hills v. Gautreaux, 425 U.S. 284 (1976); and some cases arise before reaching the stage of termination of funds where the offending governmental entity may sue to prevent enforcement of an agency integration plan, \textit{see} Keys v. School Dist. No. 1, 413 U.S. 189 (1973). However, the procedural posture should have no effect on the definition of "program" for Title VI purposes. \textit{See} note 83 \textit{infra}.

\textsuperscript{34}414 F.2d at 1076.

\textsuperscript{35}\textit{Id.} at 1078.


\textsuperscript{37}\textit{Board of Pub. Instruction v. Finch, 414 F.2d at 1077-78, 1078 n.14.}


\textsuperscript{39}The action taken by HEW in this case resulted from the decision in Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). \textit{See} notes 47-50 \textit{infra} \& text accompanying.

\textsuperscript{40}414 F.2d 1068 (5th Cir. 1969).

\textsuperscript{41}HEW was willing to concede that federal financial assistance would not ultimately be terminated to all state and city educational "programs" because one portion of local
for a city or state to comply with the strictures of Title VI when the scope of the term "program" was not clear. The court stated: "It is paradoxical to assume that a recipient of federal funding, such as a state or a large city, could rectify any discriminatory programs within its system without ever being informed which program was considered by HEW to be operating discriminatively."42

Although the court dealt harshly with the agency's actions,43 it could not itself state unequivocally what funds Title VI permits to be cut off. The court could only guess at congressional intent and try to sort out the various possible interpretations. On appeal HEW argued that the court had misinterpreted Board of Public Instruction v. Finch.44 HEW claimed to have been acting against discrimination in the entire higher education system of Maryland and, therefore, argued that a statewide cutoff of funds was permissible.45 Although the Circuit Court of Appeals has yet to decide the appeal, acceptance of such a position may result in the agency's merely having to demonstrate that, after a finding of discrimination has been made, a particular program cannot be dealt with separately, thus permitting the cutoff of funds to both. Something approaching this view has,

operations was discriminatory. However, the Department stressed that its only duty was to find any discrimination by the recipient; the burden should then be shifted to the aid recipient to prove which, if any, programs were not administered in a discriminatory fashion and were not tainted by a discriminatory environment. Brief for Appellant at 57-62, Mandel v. HEW, appeal docketed, No. 76-1494 (4th Cir. June 30, 1976) [on file with the INDIANA LAW JOURNAL].


42Mandel v. HEW, 411 F. Supp. 542, 558 (D. Md. 1976). The court called HEW's actions whimsical and arbitrary and said the Department acted "with palpable disregard of the statutory prerequisites . . . ." Id. at 559.


44Id., citing Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). See note 47 infra & text accompanying. The court in Board of Public Instruction v. Finch indicated that such a cutoff was possible:

In finding that a termination of funds under Title IV [sic] of the Civil Rights Act must be made on a program by program basis, we do not mean to indicate that a program must be considered in isolation from its context. To say that a program in a school is free from discrimination because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position. Clearly the racial composition of a school's student body, or the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to that possibility, 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. Only in this way can a reviewing court know that the effects of the order entered by the agency have been limited to programs not in compliance with the Civil Rights Act.

45 Brief for Appellant, Mayor of Baltimore v. Mathews, appeal docketed, No. 76-1493 (4th Cir. June 30, 1976) [on file with the INDIANA LAW JOURNAL].
however, already been employed in connection with higher education systems.

**A Broader Analysis: Higher Education**

In the context of primary and secondary education, the courts have tended to equate a section 602 "program" with a school system or district. But in *Adams v. Richardson* the court defined "program" broadly, justifying differential treatment of primary and secondary schools, as opposed to institutions of higher learning, on the basis of their different needs and the different experience of HEW in dealing with each. Primary and secondary schools were apparently dealt with on a district-by-district basis as distinct from the problem of integrating higher education, a problem which "must be dealt with on a statewide rather than a school-by-school basis." *Adams*, which affords HEW some leniency in the review of its handling of higher education because of its lack of experience in that field, has opened the door to a broad definition of "program," for Title VI purposes, as a whole state.

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5This action may now be mandated by analogy to *Milliken v. Bradley*, 418 U.S. 717 (1974), where the Court determined that school integration plans could not cross district lines where only one district was shown to have discriminated. The Court may thus have defined a "program" for funding under Title VI as well, at least as far as primary and secondary educational systems are concerned.

6*Adams v. Richardson, 480 F.2d 1159, 1164 (D.C. Cir. 1973).*

7After the court's order in *Adams v. Richardson*, HEW made some effort at gaining compliance with the Act by offending school districts but did not move toward enforcement proceedings; plaintiffs sued again to force HEW to act according to section 602. The court said:

HEW has often delayed too long in ascertaining whether a complaint or other information of racial discrimination constitutes a violation of Title VI. HEW has also frequently failed to commence enforcement proceedings by administrative notice of hearing or any other means authorized by law although the efforts to obtain voluntary compliance have not succeeded during a substantial period of time.

*Adams v. Weinberger, 391 F. Supp. 269, 273 (D.D.C. 1975).* The court ordered HEW to follow the 1973 order and issued a supplemental order of its own to the agency to, *inter alia*, commence enforcement proceedings where appropriate. The court did not go so far as to order termination of funds, however, nor did it expand on a definition of "program." *Id.*

8*In Georgia v. Mitchell, 450 F.2d 1317 (D.C. Cir. 1971), a racial quota was found to violate the fifth and fourteenth amendments; HEW cut off funds for education in the whole state. The court, in adopting HEW's broad analysis of the statute, said:*

[T]he Department of Health, Education and Welfare was justified in utilizing the provisions of 42 U.S.C. § 2000d-1, which authorizes the termination of federal assistance in a state which once sponsored or aided racial discrimination in its schools and has failed to take affirmative steps to cure the impact of its past policies.

450 F.2d at 1320 (emphasis added).

This case was actually a collateral attack by the state on an unreported unappealed case in which the district court had enjoined the state board of education from disbursing public funds to those school districts which did not adopt satisfactory desegregation plans. United
A slightly different approach was taken recently by a district court in New York.\textsuperscript{52} A woman alleged that she had been unlawfully discriminated against by a private law school which had denied her admission but had admitted less qualified applicants under its minority admissions program. She asserted various governmental connections with the law school and the university\textsuperscript{53} and made claims under Title VI and Title IX.\textsuperscript{54} In denying the

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\textsuperscript{52}States v. Georgia, No. 69-12972 (N.D. Ga. Dec. 17, 1969). The circuit court chose to reach the merits anyway. Although the termination of funds may ultimately have affected only particular school districts, conforming to the traditional approach to primary and secondary level education, the circuit court permitted HEW to act at the state level.


\textsuperscript{54}Sections 601 and 602 of Title VI, 42 U.S.C. §§ 2000d, 2000d-1 (1970), are quoted in full at notes 1 \& 2 supra.

Title IX, Civil Rights Act of 1964, 20 U.S.C. § 1681 (1972) states:

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex, and

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number of percentage of persons of that sex in any community, State, section,
plaintiff's claims the court's determination amounted to a decision that the law school's minority admissions program did not constitute a "program" for Title VI purposes. The court did not find a sufficient nexus between the university, various divisions of which received federal financial aid, and the law school's allegedly discriminatory minority admissions program. The court indicated that the discrimination must be found in an area larger than one policy which is not directly funded by federal monies. Although the plaintiff sought a broad analysis of the statute, this court, in holding that a "program" was "broader" than contended, ultimately arrived at a result which could be called narrow. It found that the purposes of Title VI would best be served by not terminating unrelated educational funds of the university and the law school on the basis of discrimination alleged to exist in one small part of a subdivision of the university, even under the pinpoint provision.55

A Narrow Analysis: Housing

The courts have also had to deal with Title VI requirements in the field of housing. Some have chosen to interpret the Act narrowly, paralleling narrow interpretations in the educational field.

A 1972 Seventh Circuit case, Gautreaux v. Romney,56 while not specifically defining "program," held that discrimination by a city housing authority did not support the district court's order that HUD withhold funds from the Model Cities Program, which was not discriminatory. Judge Sprecher, in a strong dissent, argued that HUD was sufficiently

or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.


One state court specifically defined a "public educational program" as a junior college that was funded in all aspects by the city, but the court's emphasis focused on what made the institution public for a condemnation proceeding rather than what constituted a "program" for Title VI purposes. Sheppard v. DeKalb County Bd., 220 Ga. 219, 138 S.E.2d 271 (1964).

Another court determined that all mental institutions in the state of Alabama comprised a program from which funds were withheld upon a finding of segregation in those institutions. Marable v. Alabama Mental Health Bd., 297 F. Supp. 291 (M.D. Ala. 1969). See note 7 supra.

Finally, all of the city of Chicago's revenue-sharing plans were considered a single program subject to loss of funds when the city's police department, which received about 75 percent of those funds, was found to be discriminatory. United States v. City of Chicago, 395 F. Supp. 329 (N.D. Ill. 1975). See note 8 supra. The court found that this case could be distinguished from Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972).

56457 F.2d 124 (7th Cir. 1972).
involved with both the housing authority's policies and the Model Cities Program to justify termination of the latter's financial assistance.\textsuperscript{57} But the court held that the policy of the Act would be violated by withholding funds from the Model Cities Program because there was an insufficient nexus between that program and the activities of the housing authority.\textsuperscript{58}

Once again there was disagreement over the scope of "program" under Title VI with little definitive authority supporting either view. The majority felt that there ought to be some balancing\textsuperscript{59} between the alternative extremes of causing hardship to beneficiaries of city programs by withholding funds and allowing discriminatory practices to continue unchecked.\textsuperscript{60} It is doubtful, however, whether the Act can be effectively applied if such a balancing test is employed. Aside from the requirement that the agency seek voluntary compliance before proceeding to administrative cutoff of funds, the terms of section 602 require that the government not be a party to discrimination by financing an offending "program or activity." Since the terms of the provision are straightforward and absolute, it would seem wholly inconsistent with section 602 to follow the balancing approach suggested by the majority.\textsuperscript{61} But a different dimension has been added in the determination of the scope of the administrative cutoff of funds: the geographic boundaries of the termination.

The geographic approach was embraced by the Supreme Court in affirming the Seventh Circuit's 1974 decision, in what was essentially the...
same case as had been before it in 1972. The Court held that for the purposes of cutting off funds under Title VI, a "program" could include all housing funded by HUD in the entire metropolitan area of Chicago. The Supreme Court permitted a metropolitan remedy to be fashioned if necessary to eliminate discrimination. The housing funds for the entire metropolitan area of Chicago would be those terminated if there were insufficient compliance with the lower court's order. The Supreme Court thus acquiesced in a definition of "program" within the confines of congressional intent which is best suited to ending discrimination. The effect of the decision is that HUD must first look to the purposes served by the federal funding and then decide the geographical extent of the area affected by the discriminatory practices of the entity receiving the funds.

THE NEED FOR FLEXIBILITY IN INTERPRETING "PROGRAM"

Title VI provides discretion for federal agencies seeking to eliminate racial discrimination by aid recipients. First, the agency must seek voluntary compliance with section 601. If this approach fails, the agency has a choice: it may either cut off funds, or it may use "any other means authorized by law." The agency may, for example, refer the case to the Attorney General for enforcement. There are also a number of administrative remedies available other than fund termination. As has been noted: "This choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination." However, flexibility to allow agencies to avoid enforcement of Title VI is not

62Gautreaux v. Chicago Hous. Auth., 503 F.2d 930 (7th Cir. 1974), aff'd sub nom. Hills v. Gautreaux, 425 U.S. 284 (1976). The 1972 and 1974 decisions of the Seventh Circuit are not in conflict because the 1972 decision raised the question of whether a "program" covered funds intended for uses entirely separate from those administered by the discriminating entity, whereas the 1974 decision concerned funds intended for the same uses but questioned how great an area could be affected by the cutoff: the city alone or the entire metropolitan district.
64Id.
65For full text of sections 601 & 602 see notes 1 & 2 supra.
68Discretion as to what remedies to pursue under section 602 has generally resulted in inaction by federal agencies. See United States Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: A Reassessment (1973); Note, Enforcing a Congressional Mandate: LEAA and Civil Rights, 85 Yale L.J. 721, 724 n.17 (1976).
69For example, in approximately six years (July 1964 to March 1970) HEW commenced about 600 administrative proceedings against school districts found to be out of compliance with section 601. In 400 of these proceedings compliance was obtained with the mere threat of fund termination. In the remaining 200 cases funds were cut off; HEW subsequently found
the objective of such discretion. Rather, discretion is to be exercised so as to foster the use of the remedy most efficacious in the particular circumstances. In the context of the present discussion, the necessary flexibility is found in the definition of “program,” i.e., the scope of fund termination to force movement toward nondiscrimination in federally funded activities.

The term “program” could refer to either local programs or federal grant programs. Some courts, as that in Board of Public Instruction v. Finch, have preferred the latter interpretation, but it has been suggested that such an approach does not really make sense. Section 602 of Title VI refers to a program or activity for which federal financial assistance is available. As a federal program does not receive “federal aid,” the term “program” must mean a local program. It would be logical to assume that the use of the word “program” in the pinpoint provision has the same meaning. However, this only makes the meaning of “program” slightly less ambiguous as it removes only one of many possible interpretations.

Ultimately, federal impetus and stringent sanctions are necessary to make Title VI work. Local political entities are not inclined to take the initiative; the impetus to eliminate discrimination must come from the federal government. It must be able to move swiftly and efficiently, and the threat to terminate financial assistance must be real and substantial. The federal government, however, cannot provide this impetus if its is forced to take an inordinate amount of time to pin down each discriminatory act. Furthermore, if loss of federal funds which constitute a relatively minute portion of the aid received is the sole sanction for violating the Act, the local entity will feel little pressure to act. As a result, stringent sanctions must be devised and courts must be responsive to this need when interpreting the word “program.” Such stringent sanctions would involve relatively quick action by the agency to end funding for as large a political entity as necessary to encourage voluntary local compliance without prior

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that the districts were then complying with section 601 and the aid was reinstated. VI United States Comm’n on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, at 384-85 (1975). Although fund termination is obviously an excellent method of enforcement, it is rarely used. The Civil Rights Commission found that every agency it examined in 1974 had failed to end financial aid where it would have been appropriate. Id. at 653, 762-97.

This problem has been recognized by the courts as well. In Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975), the court recognized that although there was value in attempting voluntary settlement (as well as a statutory requirement), “there appears to be an over-reliance by HEW on the use of voluntary negotiations over protracted time periods and a ‘reluctance in recent years to use the administrative sanction process where school districts are known to be in noncompliance . . . .’ ” 391 F. Supp. at 271, citing III United States Comm’n on Civil Rights, The Federal Civil Rights Enforcement Effort—1974 at 131 n.1 (1975).

69414 F.2d 1068 (5th Cir. 1969).

fund termination. Thus, it may well be that the answer to the problem is to leave the definition in a flexible form and conclude that each situation merits its own course of action. That is certainly not a novel approach to the problem. Principles of equity, which have always authorized the courts to fit the remedy to the problem, have been relied on by the United States Supreme Court in resolving similar problems. The scope of a court's equitable powers, after a right and violation are shown, is broad, "for breadth and flexibility are inherent in equitable remedies." As stated by the Court in Hecht Co. v. Bowles:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. This flexible approach provides guidance for courts facing the problem of interpreting the scope of the word "program" for Title VI purposes.

Public institutions of higher learning are generally managed on a statewide basis and are likely to have uniform statewide policies. State universities and colleges are open on an equal basis to all state residents and are funded from state taxes. Indeed, it would be improper for there to be vastly different policies and standards from one branch of the same state university to another. Therefore, HEW should focus on the entire state's higher educational activities in determining first whether discrimination exists and later whether to terminate funding. The cutoff should be limited to aid affecting higher education and would not affect, for example, highways or housing funds. This approach is consistent with HEW's intention, as witnessed by its appeal from Mandel v. HEW.

On the elementary and secondary school levels, the Supreme Court has found that these schools traditionally are governed at the local level. Succinctly stated, the accepted belief is: "An essential, prominent, and traditional function of local government is the maintenance and operation of a public school system." There have been a number of rationales

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73 E.g., Milliken v. Bradley, 418 U.S. 717 (1974). The Court stated: Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.
74 Id. at 741-42.
presented to emphasize the necessity for this practice. Geographic criteria are almost universally mentioned as factors in requiring local control of schools. There is a desire to minimize the need for transportation of children, to save time and to lessen costs, inconveniences and hazards associated with any transportation program. Another factor is parent interest, which will also be encouraged if there is a possibility that parental influence will have some effect, a more likely occurrence when there is local control of the schools. Furthermore, local control gives a community a chance to contribute as much as desired in tax money to improve the schools for its own children. Consequently, the term "program" should cover all funds for educational purposes in the school "district," as defined by local practice. The Board of Public Instruction v. Finch approach is too strict and unworkable in forcing HEW to follow every federal dollar and determine whether it serves a discriminatory end.

In housing, HUD has the right to look to an entire metropolitan housing district to ascertain that there is no discrimination. In contrast to the treatment of schools, public housing is not considered a locally controlled program; furthermore, it is generally administered at the federal level by HUD. HUD is seen as better able to put national housing policies into effect than local housing authorities; the agency deals with "housing market areas," and is not limited to city boundaries in carrying out its duties. As stated by the Supreme Court:

That HUD recognizes this reality is evident in its administration of federal housing assistance programs through "housing market areas" encompassing "the geographic area 'within which all dwelling units . . . ' are in competition with one another as alternatives for the users of housing . . . ." The housing market area "usually extends beyond the city limits" and in the larger markets "may extend into several adjoining counties."
If there is discrimination in housing facilities, in the way sites are selected or the way tenants or potential tenants are treated, then aid can be withheld from that metropolitan area, including all funds relative to the "subject" of housing.

Similar decisions can be made as to highways, mental institutions, public transportation or any other subject. The definition of "program" should be determined on two levels. First, the agency should deal with the subject through the entity by which it is normally governed: by state, county, city or other special district. Then it should focus on the particular type of interest—higher education, lower levels of education, housing, highways, welfare—to determine the breadth of the discriminatory impact. Such a two-step flexible analysis will insure that a proper balance is struck in line with the intent of the statute. Federal money will not be used to support discrimination, nor will the cutoff of funds cause too many innocent beneficiaries of federal aid to suffer.

Although an open definition of "program" in Title VI may indeed cause an initial increment in administrative headaches, the increase in paperwork is a small price to pay in order to gain such a powerful tool for the elimination of discrimination in federally financed programs.

CONCLUSION

The administrative power to terminate federal assistance to programs under Title VI of the Civil Rights Act of 1964\(^4\) has caused considerable consternation in the courts. Attempts to fashion a single definition of the

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term "program" have resulted in confusion over how much funding should be terminated owing to discrimination in a federally assisted project. The problem cannot be solved by fashioning one inflexible definition to cover all that Title VI encompasses. A malleable definition is the necessary and appropriate response.

Primary and secondary educational programs are traditionally treated as a unit on a district-by-district basis; so should they be treated for Title VI purposes. However, this method does not suit higher educational systems; these are generally managed on a statewide basis. Housing, on the other hand, is divided into metropolitan areas by HUD and funded accordingly. There is no apparent reason for preventing HUD from examining these metropolitan housing areas as a whole for determination of discrimination and funding termination under Title VI. Similarly, the approach to other federal aid recipients for Title VI purposes should be flexible and individualized according to the way the monies are normally governed and the area actually served by the discriminatory program. In this way the federal agencies will best be able to effectuate the overall policies of the Act.

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