

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 80 - 1348

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

CITY OF PHILADELPHIA, et al.
Defendants-Appellees

APPEAL FROM ORDERS OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEES

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TABLE OF CONTENTS

	Page
INTRODUCTION; ISSUES PRESENTED-----	1
STATEMENT-----	2
ARGUMENT:	
I. THE COMPLAINT FAILS TO SET FORTH A SPECIFIC LEGALLY COGNIZABLE THEORY OF RACE DISCRIMINA- TION-----	6
A. Nothing on the face of the Complaint even suggests that the alleged discriminatory practices were purpose- ful-----	6
II. THE ATTORNEY GENERAL CANNOT TRANSFORM THE NONDISCRIMINATION PROVISIONS OF THE CRIME CONTROL ACT AND THE REVENUE SHARING ACT INTO GENERAL STATUTORY AUTHORITY TO CHALLENGE RACE DISCRIMINATION IN LOCAL MUNICIPALITIES-----	15
A. The source of the nondiscrimination man- date, Title VI of the Civil Rights Act of 1964, prohibited only discrimination specifically connected to particular federally funded programs or activities---	17
B. The Revenue Sharing Act will not support the Attorney General's cause of action----	23
1. The Attorney General has failed to plead facts demonstrating a nexus between the discriminatory conduct and the use of federal funds-----	23
2. The Attorney General has failed to plead the specific program or activity that receives federal funds and that discriminates-----	29
3. The Revenue Sharing Act does not support the Attorney General's prayer-----	34
C. The Crime Control Act will not support the Attorney General's cause of action----	37
1. The Attorney General has failed to plead a nexus between the discrim- inatory conduct and the use of federal funds-----	37

Table of Contents (continued)

	<u>Page</u>
2. The Attorney General has failed to plead the specific program or activity that receives federal funds and that discriminates-----	41
3. The Crime Control Act does not support the Attorney General's prayer for relief-----	43
III. THE ATTORNEY GENERAL IS SEEKING AN UNCON- STITUTIONAL INTERPRETATION OF THE FUNDING STATUTES-----	46
CONCLUSION-----	50

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Amersbach v. Cleveland,</u> 598 F.2d 1033 (6th Cir. 1979)	47
<u>Arritt v. Grisell,</u> 567 F.2d 1267 (4th Cir. 1977)	48
<u>Board of Public Instruction of Taylor</u> <u>County, Florida v. Finch,</u> 414 F.2d 1068 (5th Cir. 1969)	21,22,27,28, 30,37
<u>Bryan v. Koch,</u> 492 F.Supp. 212 (S.D.N.Y. 1980)	7,28,32,39
<u>Cannon v. University of Chicago,</u> 441 U.S. 677 (1979)	6,19,21
<u>Capel v. Lamb,</u> (Civ. V.L. 77-118 RDF) (D. Nev. Aug. 8, 1978)	34
<u>Cerro Metal Products v. Marshall,</u> 620 F.2d 964 (3rd Cir. 1980)	32
<u>Charles C. Steward Machine Co. v. Davis,</u> 301 U.S. 548 (1956)	47
<u>Chrysler Corp. v. Brown,</u> 441 U.S. 281 (1979)	32
<u>Daughters of Miriam Center for the Aged v.</u> <u>Matthews,</u> 590 F.2d 1250 (3rd Cir. 1978)	32
<u>Davids v. Akers,</u> 549 F.2d 120 (9th Cir. 1977)	48
<u>Dougherty County School System v. Harris</u> 622 F.2d 735 (5th Cir. 1980)	22,28,32,37, 39
<u>Emerson Elec. Co. v. Schlessinger,</u> 609 F.2d 898 (8th Cir. 1979)	32
<u>EEOC v. Greyhound Lines, Inc.,</u> Nos. 79-2824 and 80-1154 (3rd Cir. October 15, 1980) Slip Opinion	6,7,8,9
<u>Foremost International Tours v. Qantas Airways</u> 525 F.2d 281 (9th Cir. 1975)	45
<u>Friends of the Earth v. Carey,</u> 552 F.2d 25 (2nd Cir. 1977), App. for stay denied, 434 U.S. 1310 (1977)	47

<u>Gautreaux v. Romney,</u> 457 F.2d 124 (7th Cir. 1972)	22,27
<u>Halderman v. Pennhurst State School Hospital,</u> 612 F.2d 84 (3rd Cir. 1979) app. pending (United States Supreme Court Nos. 79-1404-1408, 1415, 1480)	48
<u>Harris v. White,</u> 479 F.Supp. 996 (D. Mass. 1979)	28,34,36,37
<u>Isleboro School Committee v. Califano,</u> 593 F.2d 424 (1st Cir. 1979)	28
<u>Ivanhoe Irrigation District v. McCracken,</u> 357 U.S. 275 (1958)	47
<u>Junior College District of St. Louis,</u> St. Louis County, Missouri v. Califano, 597 F.2d 119 (8th Cir. 1979)	28
<u>Lau v. Nichols,</u> 414 U.S. 563 (1974)	11,40
<u>Lewis-Mota v. Secretary of Labor,</u> 469 F.2d 478 (2nd Cir. 1972)	32
<u>Lodge 1858 of American Federation of</u> <u>Government Employees v. Webb,</u> 580 F.2d 496 (D.C. Cir. 1978)	45
<u>Maryland v. E.P.A.,</u> 530 F.2d 215 (4th Cir. 1976), <u>vacated on other grnds.,</u> 431 U.S. 99 (1977)	47
<u>Massachusetts v. United States,</u> 435 U.S. 444 (1978)	47
<u>Mayor and City Council of Baltimore v. Matthews,</u> 562 F.2d 914, 924 (4th Cir. 1977) (<u>en banc</u>), <u>vacated on rehearing,</u> 571 F.2d 1273 (4th Cir. 1978) (<u>en banc</u>)	28
<u>Mescall v. Burrus,</u> 603 F.2d 1266 (7th Cir. 1979)	7
<u>NAACP v. Medical Center, Inc.,</u> 599 F.2d 1247 (3rd Cir. 1979)	6,19,36
<u>National League of Cities v. Usery,</u> 426 U.S. 833 (1976)	46,47,48,49
<u>Officers for Justice, etal. v. Civil</u> <u>Service Commission,</u> 18 EPD ¶8800 (N.D. Cal. 1978)	34

<u>Oklahoma v. Harris,</u> 480 F. Supp. 58, (D.D.C. 1979)	47
<u>Oklahoma v. United States Civil Service</u>	46,47,49
<u>Commission, 330 U.S. 127 (1946)</u>	
<u>Otero v. Mesa County Valley School District No. 51,</u> 470 F. Supp. 326 (D. Colo. 1979)	7
<u>Peel v. Florida Dept. of Transportation,</u> 600 F.2d 1070 (5th Cir. 1979)	47
<u>Personnel Administrator of Massachusetts v.</u> <u>Feeney,</u> 442 U.S. 256 (1979)	6,7
<u>Regents of University of California v. Bakke,</u> 438 U.S. 265 (1978)	7
<u>Resident Advisory Board v. Rizzo,</u> 564 F.2d 126 (3rd Cir. 1977)	6
<u>Scott v. City of Anniston,</u> 597 F.2d 897 (5th Cir. 1979)	47,48
<u>Seattle University v. United States Department</u> <u>of Health, Education and Welfare,</u> 621 F.2d 992 (9th Cir. 1980)	28
<u>Shawer v. Indiana University of Pennsylvania,</u> 602 F.2d 1161 (3rd Cir. 1979)	48
<u>United States v. Baltimore County,</u> 17 EPD ¶8509 (D. Md. 1978)	34
<u>United States v. Board of Education of</u> <u>Garfield Heights,</u> 581 F.2d 791 (6th Cir. 1978)	45
<u>United States ex rel. Chase v. Wald,</u> 557 F.2d 157 (8th Cir. 1977)	33
<u>United States v. City of Chicago,</u> 549 F.2d 415, 440 (7th Cir. 1977)	27,31,36,49
<u>United States v. City of Miami, Fla.,</u> 614 F.2d 1322 (5th Cir. 1980)	45
<u>United States v. Comm. of Virginia,</u> No. 76-0623-R (E.D.Va. Apr. 7, 1977)	34
<u>United States v. County of Milwaukee,</u> 457 F.Supp. 1009 (E.D. Wisc. 1978)	36

<u>United States v. International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 1, 438 F.2d 679 (7th Cir. 1971)</u>	11
<u>United States v. Larianoff, 431 U.S. 864 (1977)</u>	33
<u>United States v. School District of Ferndale, 460 F.Supp. 352, <u>rev'd on other grnds.</u> 616 F.2d 895 (6th Cir. 1980)</u>	27
<u>United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978)</u>	19,41
<u>United States v. State of New Jersey, 473 F.Supp. 1199 (D.N.J.1979)</u>	28
<u>Usery v. Allegheny County Institution District, 544 F.2d 148 (3rd Cir. 1976)</u>	48
<u>Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971)</u>	45
<u>Village of Arlington Heights v. Metropolitan, Housing Development Corporation, 429 U.S. 252 (1977)</u>	6,7
<u>Vitco, Inc. v. Government of the Virgin Islands, 560 F.2d 180 (3rd Cir. 1977)</u>	33
<u>Statutes and Regulations:</u>	
Administrative Procedures Act, 5 U.S.C. §551 <u>et seq.</u>	28,32,33
Civil Rights Act of 1964, Title VI., as amended, 42 U.S.C. 2000d <u>et seq.</u>	passim
Education Amendments of 1972, Section 901(a) Title IX, 20 U.S.C. 1681(a)	6
Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. 3701 <u>et seq.</u>	passim
Section 301(b), 42 U.S.C. 3731(b)	37
Section 518(a), 42 U.S.C. 3766(a)	36,38,49
Section 518(c)(1), 42 U.S.C. 3766(c)(1)	2,37
Section 518(c)(2), 42 U.S.C. 3766(c)(2)(E)	40
Section 601(i), 42 U.S.C. 3781(i)	42
Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197 (1973) Section 518(c)(1)	18

Justice System Improvement Act of 1979,
 Pub. L. No. 96-157, 93 Stat. 1167 (1979) 18

Public Works Employment Act of 1976,
 Section 207, 42 U.S.C. 6727 15

State and Local Fiscal Assistance Act of 1972, as
 amended, 31 U.S.C. 1221 et seq. passim
 Section 122(a), 31 U.S.C. 1242(a) 2
 Section 122(g), 31 U.S.C. 1242(g) 36

State and Local Fiscal Assistance Act of 1972,
 P.L. 92-512, 86 Stat. 919 (1972) 18
 Section 122(a), 86 Stat. 932 18

28 C.F.R. 42.202(k), 45 Fed. Reg. 28706 (1980) 39

Miscellaneous:

Civil Rights Aspects of General Revenue Sharing:
 Hearing Before the Subcommittee on Civil
 and Constitutional Rights of the House
 Committee on the Judiciary, 93rd Cong.,
 1st Sess. (1973) 31

Civil Rights Aspects of General Revenue Sharing:
 Hearings Before the Subcommittee on Civil
 and Constitutional Rights of the House
 Committee on the Judiciary, 94th Cong.,
 1st Sess. (1975) 24,26,27,35

110 Cong. Rec. (1964)
 2067 20
 2463 17
 2467 20
 2468 20
 2480 21
 2483 17,20
 2484 20
 2485 17,20
 2486 19
 2487 20
 2490 21
 2493 21
 2494 21
 2495 21
 2497 21
 6544 20
 6545 17,20
 7060 20

114 Cong. Rec. (1968)	
12828	38
13216	38
14768-69	38
14770	38
14776	38
14777	38
118 Cong. Rec. (1972)	
21724	30
21731	23
29755	30
29865-67	23
119 Cong. Rec. (1973)	
20070-20071	18, 43, 45
20097	18
22045	43
22059	38
22075	18, 38, 44
122 Cong. Rec. (1976)	
17071	48
17075	26
17087	26
17091	26
17354-57	26, 48
17364-74	26, 48
28334	42
28490	39
28491	42
28514	39, 43, 44, 45
28515	44
29879	48
29910	48
General Revenue Sharing: Hearings Before the House Committee on Ways and Means, 92nd Cong., 1st Sess. (1971)	29, 30, 48
General Revenue Sharing: Hearings on H.R. 13367 Before the Senate Committee on Finance, 94th Cong., 2nd Sess. (1976)	25, 26, 35
7 Hearings Before the Committee on the Judiciary on 5.241, 96th Cong., 1st Sess. (1979) (Justice System Improvement Act)	41
H.R. Doc. No. 92-47, 92nd Cong., 1st Sess. (1971)	23, 24
H.R. Rep. No. 92-1018, 92nd Cong., 2nd Sess. (1972) . .	30, 48
H.R. Rep. No. 93-249, 93rd Cong., 1st Sess. (1973) . . .	6, 17, 18
H.R. Rep. No. 94-1155, 94th Cong., 2nd Sess. (1976) . . .	40

H.R. Rep. No. 94-1165, Pt. I-III, 94th Cong., 2nd Sess. (1976)	.25,45
H.R. Rep. No. 94-1720, 94th Cong., 2nd Sess. (1976) . . .	.26,36
H.R. Rep. No. 94-1723, 94th Cong., 2nd Sess. (1976) . . .	.42,45
H.R. Rep. No. 96-163, 96th Cong., 1st Sess. (1979). . .	.41
H.R. Rep. No. 96-655, 96th Cong., 1st Sess. (1979). . .	.41
H.R. Rep. No. 96-695, 96th Cong., 2nd Sess. (1979). . .	.43
Law Enforcement Assistance Administration:	
Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 93rd Cong., 1st Sess. (1973)	.17,19,38,42
Law Enforcement Assistance Administration:	
Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 94th Cong., 2nd Sess. (1976)	.38, 42,44
Note: "Enforcing a Congressional Mandate: LEAA and Civil Rights", 85 Yale L.J. 721 (1976)	.7
Revenue Sharing: Hearings on H.R. 14970 Before the Senate Committee on Finance, 92nd Cong., 2nd Sess. (1972)	.48
Revenue Sharing: Hearings Before the Sub- committee on Intergovernmental Relations of the Senate Committee on Government Operations, 93rd Cong., 2nd Sess. (1974)	.35
S. Rep. No. 1097, 90th Cong., 2nd Sess. (1968).	.37
S. Rep. No. 92-1050, 92nd Cong., 2nd Sess. (1972)	.48
S. Rep. No. 94-1207, 94th Cong., 2nd Sess. (1976)	.26,35,48
S. Rep. No. 96-142, 96th Cong., 1st Sess. (1979).	.18,43,44
State and Local Fiscal Assistance Act (General Revenue Sharing): Hearings on H.R. 6558 and Related Bills Before a Subcommittee of the House Committee on Government Operations, 94th Cong., 1st Sess. (1975)	.24,25,26,30,35, 45
"Toward New Safeguards on Conditional Spending: Implications of <u>National League of Cities v. Usery</u> ", 26 Amer. Univ. L. Rev. 726 (1977)	.47
Weekly Compilation of Presidential Documents, Vol. 8, No. 43 (October 20, 1972).	.24,48

INTRODUCTION; ISSUES PRESENTED

The Court's questions, at oral argument on October 7, 1980, concerning the legal sufficiency of the funding statute theories were somewhat broader than those briefed by the Attorney General. The Court asked:

(1) Whether, after the trial court eviscerated the Complaint by dismissing the "Due Process" claims, the Attorney General should have recast the race discrimination passages into a coherent pleading rather than appealing and rejecting the opportunity offered by the Court below to amend (Tr. 39);

(2) Whether the funding statutes require specific allegations of a nexus between the program or activity funded and the claims of racially discriminatory conduct and, derivatively, a specific description of that program or activity (Tr. 14, 16-17);

(3) Whether sweeping, structural injunctive relief is available under the funding statutes, in lieu of a specific fund termination remedy, for alleged discriminatory use of specific federal funds (Tr. 8);

(4) Whether the administrative processes, provided under the funding statutes, should have been invoked before the Attorney General brought this lawsuit (Tr. 7-8).^{1/}

^{1/}Each of these issues, in turn, involve subsidiary issues, which also will be addressed herein, such as whether if a "nexus" is not required, or if structural relief is available, are the statutes constitutional or whether the Attorney General is relying upon invalid administrative regulations and interpretations to support his broad view of "program or activity."

STATEMENT

As the Attorney General has emphasized, the thrust of his Complaint was against "Due Process" violations allegedly committed by Philadelphia Police Department officials.^{2/} Causes of action under the funding statutes,^{3/} however, require allegations of a pattern or practice of race discrimination in a federally funded program or activity.

The twenty-seven page, single count Complaint contains infrequent references to race discrimination. The heart of the Complaint is ¶¶ 20-42 (A. 16-29). Under the heading of "FACTS," the Attorney General challenges certain "practices" of the Philadelphia Police Department and other municipal agencies grouped in nine categories.

Summarizing those categories one by one:

- ° Internal Procedures (¶30, A. 16-17): here, the Attorney General challenges alleged investigative "practices," Medical Examiner practices, Prison practices, charging functions, physical abuse but not on the basis of race discrimination;
- ° Street Procedures (¶31, A. 17-18): here, the Attorney General challenges alleged random stopping, random closing of public areas, abuse of arrestees, searches and seizures, detentions but not on the basis of race discrimination (he also does challenge "racial slurs");
- ° Use of Deadly Force (¶32, A. 18-19): here, the Attorney General challenges alleged shootings of nondangerous, innocent and/or non-resisting people but not on the basis of race discrimination;

^{2/}Main Brief of Appellants, p. 10; Reply Brief of Appellants, p. 1

^{3/}State and Local Fiscal Assistance Act of 1972, as amended, (the "Revenue Sharing Act") 31 U.S.C. §1242(a) and Omnibus Crime Control and Safe Streets Act of 1968, as amended (the "Crime Control Act") 42 U.S.C. §3766(c)(1).

- ° Cover Charges (§33, A. 19-20): here, the Attorney General challenges alleged "practices" of multiple, unjustified charges and charging to intimidate people but not on the basis of race discrimination;
- ° Fragmentation, Conflict of Interest, and Discrimination in Investigation of Abuse (§34, A. 20-24): here, the Attorney General challenges alleged "practices" of investigation of abuse by the Homicide Division, the Detective Bureau, Internal Affairs Division and District commanders, in part, on the basis of race discrimination, alleging that prisoners and persons shot by police "contain an overwhelming preponderance" of black and Hispanic persons, "whereas other categories of alleged abuses do not" and that "insofar as the intent and/or effect" of investigation of abuse is that prisoner complaints and shootings "receive investigations that are inferior to" other types of abuse complaints, this constitutes race discrimination;
- ° Investigative Practices (§'s 35-39, A. 22-27): here, the Attorney General challenges alleged "practices" of pressuring witnesses to take lie detector tests, withdraw complaints, altering conclusions, impeding investigations, overlooking evidence but not on the basis of race discrimination;
- ° Disciplinary System (§40, A. 27-28): here, the Attorney General challenges alleged "practices" of not disciplining and sometimes commending officers accused of abuse "of persons including discriminatory infliction of abuse on blacks and Hispanics" (A. 27).
- ° Training (§41, A. 29): here the Attorney General challenges alleged inadequate training but not on the basis of race discrimination;
- ° Harassment of Critics (§42, A. 29): here, the Attorney General alleges that certain unnamed police harass critics, "political leaders and racial minority groups" and certain "police officers, including, in particular, black police officers."

- ° Catch-all Clause (§48, A. 32): here, the Attorney General adds a qualified legal equation which, presumably, is the essence of his legal theory of discrimination by charging that "insofar as (the practices of §29-42 have a disparate impact upon black and Hispanic persons" they amount to intentional race discrimination.

Parsing the occasional references to race discrimination, the following emerges:

(1) the thrust of the entire Complaint is denial of rights of persons regardless of race, with infrequent passing references to race discrimination;

(2) the theory of race discrimination shifts between

(a) "intentional" discrimination "insofar as " a practice has a "disparate impact" on race (§48, A. 32);

(b) discrimination by "intent and/or effect" insofar as a practice amounts to a "disproportionate treatment" of blacks and Hispanics (§'s 1, 34, A. 9, 22).

(3) investigations (§34) and disciplinings (§40) of officers charged with shooting or prison abuse are vaguely charged as discriminatory because of "disproportionate" numbers of black and Hispanic victims and complainants although the conduct itself (i.e., shooting, prison practices) is not challenged as discriminatory (§'s 32, 34(e));

(4) "slurs" (§31) and "harassment of critics" also are challenged as "patterns" of "discrimination."

Times, places, names, and dates of "slurs," "harassment," discriminatory investigation or discipline are not alleged. Three attempts to reply to defendants' interrogatories also were submitted below.

After eviscerating the Due Process portions of the Complaint by rejecting the Attorney General's theories of implied rights," the lower Court ruled that only a "dimunitive dwarf" of the original Complaint remained. (A. 99) Because the remains of the Complaint contained vague, scattered, often inconsistent references to race discrimination, the trial Court dismissed the Complaint but provided an opportunity for the filing of an amended and clarified Complaint. The Attorney General elected to stand on what remained.^{4/}

^{4/}At oral argument before this Court, Assistant Attorney General Drew S. Days shed some light on that curious decision:

THE COURT: I'm curious to know why the United States (sic) did not amend the complaint when given the chance to do so?

MR. DAYS: Well, we felt very strongly, your Honor, that we were complying with the federal rules of civil procedure and the discovery requirement and that the way the judge treated this case, really, was not consistent with the federal rules.....I can understand the Court's concern about the government's unwillingness to proceed in this way, but I think it was the end of a process in which our efforts to comply with the federal rules were completely frustrated. (Tr. 39-41) (emphasis added)

ARGUMENT

I. THE COMPLAINT FAILS TO SET FORTH A SPECIFIC, LEGALLY COGNIZABLE THEORY OF RACE DISCRIMINATION

A. Nothing On The Face Of The Complaint Even Suggests That The Alleged Discriminatory Practices Were Purposeful

As the Attorney General has twice urged in prior Briefs, his claims under the funding statutes are "essentially the same" as those advanced (and since abandoned) under the equal protection clause of the United States Constitution.^{5/} Putting aside the question of whether the scope of the equal protection clause is as limited as the scope of the nondiscrimination clauses of the funding statutes (which need not be decided because the race discrimination claims are based upon the statutory clauses), the standard for race discrimination under equal protection is "invidious, discriminatory purpose."^{6/} His concession that that is the standard under the funding statutes clearly is correct.^{7/} Hence, his allegations of "discriminatory effect" are improper and confusing.

^{5/}See Appellant's Main Brief, p. 6, fn. 8; Appellant's Reply Brief, p. 1, fn. 1.

^{6/}Resident Advisory Board v. Rizzo, 564 F. 2d 126, 142 (3rd Cir. 1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

^{7/}Whether a standard of "disparate impact" suffices in a Title VII case, see, e.g., EEOC v. Greyhound Lines, Inc., Nos. 9-2824 and 80-1154 (3rd Cir., October 15, 1980) Slip Op. p. 4, fn. 3, more is required under Revenue Sharing and the Crime Control Act. The nondiscrimination provisions of those two Acts were modelled on Title VI of the Civil Rights Act of 1964. H.R. Rep. 93-249, 93rd Cong. 1st Sess. (1973) at 1973 USCAAN 1733-34; Cf. Cannon v. University of Chicago, 441 U.S. 677, 694-95 (1979) (Title IX); NAACP v. Medical Center, Inc. 599 F.2d 1247, 1258 (3rd Cir. 1979). See also, Opposition

(continued)

Assuming arguendo that allegations of "disparate impact" somehow could suffice in a pleading of intentional discrimination under the funding statutes, the allegations herein are inherently illogical and insufficient. Thus, in ¶48 of the Complaint (A. 32), the Attorney General sets forth his equation that "disparate impact" equals "intent" and urges further that

7/ (continued)

Brief of the United States to Defendant's Motion to Dismiss submitted below on November 21, 1979 where, in the footnote on page 9, the Attorney General argued that "the anti-discrimination clauses" of Title VI, Revenue Sharing and LEAA are "to be considered in pari materia on their common issue of law."; see also, Note, "Enforcing a Congressional Mandate: LEAA and Civil Rights," 85 Yale L.J. 721, 728 (1976). In Village of Arlington Heights, supra at 265 and Personnel Administrator of Massachusetts, supra at 279, the Supreme Court held that the Constitutional standard of discrimination requires a showing of invidious, purposeful, intentional discrimination. This standard has been applied to Title VI, see, e.g., Regents of University of California v. Bakke, 438 U.S. 265, 339-352 (1978) (Brennan, J. and three other Justices concurring); Bryan v. Koch, 492 F. Supp. 212, 229-232 S.D.N.Y. 1980); Otero v. Mesa County Valley School District No. 51, 470 F. Supp. 326 (D. Colo. 1979) and has been suggested by this Circuit Court and others regarding other civil rights acts. RAB v. Rizzo, supra at 142 (Fair Housing Act); Mescall v. Burrus, 603 F. 2d 1266, 1271 (7th Cir. 1979) (§1983); EEOC v. Greyhound Lines, Inc., supra (Title VII). Thus, it also would apply to Revenue Sharing and Crime Control Acts. Furthermore, a "disparate impact" test, alone or to plead a prima facie case of "intent," makes little sense in funding statute cases. It would enable Attorneys General to bring governments into court to defend themselves, ultimately, not on statistics but on the intentions and purposes of governmental decisions with the Attorney General not even having to allege anything suggesting invidious purpose. See, e.g., Bryan v. Koch, supra. On occasion, governmental decisions, involving federally-funded programs, in the abstract and in isolation, might benefit a higher percentage of e.g. one racial or ancestry group than another. For example, building a federally funded drug rehabilitation center in a largely Irish neighborhood probably would benefit more non-Asiatics than Asiatics or more Irish-Americans than Scandanavians. Subjecting that decision to an Attorney General's suit based solely on that kind of "impact" allegation could interfere unnecessarily with the decision-making processes of local government and may waste more resources than the amount of funds involved. In short, "disparate impact" allegations are besides the point.

- ° as a result of allocation of investigative resources "an overwhelming preponderance" of certain black and Hispanic complainants and prisoners receive "inferior" investigations (§34, A. 20).
- ° as a result of disciplinary procedures (§40, A. 27) and treatment of critics (§41, A. 29), persons, "including blacks and Hispanics" are mistreated.

However, the Attorney General never demonstrates why he believes that the alleged treatment of critics, complainants or prisoners has occurred because those persons are black or Hispanic rather than critics, complainants or prisoners. Allegations of harassment, verbal abuse and the condonation of physical abuse are not allegations of conduct particular to any race, EEOC v. Greyhound Lines, supra, p. 4, fn 3.^{8/} For example, the fact that persons harassed "include" blacks and Hispanics could reflect only that critics of the police include blacks and Hispanics rather than a policy of singling out critics who are harassed to insure that that group includes blacks and Hispanics.

Another striking example of the Attorney General's attenuated allegations of "intent" is his use of numerical frames of reference in §34 (A. 20). There, he urges that methods of investigating shooting charges and prisoner complaints are inferior and, therefore, amount to intentional discrimination because a

^{8/}This, of course, is said not in justification of any allegations of racially color blind but otherwise improper conduct (all of which have been denied herein), but in demonstration of the inadequacy of race discrimination charges based solely on such allegations.

"disproportionate" number of blacks and Hispanics complain of shooting or prison abuse. However, the Attorney General offers nothing to explain why he believes that investigations are inferior for racial reasons. In fact, he challenges prison "practices" or shooting "practices" not as discriminatory, but only on "Due Process" grounds. (See ¶¶ 32, 37)

Moreover, his claims of "disproportionate numbers" has no point of reference. Disproportionate to what? To the demographics of the entire prison population? To the racial mix of persons arrested? To all persons in Philadelphia? In short, the "impact" is never established.

Similarly, there are no allegations connecting the charges of discriminatory conduct with racially unequal results. The fact that more prison complaints allegedly are filed by blacks and that those complaints allegedly are not investigated properly, could suggest a number of conclusions (other than that blacks are being singled out for inferior investigations). For example, if the prison population were almost completely black or if only black prisoners filed complaints, one would expect that alleged improper investigations would involve a high percentage of blacks. However, those alleged improprieties might well occur for racially neutral reasons.

In short, no "causal connection" is pleaded between any challenged practice and "a racially unequal result," EEOC v. Greyhound Lines, supra at 10. "(A) policy does not have a disparate impact unless it is the cause of that impact." Id. The connections are missing in the Attorney General's pleading; he cannot

force an entire city police department into involved, consuming Court proceedings by pleading statistical happenstance and no more.—^{9/}

Thus, both because allegations of "disparate impact" have no place in a discrimination Complaint under the funding statutes and because these allegations of "disparate impact" are insufficient, the lower Court was correct in dismissing the remains of the Complaint.

B. The Race Discrimination Allegations Are Vague, Confusing And Insufficient

Aside from utterly failing to allege facts satisfying the correct legal standard for race discrimination, those portions of the Complaint suffer from other defects.^{10/}

^{9/} The three sets of replies to interrogatories do not cure the absence of allegations of purposeful discrimination. First, as the Attorney General himself recognizes, in testing the sufficiency of the allegations in the Complaint, the only "pertinent facts are those alleged in the Complaint." Appellant's Supplemental Brief, p. 2, fn. 4. Appellant had an opportunity to amend his Complaint below, and elected not to do so. He cannot attempt to do so now by reference to unfocussed, often irrelevant interrogatory replies. Second, the replies, at best, only contain more general allegations of disparate impact. For example, at page 9 of the "Second Reply," the Attorney General sets forth the "racial percentage" of prisoner complaints. He does not even tie this to the racial demographics of the prison population. Moreover, as discussed earlier, these percentages by themselves, do not establish that the method of investigating those complaints was invidiously inferior.

Similarly, in the Third Reply at page 65 et seq., the Attorney General refers to three studies purportedly showing some "racially discriminatory impact" from police use of force. However, the first study is from 1968-1970 (6 years before the Attorney General's beginning point for his allegations (see A. 220), and the other two studies mention nothing about race discrimination. Moreover, the Complaint does not even allege racially discriminatory use of force, but rather racially discriminatory investigation of the use of force (§34, A.20). No studies on that are offered.

^{10/} See also Appellees' Main Brief, pages 51-60; Appellees' Surreply Brief, pages 9-10. ↑

First, the allegations are laced with ambiguity. In pleading pattern or practice suits, the Attorney General is required to set forth "substantial" and "fundamental" facts demonstrating his theory of the "pattern or practice." See, e.g., United States v. International Assn. of B.S. & O.I.W., Local No. 1, 438 F. 2d 679, 681 (7th Cir. 1971); Lau v. Nichols, 414 U.S. 563 566 (1974); and Main Brief of Appellees, page 59. Not only are there no "substantial facts," there is not even a coherent statement of the activity constituting a "pattern or practice" of race discrimination.

Thus, harassment of critics including "discriminatory harassment of black and Hispanic persons" is alleged, but without facts it is not possible to determine what is meant by harassment or whether it recurs with enough frequency to be called a "pattern." Further, without facts, it is not clear how the Attorney General is differentiating "harassment" from "discriminatory harassment." Similarly, "racial slurs" are alleged but, incredibly, no specifics are set forth to determine what is a "slur" or what "race(s)" are involved.

Regarding "inferior" investigation of abuse complaints, the Attorney General charges that the PPD "pursue(s) disciplinary practices" which condone abuse "of persons" including "blacks and Hispanics." (§40 A. 27-28) Is this a theory that the entire system of discipline is illegal regardless of the race of the abuse victim? Or is it a theory of illegality based solely on race? Or is it a theory that the system of discipline is illegal regardless of race and somehow even more illegal for blacks and

Hispanics? Without further allegations, a defendant cannot possibly know how to respond to these charges.

Second, only general legal standards of race discrimination are alleged. There are no incidents from which an "intent" to establish a "pattern" even could be inferred. Moreover, no statistical frames of reference are given to understand "disparate impact" or "effect" of any "practices." For example, what are the relevant population groups, and do they change depending upon whether the Attorney General is alleging a disparate impact on blacks from physical abuse of prisoners or from treatment of complainants or critics?

Third, the shifting, sliding legal theories for discrimination amount to utter confusion which alone supports the dismissal below. What does a charge of "intent and/or effect" of discrimination mean? Must a defendant demonstrate that any given "practice" does not intentionally discriminate and does not have that "effect," does not intentionally discriminate or have that effect, does not have a "disparate impact" and does not inflict "disproportionate abuse," or does not have a "disparate impact" or inflict "disproportionate abuse." Moreover, the Attorney General, in ¶48 of the Complaint, compounds the confusion by urging that "insofar as" any given "practice" has a "disparate impact," that constitutes intentional discrimination. But when does this "insofar as" clause apply? Why should the Attorney General be permitted to rely on such conditional pleading?

Aside from the question of which of these legal standards is correct, the Attorney General cannot plead them all (each

apparently either superseding or qualifying the other) and leave the defendants at their peril of guessing which might apply to them or of having to prepare multiple, alternative defenses to cover all possibilities.

Fourth, as developed in our earlier Briefs, nothing is connected by event, time or place to any specific defendant. In his Supplemental Brief, the Attorney General has elevated the problem to new levels. For the first time, he has conceded that he has not been, and will not be, seeking relief against "other municipal agencies" because other offices and agencies (e.g., Office of the Medical Examiner, Superintendent of Prisons, Finance Department, Office of Managing Director, Office of Mayor) were named solely because of their "relation" to the Police Department. Appellant's Supplemental Brief, pages 2-3. This means that no official outside of the Police Department is properly a defendant in this lawsuit. No relief is being sought against them.

Moreover, the various Police Department defendants were named in a Complaint substantially directed at "Due Process" claims. Given the evisceration of the Complaint and few remaining race discrimination charges, it is completely unclear which Police defendants even should remain. Thus, should some funding statute theory somehow survive this Appeal, the Attorney General could not proceed against most of the official positions originally sued.^{11/}

^{11/}The Attorney General also would have to reconsider his entire set of allegations in light of any legal and factual considerations resulting from the passage of time since the Complaint was dismissed last December such as mootness, changed circumstances, etc. See e.g., Main Brief of Appellees, p. 4, fn. 4.

In sum, for all of the reasons set forth herein and in our earlier Briefs and argument, the allegations in the Complaint (which the Attorney General himself urges are all that are before this Court) are woefully lacking in specificity and coherence.^{12/} Rather than standing on those few, vague allegations of discrimination because he did not like the "way the judge treated this case" (Tr. of oral argument, p. 39), the Attorney General should have amended below. Because he did not, he has lost his opportunity to do so henceforth.

^{12/}

Again, the answers to interrogatories, if they are even considered, confuse matters further. For example, Plaintiff's first reply purports to describe "street practices" which are "racially discriminatory." The "description" is nothing more than 29 pages of a computer printout listing injuries suffered by certain persons (of undetermined race). At pages 5-6 and 9 of the "Second Reply," he describes one single incident (the "Vance Bradley matter") again, not connecting this to a purposeful pattern of anything. The Third Set of Replies also confuses more than it clarifies. For example, pages 3 and 4 of these Replies seem to be directed to the investigation of Complaints and the infliction of abuse even though the Complaint never sets forth a theory of racially motivated infliction of abuse. (See ¶34, A. 20-24). After criticizing the investigative procedures (apparently on Due Process grounds), the Attorney General merely adds his usual addendum: persons so mistreated were "overwhelmingly of black and Hispanic origin." That is the sum and substance of the Attorney General's effort to allege facts showing a pattern or practice of intentional, purposeful, invidious discrimination. See also, Third Reply, p. 98 ("large proportion" of excessive use of force is on minorities"). Even under a lesser standard of discrimination - e.g., an "effect" or "statistical" standard - these allegations are insufficient. A "large proportion" relative to what? To those living in city neighborhoods? To those persons under investigation or being pursued by police? To all persons who come into contact with police? And what is meant by "abuse," "inadequate investigation," etc.? Amazingly, the Attorney General compounds the confusion by resorting to disjointed "lists," (pages 50, 92, 100, 110, 113, 125, 135, 137, 141, 150, and 158) which
(continued)

II. THE ATTORNEY GENERAL CANNOT TRANSFORM THE NONDISCRIMINATION PROVISIONS OF THE CRIME CONTROL ACT AND THE REVENUE SHARING ACT INTO GENERAL STATUTORY AUTHORITY TO CHALLENGE RACE DISCRIMINATION IN LOCAL MUNICIPALITIES

By limiting the issues to the abstract question of whether a Police Department can be a "program or activity," the Attorney General finds in the funding statutes at issue^{13/} the broad civil rights enforcement authority that Congress, thus far, has refused to grant directly. He believes he can federalize a raft of police procedures on his claim that "since July 1, 1969, " the City has received LEAA or Revenue Sharing funds (§8, A. 11); that some unspecified amount of funds was used in some unspecified part of the Police Department for unspecified purposes at some unspecified time; and that persons not necessarily connected to the funded programs or activities in the Department allegedly discriminated.^{14/}

^{12/} (continued)

merely restate the computer printouts of the First and Second Replies, adding the race in some of these instances, but articulating no theory of race discrimination through any invidious pattern or practice and no causal relationship between a police practice and a racially discriminatory result.

^{13/} At oral argument, the Attorney General conceded that he was no longer relying on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d or the Public Works Employment Act of 1976, as amended, (CETA), 42 U.S.C. 6727. (Tr. 25-26) Previously, he conceded the same as to any theory of implied conditions in any federal grants, see e.g., Brief of Appellees, page 3. Thus, his citation to United States v. Marion County School District, 625 F.2d 607 (5 Cir. 1980) is inapposite.

^{14/} In fact, the Attorney General, emphasizing his broad theory, stresses that

"The Complaint does not address the manner in which Federal funds have been used by the Police Department." (emphasis added)
Appellant's Supplemental Brief, p. 2.

The nondiscrimination clauses in the funding statutes are far more modest in scope and require (1) allegations setting forth the suspect "program or activity" in the most particular terms possible; (2) allegation supporting a direct nexus or connection between the spending of particular federal funds and the discriminatory conduct at issue; (3) a prayer for relief involving only termination or suspension of those particular funds; (4) allegations demonstrating why attempts to resolve the dispute at the agency level are or would be of no avail.^{15/}

The Attorney General expands the statutory mandate by construing away most of the relevant legislative history and by ignoring the rest. Essentially, he urges that for Congress (in 1972 and 1976 for the Revenue Sharing Act and in 1973 and 1976 for the Crime Control Act) the issue was not the scope of the mandate but rather how best to enforce it. However, those debates contain references that also reveal Congressional thinking on the scope of the mandate, but they are dismissed as "unfocussed" and "not significant." Supplemental Brief, pp. 19-20.

Moreover, by limiting himself to the legislative history from 1972 forward, the Attorney General conveys the impression that the nondiscrimination mandate magically appeared in 1972. Thus, he can brush aside as "not controlling," *Id.* pp. 32-33, the early precedent for the very source of that mandate, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. To see the

^{15/}These required allegations, of course, are in addition to those required for all of the various reasons set forth in Section I of this Brief and in earlier Briefs filed in this Appeal.

insufficiencies in Appellant's pleading, it is necessary to begin at the beginning and canvass all, not a part, of the relevant legislative history and decisional law.

A. The Source Of The Nondiscrimination Mandate, Title VI Of The Civil Rights Act of 1964, Prohibited Only Discrimination Specifically Connected To Particular Federally Funded Programs or Activities

The nondiscrimination clauses first appeared in the Revenue Sharing Act in 1972 and in the Crime Control Act in 1973 and, for the purposes of this Appeal, were identical.^{16/} The original Crime Control Act of 1968 did not contain such a clause because Congress believed that Title VI, a more general provision banning discrimination in federal assistance programs, applied to the LEAA.^{17/} However, prior to the 1972 and 1973 hearings on the funding statutes, that Congressional intent went unfulfilled.

First, in July, 1970, the Office of Legal Counsel of the Department of Justice issued a "legal position letter" that Title VI did not apply to certain discriminatory practices of LEAA grantees.^{18/} After "scathing criticism," the Justice Department's "Office of Title VI" retreated from its OLC opinion

^{16/} The original and current clauses are set forth in the Appendix to Appellant's Supplemental Brief.

^{17/} H.R. Rep. No. 93-249, 93rd Cong., 1st Sess. (1973) reprinted in [1973] U.S. Code Cong. Admin. News 1733 (1973); 119 Cong. Rec. 20070-71, 20097; Law Enforcement Assistance Administration; Hearings Before Subcommittee No. 5 of the House Judiciary Committee, 93rd Cong., 1st Sess., pp. 621-22 (Appendix A) (1973). There was some dispute, largely unresolved at the debates on Title VI, over which federal programs it covered. See e.g., 110 Cong. Rec. 2463, 2483, 2485, 6545. This Court need not resolve that issue herein.

^{18/} Law Enforcement Assistance Administration; Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 93rd Cong., 1st Sess., pp. 621-22 (Appendix A) (1973).

somewhat.^{19/} Second, and, in part, because of the uncertainty regarding Title VI's application to LEAA, the LEAA by 1973 was not enforcing the Title VI mandate.^{20/}

Consequently, in the Revenue Sharing Act and in the Crime Control amendments of 1973, Congress reiterated the substantive provisions of Title VI in the funding statutes themselves^{21/} and also attempted to fashion enforcement procedures to assure that funds would be cut if a given program or activity failed to comply voluntarily. Indeed, Congress drafted into both Acts the proviso that the funding agencies can "exercise the powers and functions pursuant to Title VI of the Civil Rights Act of 1964."^{22/}

^{19/}Id.

^{20/}Id. p. 73; 119 Cong. Rec. 20070-71 (1973)

^{21/} See e.g., H.R. Rep. No. 93-249, 93rd Cong., 1st Sess. (1973) reprinted at [1973] U.S. Code Cong. Admin. News 1733. (Congress did not add a prohibition of discrimination on the basis of sex). See also 119 Cong. Rec. 20070-71 (Cong. Jordan, substantive provisions "parallel" Title VI); 20097 (Cong. Hutchinson, Title VI mandate has been "lifted and transplanted verbatim into the LEAA Act and that is all right....really we do not intend to make any change here at all"); 22045 (Sen. McClellan); 22075 (Sen. Javits)

^{22/} Crime Control Act, P.L. 93-83, §2, 87 Stat. 214; Revenue Sharing Act P.L. 92-512, §122, 86 Stat. 932. Even as recently as the passage of the Justice System Improvement Act of 1979, P.L. No. 96-157, 93 Stat. 1167 (1979), the Senate Report, at S. Rep. 96-142, 96th Cong., 1st Sess., pp. 56-57 (1979), noted that the Crime Control Act clause was derived from Title VI and that "precedents" under Title VI and enforcement schemes of Federal enforcement agencies should "continue to determine the type of remedial action which is appropriate in discrimination cases."

Congresswoman Jordan, instrumental in improving civil rights enforcement under both funding statutes, put Congress' intent to "reiterate" Title VI succinctly:

"If you look at your section 308, the bill which is under consideration, and the anti-discrimination provisions there, if you look at the language, it sounds good, it is language we always use...it is language which has been applied to general revenue sharing with the enforcement by the Treasury Department." ²³/ (emphasis added)

Since it is "always appropriate to assume" that Congress was aware of the law it was expressly incorporating, Cannon v. University of Chicago, 441 U.S. 677, 696 (1979), the meaning of the Title VI mandate in 1972 and 1973 certainly cannot be brushed aside as "not controlling." Congress, in enacting Title VI in 1964, did not intend to enact the very broad executive enforcement authority it chose not to enact directly in that same Civil Rights Act. Rather, Title VI was meant to apply only to specific, ²⁴/ funded programs or activities -- such as a "school lunch program."

Thus, the Attorney General remarked, at one point during the 1964 hearings that, "in withholding funds from a program," an administrator would have to be "(a)s specific and particular as it possibly could be." ²⁵/ And Congressman Celler, one of the ²³/ Law Enforcement Assistance Administration Hearings Before Subcommittee No. 5 of the House Judiciary Committee, 93rd Cong. 1st Sess., p. 73 (1973).

²⁴/ This Court itself has stressed the limited scope and coverage of the remedies in Title VI in summarizing the legislative history at NAACP v. Medical Center, Inc., 599 F.2d 1247, 1253 (3rd Cir. 1979)

²⁵/ 110 Cong. Rec. 2486 (1964); see U.S. v. Sheffield Board of Commissioners, 435 U.S. 110, 132 (1978), where the Court held that views of the Attorney General are accorded great weight in analyzing legislative history such as this.

architects of the Civil Rights Act, added:

"We felt where 'activity' or 'program' was used, that meant the activity or work that may be done by a particular agency of the Government. A school lunch program would be an activity. I would call that an activity." ^{26/}

Not only was "program or activity" to have as "specific and particular" a meaning as possible in a given matter, Congress in the 1964 Act required a direct connection between the funds and the discriminatory conduct. Senator Humphrey emphasized this point:

"Thus, Title VI does not authorize any cutoff or limitation of highway funds, for example, by reason of school segregation. And it does not authorize a cutoff of compliance action, on a statewide basis unless the State itself is engaging in discrimination on a statewide basis." ^{27/}

Furthermore, Senator Humphrey stressed that the only remedy available under Title VI for failure to voluntarily comply would be a termination of funds. ^{28/} Federal officials were not given a

^{26/} See also comments of other strong proponents of the bill such as Congressman Rodino, 110 Cong. Rec. 2468, 2484, 2485 (1964) (Title VI does not permit fund termination for discrimination outside of a funded program); Congressman Matthias, Id. at 2487 (Title VI only permits the "local cutoff of a particular program at a particular place") Senator Ribicoff, Id. at 2067; Senator Humphrey, Id. at 6544.

^{27/} Id. at 6544; see also Id. at 2484 (Cong. Rodino); 2485 (Cong. Cramer).

^{28/} Senator Humphrey, 110 Cong. Rec. 6545 ("This does not mean that Title VI would authorize a Federal official to prescribe pupil assignments, or to select a faculty, as opponents of the bill have suggested".) As for the proviso in Title VI that remedies include fund cuts and "other means authorized by law," the legislative history is clear that the phrase was meant only to incorporate those specific powers already given to specific agencies by the statutes creating the given federally funded programs. Id. at 7060. See also, 110 Cong. Rec. 2467 (Cong. Gill); 2483 (Cong. Downing); 2485 (Cong. Rodino); 6544 (Sen. Humphrey). It did not refer to general equity powers and remedies. In fact, the House turned down an amendment offered by Cong. Meader to give administrators contractual remedies such as "proceedings

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power to restructure local agencies.^{29/}

In addition to this legislative history, the decisional law at the time the Revenue Sharing Act and Crime Control amendments were considered (1972 and 1973) clearly established that a cause of action under Title VI must allege a specific program described in terms of the activity funded and a nexus between that funded activity and the federal dollars. Thus, in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969), the Court refused to permit HEW to terminate three federal grants to a school system without showing discriminatory administration of each particular grant. In ruling that Congress required a "nexus" to prevent agencies from condemn(ing) programs by association," Id. at 1078, the Court held:

"If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there also will be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a 'political entity or part thereof'), is

^{28/}(continued)
in equity, specific performance or restraining orders" to enforce civil rights. See 110 Cong. Rec. 2480, 2493, 2494 (Cong. Cell), 2495 (Cong. Hardy), 2497. Whether or not these limitations apply to private individuals attempting to bring private rights of action under Title VI, or similar federal funding statutes, is not at issue and need not be addressed herein. Cf. Cannon v. University of Chicago, supra.

^{29/}It is also interesting to note that the Civil Rights Commission in 1964 advanced the same "no nexus" proposal it advanced in the Revenue Sharing hearings in 1975, 110 Cong. Rec. 2490, and upon which the Attorney General places so much reliance. President Kennedy himself rejected that proposal as unwise. Id.

effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from vindictive application.^{30/} School and programs are not condemned enmasse or in gross with the good and the bad condemned together, but 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'." (emphasis added) Id. at 1078.

Soon after Taylor County, the Seventh Circuit, specifically relying on that opinion, applied the same reasoning to HUD's attempt to cut all Model Cities' funding to the City of Chicago because of possible discrimination in certain separately funded housing projects. Gautreaux v. Romney, 457 F. 2d 124, 128 (7th Cir. 1972). See also Dougherty County School System v. Harris, 622 F. 2d 735, 737 (5th Cir. 1980)

In summary, Congress, in 1972 and 1973, intended to incorporate a body of law into the Revenue Sharing Act and Crime Control Amendments which plainly provided for a far more limited cause of action; required "specific and particular" allegations of the funded activity and of the nexus between the federal dollars and the discrimination; and only provided for a maximum remedy in the Executive branch of fund termination or suspension. Under Revenue Sharing and the Crime Control Act, Congress, if anything, has taken a narrower view of the causes of action provided under their non-discrimination clauses.

^{30/}A point strikingly similar to the Trial Court's comments regarding the Attorney General's timing of and public posturing regarding this litigation below. See generally A134-140 ("Abuse of Power in This Law Suit").

B. The Revenue Sharing Act Will Not Support the Attorney General's Cause of Action

1. The Attorney General has failed to Plead Facts Demonstrating a Nexus Between the Discriminatory Conduct and the Use of Federal Funds

Congress reiterated the "nexus" requirement in the legislative history of the Revenue Sharing Act itself. The necessity of a "nexus" was apparent from the opening testimony of Secretary of Treasury Connally at the House hearings in 1972. As he said:

"There is one other provision that would be essential, and that is simply that all of these funds would be subject to being appropriated and spent in a nondiscriminatory fashion." (emphasis added) ^{31/}

Several others described the coverage of the clause similarly. ^{32/}

No one during the 1972 hearings urged that the clause should permit a suit against discrimination not resulting from the spending or appropriating of funds in a discriminatory fashion. At a time when Congress considered itself on an historic mission to revitalize local government, ^{33/} it defies belief to urge that at the same time (and without fanfare) Congress subjected local agencies that spend so much as a dollar of those "revitalization" funds

^{31/} H.R. Doc. 92-47 92nd Cong., 1st Sess., p. 37, 144 (1971).

^{32/} See e.g., *Id.*, p. 1237 (testimony of Comptroller General Staats); *Id.*, p. 457-459 (Senator Muskie); 118 Cong. Rec. 21731 (1972) (Cong. Hogan); *Id.* at 29866 (Senator Long). There was such little controversy over the scope of the clause that the Senate defeated by 70 to 6 an attempt by Senator Buckley to delete the clause because he feared it might be an invitation to "pervasive meddling" in local affairs. Even Senator Long called the clause "innocuous." *Id.* at 29865-29867.

^{33/} President Nixon introduced the program as a "dramatic re-orientation of our Federal system by strengthening state
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to agency-wide scrutiny by the Attorney General's legion of lawyer-bureaucrats.

Following passage of the Act, proposals were offered to Congressional committees to snap the required connection between the discrimination at issue and the spending or allocating of funds. The proposals were advanced as an answer to the "fungibility" issue, viz. the difficulty in tracing the actual allocation and use of federal funds in order to establish the requisite "nexus."^{34/}

Those proposals sought to expand the nondiscrimination clause to permit suit against any discriminatory activity occurring anywhere in the government of a recipient accepting any revenue sharing funds.^{35/} However, even Congressman Drinan, the prime sponsor of a stronger civil rights clause, was reluctant to press this proposal. He remarked

"I would still ask this question. Suppose that next year in Chicago three women go into a court and say: 'We have been discriminated against in not being hired in

33/ (continued)

and local government." H.R. Doc. 92-47, 92nd Cong., 1st Sess. p. 3 (1971). Secretary of Treasury Connally framed the issue as whether and to what extent the federal government would return and redistribute funds with "no strings attached" Id., p. 36-38, 52, 179-182, i.e. unlike categorical assistance grants. See President Nixon's comments at the signing of the 1972 Act in Philadelphia at Independence Hall. Weekly Compilation of Presidential Documents, Vol. 8, No. 43 p. 1534 (October 20, 1972).

34/

The "fungibility" issue is threaded throughout the hearings and debates of the Congressional oversight committees and of the committees considering the bill in 1976 to extend the 1972 Act. See e.g. Civil Rights Aspects of General Revenue Sharing: Hearings Before a Subcomm. of the House Judiciary Comm. 94th Cong., 1st Sess. (1975), p. 23 (GAO), p. 261-62 (Drinan); p. 272-73 (U.S. Comm'n on Civil Rights); State and Local Fiscal Assistance Act (General Revenue Sharing):

(continued)

the school system.' And suppose that a Federal judge agrees with them. Is revenue sharing suspended? Chicago would say, 'We are not even using revenue sharing funds for that. We are using it for bond retirement.' And you will say, 'We are the great purifier of all cities' So you are giving this subcommittee a tremendous burden of writing a whole new scenario for the enforcement of civil rights." (emphasis added).^{36/}

Rather than adopt a "new scenario", the House Committee on Governmental Operations rejected this radical idea and tried to solve the "fungibility" problem in a different way: improving ORS' ability to trace funds through requirements of more detailed use reports, hearings and audits and a shifting of the burden to a recipient to show that a nexus pleaded by the government does not, in fact, exist "directly or indirectly."^{37/}

The Senate modified this modification by placing the burden of proof on the Attorney General to establish a direct "nexus". After conference with the House, the Senate agreed to the adoption of

^{34/}(continued)

Hearings on H.R. 6558 and Related Bills Before a Subcomm. of the House Comm. on Government Operations, 94th Cong., 1st Sess. (1975), p. 37-39 (Cong. Drinan and Secty. Simon), Id. at p. 63-64 (Asst. Secty Schmults), Id. at p. 142-43 (Cong. Rosenthal and McHugh), Id. at p. 201-208 (Brookings Institute), Id. at p. 893-94 (Comptroller Staats), Id. at 908-912 (Cong. Drinan), Id. at p. 1062-68 (Cong. Edwards).

^{35/}Id. at p. 147 (Cong. Rosenthal), Id. at p. 893-94 (Staats), Id. at 978-79 (ADA), Id. at 1065 (Cong. Edwards), Id. at 1079 (Cong. Thompson).

^{36/}Id. at p. 909-910; see also Id. at p. 38-39 (Secretary of Treasury Simon), Id. at p. 63-64 (Asst. Treasury Secty Schmults), Id. at p. 201-08 (Brookings Institute), Id. at p. 909-910 (Cong. Drinan), Id. at p. 1072 (Cong. Fountain). General Revenue Sharing: Hearings Before the Senate Committee on Finance on H.R. 13367, 94th Cong., 2d Sess. (1976), p. 45 (Deputy Secretary of Treasury Dixon).

^{37/}H.R. Rep. 94-1165 (pts. I, II, III), 94th Cong. 2d Sess., p. 1, 13, 25 (1976).

House proposal with the deletion of the words "directly or indirectly."^{38/} The reason for the deletion was explained as follows:

"By this deletion, it is intended that, if the recipient government demonstrates by clear and convincing evidence that the challenged program or activity is not directly funded with revenue sharing funds, then that program or activity does not violate the nondiscrimination provision". (Emphasis added)^{39/}

In short, both at the House Committee level and thereafter in Conference, Congress rejected attempts to delete the nexus requirement from the Act.^{40/} The only changes made were in burden of proof.^{41/} The Attorney General would still have to plead as part of his cause of action that a "nexus" exists.^{42/} He has not done so

^{38/}

S. Rep. 94-1207, 94th Cong., 2d Sess. p. 26-28 (1976).

^{39/}

H.R. Rep. 94-1720, 94th Cong. 2d Sess., p. 32-33 (1976).

^{40/}

Id.

^{41/}

In the House, Congresswoman Jordan made one last effort to broaden civil rights enforcement beyond discrimination connected to the funds by including a clause in the bill that was reported from Committee permitting the Attorney General to have such broadened power even if ORS did not. Congressman Erlenborn fought to delete even this provision and won, making it clear that a nexus between the funds and the discriminatory conduct was still required. (See 122 Cong. Rec. 17075, 18087, 17091, 17354-57, 17364-17374).

^{42/}

The required connection between discrimination and funds was evident in comments from Congressmen and Executive officials. See e.g. Message of President Ford, House Government Operations Committee Hearings; 94th Cong., 1st Sess., p. 5 (1975) (stronger enforcement "to ensure that entitlement funds are not used in a discriminatory manner"); Id., p. 31 (Secty Simon); Id., p. 54 (Asst. Secty. Schmultz, "not one revenue sharing dollar (should) be spent in a discriminatory manner"), Id., p. 1065-68; General Revenue Sharing: Hearing on H.R. 13367 Before the Senate Committee on Finance, 94th Cong., Rec. 17087 (Cong. Drinan); 122 Cong. Rec. 29879 (Senator Packwood, bill prevents local governments from discriminating in "spending of the money"); Civil Rights

(continued)

here.^{43/}—

The few judicial decisions construing the Revenue Sharing Act have followed the Title VI precedent, e.g. Taylor County and Gautreaux. Thus, in United States v. City of Chicago, 549 F.2d 415, 442 (7 Cir. 1977), the Court adopted the Gautreaux requirement of a nexus, but held that it was satisfied in a challenge of employment discrimination throughout the Chicago Police Department since 75% of the City's Revenue Sharing Funds were channeled to the general administration of the police department. No similar allegations are made in the instant Complaint. Indeed, the Attorney General underscored that he did not allege how funds were spent, Supplemental Brief, page 2. See also United States v. School District of Ferndale, 460 F. Supp. 352, 380 rev'd on other grounds 616 F.2d 895 (6 Cir. 1980, (termination of funds is "limited to the particular program or part thereof not

42/ (continued)

Aspects of General Revenue Sharing: Hearings Before a Subcomm. of the House Judiciary Comm. 94th Cong. 1st. Sess., p. 95 (1975) (Committee counsel); Id. (Asst. A. G. Dempsey).

43/

➤ Additionally, the references in the preceding footnote make it clear that the type of discrimination covered by the Act is discrimination in spending or allocation decisions, not in the manner in which employees of the funded activity interact with the public. The prohibition against discrimination was designed to assure that federal benefits would not be misallocated for discriminatory reasons or similarly misspent, for example, in hiring employees or purchasing equipment for the funded activity. The clause does not reach conduct beyond those spending or allocation decisions. The judicial decisions under Revenue Sharing, thus far, have only involved discrimination in allocation or spending decisions concerning the federal funds, generally claims of discriminatory hiring. See e.g. United States v. City of Chicago, 549 F.2d 415 (1977) and cases discussed infra, page 38, fn. 44 and page 34, fn. 57.

found in compliance," provided that program is directly funded with federal money).^{44/} The Attorney General's theory is twice unprecedented in going beyond the funds and beyond a spending decision.^{45/}

At pages 32-34 of his Supplemental Brief, the Attorney General attempts to distinguish Taylor County as only a "Title VI"

^{44/} See also Harris v. White, 479 F. Supp. 996, 1011 (D. Mass. 1979) ("We are mindful that the congressional intent was to include in the nondiscrimination provision only programs directly funded by revenue sharing employees"). Cf. Mayor and City Council of Baltimore v. Matthews, 562 F.2d 914, 924 (4 Cir. 1977) (en banc), vacated on rehearing 571 F.2d 1273 (4 Cir. 1978) (en banc) (both majority and dissent in first opinion adopted Taylor County under Revenue Sharing Act). But see United States v. State of New Jersey, 473 F.Supp. 1199 (D.N.J. 1979) (refusal to dismiss case, without discussion, although no nexus alleged). Cf. Isleboro School Committee v. Califano, 59 F.2d 424, 430 (1 Cir. 1979) ("A nexus between the discrimination against employees and its effect on students (the funded beneficiaries under Title IX) must first be shown"); Seattle Univ. v. U.S. Dept. HEW, 621 F.2d 992, 994 (9 Cir. 1980); Dougherty County School System v. Harris, supra; Junior College District of St. Louis County Missouri v. Califano, 597 F.2d 119 (8 Cir. 1979).

^{45/} To the extent the Attorney General is relying on regulations adopted by the Treasury Department, pursuant to powers granted by 31 U.S.C. §1262, those regulations are void and of no effect if they exceed the substantive scope of the nondiscrimination clause. An agency, by rulemaking, cannot exceed its statutory jurisdiction. Cf. Dougherty County School System v. Harris, supra at 736-37; Bryan v. Koch, supra at 234. In any event, the regulations on "Discrimination Prohibited," 31 CFR §51.53, do not, in terms, define the type of race discrimination apparently alleged here as one of the prohibited types. Moreover, parts of these regulations (those to which recent "substitutions" were made) are defective for failure to follow the procedures of the Administrative Procedure Act 5 U.S.C. §553, see infra, p. 32, fn. 53.

case^{46/} and as somehow "helping" him by giving him an opportunity to prove his case. The first proposition is unsupportable. See supra, pages 17-22. Further, Taylor County "helps" only to the extent that the Attorney General first pleads facts showing a "nexus." Only then does he have a chance to prove his case.

Abandoning the "nexus" requirements amounts to turning the ORS bureaucracy into "the great purifier of civil rights." The Attorney General, in short, is attempting to end run around Congress.

2. The Attorney General Has Failed To Plead The Specific Program Or Activity That Receives Federal Funds And That Discriminates.

By naming the Philadelphia Police Department as the "program or activity," the Attorney General apparently believes that "program or activity" can be defined by the departmental box on a City organization chart where revenue sharing funds are allocated, not by a "particular and specific" analysis of the precise activity at issue.

Throughout the legislative history, "programs" were described by the purposes for which funds were spent not by references to governmental agencies housing those programs. Thus, at the House hearings in 1972, Secretary Connally described how the new bill would fund "extension programs for improved nutrition, pesticide safety, 4-H youth development, highway safety projects, bridge replacement, landscaping scenic enhancement."^{47/} A report

^{46/}Although he has freely relied on Title VI cases for other propositions in his brief, See e.g., page 35, fn. 93 of his Supplemental Brief.

^{47/}General Revenue Sharing: Hearings Before the House Committee on Ways and Means, 92nd Cong., 1st Sess. (1971), 179-182

submitted at those hearings even described how funds would help save certain programs in the Philadelphia Police Department:

"Philadelphia will be forced to eliminate and reduce Police Department support units serving the District Attorney's Office, the Sanitation Unit, the Police Athletic League, the Waterfront Patrol and the Expressway Unit." 48/

The legislative history of the 1976 bill is replete with the same kind of characterizations of the programs to be funded.^{49/} In short, "program or activity" is a specific and limited concept ^{50/} not a device to leverage enforcement authority to challenge nonfunded activities.

The Attorney General's view of "program or activity" also has no logical limits. For example, if the conduct at issue involved the purchase of a police computer, is the Attorney General really suggesting that he could name all City departments that had anything to do with that purchase (e.g., the procurement department, finance department, city manager, police department,

^{48/}Id. p. 271; see also Id., p. 457-59 (Sen. Muskie, "recreation centers," "VD Clinics"); Id., p. 1277 ("road work, sewer programs"); H.R. Rep. No. 92-1018, 92nd Cong. 2d Sess., p. 18 (1972); 118 Cong. Rec. 29755 (1972) (Sen. Humphrey, "refuse disposal systems"); Id. at 21724 (Cong. Rostenkowski)

^{49/}See, e.g., Government Operations Comm. Hearings, 94th Cong., 1st Sess. (1976), p. 112; (Congressman Lloyd) ("tree trimmings, resurfacing streets new police and fire facilities, neighborhood centers, paramedic program") p. 131, (Congressman Gradison) (purchase of garbage truck, trash compactor, fire truck) Hearings Before Senate Finance Committee, 94th Cong., 2d Sess. (1976) pp. 72-73, 78-79; (day care centers, mental health centers, neighborhood youth centers); p. 79: (parks, fire engines boats (Sen. Packwood)); p. 83: (old folks homes, hospitals (Sen. Gravel))

^{50/}This precise analysis of the references to "programs" in the legislative history was used by the Court in Taylor County, supra at 1077 in construing "program" under Title VI.

public property department) and then attempt to enjoin whatever discrimination he might find anywhere in any of those departments? Such a result truly would unhinge the nondiscrimination clause from the Act altogether.

The Attorney General traces his position essentially to three bits of legislative history which are either irrelevant or misconstrued: (1) references to a suit against the Chicago Police Department for employment discrimination; (2) certain comments in 1973 by ORS Director Graham Watt; and (3) a booklet printed by ORS in 1974.

The references to the Chicago suit^{51/} do not demonstrate that Congress intended that police departments always could be "programs or activities" under the Act. Supplemental Brief, pp. 11-12. The specific meaning of "program or activity" was not addressed. Furthermore, the Court, in City of Chicago cited favorably to Gatreaux and its requirement of a direct nexus.

As for Mr. Watt's statement, Supplemental Brief, page 10, the Attorney General stopped too early in the transcript of the 1973 hearings. After restating his position to Congressman Butler, Mr. Watt restated his position again to Congressman Edwards, "if discrimination is found in that activity, we would seek to recover or withhold funds as appropriate in this--as from the fire truck."^{52/}

^{51/}This suit is reported at United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).

^{52/}Civil Rights Aspects of General Revenue Sharing: Hearings Before a Subcomm. of the House Judiciary Comm., 93rd Cong., 1st Sess., p. 25 (1973). The Chief Counsel of ORS further emphasized the specific view of "program or activity" in response to a question from the Committee's counsel when he clarified that ORS would only name a fire department if they were challenging its employment practices. Id. pp. 40-41. Furthermore, see supra pages 24 and 25 where two years later, Congressman Drinan, responding to attempts to eliminate the nexus requirement,

Finally, resort to the ORS booklet, is irrelevant.

The booklet certainly is not an operative regulation or rule. As an expression of ORS' views in 1974^{53/}, it has no significance if it is inconsistent with the statute or Congressional intent.^{54/}

Moreover, Congress never even discussed, approved or ratified the booklet.^{55/} The Attorney General is bootstrapping an overbroad Executive branch interpretation of a Congressional act into support for the same overbroad theory on which he has based and pleaded his suit.

52/ (continued)

expressed a view flatly inconsistent to any suggestion that funds to the City of Chicago could be cut because "three women (might) go into court and say: 'We have been discriminated against in not being hired in the school system.'"

53/ Agency actions affecting recipient's rights and obligations are "substantive" and must follow the procedures of the APA 5 U.S.C. §551, et seq. to have any force and effect. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979); Emerson Elec. Co. v. Schlessinger, 609 F.2d 898 (8th Cir. 1979). The booklet was not promulgated under the rulemaking procedures of 5 U.S.C. §553 of the of the APA and, thus, is at best interpretative. See Daughters of Miriam Center for Aged v. Matthews, 590 F.2d 1250, 1255 (3rd Cir. 1978); Cerro Metal Products v. Marshall 620 F. 2d 964, 979-982 (3rd Cir. 1980); Lewis-Mota v. Secretary of Labor, 469 F. 2d 478 (2d Cir. 1972).

54/ Id.; Bryan v. Koch, supra at 234; Dougherty County, supra.

55/ To show how far the Attorney General has tortured the legislative history to support his theory of suit, the importance of the booklet to him is not that Congress expressly discussed it but rather that in 1975 (not at any hearings on revenue sharing) the Civil Rights Commission issued a report which discussed an ORS memorandum which was consistent with the booklet. Supplemental Brief, pp. 12-13, fn. 23-25. The Civil Rights Commission's views are not necessarily those of Congress. Moreover, the Attorney General never demonstrates that Congress discussed this specific part of the Civil Rights Commission report, the ORS memorandum or the booklet, much less ratified the agency's view.

The Treasury Department's interim regulation, adopted to implement the 1976 Act, comes closer to the Congressional view of "program or activity" than does its 1974 pamphlet. The Regulation defined "program or activity" as "any function conducted by an agency or department of the recipient government." 31 C.F.R. 51.51(i), April 6, 1977 interim regulations (attached as Appendix (pages 16a-17a) to Attorney General's Supplemental Brief). This regulation, unlike the booklet, assumes that "program or activity" is something "conducted by" a department rather than the department itself.^{56/}

^{56/}Contrary to the Attorney General's suggestion at page 7 of his Supplemental Brief, he cannot rely on the definition of "program or activity" which ORS substituted on April 2, 1979 (31 C.F.R. 51.5(i) as substituted) to the extent that the regulation is broader than the prior regulation or than the intent of Congress. (1) The substituted regulation was not adopted in accordance with the rulemaking procedures of the APA, 5 U.S.C. §553. See citations at fn. 32 herein. (2) The substituted regulation does not suggest that a police department always can be a "program"; by its terms it is directed at the discriminatory "operations" of the agency receiving funds. (3) Furthermore, as demonstrated in pp.39-40, infra, to the extent ORS is merely parroting what LEAA had done, see 44 Fed. Reg. 19191-19192 (1979) (attached as Appendix pages 16a-17a to Appellant's Supplemental Brief), and to the extent the LEAA regulation suggests "no nexus" is required, both regulations are in error beyond the scope of the statutes and inoperative to that extent. United States, ex rel. Chase v. Wald, 557 F.2d 157, 161 (8th Cir. 1977); Vitco, Inc. v. Government of the Virgin Islands, 560 F.2d 180, 184 (3rd Cir. 1977); U.S. v. Larionoff, 431 U.S. 864 (1977).

In sum, because the Complaint fails to plead a specific "program or activity," the District Court clearly was correct in dismissing the remains of the suit as insufficient.^{57/}

3. The Revenue Sharing Act Does Not Support The Attorney General's Prayer.

The Attorney General seeks primarily structural injunctive relief against the police department such as relief to reform complaint procedures, street procedures, arrest procedures, training procedures, investigative procedures, directives concerning use of firearms, etc. This relief is not available under the funding statutes. First, those prayers for relief primarily applied to the Due Process theories. Second, the basic relief available under the funding statutes is suspension, withholding or termination of ~~payment~~.

^{57/} The few decisions supporting the Attorney General are from District Courts which simply cite to one another without any analysis. Thus, the District Courts in U.S. v. Comm. of Virginia, No. 76-0623-R (E.D. Va. April 7, 1977) (attached to Appendix of Appellant's Supplemental Brief, pages 23a-25a) and Capel v. Lamb (Civil L.V. 77-118 RDF) (D. Nev. August 8, 1978) both ruled that entire police departments are "programs or activities" without any analysis or citation to authority other than the face of the statute. The District Court in U.S. v. Baltimore County, 17 EPD ¶8509 (D. Md. 1978) (oral opinion), in turn, pyramided the confusion by ruling that the County (!) is a "program or activity," without analysis and by citing Comm. of Va. and Capel. Thereafter, a District Court in San Francisco compounded the problem further by ruling that the San Francisco Police Department is a "program or activity," without analysis and by citing to Baltimore County Officers for Justice, et al v. Civil Service Commission, 18 EPD ¶8800 (N.D. Cal. 1978). See also, Harris v. White, 479 F. Supp. 996 (D. Mass. 1979) (entire State Civil Service Commission is a "program or activity" -- no analysis, no authority cited). These decisions are of such negligible precedential value before this Court that even the Attorney General has ignored most of them in his brief.

specific funds not reformation of the affairs of local government.^{58/}

As in the debates concerning Title VI, Congressmen in 1976 were concerned with strengthening the termination remedy, not going beyond it. Prior to the 1976 hearings, legislative oversight committees received extensive testimony regarding ORS's reluctance to use the fund termination provision of the 1972 Act.^{59/} During those hearings, Assistant Attorney General Dempsey, speaking for the Department of Justice, described the available remedies under the Act as fund cutoffs, orders to withhold future entitlements and orders to repay funds.^{60/}

The House and Senate Committees considered methods to make the fund termination remedies of the 1976 Act more effective.^{61/} No one suggested that structural injunctive powers be added to the Attorney General's available range of remedies.^{62/}

^{58/} References herein to "termination" are meant also to include the suspension and repayment remedies. Consistent with the "nexus" requirement, the "termination" relief is limited to specific funds only.

^{59/} House Judiciary Comm. Hearings., 94th Cong., 1st Sess. p. 53, 203, 272-73 (1975); Revenue Sharing: Hearings Before the Sub-Comm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93rd Cong., 2d Sess., p. 30-31 (1974).

^{60/} House Judiciary Comm. Hearings, 94th Cong., 1st Sess., p. 203 (1975).

^{61/} House Government Operations Committee, 94th Cong. 1st Sess., p. 5 (1975) President Ford's proposal; see also, Id. p. 44 (Cong. Brown); p. 75 (Cong. Brown); p. 232 (Sklar report); p. 912 (same); p. 1065-66 (Cong. Edwards).

^{62/} Hearings Before Senate Finance Comm., 94th Cong. 2d Sess., 49 (1976) (Senator Packwood: fund cut is a "reasonable threat" to force compliance), Id. p. 78-79 (Senator Gravel, debate on whether fund cut should be automatic). See also, S. Rep. 94-1207, 94th Cong. 2d Sess., p. 28-33 (1976) (fund cut remedies as method of achieving "voluntary compliance".)

Instead, the House and Senate approved bills with mechanisms to ensure the effectiveness of the existing fund suspension remedy.^{63/}

The Attorney General, however, suggests that 31 U.S.C. 1242(g) permits structural injunctive relief, by authorizing a court to grant any "injunction or other order as necessary to insure full enjoyment of the rights" under the Act. Appellant's Supplemental Brief, p.36. While this might suggest some flexibility in structuring a fund termination injunction, it does not imply that a Court can enter structural relief of the kind sought by the Attorney General, particularly since that would necessarily amount to "direction, supervision or control" of a local police department, a state of affairs expressly prohibited by Congress. Crime Control Act, 42 U.S.C. 3766(a).

Although occasional district courts have suggested that relief short of terminating funds might be available,^{64/} the issue of the exclusivity of the fund cut remedy was never squarely presented. Furthermore, there is a great difference between entering limited relief in employment discrimination cases to cure a problem without jeopardizing funds (i.e., a lesser intrusion on local affairs) and entering relief creating a far more intrusive remedy.^{65/} Because the Prayer for Relief

^{63/} H.R. Rep. 94-1720, 94th Cong., 2d Sess., p. 32-36 (1976).

^{64/} See, e.g., Harris v. White, supra at 1011; U.S. v. County of Milwaukee, 457 F. Supp. 1009 (E.D. Wisc. 1978). This Court need not decide the merits of that issue herein.

^{65/} In fact, the 7th Circuit has suggested that on "federalism" grounds, specific fund termination is the ultimate remedy available under the Act. United States v. City of Chicago, supra at 440. Cf: this Court's opinion in NAACP v. Medical Center, Inc., 599 F.2d 1247, 1255 (3rd Cir. 1979) where this Court implied private rights under Title VI to avoid making a private litigant pursue the expressly stated remedy of a fund termination proceeding.

requests remedies that have nothing to do with race discrimination, that are not available under Revenue Sharing and that are insisted upon even before this Court, the Attorney General's Complaint contains another yet fatal defect in the Prayer.

C. The Crime Control Act Will Not Support the Attorney General's Cause of Action.

1. The Attorney General Has Failed to Plead a Nexus Between the Discriminatory Conduct and the Use of Federal Funds.

The Crime Control Act also has exacting nexus requirements. The Crime Control Act is a categorical assistance statute containing, in the statute itself, the specific uses to which funds can be put. See e.g., 42 U.S.C. §3731(b) (14 categories of "grants for law enforcement purposes"). In addition, the Crime Control Act contains a "pinpoint" clause, at 42 U.S.C. §3766(c) (1)(E) providing that only a "specific" program or activity can have its funds cut through "pattern or practice" litigation. In short, as in Taylor County, supra at 1078, alleged discrimination under one LEAA grant program cannot be used to stigmatize another. See also Dougherty County, supra; Harris v. White, supra.

The "nexus" requirement is even more apparent from a consideration of the strong policies, embodied in the Act, against federal interference in local affairs. From the submission of the original bill in 1968 by President Johnson,^{66/} through the

^{66/} S. Rep. No. 1097, 90th Cong. 2d Sess. (1968) reprinted in [1968] U.S. Code Cong. & Admin. News, p. 2115.

debates in the Senate, ^{67/} one theme was repeated again and again: nothing in the Act or in any other Act would permit federal supervision or control of local police departments. In fact, from the start, the Crime Control Act has always so provided expressly.

42 U.S.C. §3766(a). In 1973, Congress "reiterated" the nondiscrimination mandate of Title VI, but never once even hinted at a departure from the strong nexus requirements of that clause. ^{68/} To the contrary, Congressmen and the Attorney General himself reiterated the strong policy of the Act against federal control over police departments. ^{69/}

In 1976, Congress (as with Revenue Sharing) was concerned primarily with strengthening the procedures to enforce the non-discrimination mandate, ^{70/} through automatic fund termination, but not with expanding the mandate itself. In fact, Congressman

^{67/} 114 Cong. Rec. 12828 (1968) (Senator Tidings); Id. at 13216 (Senator Percy); Id. at 14768-69 (Senators Monroney and Muskie); Id. at 14770 (Senator Pastore); Id. at 14776 (Senators Pastore and Thurmond); Id. at 14777 (Senator McClellan). See also, [1968] U.S. Code Cong. Admin. News, 2275, 2280 (Senators Dirksen, Scott, Hruska and Thurmond)

^{68/} In the Senate debates, Senator Bayh specifically stated that the mandate would require LEAA "to prevent racial discrimination in the use of its funds". 119 Cong. Rec. 22059; see also, 119 Cong. Rec. 22075 (Senator Javits).

^{68/} Law Enforcement Assistance Administration Hearings Before Subcommittee No. 5 of the House Judiciary Committee, 93rd Cong., 1st Sess. (1973): p. 49 (Attorney General Kleindinst, against "60 little bureaucrats tagging along on every dollar"); 119 Cong. Rec. 2-075 (Cong. Hunt and Rodino).

^{70/} See e.g., Law Enforcement Assistance Administration: Hearings Before the Subcommittee on Crime of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) pp. 442-445 (Cong. Jordan).

Rodino, in explaining the enforcement procedures said, as he said in 1964 regarding Title VI, that they were necessary to prevent "discrimination in the grant program." ^{71/} And Congressman Butler, upon whom the Attorney General oddly relies for a no nexus view, stressed that the Attorney General would be required to allege discrimination "in the use of the funds". ^{72/}

The judicial decisions regarding the nexus requirement under Revenue Sharing apply with equal force to the Crime Control Act clause. See, supra, pages 27-28. The Attorney General offers no decision supporting a contrary view of the scope of the clause. Instead, he relies exclusively upon a LEAA regulation issued after the 1976 Act which, if construed according to the Commentary to the regulation, would be invalid as beyond the intent of Congress in enacting the 1976 Act. See Dougherty County School System v. Harris, 622 F.2d 735, 736-737 (5th Cir. 1980); Bryan v. Koch, supra. See also citations at fn. 56, supra. That regulation states:

"'Program or activity' means the operations of the agency or organizational unit of government receiving or substantially benefiting from the financial assistance awarded; e.g., a police department or a department of corrections."

28 C.F.R. §42.202(k). On the face of this regulation, there is

^{71/} 122 Cong. Rec. 28490 (1976).

^{72/} Id. at 28514.

still a clear "nexus" requirement since it is directed to the "operations" of an agency receiving or substantially benefitting from the federal funds. However, relying on the Commentary to this regulation, set forth at fn. 75 of Appellant's Supplemental Brief, the Attorney General attempts to circumvent the "pinpoint" provision of the Act, 42 U.S.C. §3766(c)(2)(E). The Commentary is strange, however, since it quotes a passage of a House Report which clearly requires a "nexus",^{73/} and cites to Lau v. Nichols, 414 U.S. 563, 566 (1974) which says nothing at all about the requirement, or lack thereof, of a "nexus",^{74/} The reliance on the Commentary is a transparent attempt by the Justice Department to cite, as authority before this Court, to its own overextended, incorrect legal analysis attached to a regulation of one of its own, albeit independent, internal agencies. This is equivalent to basing a legal brief on an attorney's own opinion letters rather than on decisional law.

^{73/} That passage, at H.R. Rep. No. 94-1155, 94th Cong. 2d Sess., p. 26 (1976), specifically states that fund termination is limited to the funded activity and does not state that employment discrimination in a city police department unconnected to a federal grant can justify termination of that grant,

^{74/} The reference to Lau is odd. Mr. Justice Blackman's concurrence in Lau makes it clear that the plurality opinion requires that there be substantial discrimination in a school curriculum before funds to the school could be cut and neither the concurrence nor plurality even once intimates that a connection between the funds and that discrimination would not be required.

The Attorney General attempts to avoid the fact that the regulation cannot be construed according to its Commentary or it would be beyond the scope of the 1976 Act by suggesting that the "re-enactment" of the 1979 amendments to the Crime Control Act ratifies LEAA's commentary. The "re-enactment rule", however, does not permit the "draw(ing) of impermissible inferences from unexplained actions of Congress", United States v. Sheffield Board of Examiners, 435 U.S. 110, 135 (1978), and nowhere in the hearings or reports on the 1979 amendments ^{75/} does Congress even discuss, much less "ratify", the LEAA interpretation of its regulation. The Attorney General is grasping at straws.

2. The Attorney General Has Failed to Plead the Specific Program or Activity That Receives Federal Funds and That Discriminates.

As with Revenue Sharing and Title VI, the structure and history of the Crime Control Act establishes that the concept of "program or activity" is directly related to the specific purposes for specific funding. ^{76/} The Crime Control Act, on its face, is laced with descriptions of the "programs" it funds. These include, inter alia:

^{75/} Hearings Before the Committee on the Judiciary on S. 241, 96th Cong. 1st Sess. (1979); H.R. Rep. No. 96-163, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 96-655, 96th Cong., 1st Sess. (1979).

^{76/} "As specific and particular as it could possibly be", to use the words of Attorney General Kennedy during the Title VI hearings. See supra, page 19 .

- ° Section 3731 grants for "categories of programs and projects" including "law enforcement education programs," construction of "centers for the treatment of narcotic addicts", "correctional programs";
- ° Section 3737 grants for "priority programs and projects" including "programs dealing with the prevention, detection and control of organized crime";
- ° Section 3739 grants for antitrust enforcement "programs".^{77/}

The Act never states that an entire police department can be a grant funded program. In fact, under the Act, a police department is a "public agency", not a "program or activity".^{78/} The Attorney General's contrary authority is again just his own self-serving

^{77/} See also legislative history references e.g., (1) Law Enforcement Assistance Administration: Hearings Before Subcommittee No. 5 of the House Committee On the Judiciary, 93rd Cong., 1st Sess. (1973), p. 14 (Attorney General Kleindinst: "anticrime patrols", "rehabilitation projects", "LEEP programs"); pp. 65-66 (Cong. Brooks: purchase of "radio dispatchers and related communication items", education "training").

(2) H.R. Confer. Rep. No. 94-1723, 94th Cong., 2d Sess., p. 28 (1976) ("programs to identify needs of drug dependent offenders", grants to stop "crime against the elderly", grants for "Operation sting type ventures").

(3) Law Enforcement Assistance Administration: Hearings, Before The Subcommittee on Crime of House Comm. On the Judiciary, 94th Cong., 2d Sess., (1976) pp. 11-12 (GAO Report), 48-54, 84-86, 134-35, 168-70, 243-249, 316-317 (Deputy Attorney General Tyler), 326, 334-35, 372-73 (LEAA Administrator Velde).

(4) 122 Cong. Rec. 23344 (1976) (Javits); Id. at 28491 (Rodino).

^{78/} "Public Agency" is defined as:

"...any State, unit of local government, combination of such states or units, or any department, agency or instrumentality of any of the foregoing."

42 U.S.C. §3781(i).

Commentary to the LEAA regulaton. ^{79/}

3. The Crime Control Act Does Not Support The Attorney General's Prayer for Relief.

The legislative history of the Crime Control Act also stands foursquare against the Attorney General's prayer for structural injunctive relief. In 1973, and again in 1976, Congress amended the Act to "require" LEAA to attempt voluntary compliance with resort thereafter to the "ultimate sanction" of "funding cutoff" of specific funds involved in a specific discriminatory activity. ^{80/} Both sets of amendments essentially were administrative procedures to strengthen and quicken fund termination decisions. Neither set of amendments even suggested any other remedies.

At the floor debates in 1973, Congresswoman Jordan, the proponent of both sets of amendments, stated that her procedures "parallel(ed) the language of Title VI", which provides only for fund termination. ^{81/} Congressman Rodino stressed that "there is

^{79/} Technically, the 1979 Amendments cannot even be relied upon, even as "ratification", since this suit was brought under the 1976 Act. In any event, the legislative history of those Amendments runs against, not in favor, of the "re-enactment" rule. The 1979 Congressional reports also describe "programs" in minute detail. H.R. Rep. No. 96-695, 96th Cong., 2d Sess., p. 70-71, 75-76 (1979) ("22 specific programs" of "proven effectiveness"). S. Rep. No. 96-142, 96th Cong., 2d Sess., pp. 11-13, 16, 19 (1979) (funded "programs" include "sting" projects, "Career Criminal Programs", "Economic Crime Projects", "Victim-Witness Assistance Programs").

^{80/} 119 Cong. Rec. 20071 (1973) (Cong. Jordan); 122 Cong. Rec. 28514 (1976) (Cong. Butler)

^{81/} 119 Cong. Rec. 20071; (1973) see also, Id. at 22045 (Senator McClellan).

no intent", in the Act, "to intrude into (the) administrative practices" of local police departments.^{82/} In 1976, Congresswoman Jordan, noting that the 1973 amendments were not working because "LEAA does not like to terminate funds at all",^{83/} proposed an automatic fund termination remedy.^{84/} The proposal was described only as providing "a cause of action to the Justice Department to seek a cutoff of funds or to seek an escrow or suspension of funds".^{85/} The Jordan proposal was amended, by voice vote, on the floor of the House to conform it to the Revenue Sharing Act, not to add a remedy in addition to fund termination.^{86/} In short, funding termination of specific funds was the "ultimate" intrusion.

Again, the Attorney General seeks relief beyond termination of specific funds^{87/} and that, accordingly, is not even available

^{82/} Id. 20075

^{83/} Law Enforcement Assistance Administration: Hearings Before The Subcomm. on Crime of the House Committee on Judiciary, 94th Cong., 2d Sess., p. 442 (1976).

^{84/} Id. pp. 442-443, 445.

^{85/} Id. p. 501. Cf. recent S. Rep. 96-142, 96th Cong., 2d Sess., pp. 56-57 (1979).

^{86/} 122 Cong. Rec. 28514, 28515 (1976).

^{87/} The Attorney General agreed below to a stay of the automatic fund termination procedures of the Crime Control Act. See Order entered 9/27/79, Docket Entry #27 in Record filed herein (A. 5).

under the Crime Control Act.

88/ At oral argument, the Court also inquired whether prior agency action is a precondition to an Attorney General's pattern or practice suit. (Tr. 8) Given the centrality of the administrative scheme for enforcement, Appellees urge that such prior action is (a) required and (b) wise, particularly in view of the amorphous nature of the race discrimination charges. While there are occasional statements in the legislative history that the Attorney General's powers are "independent", see e.g., H.R. Rep. 1165, pt. 1, 94th Cong. 2d Sess., pp. 14-15 (1976) and 122 Cong. Rec. 28514, "independence" arguably means only that the Attorney General is not bound by an agency recommendation on a "pattern or practice" case and can take a second (rather than simultaneous) look. This result was reached under Title VII, U.S. v. Board of Educ. of Garfield Heights, 581 F.2d 791 (6th Cir. 1978), but see U.S. v. City of Miami, 614 F.2d 1322 (5th Cir. 1980) and consider U.S. v. City of Chicago, 549 F.2d 415, 440 (7th Cir. 1977). This view of "independence" also is supported by the legislative history of Revenue Sharing where, in 1976, Congress refused to transfer primary enforcement responsibility from ORS to the Dept. of Justice, see Hearings Before a Subcomm. of House Gov't Operations Comm., 94th Cong. 1st Sess., pp. 978-79, 1026-1030, 1066, 1067 and, instead, strengthened the agencies' powers to trace funds and monitor compliance. Similarly, under the Crime Control Act, Cong. Jordan in 1973 was successful in proposing an amendment to "reverse LEAA's traditional reliance on court proceedings", 119 Cong. Rec. 20071 and in 1976 to further strengthen agency enforcement powers, H.R. Confer. Rep. No. 94-1723, 94th Cong. 2d Sess., pp. 31-32, (1976). Aside from whether prior agency action is required, it certainly was preferred by Congress and courts have ordered deferral of jurisdiction when agency proceedings are suited to clarifying and attempting resolution of complex disputes. See, e.g., Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313-16 (D.C. Cir. 1971); Lodge 1858 of Am. Fed. of Gov't Employees v. Webb, 580 F.2d 496, 509 (D.C. Cir. 1978); Foremost International Tours v. Qantas Airways, 525 F.2d 281 (9th Cir. 1975). Given the available agency procedures, the Attorney General should not be permitted to circumvent them and foist such vague and amorphous charges on the Court. This circumvention further supports the wisdom of the Court's dismissal below.

III. THE ATTORNEY GENERAL IS SEEKING AN UNCONSTITUTIONAL INTERPRETATION OF THE FUNDING STATUTES

If the funding statutes were meant to support a suit by the Attorney General to refashion a local police department because some part of it might receive federal assistance funds, then those funding statutes would violate the Tenth Amendment to the United States Constitution. From Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1946) through National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court has held that federal interests in a given statute must be harmonized with a municipality's interests under the Tenth Amendment in sovereignty over its local institutions.

In National League of Cities, the Supreme Court held that the Tenth Amendment limited Congress from requiring, under its commerce power, that localities adopt the wage and hour provisions of the Federal Fair Labor Standards Act for public employees. Holding that the power to determine wages and hours of its employees were "functions essential to the separate and independent existence of the municipalities," Id. at 844-45, the Court held that that sovereign interest outweighed the federal interest in the FLSA. Similarly, in Oklahoma v. United States Civil Service Commission, supra, the Court permitted a limited recoupment of federal funds for a Hatch Act violation, noting that the United States did not seek to restructure the Oklahoma Highway Commission or to cut all highway funds. Upholding the suit, the Court in carefully qualified language held:

"While the United States is not concerned and has no power to regulate local political activities as such of state officials, it

does have power to fix the terms upon which its money allotments to the state shall be disbursed. The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case." ^{89/} (emphasis added)

Since National League of Cities, Courts have applied the balancing test to federal statutes enacted under powers other than the Commerce Clause ^{90/} and have ruled that the "traditional government functions" that must be accommodated include police protection. ^{91/} Moreover, the doctrine has been applied to determine whether a federal court order under 42 U.S.C. §1983 (enacted

^{89/} See also, Charles Steward Machine Co. v. Davis, 301 U.S. 548, 585-86, (1936) (Cardozo, J. recognizing that in a given case conditions tied to federal assistance can cross the line to "coercion" or "duress" of states "in contravention of the Tenth Amendment"); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 295 (1958) (federal government "may establish and impose reasonable conditions relevant to federal interest in the project and the overall objectives thereof"); Massachusetts v. United States, 435 U.S. 444, 461-62 (1978) (same, citing National League of Cities, Oklahoma, Ivanhoe); see generally, Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery, 26 Amer. Univ. L. Rev. 726, 738-746 (1977). See Maryland v. EPA, 530 F.2d 215, 228 (4th Cir. 1976) vacated on other grounds, 431 U.S. 99, (1977) (EPA cannot coerce state to accept abatement plan); and Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977), application for stay denied, 434 U.S. 1310, (1977) (Marshall, J.)

^{90/} Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979) (analyzing Title VII enacted under Fourteenth Amendment powers); Peel v. Florida Dept. of Transportation, 600 F. 2d 1070, 1083 (5th Cir. 1979) (Veterans Act passed under war powers); Oklahoma v. Harris, 480 F. Supp. 581, 587 (D.D.C. 1979) (Social Security Act passed under spending powers).

^{91/} National League of Cities, supra at 852; Amersbach v. Cleveland, 598 F. 2d 1033, 1036 (6th Cir. 1979).

under the Fourteenth Amendment) unduly invades local sovereignty.^{92/}

Thus, applying National League of Cities herein, there are essentially three federal interests in the funding statutes: revitalization of local control, assurance that federal monies are not spent in support of certain discriminatory conduct^{93/} and avoidance of federal "control, direction or supervision" of local

^{92/} Dauids v. Akers, 549 F.2d 120, 127 (9 Cir. 1977). It has been suggested that Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) should be construed as automatically exempting any federal legislation passed under the fourteenth amendment from the balancing test of National League. See e.g. Arriett v. Grisell, 567 F.2d 1267, 1271 (4 Cir. 1977). However, as Dauids v. Akers, supra, and Scott v. City of Anniston, supra, recognizes that the fourteenth amendment embodies important federal interest, there may even be occasions when the extent to which those powers are applied unnecessarily interferes with sovereign functions also given constitutional importance under the Tenth Amendment. In Halderman v. Pennhurst State School & Hospital, 612 F.2d 84, 99 (3 Cir. 1979) appeal pending (U.S. Supreme Court, Nos. 79-1404, 79-1408, 79-1415 and 79-1480) this Court suggested it would not address whether "the concerns for state autonomy - indicated in National League of Cities - would prevail over a congressional announcement of Fourteenth Amendment policy", Id., fn. 20, but proceeded in any event to demonstrate that a balancing test would not result in a finding of unconstitutionality in that case. Id., fn. 21. See also Shawer v. Indiana University of Pennsylvania, 602 F.2d 1161, 1165 (3 Cir. 1979) where this Court held that National League did not automatically invalidate Title VII but where the balancing of interests analysis required by National League apparently was neither advanced nor considered and Usery v. Allegheny County Institution District, 544 F.2d 148, 155 (3 Cir. 1976) where this Court ruled that Congress had the power, under the Fourteenth Amendment to enact sex discrimination legislation binding the states but did not consider whether any enforcement of that power always would override state interests under the Tenth Amendment.

^{93/} S. Rep. 92-1050, 92d Cong., 2d Sess., p.1, 40 (1972); H.R. Rep. 92-1018, 92d Cong., 2d Sess., p.2 (1972); President Nixon's message upon signing Weekly Compilation of Presidential Documents, Vol. 8, No. 43 p. 1534 (Oct. 20, 1972); Hrgs. House Ways & Means, 92d Cong. 1st Sess., p. 37, 62, 1289 (1972); S. Rep. No. 94-1207, 94th Cong., 2d Sess., p. 1, 26-27 (1976) Hearings Before Sen. Finance Comm., 94th Cong., 2d Sess., p. 38-43, 201, 908-912, 1027, 1066-1070; 122 Cong. Rec. 17071, 17357, 17364, 29879, 29910 (1976).

police departments. 42 U.S.C. 3766(a). The City's primary interest under the Tenth Amendment also is its sovereignty and control over one of the most basic, traditional local functions -- police protection. National League of Cities, supra at 852; Amersbach, supra at 1036. Any attempt by the Attorney General to extend his powers under Revenue Sharing and the Crime Control Act to do more than challenge discrimination in the spending or allocating of specific federal funds or to permit a remedy more intrusive than the termination of the specific federal funds directly supporting the specific program or activity at issue is not "appropriate and plainly adapted to the permitted end" of the funding statutes, Oklahoma v. U.S. Civil Service Commission, supra, 330 U.S. at 143 ^{94/} and is a violation of the Tenth Amendment. ^{95/}

^{94/} See also, United States v. City of Chicago, 549 F. 2d 415, 440, (7th Cir. 1977) (remedies other than fund termination not available on a "federalism" ground.).

^{95/} Moreover, the Attorney General's attempt to invoke the funding statute to pursue discrimination unconnected directly to the funds at issue is unconstitutional under Article III of the U.S. Constitution since the Attorney General, by the very terms of the nondiscrimination clauses, only has standing because a "program or activity" is funded, in whole or in part" with federal assistance funds. It is the funds that create the federal interest and federal standing in the Attorney General. The authorities demonstrating that the Attorney General only has standing to sue for (and, thus, to plead) discriminatory spending or allocation of specific federal funds directly used to support only the specific program or activity at issue are the same authorities that are set forth in Main Brief of Appellees, page 43, fn. 54 and are incorporated herein.

CONCLUSION

The Attorney General has chosen to stand on and defend the tattered remains of an eviscerated Complaint. Those remains do not set forth a coherent or cognizable theory of race discrimination under the funding statutes. For all of the reasons set forth herein, and in prior briefs submitted by Appellees, this Court respectfully is urged to affirm the Orders of the Court below and the dismissal of the Complaint in its entirety and with prejudice.

Respectfully submitted

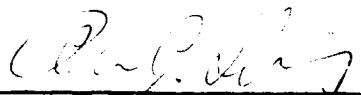

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CERTIFICATION

In accordance with Local Rule 9 of the Rules of the United States Court of Appeals for the Third Circuit, I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.


ALAN J. DAVIS
City Solicitor

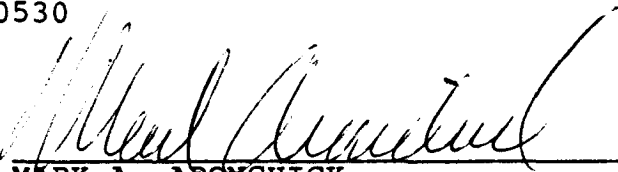
CERTIFICATE OF SERVICE

I, Mark A. Aronchick, hereby certify that on November 19, 1980, I served this Supplemental Brief for Appellees by mailing two copies to counsel for Appellant, addressed as follows:

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