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No. 80-1348

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CITY OF PHILADELPHIA, et al.,

Defendants-Appellees

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

INTRODUCTION; ISSUES PRESENTED

At the conclusion of the oral argument on October 7, 1980, this Court requested "additional briefing on the funding statutes on the specific questions raised by the various judges during the course of oral argument * * *." [1/] The pertinent statutes are the State and Local Fiscal Assistance Act of 1972, as amended, (the "Revenue Sharing Act"), and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (the "Crime Control Act" [2/]). Our review of the transcript of the argument indicates that the basic issue raised by the Court is the scope of the nondiscrimination provisions of the two statutes, i.e., the meaning of the term "program or activity" as used in those provisions. A secondary issue is whether, in an action to enforce the nondiscrimination provisions, the Attorney General may seek to enjoin racially discriminatory practices.

STATEMENT

The procedural history of this case and the nature of the complaint's allegations are discussed in our main brief (pp. 1-5). After first dismissing the Due Process claims on the ground that the Attorney General had no authority to bring them, the district court dismissed the claims based upon the nondiscrimination statutes for failure to allege detailed facts required by the specific-pleading doctrine (A 145; 482 F. Supp. at 1275).

The bases for our view that the specific-pleading doctrine does not apply to this action and that the complaint satisfies

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1/ Transcript of argument, p. 46.

2/ During the argument, this Act was referred to as the "LEAA statute."

the Federal Rules of Civil Procedure are set forth in our main brief (pp. 42-47) and our reply brief (pp. 23-24). With regard to racial discrimination, the complaint alleges that various practices of the Philadelphia Police Department, which are described in detail, discriminate against blacks and Hispanics. See our main brief (pp. 4-5; p. 46, n.92).

The complaint alleges that the City of Philadelphia has received and is receiving substantial amounts of Federal funds for the support of the Police Department, including more than 10 million dollars under the Crime Control Act and more than 42 million dollars under the Revenue Sharing Act (paragraph 8; A 11).[3/] The complaint does not address the manner in which the Federal funds have been used by the Police Department.[4/]

The complaint seeks relief against the defendants, the City of Philadelphia and certain officials, with respect to opera-

3/ In their answer, the defendants admit the receipt of Federal funds, but deny that Federal funds for the support of the Police Department are "substantial" (A 38). The answer states that the defendants lack knowledge regarding the truth of the allegations concerning the amounts of money received under the respective Federal statutes (A 38).

4/ During the oral argument in this Court, counsel for the defendants stated that, with regard to LEAA assistance (grants under the Crime Control Act), the only information "in the record" is a statement by the former City Solicitor regarding use for sensitivity training for prison guards, television sets in subway stations, and an "ACT" team (Tr. 27).

For purposes of this appeal, the pertinent facts are those alleged in the complaint. The manner in which the Philadelphia Police Department has used Revenue Sharing Act and Crime Control Act funds is a question of fact which can be addressed in discovery and at trial. In our view, because this question remains open, the issue of the scope of the nondiscrimination statutes is not squarely presented at this stage. When a factual record is developed, it might, for example, support the conclusion that Federal funds have been used throughout the Police Department.

tions of the Police Department (A 34). Allegations concerning officials of other municipal agencies, e.g., the Medical Examiner, the Superintendent of Prisons and the Director of Finance, are included solely because of their relationship to the Police Department (A 12, 21, 25).

Our main brief outlines (pp. 45-46, n.91) the bases for our position that, for purposes of the nondiscrimination provisions of the Revenue Sharing Act and the Crime Control Act, the entire Philadelphia Police Department is a "program or activity" receiving Federal funds. In their brief, the defendants assert that the term has a narrower meaning. 5/

SUMMARY OF ARGUMENT

1. Under both the Revenue Sharing Act and the Crime Control Act, the scope--and the effectiveness--of the nondiscrimination section depend on the term "program or activity." Neither statute defines "program or activity," but that term is defined in the regulations of the Federal agencies responsible for administering the statutes. The two agencies' definitions, which are essentially the same, state specifically that, in a case such as the present one, the "program or activity" is the police department.

The definitions in question are valid, because (1) they further Congress' purpose of effective civil rights enforcement and (2) Congress has ratified the administrative interpretation of both the Revenue Sharing Act and the Crime Control Act. The Law Enforcement Assistance Administration issued its definition in

5/ Brief for Appellees, pp. 52-53, n.60.

1977, relying in part on specific legislative history regarding the 1976 amendments to the Crime Control Act's nondiscrimination provision. In 1979, the latter provision was re-enacted by Congress without any pertinent change.

In 1973 and 1974, the first years of its existence, the Office of Revenue Sharing made clear to congressional committees and to all recipients of revenue sharing funds that "program or activity" refers, e.g., to a police department that uses such funds, without regard to manner of use. In 1976, Congress amended the civil rights provision of the Revenue Sharing Act in order to strengthen it. The administrative construction of "program or activity" was not a source of controversy in Congress, but was fully accepted.

The exact nature of the alternative approach asserted by the defendants is not clear. Apparently, they contend that the concept "program or activity" requires the tracing of funds to a specific project or method of use. This narrow approach would overturn the well-established administrative interpretation and would defeat Congress' goal of strengthening civil rights enforcement under the two statutes. The narrow view would permit an agency such as a police department to allocate its Federal funds to a nondiscriminatory project and then assert that all other aspects of its operations are immune from the requirements of the nondiscrimination statutes. Under this approach, the statutory right of employees and other persons to be free from racial discrimination could turn upon the ingenuity of the agency's bookkeeper.

A more concrete and workable approach, the one adopted by the Federal agencies and approved by Congress, views an organization such as a police department as a single entity for purposes of the nondiscrimination requirement.

2. The two statutes authorize the Attorney General to bring civil actions to remedy a pattern or practice of violation of the nondiscrimination provisions. Typically, in such a case, when discrimination is established by the Attorney General, the relief is an injunction against the discriminatory practices. In any event, at this stage of the present case, the question of type of relief is not pertinent.

ARGUMENT

I

THE PHILADELPHIA POLICE DEPARTMENT IS A "PROGRAM OR ACTIVITY" WITHIN THE MEANING OF THE NONDISCRIMINATION STATUTES

The nondiscrimination provisions of the Revenue Sharing Act and the Crime Control Act are similar,[6/] and each uses the term "program or activity." Section 122(a)(1) of the Revenue Sharing Act, as amended, 31 U.S.C. 1242(a)(1), reads in pertinent part as follows:

> No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a State government or unit of local government, which government or unit receives funds made available under * * * [this Act].

Section 122(a)(2) provides that the above prohibition shall not

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6/ The full nondiscrimination sections of the two acts are set forth below in the Addendum, pp. 1a-5a, 7a-10a.

apply where the State or local government "demonstrates * * * that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under * * * [the Revenue Sharing Act]."

The nondiscrimination requirement of the Crime Control Act, Section 815(c)(1), 42 U.S.C.A. 3789d(c)(1), is as follows:

> No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title. 7/

Thus, under each of the statutes, the fundamental matter of the scope of the nondiscrimination provision depends upon the meaning of "program or activity." 8/ Neither statute defines the term, but, pursuant to the statutory scheme, the term "program or activity" is defined in regulations of the administering agencies. 9/

7/ The use of "programs," rather than "program," appears to have been a typographical error. Other provisions of Section 815(c), e.g., Section 815(c)(2)(E), use the standard term "program or activity." In any event, the difference is not substantive.

8/ The question is the extent of "program or activity," not whether the term refers to the Federal level or the State or local level. The language of the nondiscrimination provisions makes clear that the term refers to a State or local "program or activity," one funded wholly or partly with Federal funds.

9/ General responsibility for implementing the Revenue Sharing Act, including the issuance of regulations, is assigned to the Secretary of the Treasury. See Section 142(a), 31 U.S.C. 1242(a). Responsibility for administering the Crime Control Act, as amended in 1979, is assigned to the Office of Justice Assistance, Research, and Statistics, which includes the Law Enforcement Assistance Administration. This responsibility also includes the issuing of regulations. See Section 802(a), 42 U.S.C.A. 3782(a).

Two basic types of Federal enforcement are authorized in the nondiscrimination provisions of the two statutes--administrative proceedings by the Treasury Department or LEAA and lawsuits by the Attorney General.

A. The applicable regulations provide that "program or activity" refers to such entities as police departments

The regulations implementing the respective nondiscrimination provisions of the Revenue Sharing Act and the Crime Control Act both include a definition of "program or activity." The pertinent provision in the regulation of the Treasury Department's Office of Revenue Sharing, 31 CFR § 51.51(i), reads as follows:

> "Program or activity" means the operations of the agency or organizational unit of the government receiving or substantially benefiting from entitlement funds, e.g., a police department; department of corrections; health department.

The corresponding definition in the regulation under the nondiscrimination provision of the Crime Control Act is essentially the same.[10/] These definitions mean that, for purposes of the present claims, the entire Philadelphia Police Department is the "program or activity." Under the regulations, that result follows when the City elects to allocate Revenue Sharing Act or Crime Control Act funds to the Police Department; the reach of the nondiscrimination requirements is not dependent on the manner in which those funds are used within the Police Department.

We deal next with the question whether the regulations are valid. The applicable standard has been stated by the Supreme Court:

10/ That definition, 28 CFR § 42.202(k), is as follows:

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

See 45 Fed. Reg. 28704, 28706 (Apr. 30, 1980), set forth in the Addendum, pp. 28a, 30a.

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 1973) (footnote and citations omitted). A review of the history of the Revenue Sharing Act and the Crime Control Act and the development of the regulations will indicate that the agencies' definition of "program or activity" is in accord with Congress' purpose and, in fact, has been ratified by Congress.

B. The administrative construction of "program or activity" is valid

We will deal first with the Revenue Sharing Act and the Treasury Department's implementation of the nondiscrimination requirement of that Act.

1. The Revenue Sharing Act

The Revenue Sharing Act was enacted in October 1972 [11/] and was intended to provide State and local governments with a new type of Federal aid that would avoid criticisms of "categorical grants." [12/] The 1972 Act imposed certain limitations, however, including a prohibition against discrimination. [13/] The latter provision, which was basically the same as the one

11/ Pub. L. No. 92-512, 86 Stat. 919 (1972).

12/ See H.R. Rep. No. 92-1018, 92d Cong., 2d Sess. 2-7 (1972); S. Rep. No. 92-1050, 92d Cong., 2d Sess. 3-11 (1972).

13/ See Section 122, 86 Stat. 932 (1972), which is set forth in the Addendum, p. 6a.

contained in the general revenue sharing bill proposed by President Nixon, [14] was dealt with only briefly in the legislative history. [15]

The prohibition contained in the 1972 Revenue Sharing Act was as follows: [16]

> No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under * * * [the Act].

This language was similar to that of Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which applies to programs receiving Federal grants. However, the enforcement scheme and coverage of the Revenue Sharing Act's nondiscrimination section differed somewhat from those of Title VI. [17]

Because of the nature and size of the revenue sharing program, it was, from the beginning, subjected to considerable scrutiny by Congress. This scrutiny related in particular to civil rights enforcement by the Office of Revenue Sharing.

14/ See President Nixon's message to Congress on revenue sharing, H.R. Doc. No. 92-44, 92d Cong., 1st Sess. 6 (1971), and his letter to the Speaker of the House of Representatives, H.R. Doc. No. 92-47, 92d Cong., 1st Sess. 8 (1971).

15/ See H.R. Rep. No. 92-1018, supra, at 12, 35-36; S. Rep. No. 1050, supra, at 3, 35.

16/ Section 122(a), 86 Stat. 932 (1972).

17/ For example, Title VI contains a provision which restricts its coverage of employment practices to limited circumstances. See Section 604, 42 U.S.C. 2000d-3. No such restriction is included in the nondiscrimination section of the Revenue Sharing Act; it covers employment practices generally, as well as the providing of benefits and services. See 31 CFR § 51.52 and § 51.53.

In September 1973, the Civil Rights Oversight Subcommittee of the House Judiciary Committee held a hearing on civil rights aspects of general revenue sharing. The question of the meaning of "program or activity" was raised by Congressman Butler. At first, the Director of the Office of Revenue Sharing, Graham W. Watt, said in effect that the concept was a narrow one.[18/] Subsequently, after consulting his staff, Mr. Watt corrected his initial answer and said the following:[19/]

> The question was asked, I believe, by Mr. Butler regarding the use of general revenue-sharing funds to purchase a firetruck; and whether or not, if discrimination were found in the fire department, we would link the two together.
>
> My answer to him this morning was that we would not.
>
> I find, after consultation with members of my staff, that we interpret the provision of the law which refers to any program and activity funded in

18/ This exchange was as follows:

> Mr. BUTLER. Let's say, a city or locality chooses to purchase a piece of firefighting equipment. Does that mean that any member of the fire department can raise a question about whether there is discrimination in the employment by the fire department of that community?
>
> Mr. WATT. Probably not. I think that if the funds were used to pay firemen's salaries, a complaint regarding discrimination in employment in the fire department would lie. But if the funds are used for a capital outlay purchase, then I don't think that would be the case. The issue might be whether a minority contractor or minority manufacturer had been unfairly excluded from bidding or something of that sort, in which case the issue of discrimination would be raised regarding the purchase of the equipment.

Civil Rights Aspects of General Revenue Sharing: Hearing Before a Subcomm. of the House Judiciary Comm., 93d Cong., 1st Sess. 17 (1973).

19/ Id. at 25.

> whole or in part with general revenue-sharing funds, to encompass a fire department. And so if any funds are spent within the department, whether it is for salaries or for uniforms, for equipment, or for other uses within the fire department, if discrimination is found in that activity, we would seek to recover or withhold the funds as appropriate in this--as from the firetruck.

Thus, at an early point, the Treasury Department adopted and expressed the position that, without regard to the precise manner in which it used revenue sharing funds, an entity such as a fire department is a "program or activity." 20/

In June 1974, a Senate subcommittee held oversight hearings on implementation of the Revenue Sharing Act, and a major subject was civil rights enforcement. 21/ The Office of Revenue Sharing ("ORS") provided the subcommittee a memorandum on its civil rights procedures. The memorandum, in discussing a complaint of employment discrimination on the part of the Chicago Police Department (a matter that ORS had referred to the Attorney General), pointed out the distinction between "program" for purposes of civil rights jurisdiction and the specific use of revenue sharing funds:

> In many cases and probably to a major extent in the Chicago case, the funds are not being spent in a discriminatory manner, but are being spent in a program to which allegations of discrimination have been made thus providing the Office of Revenue Sharing with the requisite jurisdiction. [22/]

20/ See note 25, infra.

21/ Revenue Sharing: Hearings Before a Subcomm. of the Senate Government Operations Comm., 93d Cong., 2d Sess. (1974).

22/ Id. at 39 (emphasis in original).

In November 1974, the Office of Revenue Sharing issued a booklet entitled "General Revenue Sharing and Civil Rights." This booklet, which ORS sent to all State and local governments receiving revenue sharing funds, stressed the importance of the term "program" and gave, as an example of a "program or activity," a police department. 23/ In February 1975, the United States Commission on Civil Rights issued (and sent to Congress) a report

23/ Office of Revenue Sharing, Department of the Treasury, General Revenue Sharing and Civil Rights 13 (November 1974). The booklet's discussion of "program or activity" is as follows:

> MONITORING FOR DISCRIMINATORY ACTIONS
>
> Preventing and/or eliminating any discriminatory actions that may be in a state or local program (this is a key word and has a tremendous amount of significance) funded in whole or in part by General Revenue Sharing is the objective to which this section is devoted. Listed below are some of the "do's" and "don'ts" for both recipient governments and their residents. This is intended as a checklist for both groups to achieve a common goal--the elimination and prevention of discrimination and the correction of inequities due to past discriminatory actions.
>
> As mentioned above, the word "program", which may be used interchangeably with "activity", is the word to keep in mind when monitoring for discrimination. Some governments are of the erroneous impression that if they expend revenue sharing funds for capital items (police cars, fire equipment, or tennis courts--all properly classified as capital expenditures), they are "free and clear." This could not be further from the truth! Since a police car is a part of the police department, which is a permissible program or activity, it is against ORS Regulations to discriminate in the hiring (including testing procedures) and promoting of minorities and women in the police department. The same applies to the purchase of items of a maintenance and operation nature, such as gasoline for the police cars or flashlights for the policemen. This is merely one example which can be used as a rule of thumb. [Emphasis in the original.]

evaluating the civil rights enforcement efforts of the Office of Revenue Sharing.[24/] The Commission noted with approval that ORS acknowledged the "broad scope" of the nondiscrimination provision, for example, coverage of the entire operation of a fire department that used revenue sharing funds to buy a fire truck.[25/]

Further oversight hearings on the civil rights aspects of revenue sharing were held by the subcommittee of the House Judiciary Committee in October 1975.[26/] In November 1975, the subcommittee issued a report which found that there was "widespread discrimination" in programs funded under revenue sharing[27/] and that enforcement efforts by ORS and the Department of Justice

24/ United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV: To Provide Fiscal Assistance (Feb. 1975). The report concluded that civil rights enforcement by ORS was "fundamentally inadequate." Id. at i.

25/ Id. at 16, n.40. The report cited, e.g., the 1974 ORS booklet, General Revenue Sharing and Civil Rights. Also, the Civil Rights Commission quoted an internal ORS memorandum (dated August 16, 1973) in which an ORS civil rights specialist rejected the statement of an ORS auditor that, in a case where revenue sharing funds were used to purchase a fire truck, discrimination could exist only if that truck were used in a discriminatory way. Ibid.

The Civil Rights Commission stated, and ORS acknowledged, that in such a case "any discrimination [by the fire department] * * * in either employment or provision of services would constitute a violation of the Act." Ibid.

26/ Civil Rights Aspects of General Revenue Sharing: Hearings Before a Subcomm. of the House Judiciary Comm., 94th Cong., 1st Sess. (1975). Copies of the February 1975 report of the Commission on Civil Rights were provided to the subcommittee. Id. at 1.

27/ The Civil Rights Aspects of General Revenue Sharing, Subcomm. on Civil And Constitutional Rights, House Judiciary Comm. 94th Cong., 1st Sess. 5-8 (Comm. Print, 1975). These findings of the subcommittee are set forth in the Addendum, pp. 18a-22a.

were not adequate.[28] However, neither the subcommittee majority, which favored blanket coverage of all programs and activities of a government receiving any revenue sharing funds,[29] nor the minority, which opposed that recommendation,[30] took issue with the ORS interpretation of "program or activity."

In discussing the problem of fungibility or the shifting of funds among programs to avoid civil rights scrutiny, the subcommittee report cited actual cases involving, e.g., fire and police departments.[31] It is implicit in the report's discus-

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28/ Id. at 8, 25.

29/ Id. at 29. The majority included Congressman Edwards, the subcommittee chairman, and Congressman Drinan.

30/ Id. at 41. The minority included Congressman Butler, who had raised the "program or activity" question at the 1973 hearing.

31/ The examples cited in the report were as follows:

> The impact of this fungibility problem upon the enforcement of the civil rights provisions of the Act is enormous. By engaging in a simple act of accounting sleight-of-hand, which is entirely legal under the Act, a jurisdiction can effectively circumvent the civil rights provisions by avoiding the reported expenditure of revenue sharing funds in programs or activities where discrimination may exist. An example of the use of this device occured in the city of Los Angeles where revenue sharing funds had been reported as expended on the fire department prior to fiscal year 1975. Then, because a law suit alleging discrimination was pending against the fire department, the mayor simply directed that revenue sharing funds not be reported as expended on that department during fiscal year 1975. As long as the city's Actual Use Report did not list the fire department as a beneficiary of revenue sharing funds, the Office of Revenue Sharing could not take action to withhold revenue sharing funds even if the alleged discrimination were upheld in the courts.

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sion that such a department is a "program or activity." The problem of fungibility and the same examples were discussed in the hearings and reports on the bills to extend the Revenue Sharing Act.

In April 1975, President Ford had recommended that the Revenue Sharing Act be continued; regarding the nondiscrimination section, his bill sought only limited amendments (relating to the remedies available to the Secretary of the Treasury).[32/]

Hearings on such legislation were held by a subcommittee of the House Government Operations Committee from September through December 1975. Various witnesses, e.g., Congressman Edwards[33/] and the Comptroller General,[34/] stated that the nondiscrimination provision should be amended to cover all programs and activities of a recipient government, rather than only pro-

31/ (continued)

> A similar shifting of the reported use of revenue sharing funds to avoid civil rights requirements was documented in the city of New Orleans. There, officials frankly admitted that they had proposed that revenue sharing funds not be reported as expended on minimally integrated departments where civil rights violations might be detected. Instead, they sought to designate that such funds were used in "safe" or better integrated programs.

Id. at 24-25 (footnotes omitted).

32/ State and Local Fiscal Assistance Act (General Revenue Sharing) (Part 1): Hearings on H.R. 6558 and Related Bills Before a Subcomm. of the House Government Operations Comm., 94th Cong., 1st Sess. 3, 4, 8-9 (1975).

33/ Id. at 1065.

34/ Id. at 894.

grams or activities funded in whole or in part with revenue sharing funds.

In May 1976, the House Government Operations Committee reported a bill extending the Revenue Sharing Act and substantially amending the nondiscrimination provision. With respect to the "funding" aspect of coverage, the committee reached a compromise between (1) leaving the nondiscrimination provision intact and (2) extending it to all programs and activities of a recipient government. Under the committee bill, [35/] the prohibition covered all programs or activities of a recipient government, except that the prohibition would not apply if the recipient proves that the program or activity alleged to be discriminatory is not funded in whole or in part, directly or indirectly with revenue sharing funds. This change and changes in enforcement procedures were made "to strengthen the nondiscrimination provisions." [36/]

The goal of strengthening the civil rights provisions was shared by minority (Republican) members of the committee. [37/] No member of the committee took issue with the Treasury Department's interpretation of "program or activity."

The bill (H.R. 13367) was passed by the House of Representatives on June 10, 1976. No amendment pertinent to the present issue was adopted.

35/ See H.R. Rep. No. 94-1165, Pt. 1, 94th Cong., 2d Sess. 12-13, 28 (1976).

36/ Id. at 12.

37/ Id. at 111.

In August 1976, the Senate Finance Committee held a hearing on the House-passed bill.[38] Treasury Department officials expressed opposition to extending the nondiscrimination provision to programs and activities funded only indirectly with revenue sharing payments.[39]

The report of the Senate committee discussed the need to strengthen the nondiscrimination provision.[40] However, the Senate committee took a different approach; the nondiscrimination provision of its bill covered any program or activity (1) designated as receiving revenue sharing funds or (2) demonstrated (by the Federal Government) to be funded with such funds.[41] The Senate passed its version of the bill on September 14, 1976.

Regarding the strengthening of civil rights procedures and remedies, the conference committee largely followed the Senate bill.[42] With respect to the scope of the nondiscrimation provision, the conference committee adopted the House provision, except that it deleted the phrase "directly or indirectly."

In sum, in the first years of the Revenue Sharing Act, the Treasury Department addressed the meaning of "program or activity" and made its interpretation clear to congressional

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38/ General Revenue Sharing: Hearing on H.R. 13367 Before the Senate Comm. on Finance, 94th Cong., 2d Sess. (1976).

39/ Id. at 46-47.

40/ S. Rep. No. 94-1207, 94th Cong., 2d Sess. 3, 26-27 (1976).

41/ Id. at 27.

42/ H.R. Rep. No. 94-1720, 94th Cong., 2d Sess. 34 (1976).

committees, State and local governments, and the general public. By 1976, this aspect of the scope of the Revenue Sharing Act's nondiscrimination provision had ceased to be an issue. No member of Congress sought to amend the Act to alter the Treasury Department's interpretation.

The coverage issue in 1976 was a different one--whether, because of the problem of fungibility,[43/] all programs and activities of each recipient government should, for purposes of the nondiscrimination provision, be considered to be funded with revenue sharing payments. As discussed above, a compromise was reached on that issue.[44/] The basic purpose of both the House and the Senate was to achieve stronger and more effective civil rights enforcement under the Revenue Sharing Act. That is, the reports, hearings and debates indicate that Congress sought to achieve the elimination of discrimination, in particular, discriminatory employment practices of police and fire departments.[45/] The well-established administrative construction of "program or activity"

43/ See, e.g., the examples of Los Angeles and New Orleans cited in the November 1975 report of the subcommittee of the House Judiciary Committee, supra note 31.

44/ Under Section 122(a), as amended in 1976, 31 U.S.C. 1242(a), all programs and activities funded in whole or in part with revenue sharing payments are subject to the prohibition against discrimination; when discrimination is alleged, the recipient government has the burden of proving that the program or activity in question is not so funded.

45/ See, e.g., H.R. Rep. No. 94-1165, Pt. 1, supra, at 12-13, 94-95 (Congressman Drinan), p. 97, n.2 (Drinan and eight others); 1975 House Government Operations Comm. Hearings, Pt. 2, supra note 32, at 1062, 1064.

(continued)

is consistent with Congress' purpose. It follows that the regulation in question is a valid exercise of the Treasury Department's authority under the Revenue Sharing Act. 46/

The legislative record contains a number of statements to the effect that the Act's nondiscrimination provision assures "that the funds are expended without discrimination" 47/ and other statements using the phrase "program or project" instead of "program or activity." 48/ In our view, unfocused statements of

45/ (continued)

Under the 1972 Act, revenue sharing funds of local governments could be used only for capital expenses or for specified "priority expenditures," one of which was "public safety." Section 103(a); 86 Stat. 919 (1972). (These restrictions were eliminated by the 1976 amendments. Pub. L. No. 94-488, Section 3, 90 Stat. 2341.)

46/ The definition of "program or activity," which now appears at 31 CFR § 51.51(e), was promulgated in April 1979. See 44 Fed. Reg. 19191 (Apr. 2, 1979), set forth in the Addendum, p. 16a.

The definitions contained in prior ORS regulations were less clear. See, e.g., 42 Fed. Reg. 18366 (Apr. 6, 1977). However, as noted in the April 2, 1979 statement in the Federal Register and as explained above, ORS has applied the same interpretation of "program or activity" at least since 1973.

It should be noted that, in the current session of Congress, bills to extend the Revenue Sharing Act have been reported in both the House and the Senate. See H.R. Rep. No. 96-1277, 96th Cong., 2d Sess. (1980); S. Rep. No. 96-1009, 96th Cong., 2d Sess. (1980). Neither of the reported bills would alter the nondiscrimination provision. Floor debate has not yet taken place.

47/ E.g., H.R. Rep. No. 94-1165, Pt. 1, supra, at 1. Cf. 122 Cong. Rec. 29876 (1976) (Senator Long); statement of Secretary of the Treasury William E. Simon during the 1975 hearings of the subcommittee of the House Government Operations Committee, supra note 32, at 1287.

48/ E.g., 122 Cong. Rec. 17075, 17076 (1976) (Congressman Erlenborn). Congressman Erlenborn's remarks pertained to a subparagraph of the committee bill that dealt with administrative suspension of revenue sharing payments to a recipient when the

(continued)

this kind are not significant. Our position that Congress ratified the Treasury Department's construction of "program or activity" has two kinds of bases: discussions in the legislative record of the exact issue, in the context of a police department or fire department; and Congress' over-all purpose in 1976 to make the civil rights protections more meaningful. If any Member of Congress [48/] objected to the Treasury Department's interpretation the logical course would have been to seek to amend the Act or at least to express the objection in the reports or debates. No one did so, however. The settled administrative construction of "program or activity" was fully consistent with the bipartisan goal of effective civil rights enforcement.

We turn next to the Crime Control Act.

48/ (continued)

Attorney General filed a suit alleging discrimination in any program or activity of the recipient. Under the committee bill, suspension of revenue sharing funds would be required whether or not the alleged discrimination was in a program or activity funded with revenue sharing payments. Congressman Erlenborn maintained that suspension should occur only when the Attorney General alleged that revenue sharing funds were used in a discriminatory program. Ibid.; id. at 17354-17355. On June 10, the House amended the committee bill by adding the limitation favored by Congressman Erlenborn. Id. at 17368. (For the text of the amendment, proposed Section 122(b)(3)(C), see id. at 17340.) This suspension provision was deleted by the conference committee. H.R. Rep. No. 94-1720, supra, at 34-36.

2. The Crime Control Act

Under the Crime Control Act, the Law Enforcement Assistance Administration of the Department of Justice administers grants to State and local governments for the purpose of strengthening criminal justice systems, including police departments. Originally enacted in 1968, [49/] the Act has been extended three times, in 1973, 1976 and 1979.

The 1968 Act, which resulted from a proposal made by President Johnson, did not include a nondiscrimination provision. Recipients of LEAA grants were, however, subject to Title VI of the Civil Rights Act of 1964. [50/]

In 1973, Attorney General Kleindienst sent Congress a proposed bill to modify and continue the Crime Control Act. The Attorney General's bill sought to give the State and local governments more leeway in the use of the funds. [51/] The bill included a nondiscrimination provision similar to that of the 1972 Revenue Sharing Act. [52/]

49/ Pub. L. No. 90-351, 82 Stat. 197 (1968).

50/ See Section 601 of Title VI, 42 U.S.C. 2000d. In addition, in 1970, the Department of Justice issued a regulation, based upon general authority (not upon Title VI), embodying a blanket prohibition against discrimination in the employment practices of police departments and other LEAA-assisted programs. See 35 Fed. Reg. 19998 (Dec. 31, 1970). See United States v. County of Hawaii, 473 F. Supp. 261 (D. Haw. 1979).

51/ See Law Enforcement Assistance Administration: Hearings Before Subcomm. No. 5 of the House Judiciary Comm., 93d Cong., 1st Sess. 20-26 (1973).

52/ Id. at 26.

The bill reported by the House Judiciary Committee differed from the Attorney General's proposal. The committee bill contained a nondiscrimination provision which, in addition to permitting use by LEAA of Title VI remedies and granting the Attorney General independent authority to sue, required LEAA to initiate administrative fund-termination proceedings under certain circumstances. 53/

During the debate on the bill, Congresswoman Jordan stated that she had drafted the nondiscrimination provision and that its purpose was to require effective enforcement by LEAA against discrimination by law enforcement agencies regarding "benefits or employment." 54/ That provision was included, without change, in the bill passed by the House on June 18, 1973.

The Senate passed a bill that contained a modified version of the nondiscrimination section; the Senate version did not make initiation of fund-termination proceedings mandatory. 55/ The conference committee bill, which was enacted, followed the House approach and provided for mandatory commencement of administrative proceedings. 56/

53/ H.R. Rep. No. 93-249, 93d Cong., 1st Sess. 5, 7, 27 (1973)

54/ 119 Cong. Rec. 20070 (1973).

55/ See id. at 22044.

56/ See S. Rep. No. 93-349, 93d Cong., 1st Sess. 20, 32 (1973).

Thus, as amended in 1973, the Crime Control Act included Section 518(c)(1), a prohibition against discrimination in "any program or activity funded in whole or in part with funds made available under * * * [the Act]." [57/]

In 1975, Attorney General Levi recommended that Congress extend the Crime Control Act for an additional period. His proposal did not provide for amendment of Section 518(c), the nondiscrimination provision. [58/] In 1976, the Senate Judiciary Committee reported [59/]--and the Senate passed--amendments to the Crime Control Act that did not affect Section 518(c).

In the meanwhile, the House Judiciary committee had held hearings and reported its version of the bill. There was considerable criticism during the hearings of LEAA's failure to enforce the nondiscrimination requirements. Congresswoman Jordan stated that she would offer new legislation designed to achieve effective enforcement through the sanction of withholding funds. [60/]

57/ Section 518(c)(1), as added by Pub. L. No. 93-83 (1973), 87 Stat. 214. This provision is set forth in the Addendum, p. 15a.

58/ For the text of the bill proposed by the Attorney General, see 121 Cong. Rec. 25615-25616 (1975).

59/ See S. Rep. No. 94-847, 94th Cong., 2d Sess. (1976).

60/ Law Enforcement Assistance Administration: Hearings Before the Subcomm. on Crime of the House Judiciary Comm., 94th Cong., 2d Sess. 442, 446-447 (1976).

The Staff Director of the Commission on Civil Rights stated that "one of the most serious deficiencies in the LEAA's compliance review program is its emphasis on discriminatory employment issues to the detriment of monitoring discrimination in the provison of services." 61/

The report of the House Judiciary committee repeated Congresswoman Jordan's statement that LEAA's enforcement of Section 518(c) had been "less than minimal." 62/ The bill reported by the committee included the detailed amendments to Section 518(c) that Congresswoman Jordan had offered. 63/ One of the provisions, proposed Section 518(c)(2)(C), required the suspension of funds in certain circumstances and provided that: "Such suspension shall be limited to the specific program or activity cited by * * * [LEAA in its notice to the State and local government]." 64/ In explaining this limitation to the "specific program or activity," the report said: 65/

61/ Id. at 1642. Included in the hearing record (id. at 1515) was a 1975 report of the Commission on Civil Rights that described problems of discrimination in the employment practices of and the provision of services by police departments and other LEAA-funded programs. United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort, Vol. VI, pp. 281-288.

62/ H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 10-11 (1976).

63/ Id. at 11, 25-27.

64/ Id. at 47.

65/ Id. at 26.

> For example, if discriminatory employment practices in a city's police department were cited in the notification, LEAA may only suspend that part of the city's payments which fund the police department. LEAA may not suspend the city's LEAA funds which are used in the city courts, prisons, or juvenile justice agencies.

The reported bill was debated on the House floor beginning August 31, 1976. Congressman Butler offered a substitute for the amended nondiscrimination provision.[66/] His substitute, which did not alter the use of "program or activity" in the suspension provision or elsewhere, was intended to conform to the Revenue Sharing Act amendments passed by the House on June 10, 1976.[67/] Congressman Butler discussed differences between his proposal and the nondiscrimination section of the Revenue Sharing Act,[68/] but he did not say that "program or activity" had different meanings under the two bills.[69/] Congresswoman Jordan accepted the Butler version of the amendment to Section 518(c), and it was adopted by a voice vote.[70/]

66/ 122 Cong. Rec. 28513 (1976).

67/ Id. at 28514.

68/ Ibid.

69/ It was Congressman Butler who raised the question of the meaning of "program or activity" during the 1973 hearings on revenue sharing and civil rights. See note 18, supra.

70/ 122 Cong. Rec. 28514 (1976).

The conference report noted that the Senate bill did not alter the existing nondiscrimination provision and that the House bill made extensive changes in the compliance procedures.[71] The conference committee adopted the House provision with slight modification.[72] The 1976 amendments to the Crime Control Act became law on October 15, 1976.[73]

Amended Section 521(d) directed LEAA to promulgate new regulations on civil rights compliance within 120 days of enactment of the statute.[74] This requirement indicates the importance that Congress attached to LEAA's implementation of the new nondiscrimination provisions. LEAA's proposed regulation was published in November 1976. It included a definition of "program or activity" like that quoted above (note 10), and it explained the definition with a commentary that quoted the discussion in the 1976 House report regarding suspending funds to a "specific program or activity."[75] In February 1977, LEAA issued its final regulation, which contained both the definition

71/ H.R. Rep. No. 94-1723, 94th Cong., 2d Sess. 32 (1976).

72/ Ibid.

73/ Pub. L. No. 94-503, 90 Stat. 2407. Amended Section 518(c) is set forth in the Addendum, pp. 11a-14a.

74/ Amended Section 521(d), 90 Stat. 2424 (1976).

75/ 41 Fed. Reg. 51764, 51767 (Nov. 23, 1976). The commentary is as follows (id. at 51767):

(continued)

of "program or activity" and the commentary relying on the House report. 76/

The most recent amendments to the Crime Control Act were enacted in 1979. 77/ These amendments established a new organization within the Department of Justice, the Office of Justice Assistance, Research, and Statistics ("OJARS"), which coordinates the work of LEAA and other agencies. 78/ The 1979 amendments made certain technical changes in the nondiscrimination provisions (e.g., adding references to OJARS), but did not modify the concept

75/ (continued)

Section 42.202(g). Section 518(c) of the Crime Control Act limits suspension and termination of assistance in the event of noncompliance to the "specific program or activity" in which the noncompliance is found.

House Report No. 94-1155 (94th Congress, 2d Session), at p. 26, explained this provision as follows:

> Suspension may be limited to the specific program or activity found to have discriminated, rather than all of the recipients' LEAA funds.
>
> For example, if discriminatory employment practices in a city's police department were cited in the notification, LEAA may only suspend that part of the city's payments which fund the police department. LEAA may not suspend the city's LEAA funds which are used in the city courts, prisons, or juvenile justice agencies.

This passage makes it clear that LEAA need not demonstrate a nexus between the particular project funded and the discriminatory activity. See Lau v. Nichols, 414 U.S. 563, 566 (1974). [Emphasis added.]

76/ 42 Fed. Reg. 9492 (Feb. 16, 1977).

77/ See the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167.

78/ Section 801, 42 U.S.C.A. 3781.

of "program or activity." [79] Only brief mention of the civil rights provision is contained in the reports on the 1979 amendments. [80]

Congress' re-enactment, in 1979, of the nondiscrimination section constitutes ratification of LEAA's interpretation of the scope of that section. [81] In light of the importance which Congress assigned to LEAA's implementing regulation and LEAA's explicit reliance on the 1976 House report's discussion of "program or activity," this is an especially strong case for applying the re-enactment rule.

3. In sum, with regard to both the Revenue Sharing Act and the Crime Control Act, the interplay of executive and congressional action supports the definition of "program or activity" contained in the regulations. This conclusion is fortified by the relation between the two statutes. Regarding each, the impetus for stronger civil rights provisions came from the House of Representatives. Key members, Jordan, Drinan, and Edwards,

79/ See Section 815(c), 42 U.S.C.A. 3789d(c). See note 7 supra, regarding the use in one paragraph of "programs or activity."

The amendments to the nondiscrimination provision are discussed in the preamble to the OJARS regulation, 45 Fed. Reg. 28704 (Apr. 30, 1980), set forth in the Addendum, p. 28a.

80/ S. Rep. No. 96-142, 96th Cong., 1st Sess. 56-57 (1979); H.R. Rep. No. 96-163, 96th Cong., 1st Sess. 3 (1979).

81/ Cf. United States v. Board of Commissioners of Sheffield, 435 U.S. 110, 131-135 (1978) (congressional ratification of Attorney General's construction of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c).

were involved over the years with each of the Acts. They criticized the Federal agencies for failing to eliminate discrimination, such as discrimination on the part of federally funded police departments, and they sought to spur the agencies into action.

Courts that have considered the validity of the LEAA or ORS definition of "program or activity" have upheld the definition. See, e.g., United States v. City and County of San Francisco, 18 EPD ¶ 8800, p. 5304 (N.D. Cal., Sept. 22, 1978); United States v. Commonwealth of Virginia, Civ. Action No. 76-0623-R (E.D. Va., Apr. 7, 1977).[82/] Appellate courts have rendered decisions in employment suits brought by the United States under the Crime Control Act or the Revenue Sharing Act, but the "program or activity" question was not raised in any of these appeals. See, e.g., United States v. Commonwealth of Virginia, 569 F.2d 1300 (4th Cir. 1978). See also United States v. City of Chicago, 395 F. Supp. 329, 344 (N.D. Ill.), aff'd mem., 525 F.2d 695 (7th Cir. 1975); and 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 975 (1977).

C. The interpretation of "program or activity" suggested by the defendants is contrary to the intent of Congress

1. In their brief,[83/] the defendants assert that the term "program or activity" must mean something less than an entire police department. Referring to provisions of the pre-1979

82/ A copy of this unreported order is set forth in the Addendum, p. 23a, 25a.

83/ Brief for Appellees, p. 53, n.60.

Crime Control Act that dealt with certain LEAA grants, [84/] the defendants seems to suggest that "program" means, e.g., behavioral research, training, or narcotic treatment. Similar provisions are contained in the 1979 revision of the Crime Control Act. For example, Section 401, 42 U.S.C.A. 3741, which deals with the purposes for which LEAA may make formula grants, refers to "community [crime-prevention] programs," "programs" to prevent intimidation of witnesses, and the award of funds for a "program or project" specified in an application.

A somewhat similar approach to statutory construction was rejected by the Supreme Court in United States v. Board of Commissioners of Sheffield, supra, a decision interpreting Section 5 of the Voting Rights Act. Sheffield indicates that, in a statute, Congress may use the same or similar words for different purposes. 435 U.S. at 128-129. As pointed out by the Supreme Court, issues of statutory construction are to be decided on the basis of the "language, structure, history, and purposes of the Act * * *." 435 U.S. at 118.

We have explained above why the structure and history of both the Crime Control Act and the Revenue Sharing Act support

84/ See Section 402, 42 U.S.C. 3742 (1976 ed.).

No such provisions are contained in the Revenue Sharing Act. As amended in 1976, that Act does not restrict the purposes for which revenue sharing funds may be used. See note 45, supra.

the regulations' interpretation of "program or activity." A basic purpose of Congress in amending the nondiscrimination provisions of the respective acts was to strengthen civil rights enforcement. The approach suggested by the defendants would effectively nullify that purpose.

For example, if a police department used all its revenue sharing and LEAA funds to buy a computer, it is not clear what, under the defendants' view, the nondiscrimination requirement would mean. Would it apply only to the purchase process, or would it also cover the employment of the computer staff and their manner of dealing with the public? Even under the second alternative, with regard to employment of other police officers or with regard to other officers' treatment of citizens, there could be racial discrimination and such discrimination could not be reached under either statute. The legislative record makes clear that Congress did not intend such a result. 85/

85/ The defendants also refer to the Crime Control Act provision, now Section 815(a), 42 U.S.C.A. 3789d(a), which states that the Act is not to be construed "to authorize any [Federal] department * * * or employee * * * to exercise any direction, supervision or control over any police force * * * of any State or any political subdivision thereof." The purpose of this provision is to prevent the establishment of a national police force and to prevent LEAA from controlling the routine operations of State and local law enforcement agencies. Ely v. Velde, 451 F.2d 1130, 1136 (4th Cir. 1971). See, e.g., S. Rep. No. 94-847, supra, at 11. This provision does not restrict the administrative or judicial enforcement of the Act's nondiscrimination requirements.

2. The defendants [86/] cite two cases dealing with Title VI of the Civil Rights Act of 1964, Mayor and City Council of Baltimore v. Mathews, 562 F.2d 914, 924 (4th Cir. 1977) (en banc), vacated on rehearing; district court aff'd by an equally divided court, 571 F.2d 1273 (4th Cir. 1978) (en banc); and Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969). A recent decision construing "program or activity" narrowly, in the context of Title IX of the Education Amendments of 1972, [87/] is Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980).

With regard to the Dougherty County decision, our basic position is that the court of appeals erred in striking down the Department of Education regulations implementing Title IX. Our view is supported by North Haven Board of Education v. Hufstedler, 23 EPD ¶ 31,143, p. 16,896 (2d Cir., July 24, 1980), petition for rehearing pending. See United States v. Marion County School District, 625 F.2d 607 (5th Cir. 1980).

In any event, neither Dougherty County nor any decision interpreting Title VI is controlling here. The present question depends not upon Title VI or Title IX, but upon the nondiscrim-

86/ Brief for Appellees, p. 53, n.60.

87/ Title IX, 20 U.S.C. 1681, prohibits sex discrimination in federally assisted education programs.

ination provisions of the Revenue Sharing Act and the Crime Control Act, provisions that have their own legislative history.[88/]

Moreover, even aside from the fact that Taylor County related to Title VI (and not the funding statutes in question here), that case is significantly different in terms of factual and procedural context. Taylor County did not involve a suit by the United States, but was an action by a school board for review of an HEW order terminating all HEW grants to the school district.[89/] The evidence offered by HEW in the administrative record related to segregation in the county's elementary and secondary schools. The effect of the HEW order was to terminate three grants, one of which related to adult basic education. In the administrative proceeding, HEW offered no evidence regarding adult education and no evidence regarding the outdoor education center funded by one of the other grants. 414 F.2d at 1074, n.10.

The court of appeals vacated the HEW order and remanded the case for further administrative proceedings. i.e., developing a record on use of the grants, which the court referred to as the

88/ Whether the interpretation of "program or activity" applied by ORS and LEAA under their respective funding statutes is also applicable to Title VI and Title IX need not be decided here. See Islesboro School Committee v. Califano, 593 F.2d 424, 430 (1st Cir.), cert. denied, 100 S. Ct. 467 (1979).

89/ Under Section 602 of Title VI, 42 U.S.C. 2000d-1, an administrative fund-termination order must be limited to the "program or part thereof" in which discrimination is found.

"programs." But see Part IV of the court's opinion, 414 F.2d at 1078-1079.

In one sense, the actual disposition of Taylor County supports the result we seek here--the opportunity to prove our allegations of discrimination. We reject the contention that "program or activity" means the projects for which the Police Department used the Federal funds, but the nature of that usage is a proper matter to be dealt with during discovery and trial. 90/

II

THE NONDISCRIMINATION STATUTES AUTHORIZE THE UNITED STATES TO OBTAIN INJUNCTIVE RELIEF AGAINST DISCRIMINATORY PRACTICES

A. The nondiscrimination sections of the Revenue Sharing Act and the Crime Control Act provide, in essentially identical terms, for actions by the Attorney General to seek relief against a pattern or practice violating the nondiscrimination provisions. See Section 122(g) of the Revenue Sharing Act, as amended, 31 U.S.C. 1242(g); Section 815(c)(3) of the Crime Control Act, as amended, 42 U.S.C.A. 3789d(c)(3). 91/ With respect to the relief that may be granted in such a suit, Section 122(g) of the Revenue Sharing Act provides as follows:

90/ See note 4, supra.

91/ These provisions are set forth in the Addendum, pp. 5a, 9a-10a.

> Such court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to insure the full enjoyment of the rights described in this section, including the suspension, termination, or repayment of funds made available under * * * [this Act], or placing any further payments under * * * [this Act] in escrow pending the outcome of the litigation.

The corresponding portion of Section 815(c)(3) of the Crime Control Act is the same in substance.

Clearly, under these provisions, the Attorney General may seek and, where appropriate, the court may order the suspension, termination or repayment of Crime Control Act or Revenue Sharing Act funds. It is equally clear that that kind of relief is not exclusive.

The language specifying relief with regard to funds was added to each of the statutes in 1976. The pre-1976 provisions authorized the Attorney General to bring a civil action, with regard to a pattern or practice of discrimination, "for such relief as may be appropriate, including injunctive relief." 92/ Under those provisions, a court could enjoin discrimination in employment or in the providing of services. 93/ The 1976 amendments

92/ Section 122(c) of the Revenue Sharing Act of 1972, 86 Stat. 932; Section 518(c)(3) of the Crime Control Act, 87 Stat. 214 (1973). See the Addendum pp. 6a, 15a.

93/ Cf. cases regarding judicial enforcement of Title VI of the Civil Rights Act of 1964: e.g., United States v. Marion County School District, supra; Brown v. Califano, No. 78-1864 (D.C. Cir., Jan. 31, 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979).

were intended to expand the authority of the Attorney General, not to diminish it. 94/

Under each of the statutes, the standard concerning relief is "to insure full enjoyment of the rights described in the [nondiscrimination] section." The basic right granted by each of the sections is the right to be free from discrimination in a federally funded program or activity. That right is effectuated when discriminatory practices are eliminated; the withholding, termination or repayment of Federal funds is merely a means of achieving the end of nondiscrimination.

In the present case, at this stage, the matter of type of relief is not properly in issue. A complaint is not to be dismissed for failure to state a claim, unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). If we prove our allegations, relief would be in order.

94/ This intent is indicated, for example, in the congressional reports on the 1976 amendments to the Revenue Sharing Act: H.R. Rep. No. 94-1165, Pt. 1, supra, at 100 (additional views of Congressman Drinan and eight others); S. Rep. No. 94-1207, supra, at 33; and the conference report, H.R. Rep. No. 94-1720, supra, at 36 ("The Attorney General's authority is expanded * * *.").

CONCLUSION

It is essentially undisputed that Revenue Sharing Act funds and Crime Control Act funds have been used for support of the Philadelphia Police Department. Under the applicable regulations, which are valid and binding on the City of Philadelphia, the entire Police Department is a "program or activity" within the meaning of the nondiscrimination statutes.

The claims of discrimination in the present case are a proper exercise of the Attorney General's authority under the two funding statites. The allegations meet the notice-pleading standard of the Federal Rules of Civil Procedure. In dismissing those claims, the district erred.

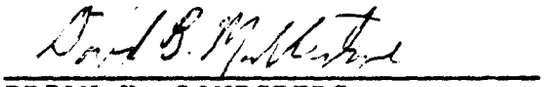
Regarding the Due Process claims stated in the complaint, the United States has an implied cause of action under the Reconstruction-era civil rights laws and the Constitution itself. For the reasons set forth in our main brief and our reply brief, the district court erred in dismissing the Due Process claims.

The judgment of the district court should be reversed, and the case should be remanded for trial.

Respectfully submitted,

PETER F. VAIRA, JR.
United States Attorney

DREW S. DAYS, III
Assistant Attorney General



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ADDENDUM

NONDISCRIMINATION PROVISION OF REVENUE SHARING ACT, AS AMENDED, 1976

SEC. 8. NONDISCRIMINATION PROVISIONS.

31 USC 1242.

(a) IN GENERAL.—Section 122 (relating to nondiscrimination provisions) is amended to read as follows:

"SEC. 122. NONDISCRIMINATION PROVISIONS.

"(a) PROHIBITION.—

"(1) IN GENERAL.—No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any program or activity of a State government or unit of local government, which government or unit receives funds made available under subtitle A. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in section 504 of the Rehabilitation Act of 1973 shall also apply to any such program or activity. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program or activity.

42 USC 6101 note.
29 USC 794.
42 USC 2000a note.
42 USC 3601.

"(2) EXCEPTIONS.—

"(A) FUNDING.—The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under subtitle A.

31 USC 1221.

"(B) CONSTRUCTION PROJECTS IN PROGRESS.—The provisions of paragraph (1), relating to discrimination on the basis of handicapped status, shall not apply with respect to construction projects commenced prior to January 1, 1977.

Effective date.

"(b) DETERMINATION BY THE SECRETARY.—

"(1) NOTICE OF NONCOMPLIANCE.—Within 10 days after the Secretary has received a holding described in subsection (c)(1) or has made a finding described in subsection (c)(4), with respect to a State government or a unit of local government, he shall send a notice of noncompliance to such government setting forth the basis of such holding or finding.

"(2) PROCEDURE BEFORE SECRETARY; SUSPENSION OF PAYMENT OF REVENUE SHARING FUNDS.—Within 30 days after a notice of noncompliance has been sent to a State government or a unit of local government in accordance with paragraph (1), such government may informally present evidence to the Secretary regarding the issues of—

"(A) (except in the case of a holding described in subsection (c)(1)) whether there has been exclusion, denial, or discrimination on account of race, color, national orgin, or sex, or a violation of any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975, or with respect to an 'otherwise qualified handicapped individual', as provided in section 504 of the Rehabilitation Act of 1973, or a violation of any prohibition against discrimination on the basis of religion as provided in the Civil Rights Act of 1964 or title VIII of the Civil Rights Act of 1968, and

"(B) whether the program or activity in connection with which such exclusion, denial, discrimination, or violation is charged has been funded in whole or in part with funds made available under subtitle A.

Before the end of such 30-day period, unless a compliance agreement is entered into with such government, the Secretary shall issue a determination as to whether such government failed to comply with subsection (a). If the Secretary determines that such government has failed to comply with subsection (a), the Secretary shall suspend the payment of funds under subtitle A to such government unless such government within the 10 day period

following such determination enters into a compliance agreement or requests a hearing with respect to such determination.

"(3) HEARINGS BEFORE ADMINISTRATIVE LAW JUDGE; SUSPENSION OR TERMINATION OF PAYMENT OF REVENUE SHARING FUNDS.—

"(A) Hearings requested by a State government or a unit of local government pursuant to paragraph (2) shall begin before an administrative law judge within 30 days after the Secretary receives the request for the hearing.

"(B) Within 30 days after the beginning of the hearing provided under subparagraph (A), the administrative law judge conducting the hearing shall, on the record then before him, issue a preliminary finding (which shall be consistent with subsection (c)(2)) as to whether such government has failed to comply with subsection (a). If the administrative law judge issues a preliminary finding that such government is not likely to prevail, on the basis of the evidence presented, in demonstrating compliance with subsection (a), then the Secretary shall suspend the payment of funds under subtitle A to such government. No such preliminary finding shall be issued in any case where a determination has previously been issued under subparagraph (C).

"(C) If, after the completion of such hearing, the administrative law judge issues a determination (consistently with subsection (c)(2)) that such government has failed to comply with subsection (a), then, unless such government enters into a compliance agreement before the 31st day after such issuance, the Secretary, subject to the provisions of subparagraph (D), shall suspend the payment of funds under subtitle A to such government; if a suspension in accordance with subparagraph (B) is still in effect, then, subject to the provisions of subparagraph (D), that suspension is to be continued.

"(D) In the event of a determination described in subparagraph (C), the administrative law judge may, in his discretion, order the termination of payment of funds under subtitle A to such government or unit.

"(E) If, after the completion of such hearing, the administrative law judge issues a determination (consistently with subsection (c)(2)) that there has not been a failure to comply with subsection (a), and a suspension is in effect in accordance with subparagraph (B), such suspension shall be promptly discontinued.

"(c) HOLDING BY COURT OR GOVERNMENTAL AGENCY; FINDING BY SECRETARY.—

"(1) DESCRIPTION.—A holding is described in this paragraph if it is a holding by a Federal Court, a State Court; or a Federal administrative law judge, with respect to a State government or a unit of local government which expends funds received under subtitle A that such government has, in the case of a person in the United States, excluded such person from participation in, denied such person the benefits of, or subjected such person to discrimination under any program or activity on the ground of race, color, national origin, or sex, or violated any prohibition against discrimination (A) on the basis of age under the Age Discrimination Act of 1975 or (B) with respect to an 'otherwise qualified handicapped individual', as provided in section 504 of the Rehabilitation Act of 1973 or (C) on the basis of religion as provided

31 USC 1221.

42 USC 6101 note.

29 USC 794.

in the Civil Rights Act of 1964 or title VIII of the Civil Rights Act of 1968, in connection with any such program or activity. 42 USC 2000a note.

"(2) EFFECT ON PROCEEDINGS OR HEARING.—If there has been a holding described in paragraph (1) with respect to a State government or a unit of local government, then, in the case of proceedings by the Secretary pursuant to subsection (b)(2) or a hearing pursuant to subsection (b)(3) with respect to such government, such proceedings or such hearing shall relate only to the question of whether the program or activity in which the exclusion, denial, discrimination, or violation occurred is funded in whole or in part with funds made available under subtitle A. In such proceedings or hearing, the holding described in paragraph (1), to the effect that there has been exclusion, denial, or discrimination on account of race, color, national origin, or sex, or a violation of any prohibition against discrimination (A) on the basis of age effected by the Age Discrimination Act of 1975, (B) with respect to an 'otherwise qualified handicapped individual', as provided in section 504 of the Rehabilitation Act of 1973, (C) on the basis of religion as provided in the Civil Rights Act of 1964 or title VIII of the Civil Rights Act of 1968, shall be treated as conclusive. 42 USC 3601. 31 USC 1221. 42 USC 6101 note. 29 USC 794.

"(3) EFFECT OF REVERSAL.—If a holding described in paragraph (1) is reversed by an appellate tribunal, then proceedings under subsection (b) which are dependent upon such holding shall be discontinued; any suspension or termination of payments resulting from such proceedings shall also be discontinued.

"(4) FINDING BY SECRETARY.—A finding is described in this paragraph if it is a finding by the Secretary with respect to a complaint referred to in section 124(d), a determination by a State or local administrative agency, or other information (pursuant to procedures provided in regulations prescribed by the Secretary) that it is more likely than not that a State government or unit of local government has failed to comply with subsection (a). *Ante*, p. 2349.

"(d) COMPLIANCE AGREEMENT.—For purposes of this section and section 124, a compliance agreement is an agreement between—

"(1) the governmental office or agency responsible for prosecuting the claim or complaint which is the basis of the holding described in subsection (c)(1) and the chief executive officer of the State government or the unit of local government that has failed to comply with subsection (a), if such agreement is approved by the Secretary, or

"(2) the Secretary and such chief executive officer, setting forth the terms and conditions with which such government or unit has agreed to comply that would satisfy the obligations of such government under subsection (a). Such agreement shall cover all the matters which had been determined or would constitute failures to comply with subsection (a), and may consist of a series of agreements which, in the aggregate, dispose of all such matters. Within 15 days after the execution of such agreement (or, in the case of an agreement under paragraph (1), the approval of such agreement by the Secretary, if later), the Secretary shall send a copy of such agreement to each person who has filed a complaint referred to in section 124(d) with respect to such failure to comply with subsection (a), or, in the case of an agreement under paragraph (1), to each person who has filed a complaint with the governmental office or agency (described in such paragraph) with respect to such failure to comply with subsection (a). Copies.

"(e) RESUMPTION OF SUSPENDED PAYMENTS.—If payment to a State

31 USC 1221.

government or a unit of local government of funds made available under subtitle A has been suspended under subsection (b)(2) or (b)(3), payment of such funds shall be resumed only if—

"(1) such government enters into a compliance agreement (but only at the times and under the circumstances set forth in such agreement, or, in the case of any agreement under subsection (d)(1), only at the times and under the circumstances set forth in the Secretary's approval of such agreement);

"(2) such government complies fully with the holding of a Federal or State court, or Federal administrative law judge, if that holding covers all the matters raised by the Secretary in the notice pursuant to subsection (b)(1), or if such government is found to be in compliance with subsection (a) by such court or Federal administrative law judge;

"(3) in the case of a hearing before an administrative law judge under subsection (b)(3), the judge determines that such government is in compliance with subsection (a); or

"(4) the provisions of subsection (c)(3) (relating to reversal of holding of discrimination) require such suspension of payment to be discontinued.

For purposes of this section, compliance by a government may include the satisfying of a requirement of the payment of restitution to persons injured by the failure of such government to comply with subsection (a).

"(f) RESUMPTION OF TERMINATED PAYMENTS.—If payment to a State government or unit of local government of funds made available under subtitle A has been terminated under subsection (b)(3)(D), payment of such funds shall be resumed only if the determination resulting in such termination is reversed by an appellate tribunal.

Civil actions.

"(g) AUTHORITY OF ATTORNEY GENERAL.—Whenever the Attorney General has reason to believe that a State government or a unit of local government has engaged or is engaging in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in an appropriate United States district court. Such court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to insure the full enjoyment of the rights described in this section, including the suspension, termination, or repayment of funds made available under subtitle A, or placing any further payments under subtitle A in escrow pending the outcome of the litigation.

"(h) AGREEMENTS BETWEEN AGENCIES.—The Secretary shall endeavor to enter into agreements with State agencies and with other Federal agencies authorizing such agencies to investigate noncompliance with subsection (a). The agreements shall describe the cooperative efforts to be undertaken (including the sharing of civil rights enforcement personnel and resources) to secure compliance with this section, and shall provide for the immediate notification of the Secretary of any actions instituted by such agencies against a State government or a unit of local government alleging a violation of any Federal civil rights statute or regulations issued thereunder.".

NONDISCRIMINATION PROVISION OF REVENUE SHARING ACT OF 1972

SEC. 122. NONDISCRIMINATION PROVISION.

(a) IN GENERAL.—No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under subtitle A.

(b) AUTHORITY OF SECRETARY.—Whenever the Secretary determines that a State government or unit of local government has failed to comply with subsection (a) or an applicable regulation, he shall notify the Governor of the State (or, in the case of a unit of local government, the Governor of the State in which such unit is located) of the noncompliance and shall request the Governor to secure compliance. If within a reasonable period of time the Governor fails or refuses to secure compliance, the Secretary is authorized (1) to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) to exercise the powers and functions
78 Stat. 252. provided by title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); or (3) to take such other action as may be provided by law.

(c) AUTHORITY OF ATTORNEY GENERAL.—When a matter is referred to the Attorney General pursuant to subsection (b), or whenever he has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

Nondiscrimination Provision of Crime Control Act, As Amended, 1979

"PROHIBITION OF FEDERAL CONTROL OVER STATE AND LOCAL CRIMINAL JUSTICE AGENCIES

42 USC 3789d.

"SEC. 815. (a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof.

"(b) Notwithstanding any other provision of law, nothing contained in this title shall be construed to authorize the National Institute of Justice, the Bureau of Justice Statistics, or the Law Enforcement Assistance Administration—

"(1) to require, or condition the availability or amount of a grant upon the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance in any criminal justice agency; or

"(2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

Discrimination prohibition.

"(c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title.

"(2)(A) Whenever there has been—

"(i) receipt of notice of a finding, after notice and opportunity for a hearing, by a Federal court (other than in an action brought by the Attorney General) or State court, or by a Federal or State administrative agency, to the effect that there has been a pattern or practice of discrimination in violation of paragraph (1); or

"(ii) a determination after an investigation by the Office of Justice Assistance, Research, and Statistics (prior to a hearing under subparagraph (F) but including an opportunity for the State government or unit of local government to make a documentary submission regarding the allegation of discrimination with respect to such program or activity, with funds made available under this title) that a State government or unit of local government is not in compliance with paragraph (1);

Notification of discrimination violation.

the Office of Justice Assistance, Research, and Statistics shall, within ten days after such occurrence, notify the chief executive of the affected State, or the State in which the affected unit of local government is located, and the chief executive of such unit of local government, that such program or activity has been so found or determined not to be in compliance with paragraph (1), and shall request each chief executive, notified under this subparagraph with respect to such violation, to secure compliance. For purposes of clause (i) a finding by a Federal or State administrative agency shall

be deemed rendered after notice and opportunity for a hearing if it is rendered pursuant to procedures consistent with the provisions of subchapter II of chapter 5 of title 5, United States Code.

5 USC 551.

"(B) In the event the chief executive secures compliance after notice pursuant to subparagraph (A), the terms and conditions with which the affected State government or unit of local government agrees to comply shall be set forth in writing and signed by the chief executive of the State, by the chief executive of such unit (in the event of a violation by a unit of local government), and by the Office of Justice Assistance, Research, and Statistics. On or prior to the effective date of the agreement, the Office of Justice Assistance, Research, and Statistics shall send a copy of the agreement to each complainant, if any, with respect to such violation. The chief executive of the State, or the chief executive of the unit (in the event of a violation by a unit of local government) shall file semiannual reports with the Office of Justice Assistance, Research, and Statistics detailing the steps taken to comply with the agreement. These reports shall cease to be filed upon the determination of the Office of Justice Assistance, Research, and Statistics that compliance has been secured, or upon the determination by a Federal or State court that such State government or local governmental unit is in compliance with this section. Within fifteen days of receipt of such reports, the Office of Justice Assistance, Research, and Statistics shall send a copy thereof to each such complainant.

Terms and conditions of compliance.

Semiannual compliance reports.

"(C) If, at the conclusion of ninety days after notification under subparagraph (A)—

"(i) compliance has not been secured by the chief executive of that State or the chief executive of that unit of local government; and

"(ii) an administrative law judge has not made a determination under subparagraph (F) that it is likely the State government or unit of local government will prevail on the merits; the Office of Justice Assistance, Research, and Statistics shall notify the Attorney General that compliance has not been secured and caused to have suspended further payment of any funds under this title to that program or activity. Such suspension shall be limited to the specific program or activity cited by the Office of Justice Assistance, Research, and Statistics in the notice under subparagraph (A). Such suspension shall be effective for a period of not more than one hundred and twenty days, or, if there is a hearing under subparagraph (G), not more than thirty days after the conclusion of such hearing, unless there has been an express finding by the Office of Justice Assistance, Research, and Statistics, after notice and opportunity for such a hearing, that the recipient is not in compliance with paragraph (1).

Attorney General, notification of noncompliance and suspension of funds.

"(D) Payment of the suspended funds shall resume only if—

"(i) such State government or unit of local government enters into a compliance agreement approved by the Office of Justice Assistance, Research, and Statistics and the Attorney General in accordance with subparagraph (B);

"(ii) such State government or unit of local government complies fully with the final order or judgment of a Federal or State court, or by a Federal or State administrative agency if that order or judgment covers all the matters raised by the Office of Justice Assistance, Research, and Statistics in the notice pursuant to subparagraph (A), or is found to be in compliance with paragraph (1) by such court; or

"(iii) after a hearing the Office of Justice Assistance, Research, and Statistics pursuant to subparagraph (F) finds that noncompliance has not been demonstrated.

Suspension of funds.

"(E) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race, color, religion, national origin, or sex in any program or activity of a State government or unit of local government which State government or unit of local government receives funds made available under this title, and the conduct allegedly violates the provisions of this section and neither party within forty-five days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law, the Office of Justice Assistance, Research, and Statistics shall cause to have suspended further payment of any funds under this title to that specific program or activity alleged by the Attorney General to be in violation of the provisions of this subsection until such time as the court orders resumption of payment.

Expedited preliminary hearings.

"(F) Prior to the suspension of funds under subparagraph (C), but within the ninety-day period after notification under subparagraph (C), the State government or unit of local government may request an expedited preliminary hearing on the record in accordance with section 554 of title 5, United States Code, in order to determine whether it is likely that the State government or unit of local government would, at a full hearing under subparagraph (G), prevail on the merits on the issue of the alleged noncompliance. A finding under this subparagraph by the administrative law judge in favor of the State government or unit of local government shall defer the suspension of funds under subparagraph (C) pending a finding of noncompliance at the conclusion of the hearing on the merits under subparagraph (G).

"(G)(i) At any time after notification under subparagraph (A), but before the conclusion of the one-hundred-and-twenty-day period referred to in subparagraph (C), a State government or unit of local government may request a hearing on the record in accordance with section 554 of title 5, United States Code, which the Office of Justice Assistance, Research, and Statistics shall initiate within sixty days of such request.

Finding of compliance or noncompliance.

"(ii) Within thirty days after the conclusion of the hearing, or, in the absence of a hearing, at the conclusion of the one-hundred-and-twenty-day period referred to in subparagraph (C), the Office of Justice Assistance, Research, and Statistics shall make a finding of compliance or noncompliance. If the Office of Justice Assistance, Research, and Statistics makes a finding of noncompliance, the Office of Justice Assistance, Research, and Statistics shall notify the Attorney General in order that the Attorney General may institute a civil action under paragraph (3), cause to have terminated the payment of funds under this title, and, if appropriate, seek repayment of such funds.

"(iii) If the Office of Justice Assistance, Research, and Statistics makes a finding of compliance, payment of the suspended funds shall resume as provided in subparagraph (D).

Appeals.

"(H) Any State government or unit of local government aggrieved by a final determination of the Office of Justice Assistance, Research, and Statistics under subparagraph (G) may appeal such determination as provided in section 805 of this title.

Litigation of discrimination complaints.

"(3) Whenever the Attorney General has reason to believe that a State government or unit of local government has engaged in or is engaging in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in an appropri-

ate United States district court. Such court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to insure the full enjoyment of the rights described in this section, including the suspension, termination, or repayment of such funds made available under this title as the court may deem appropriate, or placing any further such funds in escrow pending the outcome of the litigation.

"(4)(A) Whenever a State government or unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this subsection, a civil action may be instituted after exhaustion of administrative remedies by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction. Administrative remedies shall be deemed to be exhausted upon the expiration of sixty days after the date the administrative complaint was filed with the Office of Justice Assistance, Research, and Statistics or any other administrative enforcement agency, unless within such period there has been a determination by the Office of Justice Assistance, Research, and Statistics or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.

"(B) In any civil action brought by a private person to enforce compliance with any provision of this subsection, the court may grant to a prevailing plaintiff reasonable attorney fees, unless the court determines that the lawsuit is frivolous, vexatious, brought for harassment purposes, or brought principally for the purpose of gaining attorney fees.

"(C) In any action instituted under this section to enforce compliance with paragraph (1), the Attorney General, or a specially designated assistant for or in the name of the United States, may intervene upon timely application if he certifies that the action is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

Nondiscrimination Provision of Crime Control Act, As Amended, 1976

CIVIL RIGHTS ENFORCEMENT PROCEDURES

42 USC 3757.

SEC. 122. (a) Section 509 of the Omnibus Crime Control and Safe Streets Act of 1968 is amended by striking out "Whenever the Administration" and all that follows down through "grantee under this title," and inserting in lieu thereof "Except as provided in section 518(c), whenever the Administration, after notice to an applicant or a grantee under this title and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code,".

Infra.

42 USC 3766.

(b) Section 518(c) of such Act is amended to read as follows:

"(c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any program or activity funded in whole or in part with funds made available under this title.

"(2)(A) Whenever there has been—

Hearing.

"(i) receipt of notice of a finding, after notice and opportunity for a hearing, by a Federal court (other than in an action brought by the Attorney General) or State court, or by a Federal or State administrative agency (other than the Administration under subparagraph (ii)), to the effect that there has been a pattern or practice of discrimination in violation of subsection (c)(1); or

"(ii) a determination after an investigation by the Administration (prior to a hearing under subparagraph (F) but including an opportunity for the State government or unit of general local government to make a documentary submission regarding the allegation of discrimination with respect to such program or activity, with funds made available under this title) that a State government or unit of general local government is not in compliance with subsection (c)(1);

the Administration shall, within ten days after such occurrence, notify the chief executive of the affected State, or the State in which the affected unit of general local government is located, and the chief executive of such unit of general local government, that such program or activity has been so found or determined not to be in compliance with subsection (c)(1), and shall request each chief executive, notified under this subparagraph with respect to such violation, to secure compliance. For purposes of subparagraph (i) a finding by a Federal or State administrative agency shall be deemed rendered after notice and opportunity for a hearing if it is rendered pursuant to procedures consistent with the provisions of subchapter II of chapter 5, title 5, United States Code.

"(B) In the event the chief executive secures compliance after notice pursuant to subparagraph (A), the terms and conditions with which the affected State government or unit of general local government agrees to comply shall be set forth in writing and signed by the chief executive of the State, by the chief executive of such unit (in the event of a violation by a unit of general local government), and by the Administration. On or prior to the effective date of the agreement, the Administration shall send a copy of the agreement to each complainant, if any, with respect to such violation. The chief executive of the State, or the chief executive of the unit (in the event of a violation by a unit of general local government) shall file semiannual reports with the Administration detailing the steps taken to comply with the agreement. Within 15 days of receipt of such reports, the Administration shall send a copy thereof to each such complainant.

Reports to Administration.

"(C) If, at the conclusion of ninety days after notification under subparagraph (A)—

"(i) compliance has not been secured by the chief executive of that State or the chief executive of that unit of general local government; and

"(ii) an administrative law judge has not made a determination under subparagraph (F) that it is likely the State government or unit of local government will prevail on the merits; the Administration shall notify the Attorney General that compliance has not been secured and suspend further payment of any funds under this title to that program or activity. Such suspension shall be limited to the specific program or activity cited by the Administration in the notice under subparagraph (A). Such suspension shall be effective for a period of not more than one hundred and twenty days, or, if there is a hearing under subparagraph (G), not more than thirty days after the conclusion of such hearing, unless there has been an express finding by the Administration after notice and opportunity for such a hearing, that the recipient is not in compliance with subsection (c)(1).

"(D) Payment of the suspended funds shall resume only if—

"(i) such State government or unit of general local government enters into a compliance agreement approved by the Administration and the Attorney General in accordance with subparagraph (B);

"(ii) such State government or unit of general local government complies fully with the final order or judgment of a Federal or State court, or by a Federal or State administrative agency if that order or judgment covers all the matters raised by the Administration in the notice pursuant to subparagraph (A), or is found to be in compliance with subsection (c)(1) by such court; or

"(iii) after a hearing the Administration pursuant to subparagraph (F) finds that noncompliance has not been demonstrated.

"(E) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race, color, religion, national origin, or sex in any program or activity of a State government or unit of local government which State government or unit of local government receives funds made available under this title, and the conduct allegedly violates the provisions of this section and neither party within forty-five days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law, the Administration shall suspend further payment of any funds under this title to that specific program or activity alleged by the Attorney General to be in violation of the provisions of this subsection until such time as the court orders resumption of payment.

"(F) Prior to the suspension of funds under subparagraph (C), but within the ninety-day period after notification under subparagraph (C), the State government or unit of local government may request an expedited preliminary hearing by an administrative law judge in order to determine whether it is likely that the State government or unit of local government would, at a full hearing under subparagraph (G), prevail on the merits on the issue of the alleged noncompliance. A finding under this subparagraph by the administrative law judge in favor of the State government or unit of local government shall defer the suspension of funds under subparagraph (C) pending a finding of noncompliance at the conclusion of the hearing on the merits under subparagraph (G).

"(G)(i) At any time after notification under subparagraph (A), but before the conclusion of the one hundred and twenty day period referred to in subparagraph (C), a State government or unit of general local government may request a hearing, which the Administration shall initiate within sixty days of such request.

"(ii) Within thirty days after the conclusion of the hearing, or, in the absence of a hearing, at the conclusion of the one hundred and twenty day period referred to in subparagraph (C), the Administration shall make a finding of compliance or noncompliance. If the Administrator makes a finding of noncompliance, the Administration shall notify the Attorney General in order that the Attorney General may institute a civil action under subsection (c)(3), terminate the payment of funds under this title, and, if appropriate, seek repayment of such funds.

"(iii) If the Administration makes a finding of compliance, payment of the suspended funds shall resume as provided in subparagraph (D).

"(H) Any State government or unit of general local government aggrieved by a final determination of the Administration under subparagraph (G) may appeal such determination as provided in section 511 of this title.

"(3) Whenever the Attorney General has reason to believe that a State government or unit of local government has engaged or is engaging in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in an appropriate United States district court. Such court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to insure the full enjoyment of the rights described in this section, including the suspension, termination, or repayment of such funds made available under this title as the court may deem appropriate, or placing any further such funds in escrow pending the outcome of the litigation.

"(4)(A) Whenever a State government or unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this subsection, a civil action may be instituted after exhaustion of administrative remedies by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction. Administrative remedies shall be deemed to be exhausted upon the expiration of sixty days after the date of the administrative complaint was filed with the Administration, or any other administrative enforcement agency, unless within such period there has been a determination by the Administration or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.

"(B) In any civil action brought by a private person to enforce compliance with any provision of this subsection, the court may grant to a prevailing plaintiff reasonable attorney fees, unless the court determines that the lawsuit is frivolous, vexatious, brought for harassment purposes, or brought principally for the purpose of gaining attorney fees.

"(C) In any action instituted under this section to enforce compliance with section 518(c)(1), the Attorney General, or a specially designated assistant for or in the name of the United States, may intervene upon timely application if he certifies that the action is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.". *Ante*, p. 2418.

NONDISCRIMINATION PROVISION OF CRIME CONTROL ACT, AS AMENDED, 1973

"SEC. 518. (a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement and criminal justice agency of any State or any political subdivision thereof.

"(b) Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

Discrimination prohibition.

"(c)(1) No person in any State shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.

Noncompliance.

"(2) Whenever the Administration determines that a State government or any unit of general local government has failed to comply with subsection (c)(1) or an applicable regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 509 of this title, and is authorized concurrently with such exercise—

"(A) to institute an appropriate civil action;

"(B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); or

78 Stat. 252.

"(C) to take such other action as may be provided by law.

"(3) Whenever the Attorney General has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

DEPARTMENT OF THE TREASURY

Office of Revenue Sharing

31 CFR Part 51

State and Local Fiscal Assistance; Changes in Definitions

AGENCY: Office of Revenue Sharing Department of the Treasury.

ACTION: Interim Regulation.

SUMMARY: This regulation amends and clarifies the definition of "program or activity" contained in the interim non-discrimination Revenue Sharing regulations published under the State and Local Fiscal Assistance Act of 1972, as amended (the Revenue Sharing Act), and deletes the definition of the term "funded." The purpose of the amendment is to clarify ORS jurisdiction in accordance with governing case law.

EFFECTIVE DATE: APRIL 2, 1979.

ADDRESS: Comments may be sent to: Chief Counsel, Office of Revenue Sharing (Symbol CC), Department of Treasury, Washington, D.C. 20226.

FOR FURTHER INFORMATION CONTACT: Herman Schwartz, Chief Counsel, Office of Revenue Sharing, (202) 634–5184.

SUPPLEMENTARY INFORMATION:

Background

On October 10, 1976, the Revenue Sharing Act 31 U.S.C. 1221 *et seq.* was substantially amended by the State and Local Fiscal Amendments of 1976 (Pub. L. 94–488). Interim regulations were published on April 6, 1977, to implement the 1976 Amendments to the nondiscrimination requirements of the Revenue Sharing Act. Sections 51.51 (e) and (i) of those interim regulation provide as follows:

51.51(e) "Funded" means funds have been made available for expenditure in a designated program or activity through legislative action.

51.51(i) "Program or activity" means any function conducted by an agency or department of the recipient government which government has received or is receiving entitlement funds, or by any other unit of government or private contractor which has received or is receiving entitlement funds from the recipient government.

On October 15, 1976, the Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701 *et seq.*, was amended by Pub. L. 94–503. The nondiscrimination provisions of that Act, which is administered by the Law Enforcement Assistance Administration (LEAA), were amended in substantially the same manner as the 1976 Amendments to the Revenue Sharing Act.

The operative language with respect to jurisdiction is virtually identical in the Revenue Sharing Act and the Crime Control Act—no discrimination in any program or activity funded in whole or in part with LEAA or Revenue Sharing funds. However, the implementing regulations under these two Acts differ in form, though not in substance. The LEAA regulations implementing the Crime Control Act do not define "funded", and "program or activity" is defined in 28 CFR 42.202(g) as follows:

"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 department of corrections.

Although the language of their respective regulations differs, the LEAA and ORS have consistently interpreted the term "program or activity" to constitute the department or agency of the recipient government to which the Federal funds were allocated for use. This administrative interpretation has been upheld by the Federal courts. In several cases, the courts have ruled that the jurisdiction of LEAA and ORS includes the entire department in which the funds were used for a project, and is not limited "to discrimination which may occur in the individually funded projects under the particular agency [of the recipient government.]" *U.S. v. Baltimore County et al.* C.A. No. H–78–836 Slip Op. at 11 (D. Md. 7/3/78), citing *Capel v. Lamb*, C.A. No. LV 77–118 RDF (D. Nev. 5/23/78) and *U.S. v. Commonwealth of Virginia*, C.A. No. 76–0623–R (E.D. Va. 4/18/77). In *U.S. v. City and County of San Francisco*, C.A. No. C–73–0657 RFP (N.D. Cal. 9/22/78), a case under the Revenue Sharing Act, the Court held that the entire Police Department was the "program or activity" and did not deem it necessary to inquire into which specific projects of the Department had used Revenue Sharing funds. See also *U.S. v. City of Chicago*, 395 F. Supp. 329 (N.D. Il., 1975).

In light of this uniform and long standing administrative position that the

term "program or activity" in the Revenue Sharing and Crime Control Acts has the same meaning, and the Federal court rulings upholding this interpretation, the ORS has determined that in the interest of clarity and interagency consistency, its regulation defining "program or activity" should be amended and the regulation defining "funding" should be deleted to conform to LEAA's regulations. That objective is accomplished by these amendments to the ORS regulations.

Need for Immediate Guidance

Because these amendments are primarily procedural and necessary to provide immediate guidance to recipient governments, it is impractical to issue this regulation in accordance with the notice and public procedures prescribed by 5 U.S.C. 553(b), or subject to the effective date limitations of 5 U.S.C. 553(d).

Non-Significant Regulation

Because these amendments are (1) essentially procedural, (2) do not materially change existing, or establish new policy, and (3) do not impose substantial additional requirements or costs on, or substantially alter the legal rights or obligations of those affected, ORS has determined they do not meet the criteria for significant regulations established by the Treasury Department.

Authority

These regulations are issued under the authority of the State and local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221 *et seq.*, and Treasury Department Order No. 224, dated January 26, 1973, (38 FR 3342) as amended by Treasury Department Order No. 242 (Revision 1, dated May 17, 1977). 31 CFR Part 51, Subpart E is hereby amended in the manner set forth below.

Bernadine Denning,
Director, Office of Revenue Sharing.

Approved:

Roger C. Altman,
Assistant Secretary.

Title 31 of the Code of Federal Regulations is amended by deleting paragraph (e) of § 51.51 and revising paragraph (i) of § 51.51.

§ 51.51 Definitions

* * * * *

(e) [deleted]

* * * * *

(i) "Program or activity" means the operations of the agency or organizational unit of the government receiving or substantially benefiting from entitlement funds, *e.g.*, a police department; department of corrections; health department.

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17a

94th Congress
1st Session

COMMITTEE PRINT

THE CIVIL RIGHTS ASPECTS OF GENERAL REVENUE SHARING

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

NOVEMBER 1975

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

60-851

Two full days of hearings were held by the Subcommittee on Civil and Constitutional Rights on October 8 and 9, 1975.[14] On those days, the Subcommittee received testimony from the United States Department of the Treasury and from the United States Justice Department, regarding their enforcement efforts under Section 122 of the Revenue Sharing Act. Testimony was also received from the General Accounting Office on the preliminary findings of its study, conducted at the request of the Committee on the Judiciary, on the civil rights enforcement effort of the Office of Revenue Sharing.

Similarly, testimony was received from the Lawyers' Committee for Civil Rights Under Law, which has engaged in extensive litigation under the Act; from the U.S. Commission on Civil Rights, which earlier this year released a report on ORS' civil rights enforcement effort;[15] from representatives of the N.A.A.C.P.; and from the Southern Regional Council, Inc., which has engaged in an extensive monitoring project in the southern states. Additional views were expressed on behalf of the Center for Community Change, the League of Women Voters, the Center for National Policy Review, and the National Urban Coalition.[16] These latter groups comprise The National Revenue Sharing Monitoring Project which, in August of this year, released a report examining civil rights under general revenue sharing.[17] Earlier, in July of this year, the Center for National Policy Review had also released a similar report dealing with the civil rights aspects of the program.[18]

Based upon the testimony of these witnesses and various publicly released reports and studies the Subcommittee arrived at the following findings and recommendations. On November 4, 1975, the Chairman of the Subcommittee presented these findings and recommendations to the Subcommittee on Intergovernmental Relations of the House Government Operations Committee.

Findings

1. *There is clear and strong evidence that widespread discrimination against minorities and women exists in programs reportedly funded by general revenue sharing*[18a]

State and local governments with more than 100 employees are required to submit annual forms, known as EEO–4 forms, to the Equal Employment Opportunity Commission. On those forms, all public employees are classified by race, national origin, sex, job func-

[14] Hearings on the civil rights aspects of general revenue sharing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong. 1st sess. (1975) [hereinafter referred to as *1975 Hearings*].

A 3d day of hearings was also scheduled at the request of the minority members of the subcommittee. Oct. 20, 1975 was scheduled as the day on which the minority would call witnesses. However, because of scheduling problems, that hearing day was canceled at the request of the minority members of the subcommittee.

[15] Report of the U.S. Commission on Civil Rights, *supra* note 14.

[16] It should be noted that the Steering Committee of the National Urban Coalition includes elected public officials. For example, its membership includes the Hon. Abraham David Beame, Mayor of New York City, and the Hon. Moon Landrieu, Mayor of New Orleans.

[17] The National Revenue Sharing Monitoring Project, "Equal Opportunity Under General Revenue Sharing" (1975).

[18] The Center for National Policy Review, "Civil Rights Under General Revenue Sharing" (1975) [hereinafter referred to as the report of the Center for National Policy Review].

[18a] See the following discussion on fungibility and nontraceability of funds.

tion, job type, and salary. The most recent summary of these reports, which is based on 1973 data, indicates that:

> Minorities and women are under-represented in particular agencies and program areas, such as law enforcement, fire protection, streets and highways and—for blacks, especially—financial administration, all of which have been substantial recipients of GRS [19] funds."
>
> Minorities and women are concentrated at the lower level jobs . . .
>
> . . . Blacks and Hispanic Americans earn less than Whites and women earn less than men." [20]

Specifically, the EEO–4 form summary indicates that in fire protection, whites are employed at a rate of 95 percent, Blacks 3.0 percent, Spanish-speaking 1.5 percent, and women 1.3 percent. In police protection, whites are 90.7 percent, Blacks 6.3 percent, Spanish-speaking 2.3 percent and women 12 percent.[21] These figures are of course very significant since a 1974 General Accounting Office (GAO) study indicates that within its sample, governments designated 57.7 percent of their revenue sharing funds as being used for public safety, and nearly all of that amount was allocated for fire and police protection.[22]

A very recent report of the GAO, released on July 21, 1975, confirms that such severe employment disparities, based on race and sex, still persist in many local governments.[23] Based on a survey of 26 jurisdictions which receive revenue sharing funds, the GAO found that:

> Higher percentages of women and minorities were in the governments' lower level positions i.e., clerical or manual labor jobs.
>
> Police and fire protection employees were predominantly white males, while black males were concentrated in sanitation and service maintenance type activities.[24]

Witnesses who appeared before the Subcommittee, who participated in the National Revenue Sharing Monitoring Project, found that, based on their examination of 33 jurisdictions, "there were wide gaps in the percent of minorities and women in the work force and the percent employed in particular departments and agencies of government . . ." [25] It was brought to our attention that in one large southern city with a 50 percent minority population, the fire department, which received revenue sharing funds, had fewer than 3 percent minorities.[26]

Similarly, as was pointed out by evidence submitted by a member of the Subcommittee, New York City (which has allocated large portions of its revenue sharing funds to the police, sanitation and fire departments) has significantly disparate employment statistics in those departments. New York City's population is approximately 25 percent Black and 15 percent Hispanic. Yet, the Police Department has 7.5 percent Blacks and 2.9 percent Hispanic employees. The Fire Department is 5.4 percent Black and .9 percent Hispanic.[27]

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[19] General revenue sharing.
[20] Report of the Center for National Policy Review, 12-14.
[21] *Id.* at 12.
[22] Comptroller General of the United States, Report to the Congress, "Revenue Sharing: Its Use By and Impact on State Governments," Apr. 25, 1974, 11.
[23] Comptroller General of the United States, Report to the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, "Case Studies of Revenue Sharing in 26 Local Governments," July 21, 1975, 29.
[24] *Id.*
[25] Statement of William L. Taylor, Director, Center for National Policy Review, Catholic University School of Law, "1975 Hearings," 4 [hereinafter referred to as Taylor Statement].
[26] *Id.*
[27] Statement of the Honorable Herman Badillo (D-N.Y.), U.S. House of Representatives, "1975 Hearings," 2.

These disparate representational patterns are important because it has been widely accepted that "statistics often tell much and Courts listen." [28] Racial discrimination is seldom admitted by an employer. Therefore, there is a growing judicial practice to rely upon statistical evidence to establish a *prima facie* violation. The burden then shifts to the employer/defendant, who must rebut the presumption of discrimination.[29]

Besides the area of employment, there are also strong indications that revenue sharing funds may be being broadly used to support discriminatory school systems. In *Adams* v. *Weinberger*, Civ. Action No. 3095–70 (D.C.D.C. Mar. 14, 1975) (Supplemental Order), Judge John H. Pratt found that there were some 125 southern "HEW school districts" where one or more schools had substantially disproportionate racial compositions. The court ordered HEW to require those school districts, which are located throughout some 15 states, to rebut or explain the substantial racial disparities. In 10 of the 15 states, where at least initially there appear to be desegregation violations, state general revenue sharing funds were allocated to education.[30] While there is no precise documentation which indicates that those funds are supporting the apparently non-complying school districts, it does seem likely that some of the funds are filtering into those areas.

In the area of municipal services, although there are few cases and sparse research in this newly developing area of the law, there are at least some indications that the disparate provision of municipal services, such as garbage pickup and street paving and lighting, is significant. Approximately one-fourth of the Office of Revenue Sharing's civil rights complaints have charged the discriminatory provision of services. Moreover, in three court cases, instances of such services discrimination have been found in the States of Mississippi and Florida.[31] In all three of those cases, the courts have specifically required that revenue sharing funds be used to cure the service inequities.

Testimony presented before the Subcommittee indicated that while the National Revenue Sharing Monitoring Project did not find services discrimination as blatant as that found in some communities, "people in minority and ghetto neighborhoods expressed strong feelings that they were not receiving equal services." [32] During his appearance before the Subcommittee, the Chairman of the U.S. Commission on Civil Rights noted that the Commission has concluded that:

> Abundant evidence indicates that discrimination in the employment practices and delivery of benefits of State and local governments is far reaching, often extending to programs funded by general revenue sharing.[33]

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[28] *State of Alabama* v. *United States*, 304 F. 2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962).

[29] See *e.g. Patterson* v. *American Tobacco Company*, 8 F.E.P. Cases 778 (E.D. Va. 1974); *United States* v. *Chesapeake and Ohio Railway Co.*, 471 F. 2d 582 (4th Cir. 1972); *United States* v. *Hayes International Corporation*, 456 F. 2d 112 (5th Cir. 1972); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971). *Marquez* v. *Omaha District Sales Office, Ford Division*, 440 F. 2d 1157 (8th Cir. 1971); and *Parham* v. *Southwestern Bell Telephone*, 433 F. 2d 421 (8th Cir. 1970).

[30] Local governments are precluded from using GRS funds for operating and maintenance expenses for education because such expenditures are not embraced by any of the priority expenditure categories of the Act. States, on the other hand, have allocated over one-half of their revenue sharing funds to education.

[31] *Hawkins* v. *Town of Shaw*, 437 F. 2d 1286 (5th Cir. 1971) *aff'd on reh. en banc* 461 F. 2d 1171 (5th Cir. 1972) (per curiam); *Harris* v. *Town of Ita Bena*, Civ. Action No. GC 67-56-S (D.N.D. Miss. October 4, 1973) (Order Approving Plan of Equalization); and *Davis* v. *City of Sanford*, Civ. Action No. 70 172 (D.M.D. Fla., January 11, 1974).

[32] Taylor statement, 6.

[33] Statement of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, "1975 Hearings," 3 [hereinafter referred to as Flemming statement].

Thus, the Subcommittee finds that, based upon statistical evidence as well as complaint activity within ORS and the courts, there are strong indications that general revenue sharing funds are used to support both discriminatory employment and services systems. Realizing that the problem of discrimination exists, despite the clear prohibition found in Section 122 of the Revenue Sharing Act, the Subcommittee's next task was to assess the quality of the jobs being done by those responsible under the Act for discovering and eliminating that discrimination.

2. The Office of Revenue Sharing relies upon grossly inadequate methods for discovering where discrimination exists

Under the general revenue sharing program, ORS has the primary responsibility for enforcing the Act's nondiscrimination provisions. In carrying out this important responsibility, that Office's methods for locating or ferreting-out the existence of discrimination have been an abject failure.

A. *ORS' enforcement methodology has been too heavily complaint-oriented.*—"The Office of Revenue Sharing's civil rights compliance program has been heavily weighted towards complaints as the primary method for identifying violations, almost to the exclusion of other sources for detecting violations. As of March 12, 1975, ORS had 148 civil rights cases, nearly all arising from complaints." [34]

In fact, as recently as August 15, 1974, ORS noted that ". . . the policy decision was made to enforce the law strictly against known offenders." [35] [As will be discussed later in the report, however, there is every indication that ORS has not even properly "enforce[d] the law" where complaints have been filed.] However, as has been so aptly noted by the U.S. Commission on Civil Rights, "Complaint-oriented compliance systems cannot expose the full range and depth of problems of noncompliance.[36]

The Subcommittee was told by witnesses who recently appeared before it that the average citizen does not know about the revenue sharing program, much less about his or her rights under its nondiscrimination provisions.[37] Thus, the Subcommittee is extremely concerned over ORS' heavy reliance upon complaints when, in fact, the average citizen is totally unaware of the right to even complain.

Even assuming that ORS could justify significant reliance upon the complaint process in carrying out its enforcement responsibilities, ORS' total failure to provide to the public any information on the civil rights complaint process for the first two years of a five year program would make such reliance ludicrous indeed. It was not until November 1974, two years after the passage of the Revenue Sharing Act, that ORS published and distributed its guide, *General Revenue Sharing and Civil Rights.*[38]

Clearly, it may be that under other circumstances, particularly if one is dealing with a program which is definitely of a continuing nature, such delay and laxity in informing the public may not be of

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[34] Report of the Center for National Policy Review, 49.
[35] Report of the U.S. Commission on Civil Rights, 65.
[36] *Id.* at 66.
[37] Testimony of Eddie Mae Steward, president, Jacksonville, Florida Branch of NAACP, "1975 Hearings" [hereinafter referred to as Steward testimony].
[38] Office of Revenue Sharing, Department of the Treasury, "General Revenue Sharing and Civil Rights" (November 1974).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

FILED
APR 8 1977
CLERK, U. S. DIST. COURT
RICHMOND, VA.

UNITED STATES OF AMERICA	:	
	:	
v.	:	CIVIL ACTION
	:	NO: 76-0623-R
COMMONWEALTH OF VIRGINIA	:	

O R D E R

In accordance with the memorandum this day filed, and deeming it just and proper so to do, the Court ADJUDGES and ORDERS that defendant's 9 March 1977 motion to dismiss is GRANTED as to the Title VII claim, 42 U.S.C. § 2000e-5, and is GRANTED as to the claims under 42 U.S.C. § 1981 and 1983, but is DENIED as to the 42 U.S.C. § 3766(c)(1) claim.

Let the Clerk send a copy of this order along with the memorandum to all counsel of record.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 7 April 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
APR 8 1977
CLERK, U. S. DIST. COURT
RICHMOND, VA.

UNITED STATES OF AMERICA	:	
	:	
v.	:	CIVIL ACTION
	:	NO: 76-0623-R
COMMONWEALTH OF VIRGINIA	:	

MEMORANDUM

This matter comes before the Court on defendant's 9 March 1977 motion to dismiss the above styled action on the grounds, as perceived by the Court, that we lack subject matter jurisdiction over the Title VII, Section 1981 and Section 1983 claims and that the charge under 42 U.S.C. § 3367 (c)(1) (Section 518(c)(1) of the Crime Control Act of 1973) fails to state a claim upon which relief may be granted.

I

With regard to the Title VII claim (42 U.S.C. § 2000e-5) defendant contends that the Attorney General of the United States is without authority to maintain an action. A number of Courts have considered this question. Almost uniformly they have rejected arguments by the Attorney General of the United States that he is empowered, in cases such as this, to bring actions against States under that Title. This Court has studied the opinions of other District Courts on the question and has nothing to add to the body of the law other than to concur in the reasoning. Accordingly, the claim asserted by the United States under Title VII will be dismissed. United States v. State of North Carolina, C.A. 75-0328 (E.D.N.C. Dec. 30, 1976); United States v. City of Pompano Beach, CA 76-6059 (S.D. Fla. Jul. 8, 1976); United States v. Fresno Unified School Dist., 412 F. Supp. 392 (E.D. Col. 1976); United States v. Pima County Community College, 409 F. Supp. 1061 (D.C. Ariz. 1976); United States v. Board of Education of Garfield Heights, 13 E.P.D. Para. 11.369 (N.D. Ohio 1976). But see, EEOC v. United Airlines, 10 E.P.D.

Para. 10,271 at 5136 (N.D. Ill. 1975), aff'd. 515 F.2d 946 (7th Cir. 1975), and Ramos v. Port Authority of N.Y. and N.J., 12 E.P.D. Para. 11,035, fn. 1 (S.D.N.Y., 1976).

II

As to the Section 1981 and Section 1983 claims, the United States having abandoned the same as a basis for jurisdiction and no basis for such jurisdiction appearing to the Court, these claims will be dismissed.

III

As to the allegation of the United States under 42 U.S.C. § 3766(c)(1)[1], defendant urges that the United States fails to state a claim upon which relief may be granted for the following reasons:

1) § 3766(c)(1) prohibits invidious discrimination in connection with an LEAA-funded "program or activity." No allegations of such discrimination have been charged with respect to the particular operations within the Virginia Department of State Police that receive LEAA funds. Hence, the facts alleged do not come within the coverage of the statute.

2) Code 42 U.S.C. § 3766(e)(3) requires that a suit under § 3766(c)(1) be predicated upon reason to believe that defendant had engaged in invidious discrimination in violation of the provisions of that Section. No basis for such reasonable belief exists in this action.

3) The Section 3766(c)(1) allegations set forth in the complaint are insufficient, conclusory and wholly speculative.

We must deny the motion to dismiss with respect to the Section 3766(c)(1) claim. First, 28 C.F.R. 42.202(g)(1977) shows that the phrase "program or activity" is intended to include an entity such as a State police force receiving funds for any of its work[2] The program or activity receiving funds in this case is the Virginia Department of State

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1. 42 U.S.C. § 3766(c)(1): No person in any State shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available by this title.

2. 42 C.F.R. 42.202(g): "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 department of corrections.

Police and that is the entity which is the subject of the suit.

Second, the Seventh Circuit, in reviewing the legal effect of language in 42 U.S.C. § 2000e-(6)(a) analogous to the "reason to believe" language in question here, found that:

> [T]he district court erred in its view that a defendant may have a pre-trial inquiry into the factual basis of the Attorney General's "reasonable cause belief."
>
> Federal courts have consistently held that the Attorney General need not plead his "reasonable cause to believe" that discrimination exists....
>
> A sufficient complaint by its substantial allegations with respect to the existence of a "pattern or practice" of discrimination will clearly demonstrate the basis of the Attorney General's "reasonable cause to believe." [United States v. International Ass'n. of Bridge Structural and Ornamental Iron Workers, Local No. 1, 438 F.2d 679, 680-681 (7th Cir. 1971] (citations omitted).

Under this view the "reason to believe" need not be pleaded and its omission from the complaint is not grounds upon which the complaint may be dismissed. It may very well be that the Attorney-General's reasons, whatever they may be, are insufficient for the United States to prevail. His reason may be based upon insufficient, inadmissible, or erroneous "evidence." But the law suit determines whether there has been invidious discrimination not whether the Attorney General had reason to believe there was invidious discrimination.

Third, we believe that there is a sufficient complaint containing substantial allegations with respect to the existence of a pattern or practice of discrimination. The primary factual allegations in the complaint supportive of the conclusory allegations of invidious discrimination are the statistics. Although statistics alone may not prove the case for the United States, in light of the liberal construction of notice pleading it cannot be said that the complaint is wholly conclusory or wholly speculative so as to be frivolous.

For these and the foregoing reasons, defendant's motion to dismiss will be granted on the Title VII, the Section 1981 and the Section 1983 claims. The motion to dismiss as to the claim based on 42 U.S.C. § 3766(c)(1) will be denied.

An appropriate order shall issue.

/s/ D. DORTCH WARRINER
United States District

Date: 7 April 1977

[Four]

list of persons expected to attend the closed meeting and their affiliations.

(iii) *Emergency votes.* If a meeting or portion thereof may properly be closed because of section 552b(c) (4), (8), (9)(A), or (10), it may be closed by a majority vote of the members taken at the beginning of the meeting. The vote shall be recorded and made available to the public. To the extent not exempt from disclosure under section 552b(c), public announcement of the time, place and subject matter of the meeting will be made at the earliest practicable time.

Dated: April 28, 1980.

Brian M. Freeman,

Secretary, Chrysler Corporation Loan Guarantee Board.

[FR Doc. 80-13441 Filed 4-29-80; 8:45 am]

BILLING CODE 4810-27-M

INTERNATIONAL TRADE COMMISSION

19 CFR Part 210

Import Trade; Investigations of Alleged Unfair Practices

AGENCY: United States International Trade Commission.

ACTION: Final rule.

SUMMARY: Part 210 of the Commission's *Rules of Practice and Procedure* contains rules for the conduct of investigations of alleged unfair practices in the import trade. The Commission conducts such investigations pursuant to section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). Commission § 210.54 concerns the filing of (1) exceptions to the presiding officer's recommended determination, and (2) alternative findings of fact and conclusions of law. The Commission is amending § 210.54 to make clear that motions for extensions of time in which to file exceptions to the recommended determination and alternative findings of fact and conclusions of law will be ruled upon by the Commission. The amended rule also provides that such motions may be ruled upon by the Commission on an ex parte basis.

EFFECTIVE DATE: April 30, 1980.

FOR FURTHER INFORMATION CONTACT: N. Tim Yaworski, Office of the General Counsel, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C., telephone (202) 523-0311.

Section 210.54 of the U.S. International Trade Commission's *Rules of Practice and Procedure* is amended to read as follows:

§ 210.54 Filing of exceptions to the recommended determination and alternative findings of fact and conclusions of law.

Except as otherwise authorized by the Commission, the parties shall be allowed ten (10) days from the date of service of the recommended determination to file exceptions to the recommended determination and alternative findings of fact and conclusions of law with the Commission. All exceptions and alternative findings of fact and conclusions of law shall be concisely supported by references to the record and the law relied upon. The Commission may rule upon motions for extension of time to file exceptions ex parte.

By order of the Commission.

Issued: April 15, 1980.

Kenneth R. Mason,

Secretary.

[FR Doc. 80-13286 Filed 4-29-80; 8:45 am]

BILLING CODE 7020-02-M

DEPARTMENT OF JUSTICE

Office of Justice Assistance, Research, and Statistics

28 CFR Part 42

Nondiscrimination in Federally Assisted Programs

AGENCY: Department of Justice/Office of Justice Assistance, Research, and Statistics (OJARS), Law Enforcement Assistance Administration (LEAA), National Institute of Justice (NIJ), Bureau of Justice Statistics (BJS).

ACTION: Final rule.

SUMMARY: OJARS is amending its nondiscrimination regulations, affecting recipients of financial assistance from LEAA, NIJ, and BJS, to conform them to statutory amendments made by the Justice System Improvement Act of 1979 (JSIA).

EFFECTIVE DATE: April 30, 1980.

FOR FURTHER INFORMATION CONTACT: Thomas J. Madden, General Counsel, OJARS or David I. Tevelin, Attorney-Advisor, OJARS Office of General Counsel (202) 724-6235.

SUPPLEMENTARY INFORMATION: The Law Enforcement Assistance Administration (LEAA) was reorganized by the Justice System Improvement Act of 1979 (JSIA), Pub. L. 96-157, on December 27, 1979. Section 817(d) of the act directed the Office of Justice Assistance, Research, and Statistics (OJARS), one of the new agencies created by the Act, to "review existing civil rights regulations and conform them" to the Act within 120 days after its enactment. Those regulations, the LEAA Nondiscrimination Regulations, are codified at 28 CFR 42.201, *et seq.*

The civil rights provisions in the JSIA differ from the previously applicable provisions in the Crime Control Act of 1976, Pub. L. 94-503, in only three respects. First, section 815(c) of the JSIA now vests the civil rights authority previously given to the Administrator of LEAA in the Director of OJARS. Changes reflecting that amendment have been made throughout the regulation. Second, section 815(b) of the JSIA no longer contains the provision previously found in section 518(b) of the Crime Control Act that forbade LEAA from requiring a recipient to adopt quotas in order to eliminate a racial imbalance. That restriction has, accordingly, been eliminated from section 42.203(j) of the regulations. Third, the new Act specifies that all compliance hearings should be held on the record in accordance with the Administrative Procedures Act, 5 U.S.C. 554. See section 815(c)(2) (F) and (G) of the JSIA. Sections 42.202(a) and 42.213(a) of the regulations have been amended to reflect this change.

OJARS' review of the previous regulations also revealed a number of areas not related to the passage of the new Act that also warranted amendment. Because most of these amendments are procedural, technical, or purely informational, they are being made as final in the manner specified below.

1. All references in the LEAA Nondiscrimination Regulations to "section 262 of the Juvenile Justice Act" have been eliminated. The Juvenile Justice Amendments of 1977, Pub. L. 95-115, eliminated the civil rights provisions formerly found in section 262(b) of the Juvenile Justice Delinquency and Prevention Act of 1974, as amended, 42 U.S.C. 5601, *et seq.*, (JJ Act), and made the civil rights provisions of the Crime Control Act, supra, applicable to recipients of funds under the JJ Act. See 42 U.S.C. 5672. Many of the references to section 262 were eliminated from the regulations on June 30, 1978 (43 FR 28794). The references retained since that date are, by this time, unnecessary as a point of reference to Juvenile Justice Act recipients. OJARS wishes to emphasize, however, that the deletion of the reference to section 262 does not mean that the civil rights provisions of the JSIA are not applicable to Juvenile Justice Act recipients. Those provisions apply to those recipients in the identical

manner that they apply to JSIA recipients.

2. Section 42.205(a) has been amended to specify that OJARS will investigate only those complaints "filed by or on behalf of an individual claiming to be aggrieved." This change conforms the regulations to the agency's actual practice and to the Equal Employment Opportunity Commission's complaint investigation regulations, 29 CFR 1601.7(a). Letters that charge a recipient with discrimination, without citing a specifically aggrieved individual, will be considered in the selection of recipients for compliance reviews under § 42.206, but will not initiate a complaint investigation under § 42.205.

OCRC will, however, treat as complaints letters that are filed on behalf of an individual who does not wish to have his identity divulged to the allegedly discriminating agency, and investigate them pursuant to § 42.205.

3. Former §§ 42.208 and 42.209 are no longer "reserved." Accordingly, former §§ 42.210–42.217 have been redesignated as §§ 42.208–42.215, in sequence.

4. The reference to pre-award compliance reviews that was previously in the Commentary on § 42.206(a) has been eliminated and replaced, with some elaboration, by § 42.206(b) of the regulations themselves.

5. Section 42.201(a) has been amended to expressly note that the regulations implement not only the nondiscrimination provisions of the Justice System Improvement Act, but Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Executive Order 12138 (requiring all Federal agencies to take steps to support women's business enterprise) as well. Numerous citations in the regulations to other statutes, regulations, and guidelines have also been updated.

6. A definition has been added to explain that all masculine terms, such as "he," "him," and "his," should be construed to mean their respective feminine counterparts, "she," "her" and "hers," where appropriate. See section 42.202(s).

7. The reference in § 42.208(b) to the West Publishing Company's National Reporter System as a source for finding "pattern or practice" findings of discrimination against JSIA recipients has been eliminated. This reference has proven only duplicative of the other sources listed in § 42.208(b).

8. Section 42.205(c)(5) has been amended in order to clarify that OJARS will monitor ongoing litigation between a complainant and a recipient primarily through the court docket. The complainant will be contacted only if the docket does not sufficiently disclose the current status of the case. The term "where necessary" has accordingly been inserted before the phrase "contacts with the complaint" in § 42.205(c)(5).

9. The Commentary on § 42.205(c)(1) has been amended to require that a recipient must have been receiving LEAA, NIJ, or BJS assistance at the time of the alleged discrimination if OJARS is to have jurisdiction over the complaint. The complaint will be investigated even if the respondent agency is no longer a recipient at the time the complaint is received.

10. A number of other grammatical, technical, and clarifying changes that do not substantively affect the regulations have also been made. Compare specifically, §§ 42.202(d), 42.203(b)(9), 42.203(c), 42.203(e), 42.203(f), 42.203(g), 42.204(c), 42.205(c)(3)(i), 42.205(c)(4), 42.205(c)(5), 42.206(c), 42.206(c)(2), 42.206(d)(3), 42.206(e), 42.206(f), 42.208(a)(2), 42.208(b)(2), 42.208(c), 42.208(c)(3), 42.208(e) (i) (ii), 42.208(g)(3), 42.308(g)(4), 42.210(a), and the Commentary on §§ 42.203(j) and 42.205(b), with their respective predecessor sections.

OJARS expects to publish a Proposed Rule for §§ 42.203(b)(8) and 42.204(b) in the near future. Section 42.203(b)(8) would specifically prohibit a JSIA or Juvenile Justice (JJ) Act recipient from depriving any person of his or her constitutional rights on the basis of race, color, religion, national origin, or sex. Section 42.204(b) would prohibit certain awards of assistance under the JSIA or the JJ Act until the applicant's Equal Employment Opportunity Program (EEOP) has been approved by OJARS. These paragraphs are shown as reserved in this final rule.

There have been no changes in the complaint investigation and compliance review timetables published as final on February 16, 1977, 42 FR 9492. Part 42 of title 28 CFR is amended by revising Subpart D to read as follows:

PART 42—NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES

Subpart D—Nondiscrimination in Federally Assisted Programs—Implementation of Section 815(c)(1) of the Justice System Improvement Act of 1979

Sec.

42.201 Purpose and application.
42.202 Definitions.
42.203 Discrimination prohibited.
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42.206 Compliance reviews.
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42.214 Judicial review.
42.215 Other actions authorized under the JSIA.
Appendix A—Commentary.

Authority: Secs. 802(a), 815(c), and 817(d) of the Justice System Improvement Act of 1979, 42 U.S.C. § 3701, *et seq.*, as amended (Pub. L. 90–351, as amended by Pub. L. 93–83, Pub. L. 93–415, Pub. L. 94–503, and Pub. L. 96–157 (December 27, 1979) (JSIA) and Sec. 262 of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. 5672 (Pub. L. 93–415, as amended by Pub. L. 95–115)].

Subpart D—Nondiscrimination in Federally Assisted Programs—Implementation of Section 815(c)(1) of the Justice System Improvement Act of 1979

§ 42.201 Purpose and application.

(a) The purpose of this subpart is to implement the provisions of section 815(c) of the Justice System Improvement Act of 1979 (42 U.S.C. 3789d(c); Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et seq.*, to the end that no person in any State shall on the ground of race, color, national origin, sex, or religion be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment in connection with any program or activity funded in whole or in part with funds made available under either the Justice System Improvement Act or the Juvenile Justice Act by the Law Enforcement Assistance Administration, the National Institute of Justice, or the Bureau of Justice Statistics. These regulations also implement Executive Order 12138, which requires all Federal agencies awarding financial assistance to take certain steps to advance women's business enterprise.

(b) The regulations in this subpart apply to the delivery of services by, and employment practices of recipients administering, participating in, or substantially benefiting from any program or activity receiving Federal financial assistance extended under the Justice System Improvement Act of 1979, or the Juvenile Justice and Delinquency Prevention Act of 1974, as amended.

(c) Where a private recipient which receives such assistance through a unit of government is engaged in prohibited discrimination, the Office of Justice Assistance, Research, and Statistics will invoke the enforcement procedures of this subpart (Sections 42.208, *et seq.*) against the appropriate unit of government for failure to enforce the

assurances of nondiscrimination given it by the private recipient pursuant to § 42.204(a). Where a private recipient receives assistance either directly from the Law Enforcement Assistance Administration, the National Institute of Justice, or the Bureau of Justice Statistics or through another private entity which receives funds directly from one of those agencies, compliance will be enforced pursuant to section 803(a) of the Justice System Improvement Act.

§ 42.202 Definitions.

(a) "JSIA" means the Justice System Improvement Act of 1979, Pub. L. 96-157, 42 U.S.C. 3701, *et seq.*

(b) "Juvenile Justice Act" means Title I and II of the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 93-415, as amended by Pub. L. 94-503 and Pub. L. 95-115.

(c) "OJARS" or "Office" means the Office of Justice Assistance, Research, and Statistics.

(d) "LEAA" means the Law Enforcement Assistance Administration.

(e) "NIJ" means the National Institute of Justice.

(f) "BJS" means the Bureau of Justice Statistics.

(g) "Employment practices" means all terms and conditions of employment including but not limited to, all practices relating to the screening, recruitment, referral, selection, training, appointment, promotion, demotion, and assignment of personnel, and includes advertising, hiring, assignments, classification, discipline, layoff and termination, upgrading, transfer, leave practices, rate of pay, fringe benefits, or other forms of pay or credit for services rendered and use of facilities.

(h) "Investigation" includes fact-finding efforts and, pursuant to § 42.205(c)(3), attempts to secure the voluntary resolution of complaints.

(i) "Compliance review" means a review of a recipient's selected employment practices or delivery of services for compliance with the provisions of section 815(c)(1) of the Justice System Improvement Act, or this subpart.

(j) "Noncompliance" means the failure of a recipient to comply with section 815(c)(1) of the Justice System Improvement Act, or this subpart.

(k) "Program or activity" means the operation of the agency or organizational unit of government receiving or substantially benefiting from financial assistance awarded, e.g., a police department or department of corrections.

(l) "Pattern or practice" means any procedure, custom, or act affecting or potentially affecting, more than a single individual in a single or isolated instance.

(m) "Religion" includes all aspects of religious observance and practice as well as belief.

(n) "Recipient" means any State or local unit of government or agency thereof, and any private entity, institution, or organization, to which Federal financial assistance is extended directly, or through such government or agency, but such term does not include any ultimate beneficiary of such assistance.

(o) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands;

(p) "Unit of local government" means any city, county, township, town, borough, parish, village or other general purpose political subdivision of a State, an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior, or, for the purpose of assistance eligiblity, any agency of the District of Columbia government or the United States Government performing law enforcement functions in and for the District of Columbia;

(q) "Combination" as applied to States or units of local government means any grouping or joining together of such States or units for the purpose of preparing, developing, or implementing a criminal justice program or project;

(r) "Criminal justice control" or "CJC" means the agency designated by a State to perform the functions listed in section 402(b)(1) of the Justice System Improvement Act.

(s) All masculine terms such as "he," "his," and "him" should be construed to mean their respective feminine counterparts, "she," "hers," and "her," where appropriate.

§ 42.203 Discrimination prohibited.

(a) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or denied employment in connection with any program or activity funded in whole or in part with funds made available under the JSIA or the Juvenile Justice Act.

(b) A recipient may not, directly or through contractual or other arrangements, on the grounds set forth in paragraph (a) of this section:

(1) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(2) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(3) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

(4) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, or financial aid or benefit under the program;

(5) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function, or benefit provided under the program;

(6) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program;

(7) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program;

(8) [Reserved]

(9) Subject any individual to discrimination in its employment practices in connection with any program or activity funded in whole or in part with funds made available under the JSIA or the Juvenile Justice Act;

(10) Use any selection device in a manner which is inconsistent with the Department of Justice Uniform on Employee Selection Guidelines, 28 CFR 50.14.

(c) In matters involving employment discrimination, section 815(c)(1) of the JSIA shall be interpreted by the Office consistently with Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 79 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 87 Stat. 103, and the Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076.

(d) The use of a minimum height or weight requirement which operates to disproportionately exclude women and persons of certain national origins, such as persons of Hispanic or Asian descent, is a violation of this subpart, unless the recipient is able to demonstrate convincingly, through use of supportive factual data, that the requirement has been validated as set forth in the

Department of Justice Guidelines on Employee Selection Procedures, 28 CFR 50.14.

(e) A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any program, or the class of individuals to whom, or the situations in which, such will be provided under any program, may not directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination under section 815(c)(1) of the JSIA, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, sex, national origin, or religion.

(f) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, subjecting them to discrimination under, or denying them employment in connection with any program or activity to which this subpart applies; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the JSIA, the Juvenile Justice Act, or this subpart.

(g) For the purposes of this section, the disposition, services, financial aid, or benefits provided under a program or activity receiving Federal financial assistance shall be deemed to include any portion of any program or function or activity conducted by any recipient of Federal financial assistance which program, function, or activity is directly or indirectly improved, enhanced, enlarged, or benefited by such Federal financial assistance or which makes use of any facility, equipment, or property provided with the aid of Federal financial assistance.

(h) The enumeration of specific forms of prohibited discrimination in paragraphs (b) through (g) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(i)(1) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, religion, national origin, or sex, the recipient must take affirmative action to overcome the effects of prior discrimination.

(2) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, religion, national origin, or sex.

(j) Nothing contained in this subpart shall be construed as requiring any recipient to adopt a percentage ratio, quota system, or other program to achieve racial balance. The use of goals and timetables is not use of a quota prohibited by this section.

§ 42.204 Applicants' obligations.

(a) Every application for Federal financial assistance to which this subpart applies shall, as a condition of approval of such application and the extension of any Federal financial assistance pursuant to such application, contain or be accompanied by an assurance that the applicant will comply with all applicable nondiscrimination requirements and will obtain such assurances from its subgrantees, contractors, or subcontractors to which this subpart applies, as a condition of the extension of Federal financial assistance to them.

(b) [Reserved]

(c) Every application for Federal financial assistance from a State or local unit of government or agency thereof shall contain an assurance that in the event a Federal or State court or Federal or State administrative agency makes a finding of discrimination after a due process hearing, on the ground of race, color, religion, national origin, or sex against the recipient State or local government unit, or agency, the recipient will forward a copy of the finding to the appropriate CJC and to OJARS.

§ 42.205 Complaint investigation.

(a) The Office shall investigate complaints filed by or on behalf of an individual claiming to be aggrieved, that allege a violation of section 815(c)(1) of the JSIA, or this subpart.

(b) No complaint will be investigated if it is received more than one year after the date of the alleged discrimination, unless the time for filing is extended by the Director of OJARS for good cause shown.

(c) The Office shall conduct investigations of complaints as follows:

(1) Within 21 days of receipt of a complaint, the Office shall:

(i) Ascertain whether it had jurisdiction under paragraphs (a) and (b) of this section;

(ii) If jurisdiction is found, notify the recipient alleged to be discriminating of its receipt of the complaint; and

(iii) Initiate the investigation.

(2) The investigation will ordinarily be initiated by a letter requesting data pertinent to the complaint and advising the recipient of:

(i) The nature of the complaint, and, with the written consent of the complainant, the identity of the complainant;

(ii) The programs or activities affected by the complaint;

(iii) The opportunity to make, at any time prior to receipt of the Office's preliminary findings, a documentary submission, responding to, rebutting, or denying the allegations made in the complaint; and

(iv) The schedule under which the complaint will be investigated and a determination of compliance or non-compliance made.

Copies of this letter will also be sent to the chief executive of the appropriate unit(s) of government, and to the appropriate CJC.

(3) Within 150 days or, where an on-site investigation is required, within 175 days after the initiation of the investigation, the Office shall advise the complainant, the recipient, the chief executive(s) of the appropriate unit(s) of government, and the appropriate CJC of:

(i) Its investigative findings;

(ii) Where appropriate, its recommendations for compliance; and

(iii) If it is likely that satisfactory resolution of the complaint can be obtained, the recipient's opportunity to request the Office to engage in voluntary compliance negotiations prior to the Director of OJARS' determination of compliance or non-compliance.

(4) If, within 30 days, the Office's recommendations for compliance are not met, or voluntary compliance is not secured, the Director of OJARS of the 30-day period. If the Director makes a determination of non-compliance with section 815(c)(1) of the JSIA, the Office shall institute administrative proceedings pursuant to § 42.208, *et seq.*

(5) If the complainant or another party, other than the Attorney General, has filed suit in Federal or State court alleging the same discrimination alleged in a complaint to OJARS, and, during OJARS' investigation, the trial of that suit would be in progress, OJARS will suspend its investigation and monitor the litigation through the court docket and, where necessary, contacts with the complainant. Upon receipt of notice that the court has made a finding of a pattern or practice of discrimination within the meaning of § 42.208, the Office will institute administrative proceedings pursuant to § 42.208, *et seq.* Upon receipt of notice that the court has made a finding affecting only the complainant, the Office will adopt the findings of the court as its investigative findings pursuant to § 42.205(c)(3).

(6) The time limits listed in paragraphs (c)(1) through (c)(5) of this section shall

be appropriately adjusted where OJARS requests another Federal agency or another branch of the Department of Justice to act on the complaint. OJARS will monitor the progress of the matter through liaison with the other agency. Where the request to act does not result in timely resolution of the matter, OJARS will institute appropriate proceedings pursuant to this section.

§ 42.206 Compliance reviews.

(a) The Office shall periodically conduct:

(1) Pre-award compliance reviews of all applicants requesting a grant from IEAA, NIJ, or BJS for $500,000 or more; and

(2) Post-award compliance reviews of selected recipients of IEAA, NIJ, or BJS assistance.

(b) *Pre-award reviews.* The Office shall review selected formula, discretionary, and national priority applications for $500,000 or more in order to determine whether the application presents a possibility of discrimination in the services to be performed under the grant, or in the employment practices of the applicant. In those instances where it finds such a possibility, the Office shall special condition, disapprove or take other action with respect to the application to assure that the project complies with section 815(c)(1) of the JSIA.

(c) *Post-award reviews.* The Office shall seek to review those recipients which appear to have the most serious equal employment opportunity problems, or the greatest disparity in the delivery of services to the minority and non-minority or male and female communities they serve. Selection for review shall be made on the basis of:

(1) The relative disparity between the percentage of minorities, or women, in the relevant labor market, and the percentage of minorities, or women, employed by the recipient;

(2) The percentage of women and minorities in the population receiving program benefits;

(3) The number and nature of discrimination complaints filed against a recipient with OJARS or other Federal agencies;

(4) The scope of the problems revealed by an investigation commenced on the basis of a complaint filed with the Office against a recipient or by a pre-award compliance review; and

(5) The amount of assistance provided to the recipient.

(d) Within 15 days after selection of a recipient for review, the Office shall inform the recipient that it has been selected and will initiate the review. The review will ordinarily be initiated by a letter requesting data pertinent to the review and advising the recipient of:

(1) The practices to be reviewed;

(2) The programs or activities affected by the review;

(3) The opportunity to make, at any time prior to receipt of the Office's investigative findings, a documentary submission responding to the Office, explaining, validating, or otherwise addressing the practices under review; and

(4) The schedule under which the review will be conducted and a determination of compliance or non-compliance made.

Copies of this letter will also be sent to the chief executive of the appropriate unit(s) of government, and to the appropriate CJC.

(e) Within 150 days or, where an on-site investigation is required, within 175 days after the initiation of the review, the Office shall advise the recipient, the chief executive(s) of the appropriate unit(s) of government, and the appropriate CJC, of:

(1) Its investigative findings;

(2) Where appropriate, its recommendations for compliance; and

(3) The opportunity to request the Office to engage in voluntary compliance negotiations prior to the Director of OJARS' determination of compliance or noncompliance.

(f) If, within 30 days, the Office's recommendations for compliance are not met, or voluntary compliance is not secured, the Director of OJARS shall make a determination of compliance or non-compliance. The determination shall be made no later than 14 days after the conclusion of the 30-day negotiation period. If the Director makes a determination of non-compliance with section 815(c) of the JSIA, the Office shall institute administrative proceedings pursuant to § 42.208, *et seq.*

§ 42.207 Compliance information.

(a) Each recipient shall:

(1) Keep such records, and submit to OJARS such timely, complete, and accurate information as OJARS may request to determine whether the recipient is complying with Section 815(c)(1) of the JSIA; and

(2) Permit reasonable access by OJARS to its books, documents, papers, and records, to the extent necessary to determine whether the recipient is complying with Section 815(c)(1) of the JSIA.

(b) Failure to comply with § 42.207(a) shall subject the recipient to the sanctions provided in Section 803(a) of the JSIA, 42 U.S.C. 3783(a).

§ 42.208 Notice of noncompliance.

(a) Whenever the Office has:

(1) Received notice of a finding, after notice and opportunity for a hearing by:

(i) A Federal court (other than in an action brought by the Attorney General under Section 815(c)(3) of the JSIA);

(ii) A State court; or

(iii) A Federal or State administrative agency (other than the Office under paragraph (a)(2) of this section); to the effect that there has been a pattern or practice of discrimination in violation of Section 815(c)(1) of the JSIA; or

(2) Made a determination after an investigation by the Office pursuant to § 42.205 or § 42.206 of this subpart that a State government or unit of general local government, or agency thereof, is not in compliance with this subpart, or Section 815(c)(1) of the JSIA, or this subpart: the Office shall, within 10 days after such occurrence, notify the chief executive of the affected State and, if the action involves a unit of general local government, the chief executive of such unit of general local government, that such program or activity has been so found or determined not to be in compliance with this subpart or section 815(c)(1) of the JSIA or this subpart, and shall request each chief executive notified under this section with respect to such violation to secure compliance.

(b) For the purposes of this section, notice means:

(1) Publication in—

(i) Employment Practices Decisions, Commerce Clearinghouse, Inc.;

(ii) Fair Employment Practices, Bureau of National Affairs, Inc.;

(iii) The United States Law Week, Bureau of National Affairs, Inc.; or

(iv) Federal Supplement, Federal Reporter, or Supreme Reporter, West Publishing Company; or

(2) Receipt by the Office of a reliable copy of a pattern or practice finding, made after a due process hearing from any source.

(c) When the Office receives notice of a finding which has been made more than 120 days prior to receipt, the Office will determine if the finding is currently applicable.

(1) In determining the current applicability of the finding, the Office will contact the clerk of the court and the office of the deciding judge (or the appropriate agency official) to determine whether any subsequent orders have been entered.

(2) If the information is unavailable through the clerk or the office of the judge (or the appropriate agency official), the Office will contact the attorneys of record for both the plaintiff and defendant to determine whether any

subsequent orders have been entered, or if the recipient is in compliance.

(3) If, within 10 days of receipt of notice, it is not determined through the procedures set forth in paragraphs (c)(1) and (2) of this section, that the recipient is in full compliance with a final order of the court (or agency) within the meaning of § 42.211(b), the Office will notify the appropriate chief executive of the recipient's noncompliance as provided in § 42.208(a).

(d) For purposes of paragraph (a)(1)(iii) of this section a finding by a Federal or State administrative agency shall be deemed rendered after notice and opportunity for a hearing if it is rendered pursuant to procedures consistent with the provisions of subchapter II of Chapter 5, Title 5, United States Code (the Administrative Procedures Act).

(e) The procedures of a Federal or State administrative agency shall be deemed to be consistent with the Administrative Procedure Act (APA) if:

(1) The agency gives all interested parties opportunity for—

(i) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(ii) Hearing on notice, and a decision by an individual who did not participate in the investigation or prosecution of the matter.

(2) A party is entitled to be represented by counsel or other qualified representative, to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts; and

(3) The record shows the ruling on each finding, conclusion, or exception presented. All decisions, including initial recommended, and tentative decisions, shall be a part of the record and shall include a statement of—

(i) Findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(ii) The appropriate rule, order, sanction, relief, or definal thereof.

(f) If within 10 days of receipt of notice the Office cannot determine whether the finding was rendered pursuant to procedures consistent with the APA, it shall presume the APA procedures were applied, and send notification under § 42.208(a) to the appropriate chief executive(s).

(g) Each notification under § 42.208(a) shall advise the appropriate chief executive of:

(1) The program or activity determined to be in noncompliance;

(2) The general legal and factual basis for its determination;

(3) The Office's request to secure compliance;

(4) The action to be taken by the Office and the provisions of law under which the proposed action is to be taken should the chief executive fail to secure compliance; and

(5) The right of the recipient to request a preliminary hearing, pursuant to § 42.212, and a full hearing, pursuant to § 42.213.

§ 42.209 Compliance secured.

(a) In the event a chief executive secures compliance after notice pursuant to § 42.208, the terms and conditions with which the affected State government or unit of general local government agrees to comply shall be set forth in writing and signed by the chief executive of the State, by the chief executive of such unit (in the event of a violation by a unit of general local government), and by the Director of OJARS.

(b) Prior to the effective date of the agreement, the Office shall send a copy of the agreement to each complainant, if any, with respect to such violation, and to the appropriate CJC.

(c) The chief executive of the State, or the chief executive of the unit (in the event of a violation by a unit of general local government) shall file semi-annual reports with the Office detailing the steps taken to comply with the agreement.

(d) Within 15 days of receipt of such reports, the Office shall send a copy to each complainant, if any.

(e) The Director of OJARS shall also determine a recipient to be in compliance if it complies fully with the final order or judgement of a Federal or State court, pursuant to §§ 42.211(a)(2) and 42.211(b), or if found by such court to be in compliance with section 815(c)(1).

§ 42.210 Compliance not secured.

(a) If, at the conclusion of 90 days after notification of noncompliance with Section 815(c)(1):

(1) Compliance has not been secured by the chief executive of that State or the chief executive of that unit of general local government; and

(2) An administrative law judge has not made a determination under § 42.212 that it is likely the State government or unit of local government will prevail on the merits;

the Office shall notify the Attorney General that compliance has not been secured and shall cause to have suspended further payment of any funds under the JSIA or Juvenile Justice Act, as appropriate, to the specific program or activity in which the noncompliance has been found.

(b) If a hearing is requested pursuant to section 42.213, the suspension of funds shall be effective for a period of not more than 30 days after the conclusion of the hearing, or in the absence of a hearing under section 42.213, funds shall be suspended for not more than 120 days, unless there has been an express finding by the Director of OJARS after notice and opportunity for such a hearing, that the recipient is not in compliance with section 815(c)(1) of the JSIA, or this subpart.

§ 42.211 Resumption of suspended funds.

(a) Payment of suspended funds made available under the JSIA or the Juvenile Justice Act shall resume only if—

(1) Such State government or unit of general local government enters into a compliance agreement signed by the Director of OJARS in accordance with § 42.209;

(2) Such State government or unit of general local government:

(i) Complies fully with the final order or judgment of a Federal or State court, if that order or judgement covers all matters raised by the Director of OJARS in the notice pursuant to 42.208, or

(ii) Is found to be in compliance with section 815(c)(1) of the JSIA by such court;

(3) After a hearing, the Director of OJARS, pursuant to § 42.213, finds that noncompliance has not been demonstrated; or

(4) An administrative law judge has determined, under § 42.212, that it is likely that the State government or unit of local government will prevail on the merits.

(b) Full compliance with a court order, for the purposes of paragraph (2) of this section, includes the securing of an agreement to comply over a period of time, particularly in complex cases or where compliance would require an extended period of time for implementation.

§ 42.212 Preliminary hearing.

(a) Prior to the suspension of funds under § 42.210(a), but within the 90-day period after notification under § 42.208, the State government or unit of local government may request an expedited preliminary hearing on the record in accordance with 5 U.S.C. 554 in order to determine whether it is likely that the State government or unit of local government would, at a full hearing under §42.213, prevail on the merits on the issue of the alleged noncompliance.

(b) The preliminary hearing shall be initiated within 30 days of request. The ALJ shall make his finding within 15 days after the conclusion of the preliminary hearing.

§ 42.213 Full hearing.

(a) At any time after notification of noncompliance under § 42.208, but before the conclusion of the 120-day suspension period referred to in § 42.210, a State government or unit of general local government may request a hearing on the record in accordance with 5 U.S.C. 554 in order to contest the findings of determination of noncompliance made under § 42.208. The Office shall initiate the hearing within 60 days of request.

(b) Within 30 days after the conclusion of the hearing, or, in the absence of a hearing, at the conclusion of the 120-day period referred to in § 42.210, the Director of OJARS shall make a finding of compliance or noncompliance.

(1) If the Director makes a finding of noncompliance, the Director shall:

(i) Notify the Attorney General in order that the Attorney General may institute a civil action under section 815(c)(3) of the JSIA;

(ii) Cause to have terminated the payment of funds under the JSIA and/or the Juvenile Justice Act; and

(iii) If appropriate, seek repayment of funds.

(2) If the Director makes a finding of compliance, payment of the suspended funds and reconsideration of applications shall resume.

§ 42.214 Judicial review.

Any State government or unit of general local government aggrieved by a final determination of the Office under § 42.213 may appeal such determination as provided in Section 805 of the JSIA.

§ 42.215 Other actions authorized under the JSIA.

(a) The Director of OJARS may, at any time, request the Attorney General to file suit to enforce compliance with section 815(c)(1). OJARS will monitor the litigation through the court docket and liaison with the Civil Rights Division of the Department of Justice. Where the litigation does not result in timely resolution of the matter, and funds have not been suspended pursuant to § 42.215(b), OJARS will institute administrative proceedings unless enjoined from doing so by the court.

(b)(1) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race, color, religion, national origin, or sex in any program or activity of a State government or unit of local government which State government or unit of local government receives funds made available under the JSIA or the Juvenile Justice Act and the conduct allegedly violates or would violate the provisions of this subpart or section 815(c)(1) of the JSIA and neither party within 45 days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may otherwise be available by law, the Director of OJARS shall suspend further payment of any funds under the JSIA and the Juvenile Justice Act to that specific program or activity alleged by the Attorney General to be in violation of the provisions of section 815(c)(1) of the JSIA until such time as the court orders resumption of payment.

(2) The Office expects that preliminary relief authorized by this subsection will not be granted unless the party making application for such relief meets the standards for a preliminary injunction.

(c)(1) Whenever a State government or unit of local government or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by section 815(c)(1) of the JSIA, a civil action may be instituted after exhaustion of administrative remedies by the person aggrieved in an appropriate United States District Court or in a State court or general jurisdiction.

(2) Administrative remedies shall be deemed to be exhausted upon the expiration of 60 days after the date the administrative complaint was filed with the Office or any other administrative enforcement agency, unless within such period there has been a determination by the Office or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.

(3) The Attorney General, or a specifically designated assistant for or in the name of the United States may intervene upon timely application in any civil action brought to enforce compliance with Section 815(c)(1) of the JSIA if he certifies that the action is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

Appendix A—Commentary

Section 42.201(c). The compliance enforcement mechanism of section 815(c)(2) applies by its terms to State and local government. The prohibitions in section 815(c)(1), however, apply to all recipients of OJARS assistance. Accordingly, where a private entity which has received LEAA, NIJ, or BJS assistance through a State or local unit of government is determined by OJARS to be in non-compliance, OJARS will invoke the section 815(c)(2) mechanism against the appropriate unit of government for its failure to enforce the assurances of compliance given it by the private recipient, unless the unit has initiated its own compliance action against the private recipient. The fund termination procedures of section 803(a) will be invoked against non-complying private recipients which receive assistance directly from LEAA, NIJ, or BJS, or through another private entity.

Section 42.202(g). Section 815(c)(1) of the JSIA limits suspension and termination of assistance in the event of noncompliance to the "programs or activity" in which the noncompliance is found. The phrase "program or activity" was first used in section 815(c)(1) of the Crime Control Act of 1976, the substantially identical predecessor to section 815(c)(1).

House Report No. 94–1155 (94th Congress, 2d Session), at p. 26, explained the provision as follows:

"Suspension may be limited to the specific program or activity found to have discriminated, rather than all of the recipients' LEAA funds.

"For example, if discriminatory employment practices in a city's police department were cited in the notification, LEAA may only suspend that part of the city's payments which fund the police department. LEAA may not suspend the city's LEAA funds which are used in the city courts, prisons, or juvenile justice agencies."

This passage makes it clear that OJARS need not demonstrate a nexus between the particular project funded and the discriminatory activity. See *Lau* v. *Nichols*, 414 U.S. 563, 568 (1974).

Sections 42.203(b) and 42.203(e–i). These provisions are derived from 28 CFR 42.104(b) of Subpart C of the Department of Justice Nondiscrimination Regulations. Where appropriate "sex" and "religion" have been added as prohibited grounds of discrimination, and "denial of employment" as another activity within the scope of section 815(c)(1).

Individual projects benefiting a particular sex, race, or ethnic group are not violative of section 815(c)(1) unless the granting agency or the recipient has engaged in a pattern of granting preferential treatment to one such group, and cannot justify the preference on the basis of a compelling governmental interest, in the case of racial or ethnic discrimination, or a substantial relationship to an important governmental function, in the case of sex discrimination.

Section 42.203(b)(10). On August 25, 1978, the Department of Justice, the Equal Employment Opportunity Commission, the Department of Labor and the then-Civil Service Commission published the Uniform Employee Selection Guidelines codified at 28 CFR 50.14. Since OJARS is a component of the Department, these guidelines are applicable to the selection procedures of LEAA, NIJ, and BJS recipients. See 44 FR 11996 (March 2, 1979) for a detailed commentary on the guidelines.

Section 42.203(c). In the Conference Report on Section 518(c) of the Crime Control Act (the substantially identical predecessor of Section 815(c)), the managers stated that "In the area of employment cases brought under this section, it is intended by the conferees that the standards of Title VII of the Civil Rights Act of 1964 apply." H. Rept. No. 94-1723 (94th Cong., 2d Sess.) at p. 32.

This section makes the OJARS standards of employment discrimination consistent with those used by the Civil Rights Division of the Department of Justice. It further clarifies that the burden shifts to the employer to validate its selection procedures once OJARS has demonstrated that those procedures disproportionately exclude an affected class. Discriminatory purpose on the part of the employer, which must be shown before the burden shifts in a Fourteenth Amendment case such as *Washington* v. *Davis*, 426 U.S. 229, 96 S. Ct. 2040 (1976), need not be shown in an employment discrimination case brought under section 815(c)(1).

Section 42.203(j). Section 815(b) of the JSIA reads:

"Notwithstanding any other provision of law, nothing contained in this title shall be construed to authorize the National Institute of Justice, the Bureau of Justice Statistics, or the Law Enforcement Assistance Administration (1) to require, or condition the availability or amount of a grant upon the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance in any criminal justice agency; or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program."

In commenting on the Crime Control Act of 1976, Senator Roman Hruska of Nebraska explained the difference between quotas and goals and timetables as follows:

"Section 518(b) [now 815(b)] of the act prohibits the setting of quotas. This provision was unchanged, and this provision will still bind the Administration.

"LEAA does have an affirmative obligation under this law to seek to eliminate discriminatory practices, voluntarily, if possible, prior to resorting to fund termination. LEAA can request that a recipient eliminate the effect of past discrimination by requiring the recipient to commit itself to goals and timetables. The formulation of goals is not a quota prohibited by section 518(b) of the act. A goal is a numerical objective fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available. Factors such as a lower attrition rate than expected, bona fide fiscal restraints, or a lack of qualified applicants would be acceptable reasons for not meeting a goal that has been established and no sanctions would accrue under the program." Cong. Rec. S 17320 (September 30, 1976, daily ed.).

The Senate Judiciary Committee Report on the JSIA also emphasized that section 815(b) does not "undercut subsection (c) in any way; subsection (b) has been interpreted so as not to limit LEAA's anti-discrimination enforcement capabilities. Indeed, recent court decisions have made this abundantly clear. See, e.g., *United States* v. *City of Los Angeles*, No. 77-3460 (C.D. Cal. 2/1/79)." S. Rept. 96-142, p. 57.

See also the Equal Employment Opportunity Commission Affirmative Action Guidelines, 44 FR 4422 (January 19, 1979).

Section 42.204. All grantees and subgrantees must make the assurances found in paragraph (a). Only State and local units of government and agencies thereof must make the assurance found in paragraph (c), since, as explained in the commentary on § 42.201(c), the enforcement provisions of section 815(c)(2) apply only to governmental recipients.

Section 42.205(a). Where information available to the Office clearly and convincingly demonstrates that the complaint is frivolous or otherwise without merit, the complaint will not be investigated, and the complainant will be so advised.

Section 42.205(b). A one-year timeliness requirement is imposed to ensure that OJARS will be devoting its resources to the resolution of active issues, and to maximize the possibility that necessary witnesses and evidence are still available.

Examples of good cause which would clearly warrant an extension of the filing period are a statement from the complainant stating that he or she was unware of the discrimination until after a year had passed, or that he or she was not aware that a remedy was available through OJARS.

Section 42.205(c)(1). Jurisdiction exists if the complaint alleges discrimination on a ground prohibited by section 815(c)(1), if the recipient was receiving funds at the time of the discrimination, and the respondent named in the complaint is a current recipient of LEAA, NIJ, or BJS assistance.

Prior to a determination of noncompliance, OJARS will attempt to negotiate voluntary compliance only during the 30-day period following receipt of the Office's preliminary findings, and only at the request of the recipient, as provided in § 42.205(c)(3). If a determination of noncompliance is made, OJARS will participate in voluntary compliance efforts during the 90-day period following the letter sent to the chief executive(s) under section 42.208.

Sections 42.205(c) (3) and (4) and 42.206(e). OJARS will notify the appropriate chief executive(s) of its recommendations during the voluntary resolution phase of both the complaint investigation and compliance review process. OJARS expects that the early involvement of the chief executive will often expedite the resolution of issues.

Section 42.205(c)(5). OJARS will initiate an investigation if the litigation discussed in this subparagraph becomes protracted or apparently will not resolve the matter within a reasonable time.

Section 42.205(c)(6). In order to effectively utilize the resources of other agencies, and to avoid duplication of effort, OJARS may request another agency to act on a particular complaint. OJARS expects this practice to be limited, and will attempt to ensure that any cooperative agreement reached with another agency is consistent with the timetables set forth in § 42.205(c).

Section 42.206(a). OJARS recognizes the practical impossibility of reviewing the compliance of each of its more than 39,000 recipients. The regulations seek to expedite the review process by reducing its length and narrowing its focus. Compliance reviews may, in some instances, be limited to specific employment practices, or other functions of a recipient, that appear to have the greatest adverse impact on an affected class.

Section 42.206(b). The factors listed will be considered cumulatively by OJARS in selecting recipients for reviews. OJARS will consider data from all sources, including information provided by both internal and external auditors.

Section 42.208(b). Upon receipt of the publications listed, OJARS will review the case reports for findings that may be violations of section 815(c)(1). In the case of the West Publishing Company reporters, OJARS will consult the topic "Civil Rights" in the Key Number Digests contained in the advance sheets.

Section 42.208(e). This subsection sets forth the minimum procedural safeguards that OJARS would require of an administrative hearing to assure the process was consistent with the Administrative Procedure Act. The sufficiency of other procedures that may vary in form but insure due process and the same opportunity for a fair hearing of both parties' evidence will be determined by OJARS on a case-by-case basis.

The Office will compile a list of State agencies whose procedures have been found consistent with the Administrative Procedure Act, and a list of State agencies whose procedures have been found inconsistent. When a finding of an agency not on either list is received, the Office will attempt to reliably determine the procedures used to render the findings.

Section 42.209(a). Although the signature of the appropriate chief executives are ultimately required on the compliance agreement, these regulations do not preclude them from delegating the responsibility for securing compliance during the 90-day period following notification, to State or local administrative or human rights agencies under their respective authority. A compliance agreement may be an agreement to comply over a period of time, particularly in complex cases or where compliance would require an extended period of time for implementation.

Section 42.209(b). The regulations require that a copy of the proposed compliance agreement be sent to the complainant, if any, before the effective date of the agreement. Although the Act would permit a copy to be sent as late as the effective date, OJARS believes the compliance agreement would be more likely to resolve all concerns and discourage litigation if the complainant's views were considered before it took effect.

Section 42.211(b). An example of a case where compliance would require an extended period of time for implementation would be a court order setting a goal of five years for an employer to raise the percentage of minorities in its workforce to parity with the percentage of minorities in the relevant geographical labor force.

Section 42.213. The full hearing will be conducted in accordance with JSIA Hearing and Appeal Procedures, 28 CFR 18.1, *et seq.*

Section 42.215(a). In a December 20, 1976 letter to the Administrator of LEAA, Congressman Peter Rodino, Chairman of the House Judiciary Committee, commented on the regulations proposed to implement the substantially identical nondiscrimination provisions of the Crime Control Act. He advised the Administrator that "the committee intentionally omitted the word 'refer' from the law to ensure that LEAA would always retain administrative jurisdiction over a complaint filed with them. It is not appropriate for LEAA to refer cases to the Civil Rights Division or other Federal or State agencies without monitoring the case for prompt resolution."

Section 42.215(c)(2). The exhaustion of administrative remedies at the end of 60 days (unless the Office has made a determination) does not limit OJARS' authority to investigate a complaint after the expiration of that period. OJARS will continue to investigate the complaint after the end of the 60-day period, if necessary, in accordance with the provisions of § 42.205.

The provision for attorney's fees in section 815(c)(4)(B) of the JSIA is not recited in the regulations because it does not affect the authority or actions of the Office.

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DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 316

Offering of U.S. Savings Bonds, Series E

Correction

In FR Doc. 80-10069 appearing at page 21880 in the issue for Wednesday, April 2, 1980, on page 21985 the following appendix should be added following the last table in the document.

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CERTIFICATE OF SERVICE

I, David B. Marblestone, hereby certify that, on October 28, 1980, I served this Supplemental Brief for the United States by mailing two copies to counsel for appellees, addressed as follows:

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