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Department of Justice

DEPARTMENT OF JUSTICE

PRESS CONFERENCE

OF

HONORABLE J. STANLEY POTTINGER

ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES

AND

MEMBERS OF THE PRESS



August 13, 1973
Washington, D. C.

ASSISTANT ATTORNEY GENERAL POTTINGER: I have the pleasure of announcing today the creation of an Office of Indian Rights within the Civil Rights Division of the Department of Justice.

Carl Stoiber, senior trial attorney in the Civil Rights Division and head of a special task force on Indian rights, has been named Director of the new Office. R. Dennis Ickes will serve as Deputy Director.

The Department of Justice, we believe, has a special statutory mandate to protect the civil rights of American Indian citizens, and, therefore, the Office of Indian Rights will have both a litigative and a coordinating function to carry out this mandate.

The new Indian Rights Office is an outgrowth of a special Division task force that has recently been engaged in studying the legal problems of native American Indians since last January.

After a careful review of this task force's findings, I recommended to Attorney General Elliot Richardson the need to establish a permanent Office of Indian Rights. He has agreed to do so.

The Office of Indian Rights will have the responsibility for enforcing Federal statutes regarding the civil rights of American Indians, with a prime focus



on Title II of the 1968 Civil Rights Act. Under this Title, individual Indian citizens are protected from violations of constitutional rights by their tribal council.

The Office of Indian Rights will also have the responsibility of conducting litigation in appropriate cases and recommending intervention or friend-of-the-court participation in cases.

The new Office also will coordinate Civil Rights Division activities regarding Indians.

The new Office will be in close communication and will coordinate its activities with other Federal agencies with responsibilities for the rights of native Americans.

Eventually, we hope to see the Office expanded beyond the Director and Deputy Director and two attorneys which now staff it on a professional basis to a still larger office in order to meet the needs that we believe this new Office will have.

I have with me now both Mr. Stoiber and Mr. Ickes, whom I would like to involve as fully as I can in the questions and answers and participation at this press conference.

I do intend to turn to them from time to time.

At this point, I would like to take your questions and provide as many answers to them as I am able.

I would say only as a further ground rule, if I may, that I would like to keep the subject matter to the one of

this announcement at hand. I know there are other questions that you may have on other business in the Division. I will be pleased to respond to them as best I can through the Office of Public Information, if you will bear with me on that today.



QUESTION: Will this Office involve itself in school segregation cases involving off-reservation Indians, particularly the Shawano-Menominee case in Wisconsin?

ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, the Office may well do that. What we have is a jurisdictional question within our own office about when the Education Section, which has ordinary responsibility for education matters, including school desegregation, will continue that role and when this Office will assume jurisdiction over a matter of that kind.

At the present time we have an internal working arrangement which will determine where matters that are uniquely Indian go. That is to say, they will go to the Office of Indian Rights. In those cases where Indian rights are part of a broader protection in the field of employment, housing or education which is being extended to citizens generally, then in that case the Office of Indian Rights will have a coordinating and oversight function, but the actual litigation will probably still be handled by the Education Division.

The reason for that is, as you can imagine, we need

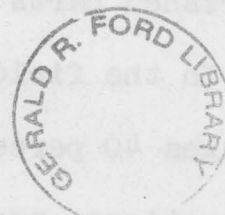
to make sure that we neither eliminate nor reduce the impact we have at present by "ghettoizing," if you will, Indian rights in one small agency. We must continue to have spread throughout this Division a continuing review function by the regular section chiefs and their staffs.

So that relationship will be established on a case-by-case basis.

Now, in the case of Shawano and the Menominee Indians in Wisconsin, we are in the process of determining where that case will go at the present time. It may well be exclusively, because it is uniquely Indian, in the Office of Indian Rights.

QUESTION: Could you summarize what findings you had from this study that has been going on since January -- what types of legal problems you are going to be interested in?

ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, I would be pleased to, but let me start by saying that the general findings of the task force have been to focus on the unique problems that American Indians face today and which they have faced for so many years without adequate solution.



In the field of health, the infant mortality rate of Indians is 23.8 deaths per 1,000 live births, which far exceeds the rate for all other persons and races in our society.

Life expectancy for American Indians is 64.9 years as opposed to 70.8 years for the rest of our population. In other words, it is significantly lower.

Deaths from alcoholism are 6-1/2 times higher for Indians than for the general population.

The tuberculosis rate is 8 times higher than the national rate.

The suicide rate for Indians is twice the national average.

In the field of housing we find that the typical Indian family today in many parts of our country-- families of five or six are living in one- and two-room houses. Twenty-four percent of Indian homes lack running water and adequate facilities, exceeding that for other impoverished parts of our society.

In the field of employment, Indian unemployment averages 40 percent. It is as high as 58 percent in some reservations, and particularly during the winter months.

The average annual per capita income for Indians is significantly lower than for the national average. It is \$1,184 compared to the national average of \$3,344.

In the field of education, 43 percent of Indian students drop out of high school before graduation. The average number of years of education is significantly lower for Indians than for the national average, 8.4 years compared to 10.6.

Now, these general findings can go on at some length.

Our Indian task force has found that we have a responsibility not, of course, to deal expansively or conclusively with each of these problems. We cannot do that alone, nor do we pretend to do that. There are many Federal agencies which have a high responsibility to fulfill their role in making sure that these problems are met.

But we have a unique role both in coordinating an effort to make sure that the civil rights of Indians are protected in an overall expanded effort to deal with their problems generally, and to be sure that there is coordination, that there is a concerted effort between the agencies with which we deal to have the widest possible impact on



these problems.

Now, the task force went into each of these areas where we have jurisdiction or could have jurisdiction, and they have made recommendations for us to pull together these jurisdictions in the form that I have discussed.

Let me add one quick point in that regard which I think would be of interest to you. We have an understanding with the Land Division of the Department of Justice, which presently has jurisdiction over a number of Indian matters, that those that are relevant to the task I have outlined will be ceded or given to this new Office of Indian Rights.

That, we believe, is an important step forward for us and for the Land Division, which has applauded this effort and which is cooperating with us and which wants to see this jurisdiction pulled together in one place.

We have also notified and discussed this matter with the Bureau of Indian Affairs, with the Solicitor of the Interior's Office, with other agencies of the Federal Government, and have found that they agree that there is a need for this kind of an effort. And we have so far received their cooperation in a very excellent manner.

QUESTION: Will you have any Indians working in this Office of Indian Rights?

ASSISTANT ATTORNEY GENERAL POTTINGER: We will have, but we do not now have Indian attorneys assigned to the Office. We have as a result of the recommendations of the task force and our own perceived need in this regard begun a very careful recruitment process, including recruitment in recent weeks at the University of New Mexico, in Colorado at the Colorado University, in Arizona and in Oklahoma. That effort will be expanded to other parts of the country.

You notice that there are not Eastern parts of the country represented in this particular summary.

But we have also sought to undertake to recruit through the American Indian Law Students Association.

Our objective is to have a mix of both Indian lawyers and non-Indian lawyers, and we expect to meet that objective.

QUESTION: But none has been hired to this time?

ASSISTANT ATTORNEY GENERAL POTTINGER: That's correct. We are actually staffed with a skeleton crew, if you will, at this point, only four attorneys at present. But we believe it more important to get the



Office established, to get it operating with the assistance of other sections rather than wait until it can be fully staffed, because that is going to take us some weeks to do.

QUESTION: Mr. Pottinger, if we might, maybe you or your new aides have a numerical count of your clientele, those who are on reservations and those who are urbanized or in urban centers.

STOIBER: I think the current statistics, at least from the 1970 census, indicate that there are in the neighborhood of 800,000 Indian citizens in the United States. Approximately half of those are now resident on Federal Indian reservations. Approximately half are what you would describe as off-reservation Indians in both the rural and urban context.

A lot of people have tried to make the discrimination between urban Indians and reservation Indians, and we don't take that view. There are a lot of Indians who live off-reservation but find themselves in a rural context as well.

QUESTION: How many cases are you taking over from the Bureau, Mr. Stoiber?

STOIBER: I don't think we know. We don't have a definite count on this number at present.

QUESTION: Do you have any?

QUESTION: Are you Mr. Stoiber or Mr. Ickes?

STOIBER: I'm Carl Stoiber.

QUESTION: Do you have any special expertise in Indian affairs or background?

STOIBER: Well, I've been working in Indian matters for the past 3-1/2 years since I joined the Division. Since we did not have any special structure set up to deal with these problems, I have handled them really on an ad hoc basis.

I have prosecuted four or five cases involving the deaths of Indians on various reservations. I have been involved in some litigation under the Indian Bill of Rights and a variety of other cases.

My experience was basically criminal in nature within the Division.

QUESTION: Do you have any --

ASSISTANT ATTORNEY GENERAL POTTINGER: I would like to say that Mr. Stoiber would be inclined perhaps to be somewhat modest on his background. You have asked the



question. Let me add just a couple of points.

He is 31 years old, from the State of Colorado. He was a summa cum laude there, Phi Beta Kappa, was a Rhodes Scholar. He has a Juris Doctor from the University of Colorado.

And I can say that in my experience at Wounded Knee, and the effort that he made there, that his sensitivity to the problems that face American Indians, his ability both to negotiate, to put a staff together, to investigate and to bring to bear a balanced effort on behalf of American Indians was very well received and very well demonstrated, not only to us in the Department but to the Indian community with which we dealt.

And the response that I have received from many of the persons, if not all of them, to Carl's efforts in this regard, his selfless efforts, has been very, very good.

The same I could say generally for Mr. Ickes who has spent even more time in the field in this regard.

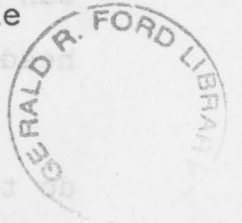
QUESTION: What did you learn from Wounded Knee that would make you perhaps a little bit more sensitive to the Indian problems right now, and what do you hope to accomplish in this new Division?

STOIBER: I think the one great lesson of Wounded Knee, of course, is the fact that there is no Indian problem as such, one identifiable, single problem which eclipses others. The problems Indian citizens face are very complex. They involve very difficult questions not only of law but of social policy.

And I think we want to approach our task with a good bit of humility, because so many people before us, both Indian people and non-Indian people, have had such little luck in solving these problems.

The other great lesson of Wounded Knee is not only are the problems very multifarious, but also the viewpoint of the Indian community is extremely complex and diffuse on these questions, and that no single person can pretend to speak either for the Indian community or for Indians in general.

So what we are going to attempt to do in this new Office is to solicit the broadest conceivable expression of viewpoint on the part of the Indian community on what kind of solution to these problems they envision. And I think our main interest here is one of self-determination and of dealing with problems on a very broad basis with



broad Indian participation.

QUESTION: Mr. Pottinger, do you think that Mr. Stoiber can really appreciate the Indian cause when he must refer to them as "they" instead of "we"?

ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, I do think he can. Let me add with regard to the Wounded Knee experience --

QUESTION: I mean that in all seriousness, if you can answer that. In other words, to have a non-Indian head up this particular group.

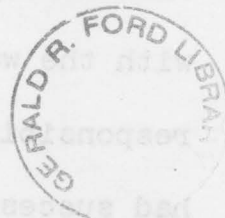
ASSISTANT ATTORNEY GENERAL POTTINGER: Certainly I do think he can. And I mean my answer seriously. First of all, let me point out that from the Indian point of view, as expressed very articulately to this Office and others, one of, if not the most important, problems in solving Indian problems lies not in the Indian community but with the way in which the Federal Government, non-Indian in most regards, has approached its responsibilities to Indians.

To this extent, the problem is not an Indian problem. It is, if you wish to characterize it in racial terms or ethnic terms, a white man's problem.

So I believe that it would be a mistake to assume that we must have a particular cast -- historical, racial, ethnic cast -- to an office of this kind. What we must have is a mixture of viewpoints and those that draw on different cultural backgrounds, different experiences, both those experiences that lie uniquely in the Indian community, but also those experiences that lie uniquely in the Federal Government and its failure to respond through its own ways, through the white man's ways, to the perceived needs of Indians.

I will never accede to the position that a civil rights effort or a civil rights responsibility can be carried out by one particular group of people in a pluralistic society. It's impossible. And that goes not simply for this particular effort on behalf of Indians, but on behalf of all civil rights enforcement.

I wanted to point out with regard to the Wounded Knee exercise that, lest there be a misunderstanding on that point, this Office is not an outgrowth of Wounded Knee as such. The effort and the task force began in January, well before the Wounded Knee exercise.



I can say that the Wounded Knee exercise, in my own personal viewpoint, has contributed to an acceleration of our effort and contributed importantly to our own sensitivity to the needs to make such an effort. But I don't want the impression left that this was solely a result of that episode.

QUESTION: Was it an outgrowth of the BIA takeover?

ASSISTANT ATTORNEY GENERAL POTTINGER: I'm sorry. I didn't hear.

QUESTION: Was it an outgrowth of the BIA takeover?

ASSISTANT ATTORNEY GENERAL POTTINGER: No, it was not an outgrowth of the BIA takeover. Not as such. It was an outgrowth of a history of progress and failures by the Federal Government in this area, and the history is too long in both regards for me to recount completely at this point.

I would like to point out though that we believe that nobody in the Federal Government is fully satisfied with the way in which we as a whole have executed our responsibilities to American Indians. And while we have had successes and continue to learn from them and build on them, we have not solved the problems that are unique to

our responsibility in the most complete way.

So that kind of balance that needs to take place between executing our responsibility without becoming paternalistic -- in other words, making sure that we respect the right to self-determination -- and, on the other hand, making sure that the right to self-determination does not allow us to cop out on our responsibilities by saying that the problems are uniquely Indian, and therefore must be solved by the Indian -- that kind of balance must be struck. And we have experience in trying to do that.

That experience leads us, as I said a moment ago, both to a balance of judgment in our policy formulation and a balance in the composition of the Office which will execute policy in terms of having a mix of Indians and non-Indians working hand in hand.

QUESTION: Does this Office have the power to take the Indian side in disputes with other Federal agencies about land and water rights?

ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, it does. And we expect that that will be a unique and new aspect of this Office's duties and how we perform.



QUESTION: Will this also involve the consideration of old tribal claims or treaties in the past?

ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, it will take that into account. I have to tell you that we have not yet completely formulated the jurisdictional lines that will be drawn between our Office and the Land Division, and yours is uniquely a Land question. But we believe that if the effort that has gone forward so far continues to culmination within the next week or ten days, we will have that responsibility.

QUESTION: What kind of action do you intend to take, Mr. Stoiber, in connection with Wounded Knee? You mentioned in the press release conflicts or violations of constitutional rights by tribal councils. Do you intend to act in the Wounded Knee situation?

STOIBER: Perhaps I could answer that question a little bit more fully by referring to a breakdown of civil rights complaints and investigations that we conducted during our period at Wounded Knee.

I might mention that attorneys from the Civil Rights Division were present at Wounded Knee for over two months during the spring in connection with the problems which

arose there. In fact, I think we spent something in excess of 160 mandays there.

We attempted to investigate fully every civil rights complaint that was brought to our attention, and some figures on this investigative effort are, I think, revealing.

We received during the period of Wounded Knee some 57 civil rights complaints. They break down into a variety of subject matter areas.

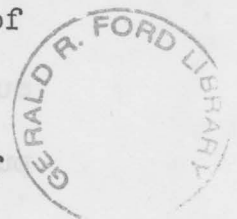
Let me do that in two ways. Let me break them down as to who the complaints were made against, who were the subjects of the investigation, and also the subject matter type of complaint made.

With respect to potential subjects, seven of those 57 complaints dealt with unknown subjects. These were people we could not identify and, in fact, never were able to identify. Anonymous threats. Various complaints of that nature.

Twenty-three of the complaints involved Bureau of Indian Affairs police officers.

Nine of those involved the tribal chairman or other officials of the Oglala Sioux Tribe.

Nine of the complaints dealt with persons who were



described as members of a "goon squad" or group of individuals harassing the citizens of the Oglala Sioux Tribe.

Two involved other police officers not associated with the BIA.

Six involved private persons.

And one involved a local county official.

In terms of subject matter type, 25 of the 57 involved allegations of physical abuse or injury.

One complaint involved a death, but this was later determined to be solely accidental and unconnected in any way with the Wounded Knee situation.

Eleven involved property damage or deprivation of property.

Thirteen involved verbal threats.

Approximately seven were placed in other categories, such as denial of medical treatment, illegal searches, public facilities type complaints.

In terms of the present status of those investigations, we have closed 34 of those as having no prosecutive or litigative merit.

Fifteen are currently in an open status.

Three involve prosecutive recommendations which are pending now currently within the Department.

And five of those involve actions pending in tribal or Federal court. That does not mean by us but actions involving, say, private suits where we are unable to complete our investigation because of the pendency of that jurisdiction.

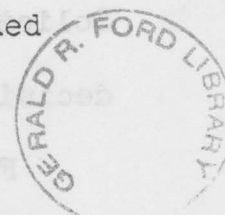
Another rather interesting statistic here is that out of the 23 complaints made against BIA police, approximately half, or 11, of those incidents involve two individual police officers, and through the efforts of this Division and through contact with the BIA, those officers were summarily discharged earlier this year.

So that is really where we stand now in the Wounded Knee investigation.

QUESTION: Do you plan to do anything more?

STOIBER: We have, as I mentioned before, some of these matters which are now pending within the Department. Hopefully, we can either bring those before a Federal grand jury or take other appropriate action.

ASSISTANT ATTORNEY GENERAL POTTINGER: Not seeing, to my knowledge, any of the representatives of the Indian



press here in front of the cameras, may I make an effort to try to invite members of the Indian press or other inquiries from-- Yes?

QUESTION: The Mancari decision has been criticized by the Indian community as Indian discrimination. Will your Office be making any recommendations on it?

ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, we will be. I can't tell you at this moment what they are because we are in the middle of negotiations with other offices on that.

I can tell you what it is. Carl, why don't you explain what our memo says?

STOIBER: We have forwarded a memorandum to the Solicitor General stating that we believe the Mancari decision ought to be appealed by the Federal Government.

For those of you who are not familiar with Mancari, this is a decision by a three-judge Federal court in New Mexico invalidating the Bureau of Indian Affairs Indian preference statute which provides that if there are two candidates for any job within the Bureau of Indian Affairs, preference will be given to a candidate with a background of Indian ancestry.

Of course, our responsibility is to review this decision with respect to the equal employment opportunity statutes, and there was some suggestion, of course, that giving Indians preference might, in fact, violate Title VII of the Equal Employment Opportunity Act with specific reference to the 1972 amendments which made that act applicable to the Federal Government.

We took the position that this was not the case, that the Indian preference was justified in both law and in policy, and that it ought to be actively appealed.

ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, sir?

QUESTION: What can you do with this new Office that you could not have done before? What does "upgrading" it mean?

ASSISTANT ATTORNEY GENERAL POTTINGER: I think in terms of getting both clear jurisdiction where before it was not defined and, second, new jurisdiction where before it was in other offices, it gives us a launching pad for effort that we couldn't do by task force alone.

Second, in terms of making that jurisdiction both better defined and new, there is always an importance, I believe, in dignifying that effort with a status of



an official office that has both the sanction of the Attorney General behind it as well as my own.

Third, I think it's important in terms of that dignity to make it clear to the public at large, particularly the Indian community whom we hope to serve, that this Office is functioning on their behalf, that we must have close and careful coordination with them. We must listen to them. We must go to them, not simply ask them to come to us.

We must do business on their turf, not simply on our own. We must change both our style as well as the substance of what we have traditionally been doing.

Now, all of these are incorporated into this Office, into its approach, and, therefore, the importance of the announcement can be seen.

QUESTION: Have you gotten any feedback from the activists, especially within the Indian community, on the formation of this Office?

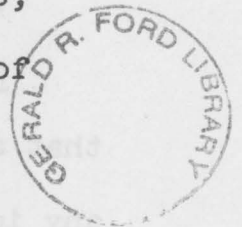
ASSISTANT ATTORNEY GENERAL POTTINGER: Yes, the feedback has been very good with the number of organizations and individuals with whom we have spoken. I don't want to

say that we have heard from everyone, and I don't want to say that others may not have continuing questions. I trust and hope that they will. But our feedback has been excellent so far.

QUESTION: Question regarding the participation of the Federal officials at Wounded Knee as to the total cost involved. There has been some understanding of the Bureau of Indian Affairs having to assume the cost of keeping the Federal team out there for a number of mandays, as you say over a hundred. I was curious who had to pay for the final cost of this occupation.

ASSISTANT ATTORNEY GENERAL POTTINGER: I can't give you a definitive answer to that. I do believe that the Interior Department did assume the major share of the cost. To my knowledge, none of that has been reimbursed to us in terms of our own participation. In other words, the heavy amount of time that we spent there comes out of our budget. And I am not complaining about that.

But I can say that the final arrangements that are worked out on that have been left to the administrators in both -- I mean the budget people and manpower people in both those agencies. I can get you an answer if you want



to pursue it further.

Yes, ma'am?

QUESTION: How closely are you going to deal with Bill Veedor and the Interior Department on water rights? And do you agree with his position?

STOIBER: At the present time we only foresee a limited role in the water rights controversy area, and, of course, this depends on what kind of jurisdictional statement comes out with respect to our relationship with Lands.

Were we to be given that kind of jurisdiction on a broad level, we would certainly coordinate our efforts very closely with Mr. Veedor.

ASSISTANT ATTORNEY GENERAL POTTINGER: Let me take one or two more, if there are more questions.

Yes, sir?

QUESTION: In addition to the 20 or some-odd cases that are in the Department from Wounded Knee, do you have any idea of how many other cases involving Indians are before your Division now?

ASSISTANT ATTORNEY GENERAL POTTINGER: I don't as I stand here, but I'll be pleased to track that down for you

immediately after the conference.

QUESTION: Why would you say it took so long to get an Office of Indian Rights?

ASSISTANT ATTORNEY GENERAL POTTINGER: Why did it take --

QUESTION: Why so long to now?

ASSISTANT ATTORNEY GENERAL POTTINGER: Well, I can tell you why it is now. I think I have given an answer to that. Why there hasn't been an Office of Indian Rights in the Civil Rights Division before is something I can't give you a definitive answer to.

I believe that the responsibility that we have, and which the Government has had for many years, is one which we are taking account of recently because the problems are so compelling, because our ability to understand them is so much more acute. I don't mean in any way to denigrate the good faith of those who have preceded us in this Department for years. But the fact is that our ability to communicate more, our ability as a government to be sensitive to the plight of impoverished people, whether American Indians or others, I think, has increased.

I think that the record of civil rights enforcement



and delivery in that regard probably gives us a trend line on an upward swing that would be the best explanation for what has been happening in the last few years.

I don't have any more specific answer for you as to why there wasn't an office of this kind established, except to say that, whether rightly or wrongly, we didn't perceive the need for it until recent months. And having perceived that need, we are trying to act as vigorously as we can to meet it.

QUESTION: That sounds as if it were Wounded Knee then and the BIA takeover.

ASSISTANT ATTORNEY GENERAL POTTINGER: No. Wounded Knee certainly contributed to my understanding of the issues personally, and I think, as I said before, it sharpened the capability of others who were involved there to understand the issues. But one cannot lay this Office to the foot of that experience -- for one reason because our effort began in January, long before Wounded Knee arose. And it began as an outgrowth of the perception of many contributing factors of the kind that I characterized generally in discussing the health, education, employment and housing needs of native Americans.

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That's what led to the establishment of the task force, and the task force, in turn, led to the establishment of the Office.

Thank you very much.





Department of Justice

SPEECH BY J. STANLEY POTTINGER

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

U. S. DEPARTMENT OF JUSTICE

BEFORE

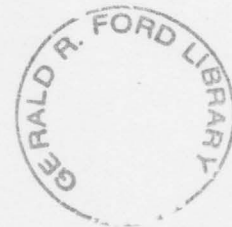
FEDERAL BAR ASSOCIATION CONVENTION

MAYFLOWER HOTEL

WASHINGTON, D. C.

FRIDAY, SEPTEMBER 6, 1974

2 p.m.



"ADMINISTERING A SOLUTION--GOALS VERSUS QUOTAS"

Good Afternoon.

I appreciate the opportunity to be here this afternoon to participate in this discussion on goals versus quotas, a subject which has attracted great attention in the areas of equal employment opportunity and college admissions.

As all of you know, the concept of specific numerical hiring or promotion obligations, and the uses to which that concept has been put by various courts and executive enforcement agencies, have been the subject of considerable controversy--and growing resentment--in various segments of society. Much of the resentment is, I believe, a product of misunderstanding of what is involved. So I would like to describe for you the efforts we have made in the federal government to define the "goals and timetables" concept, and to fix for ourselves as enforcement agencies the permissible limits within which this particular device may be used.

Almost two years ago, the Equal Employment Opportunity Coordinating Council, which was created



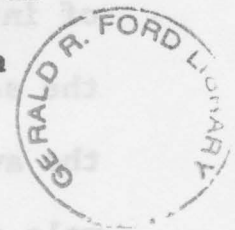
by the Congress in the Equal Employment Opportunity Act of 1972, undertook as one of its first substantive pieces of business the drafting of a uniform set of guidelines governing the uses of the "goals and timetables" devices. The product of that effort is the so-called Four Agency Agreement executed on March 23, 1973, by the Justice Department, EEOC, the Department of Labor, and the Civil Service Commission--the four federal agencies with operating authority in the field of equal employment.

The immediate concern of the Four Agency Agreement was what some perceived to be conflicting requirements of merit selection systems and affirmative numerical hiring obligations. The Agreement addressed itself primarily to public employers, newly covered by Title VII under the 1972 Amendments. But the policies and distinctions drawn in the Agreement are applicable to the private sector as well, and bear careful consideration.

The central thesis of the Four Agency Agreement is that there is no necessary conflict between a system of goals and timetables on the one hand, and a system

of hiring and promoting on the basis of ability to succeed on the other. I say that there is no "necessary" conflict. But harmony between affirmative action and merit hiring depends entirely upon two things: Some precision of thought in understanding what each of these principles is designed to achieve, and a little care in adhering to these principles in the actual hiring and promotion practices. A careful resolution of these apparently conflicting principles is a role that we as lawyers, above all, must play if the requirements of law and a good policy are to be met. And certainly there is no reason that we cannot do so more successfully; every day we as lawyers must translate into action legal distinctions and principles more complicated than those involved in affirmative action and merit system fields.

Unfortunately, however, too many employers and their counsel are slipping in their adherence to sound legal distinctions. As a result of this slippage, myths about the law requiring quotas actually begin to control employers' behavior, and resulting abuses sadly begin



to characterize the entire affirmative action concept.

What are the characteristics of illegal reverse discrimination and compromises of merit hiring which we typically refer to as a quota system? What are the characteristics of a lawful and sensible system of affirmative action designed ultimately to do nothing more than serve the most fundamental concept of the common law--provide remedies where rights have been denied?

The major complaint about affirmative action today is what is seen as an inflexible requirement to hire a fixed number or percentage of minorities or women regardless of realistic assessments of the vacancies in the employer's work force, regardless of the availability of interested and qualified minorities and women to fill the set number of those positions, and regardless of the availability of equally or better qualified white male applicants who might also apply for the same jobs. This kind of system, it is pointed out, will inevitably lead to the hiring of unqualified or lesser qualified people, thereby lowering standards of performance, mocking merit as the basis for advancement, and violating

the spirit and letter of the Constitution itself by discriminating against persons--in this case white males--solely on the account of their race or sex.

If this system were actually required by the law, something would be wrong with the law, and the resentment which occasionally arises today about affirmative action would be both understandable and justified. But the law does not require employment behavior of this kind, and anyone who engages in it is either misunderstanding what the law requires, or petulantly indulging excesses in a sloppy form of "affirmative action with a vengeance."

If this rigid system--which we call a "quota system"--is not required, what is? The characteristics of a lawful and sensible system of numerical objectives--which we have called a "goal system"--needs to be examined. (Incidentally, attaching the word "goals" to a lawful system is not a semantic trick to identify a rose or a quota by some other name. Frankly, it does not matter what names we give to what we have described as a quota system and a goal system. Call them what you wish--the alpha process, the beta process, or something else. What



matters, of course, is how the systems operate, and the real, not just semantic, distinctions between them.

First, in a goal system, the size of the numerical objective which the employer will work toward should be fixed based on a realistic estimation of the number of vacancies expected, and a realistic estimation of the number of qualified applicants of the relevant group who are available for and interested in the particular jobs in question.

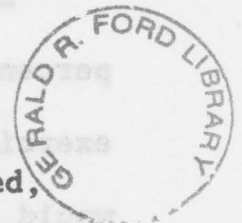
When the goal has been selected through this process, the employer's obligation is to do his best to achieve it. But doing his best does not mean hiring unqualified applicants. Nor does it mean hiring less qualified applicants if the standards for measuring qualifications are truly valid--that is, if they really predict the job applicant's ability to do the job. That has become a big "if," as you know. But it is a legitimate question, and the need for valid selection criteria is not a legalistic "Catch 22" designed to eliminate all tests or selection criteria

in order to pave the way for quota hiring. More on tests in a moment.

Unlike quotas, a goal will help the employer to focus on process, not just arbitrary results.

A meaningful goal can be set only if the employer realistically examines his vacancies, his hiring practices, and his potential for fair employment gains. In this sense, goal setting is an inducement to adopt sound employment practices, and is not a short-cut end in itself which, if reached by any means, serves the law or, for that matter, his enterprise.

A goal also serves as an objective to be reached, but unlike quotas, a goal should not become carved in stone. Changing circumstances beyond the employer's control, or estimations which prove through experience to have been unrealistic when made, can impair an employer's ability to achieve a goal regardless of his good faith efforts to do so. The key here, and one of the major distinctions between the use of a goal which is permissible and the imposition of a quota which is not, is flexibility. If the employer's goal has been realistically set, he is expected to do his



best to achieve it by using fair, non-discriminatory processes, and thereby achieving the elimination of unlawful exclusion from his work force. But if he does his best, and fails nevertheless, he ought not be sanctioned for his failure. To be sure, failure to meet such goals ought to prompt a critical re-examination of the goals, and a search for alternatives or modifications which might prove more effective. But it ought not, without more, provoke sanctions against the employer.

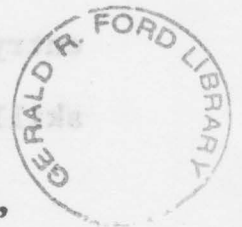
By contrast, a system where the numerical or percentage goals themselves become the object of the exercise, where failure to achieve the required numbers would subject the employer to sanctions regardless of what his efforts had been, or how realistic his expectations had been, would constitute an unlawful quota.

I mentioned that the flexibility inherent in a properly constructed system of goals was one of the major distinctions between that system and a quota system. The other principal distinction is suggested by the first. A fixed, inflexible system of quotas could require an employer to hire people who are not qualified to perform

the jobs he is trying to fill. Such a result would, of course, be inefficient, unfair, and unlawful in the effort to end the effects of prior unlawful exclusion. Again, both the Four Agency Agreement and the courts which have dealt with this issue have made clear that no permissible system of affirmative goals and timetables can require an employer to hire unqualified applicants.

Of course, the whole area of permissible ways and means for measuring qualifications, implicit in what I have just said, is itself the subject of debate, as Mr. Goodman's remarks this morning suggested. I will not attempt to cover the ground that he covered again, but I would like briefly to describe for you the position of the Four Agency Agreement on the question of measuring qualifications.

As I said, both the courts and the federal executive agencies working in this field have recognized employers' needs to be free to hire only qualified applicants. But continued exercise of that appropriate discretion carries with it the obligation on the part of employers to use criteria which do in fact measure qualifications--that is, that they validly predict successful performance on



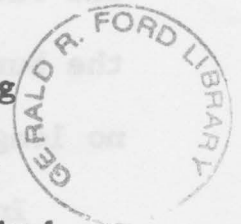
the job. A corollary of this obligation is that where an employer wishes to use a selection device to rank order applicants, and intends to select in accordance with the rank order, he must be willing to show that the selection device validly predicts relative likelihood for successful performance among a group of candidates, all of whom are "qualified" in that they meet basic qualifications. This standard can be a difficult one to satisfy, particularly when it is used to select for entry level jobs requiring only general or very basic skills.

I have so far attempted to give you in broad outline the contours of the notion of affirmative goals and timetables, as adopted in the Four Agency Agreement. Before I conclude I would like to mention two recent appellate court decisions dealing with the issue of affirmative hiring relief.

The Fifth Circuit has recently had occasion to consider the efficacy, propriety, and constitutionality of affirmative numerical hiring relief in two cases challenging the hiring practices of the state police

forces of Mississippi and Alabama. I think those opinions, when read together, demonstrate both that the courts are coming increasingly to consider affirmative hiring relief as not merely appropriate, but required under some circumstances, and that, while recognizing that necessity, courts will nevertheless continue carefully to safeguard the constitutional and proprietary interests of employers and other affected employees or applicants.

In Morrow v. Crisler, the Fifth Circuit sitting en banc was faced with an undisputed finding by the district court that the Mississippi Highway Patrol had unconstitutionally excluded blacks from virtually all jobs on the patrol. The district court had ordered a variety of changes in the recruiting and hiring practices of the patrol, but had declined to order specific numerical goals. The Fifth Circuit, with the benefit of several years' experience under the district court's decree before it, held that the relief ordered by the district court had been insufficient, and that the district court's obligation was to fashion a decree "which will have the certain result of increasing the number of blacks on the Highway Patrol."



Leaving no doubt what it had in mind, the appellate court went on to say that "it will be incumbent on the district court to order some affirmative hiring relief," with those affirmative obligations to last until the district court "is convinced that the measures undertaken by the Patrol effectively offset the effects of past discrimination." The court pointed out in this connection that there was no requirement that the Patrol mirror the population, but placed on the Patrol the burden of demonstrating that affirmative relief was no longer necessary.

In the second case I want to mention, involving the Alabama State Police, the district court had ordered affirmative hiring relief, the constitutionality of which was challenged on appeal. The Court of Appeals rejected contentions that the affirmative hiring relief required discrimination against white applicants, and that it required the patrol to appoint less qualified black applicants before more qualified white applicants. The court disposed of these contentions by pointing out that the selection procedure previously used in Alabama

had itself been unlawful, and there could therefore have been no constitutionally protected "right" to employment vested in those who had qualified through its use. In the words of the Circuit Court, "Until the selection procedures used by the defendants here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional 'reverse' discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons." I should note that Judge Clark, in writing for the Court of Appeals, used the word "quota" to describe the affirmative hiring decree under review, but his opinion makes clear that the hiring of unqualified applicants could not be required. And it was assumed, both in the district court and in the court of appeals, that the affirmative relief would apply to filling of actual, existing trooper vacancies, so there was never any question of hiring unneeded people simply to meet a goal or quota or whatever one might call a specific numerical level of employment. Thus, while Judge Clark speaks of "quotas" and "color



conscious hiring," upon examination one can easily see that the system approved in his opinion has the characteristics I described earlier of a system of goals and timetables.

The device of specific affirmative hiring obligations, both those undertaken voluntarily and those ordered by courts, has now been a part of equal employment opportunity long enough to permit some assessment of its usefulness and some analysis of its weaknesses. The Four Agency Agreement represents an attempt to identify and eliminate some weaknesses, and I think the appellate opinions I have described, while soundly ratifying use of the concept, were also careful to build in safeguards against its misuse. When properly safeguarded, and when administered in the proper spirit, the use of numerical goals can be an effective tool in the continuing effort to eliminate all remnants of employment discrimination. What we need now is the same care and devotion to the law and its important distinctions that we daily apply to other fields of law. The importance of equal employment opportunity to ourselves and our country deserves no less.

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Department of Justice

SPEECH BY J. STANLEY POTTINGER

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

U. S. DEPARTMENT OF JUSTICE

BEFORE

THE CONGRESSIONAL BLACK CAUCUS

RAYBURN BUILDING

WASHINGTON, D. C.

FRIDAY, SEPTEMBER 27, 1974

9:30 a.m.

"JUSTICE AND THE VOTING RIGHTS ACT OF 1970"

I appreciate the opportunity to join your deliberations on Black Legislative Priorities for '75. It is an honor to share the platform with John Lewis and Clarence Mitchell. In addition, Mr. Chairman, I would like to take this opportunity to congratulate you, as Chairman of the Joint Center for Political Studies, and to commend the Voter Education Project and the Lawyers' Committee for Civil Rights Under Law on the outstanding contribution made in the recent publication of the handbook on "How to Use Section 5 of the Voting Rights Act." This is a valuable research tool, and I recommend it to everyone here as a guide for understanding and using the pre-clearance provisions of the Voting Rights Act.

In connection with your consideration of legislative priorities, I have been asked to discuss the Department of Justice's experience in enforcing the Voting Rights Act and to say what I can about the Administration's position on extending the Act next year.

It is entirely appropriate for voting to be the first item on any black legislative agenda. It always has been.



Almost 75 years ago, during the meetings and soul-searching that preceded the formation in 1910 of the NAACP, a group of black educators and doctors met at Harper's Ferry, the site from which John Brown's abortive raid to free the slaves began. Barefooted at dawn, they issued what was probably one of the first listings of black legislative priorities. And the first item on that first list concerned the same subject we discuss today. Of course, there was no Voting Rights Act then. In most places, there wasn't any black voting at all, so the thrust of their entire agenda was toward the establishment and recognition of basic rights for Negro citizens. But the simplicity and force of that declaration still has meaning for us today as we consider voting:

"We want full mankind suffrage, and
we want it now, henceforth and forever."

As all of us know, this goal proved much easier to state than to achieve. The Voting Rights Act of 1965 was the last of a long series of acts passed in that tradition. Beginning in 1957, when the Department of Justice established a Civil Rights Division, the primary federal effort had been to enforce the laws relating to the right to vote.

Until 1965, those efforts, although massive at times, had not made much of a dent in the problem. What they did do, however, was to focus needed attention on a frustrating record of systematic official policies of disfranchisement of blacks in southern states.

The Voting Rights Act was tailored specifically to the various devices that had been carefully documented in elaborate Congressional hearings.

First, literacy and other tests which blacks, but not whites, had to pass were among the ways the polls were kept white. The Act relied on the statistical relation between low registration and voting and racial discrimination and suspended for at least five years all literacy tests and devices in states which had less than 50 per cent registration or voting in the 1964 presidential election.

Another documented problem was the refusal of some registrars to act fairly. The Act dealt with this problem by authorizing the Attorney General to send federal examiners to individual counties to do the registrar's job for him.



Another problem was the refusal to permit those blacks who registered to take part freely in elections. Under the Act, the Attorney General could send federal observers right into the polling places to gather evidence of violations so that prompt judicial relief could be obtained with the best possible evidence.

Finally, a major problem had been that state and local laws and procedures had been shown to be shifting sands which moved and changed to preserve white political control. Whenever one device was discovered and cured in court, another would spring up to take its place--from grandfather clause, to literacy test, to white primary, to poll tax, and so on. The Act, in Section 5, required all changes in voting in the covered states to be submitted for review before implementation--either to the District Court for the District of Columbia, or to the Attorney General, who could approve the law only if the state could show it had no discriminatory purpose and would have no discriminatory effect.

The Act did provide a way for covered states and counties to exempt themselves from coverage if they could show in court that no test or device had been used

discriminatorily for five years. But no jurisdictions except Alaska and a few scattered counties in other places have been able to make such a showing. You may have read about Virginia's unsuccessful attempt to bail out of the Act last week.

During the first five years of the Act, the Department of Justice concentrated its efforts on filing law suits to forbid the use of literacy tests and the poll tax, and on assigning federal examiners and observers to counties where voluntary compliance could not be obtained. The impact on black registration was significant: Directly, federal examiners listed for registration almost 160,000 black persons. However, the indirect effect of finally having an effective federal law was even more striking, and voluntary compliance increased dramatically. Black registration increased in all 11 southern states from 2.2 million to 3.4 million. The most striking improvements were in Alabama (from 23.1 per cent registration to 59.3 per cent) and in Mississippi (from 6.7 per cent to 63.3 per cent).

Registration is only the threshold to political participation. Elections are equally important, and therefore



became the other focus of federal enforcement in the first five years of the Act. In 34 different elections the Attorney General committed a total of 4,500 federal observers to gather evidence in polling places, and the federal government sought to correct denials of voting rights in 21 lawsuits. Through these efforts, in combination with the direct efforts of black candidates and organizations, the number of black elected officials in the southern states increased from 14 to almost 400 in these first five years. Although it is hard to measure, there can be no doubt that the increase in black voting also had an effect on the caliber and responsiveness of white elected officials.

Because the federal resources were largely used for registration and voting enforcement, the massive job of inspecting every change in voting laws and procedures was only partly done during those first five years. Only about 300 changes in state laws were submitted to the Justice Department for review, and one-third of those were submitted during 1969, after the courts ruled that the pre-clearance requirements applied to laws authorizing reapportionment of legislative bodies and annexations to

cities. But only 24 objections to voting changes had been interposed by the Attorney General during this first term of the Act.

When Congress took up the question of whether to extend portions of the Act in 1970, the Administration proposed that the suspension of literacy tests and the observer provisions be expanded nationwide, but that the requirement of pre-clearance of state-changed laws should be abolished. Congress accepted the Administration's argument that the disadvantaged education of southern blacks, coupled with the extensive migration of blacks to the North, justified a nationwide suspension of literacy tests and devices. Congress disagreed, however, that pre-clearance of voting changes was no longer needed and extended those provisions for still another five years.

Thus, the second period of federal enforcement of the Voting Rights Act, from 1970 to the present time, began. Since the massive resistance to black registration and voting had significantly dissipated, the federal effort during this second phase focused on the submission and approval of voting changes. The 1970 census required many states to change district lines--for Congress, state



legislatures, school boards, county commissioners, and city councils. Since 1970, over 4,000 changes have been submitted to the Attorney General. While most of these have involved routine matters, such as a change of a polling place or the like, no less than 174 have involved changes that appeared to have a purpose or effect adverse to minority voting rights, and therefore have not been cleared by the Attorney General.

For example, in the proposed Fifth Congressional District in Georgia, the district lines divided a major black neighborhood and excluded the three potential black candidates in order to include a virtually all-white suburban neighborhood. It was an obvious and typical racial gerrymander. After the Attorney General objected to that district line, the state corrected it, and the new lines drawn helped make it possible for an outstanding black candidate to be elected.

Some of the submissions are much more complex, especially since the law requires the changes to be examined for racial effect as well as any underlying discriminatory intent. Petersburg, Virginia, proposed a large annexation of territory. Both blacks and

whites supported the idea of city growth, but the effect-- which would have changed the population from majority black to majority white--combined with the city's system of electing all officers by an at-large vote, plainly projected a racial effect for the city's emerging black electorate. The Attorney General's objection included an opinion that if the racial effect would be improved by electing officials from fairly drawn single-member councilmanic districts, the objection would be withdrawn. This was done, and in the next election four of the seven councilmen elected were black.



Careful examination of devices such as numbered posts, multi-member districts, staggered terms, majority run-offs, and residency requirements has gradually resulted in a new body of law dealing with racial discrimination in electoral systems.

While the priority emphasis since 1970 has been on the pre-clearance of election law changes, this Department has used the other provisions of the Act as well. Two counties in Georgia, three in Mississippi, and one in Louisiana have been designated for federal examiners since 1970.

Over 2,100 federal observers have been sent to cover 32 elections in covered states, including five in the last few months in Georgia, Alabama, Louisiana, and Mississippi. Nineteen more lawsuits have also been initiated to enforce the Voting Rights Act.

One other area of expansion is noteworthy. Under the 1970 Amendments, the coverage formula which was updated to the 1968 presidential election picked up three counties in New York--Bronx, New York, and Kings. Incidentally, there are more black people in those three counties than in any southern state covered by the Act. Moreover, the courts have held that Spanish-surnamed persons are also entitled to the protection of the Act. The Attorney General's recent objection to New York's reapportionment plan for these counties resulted in the redrawing of lines to assure minority voters a fair opportunity to elect representatives to Congress and the state legislature.

This brings us to the present day. In less than a year, some of the provisions of the Voting Rights Act will expire unless Congress votes another extension. As you

know, the Congressional Black Caucus in meeting with President Ford indicated that extension of this Act is a high priority matter, and the President agreed to consider the Administration's position promptly and carefully. Even before that, Clarence Mitchell met with Attorney General Saxbe and made a similar request. As a result, at the present time the Civil Rights Division is preparing a recommendation, and I would like to tick off briefly for you some of the contentions and views we are bound to consider.

First, let's look at the arguments that are being raised for not extending the expiring portions of the Act. A basic issue today, as it was in 1970, is whether the success of the Act means that the essential needs it was designed to meet no longer exist. The Act was passed to deal with the systematic exclusion of blacks from the voting process in the South. Now black registration has almost doubled in the covered states--from 1.2 million in 1965 to over 2.1 million now. Mississippi now has more black elected officials--191--than the State of New York, and it ranks second in the nation in the number of blacks holding elective office, with only



Michigan having a better record. To comply with the voting rights guarantees, the state legislative redistricting plans in South Carolina, Alabama, Mississippi, Louisiana, and Georgia have been redone to insure fairness to blacks. In short, black citizens in the South are voting in unprecedented numbers. Also the nationwide suspension of literacy tests has demonstrated that elections may be conducted fairly and properly without such requirements. In fact, 16 of the 30 states which imposed such tests in 1970 have now dropped them.

On the other side, however, is the work yet to be done. And there is the ever-present danger that absent the guarantees of federal legislation, a reversion to past practices could occur. In addition, some of the gains of the past 10 years are more apparent than real. The 191 black Mississippi officeholders are principally located in heavily majority black counties or districts. Only one black person serves in the Mississippi legislature even though 36 per cent of the people are black. Not one Mississippi county, even the majority black ones, has a black sheriff. One can also see a continuing need for Section 5 from the number of voting changes to which

objection has been entered in the recent past. So far this year we have objected to 35 voting changes as having the potential for discriminating against minority voters.

Should we recommend in favor of continuing the protections of the Act, there are some subsidiary issues.

First, when Congress addressed the literacy issue in 1970, it chose to suspend the use of literacy tests nationwide for a period of five years. If the ban is continued, should it be permanent or merely another temporary suspension of five or ten years?

Second, if the provisions relating to federal examiners, observers, and pre-clearance of changes are extended, is there any need to reconsider or supplement the coverage formula? The existing coverage formula is based on the existence of literacy tests and devices and less than 50 per cent registration or voting. Since literacy tests have been suspended everywhere for five years, and in most of the South for 10 years, should that criterion be eliminated or replaced.

Finally, there is the question of whether the implicit protection of national origin minorities which



the courts and the Attorney General have read into the Act should be expressly added to the law. And can one demonstrate any need to add sex or religion to the protected classifications?

We are hard at work at the present time evaluating these issues. We hope to conclude this work soon, and we would appreciate continuing to hear your views on extension and, if positive, in what form.

While I cannot announce at this time what the Administration's position will be, I do want to give you two personal commitments: First, the recommendation of the Civil Rights Division will be an honest one, based as nearly as we can make it on the facts we have outlined to you and without consideration of partisan political issues. Some of you may have heard the rumor that the former Administration's approach in 1970 was politically motivated. Whether it was or not, we simply cannot afford to have that perception of the government exist.

I want to take this occasion to promise you that politics will not be a part of the Civil Rights Division's evaluation. As Thomas Jefferson once admonished:

"The whole art of government consists of being honest. Only aim to do your duty and mankind will give you credit where you fail."

The second commitment I want to make to you is that in our consideration of this matter, we will not lose sight of the great symbolic meaning of the Voting Rights Act. Its practical protections have been great, as we all know, but its symbolic value has been no less important. This great Act was passed after the 1965 Selma-Montgomery march as an expression of the national conscience. It has been the centerpiece of all the Civil Rights Acts, and the issues of extension deserve our most serious and careful evaluation with full recognition of the value of the Voting Rights Act as a basic protection of an American promise.



That is the spirit in which we are enforcing the Act today, and that is the spirit in which we are evaluating its need for the future.

Thank you.



Department of Justice

SPEECH BY J. STANLEY POTTINGER

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

U.S. DEPARTMENT OF JUSTICE

BEFORE

DEPARTMENT OF TRANSPORTATION

REGIONAL CIVIL RIGHTS OFFICIALS

WASHINGTONIAN MOTEL

SHADY GROVE, MARYLAND

FRIDAY, NOVEMBER 8, 1974

10:00 A.M.

"MANAGING TITLE VI PROGRAMS"





I appreciate the opportunity to be here this morning to discuss the challenge of effectively managing Title VI enforcement programs. And make no mistake about it -- the effective management of Title VI enforcement is a challenge.

I will not belabor the techniques of a management by objectives system. I am sure that you have all been erecting program pyramids until you feel as if you work for the Pharoahs. What I will try to do is to suggest some of the building blocks to fill in those pyramids, program objectives, methods of operation, and the measures of success.

The organizational mission of a Title VI enforcement unit is simple. It is spelled out for us by Congress in the first section of Title VI:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected

to discrimination under any program or activity receiving Federal financial assistance. (42 U.S.C. 2000d)

The second section of Title VI directs each federal agency to effectuate the first by issuing regulations, enforceable by fund termination and by lawsuit, where voluntary compliance cannot be achieved.

Title VI, as you know, has been supplemented in the last year by statutes prohibiting sex discrimination in highway and mass transit programs. (23 U.S.C. 324 and 49 U.S.C. 1608(f)). I might also mention here another statute which affects many of your programs, and that is the Federal Fair Housing Act of 1968. That law provides that:

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. (42 U.S.C. 3601)

It goes on to prohibit discrimination in housing on the basis of race, color, religion, national origin, and sex. It then states:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmative-ly to further the purposes of this title

* * *. (42 U.S.C. 3608(c))

Both Title VI and the Fair Housing Act are written in mandatory terms in describing the duties of the federal agencies subject to them. Under Title VI federal grant agencies are "directed to effectuate" its provisions, and under the Fair Housing Act, "all federal departments and agencies shall" take affirmative action to further the policies of the Act. Such language emphasizes the importance which Congress attaches to a policy of nondiscrimination and its intent that the federal agencies take an active role in enforcement, not merely a reactive role.



In addition, the statutes have a double thrust. They are intended not only to protect minorities from harmful acts, but also to insure that they benefit on an equal basis from the expenditure of federal tax dollars. Enforcement activities must consider the compliance status of any given program from both aspects.

The mission elements of a Title VI unit flow from the mission of ensuring that federally assisted programs operate on a nondiscriminatory basis. I think there are two primary elements: first, to secure the voluntary cooperation of recipient states and agencies; second, to carry out enforcement responsibilities where a recipient, by design or neglect, fails to comply. The second element can be subdivided into the prevention of discriminatory projects by the use of pre-award reviews, and the elimination of discriminatory practices in the implementation of projects by post-award reviews.

Securing voluntary compliance is the most important part of your job, and the most difficult. By securing voluntary compliance I mean inducing the recipients

themselves to analyze the racial and ethnic impact of their actions, and to correct any discrimination. It should be our ultimate goal to have all recipients doing this as a matter of routine, and doing it well. The initial responsibility for complying with the law, for planning and executing projects with full consideration for the rights of minorities, lies with the state and local agencies. To the extent that they do not carry out that responsibility because they do not have the will to do so, or because of political pressures to carry out discriminatory projects, the solution is a vigorous enforcement program at the federal level.



Discriminatory intent, administrative sloth, and power politics, however, are not the sole, nor, perhaps, the major, cause of discrimination. Discrimination can arise without an intent to discriminate, and frequently arises merely because the recipient does not know how not to discriminate. The federal agency, therefore, must provide recipients with clear and intelligible guidelines, and train the recipients intensively in how

to apply them. Only when state and local agencies know what is expected of them, when they have a thorough understanding of what the federal laws and Constitution require, can they carry out their proper role in the federal system.

The enforcement element of your mission can in a real sense be looked upon as an adjunct to voluntary compliance. It can serve the function of providing a motive to recipients to comply. It can also serve as a means for the federal agency itself to learn what discrimination is taking place and how to cure it, knowledge which can be passed back to the recipients. Standards and guidelines cannot be written in the abstract. Obviously you must think and you must analyze the possibilities of discrimination, but it is a real-world process. The thought and the analysis will be much more effective if based on adequate data collection and intensive investigation in the field into the impact of actual projections on minority communities, whether they were served

or injured, how those results come about, and what would be the measuring rod of improvement.

With respect to enforcement activities themselves, both pre-grant reviews and post-grant reviews are essential elements of an adequate program. Pre-grant reviews can assure that the irreversible effects of a project are not discriminatory, and that the recipient has plans to implement it in a nondiscriminatory manner. For example, a highway project can be reviewed to see whether it is being routed so as to cause displacement of a substantially disproportionate number of minority residents, without an adequate, nonracial justification. If a route causing displacement of minorities is nondiscriminatory, the project may then be reviewed to see whether the local agency has an adequate plan to relocate them on a non-discriminatory basis.



Once the project is underway, you would want to carry out a second review to see that its implementation is nondiscriminatory. For example, is the local agency

paying for homes and making relocation payments without regard to race? Are relocation services being carried out as promised? Are displaced minorities securing replacement housing of the same quality, and with the same choice of locations, as others with similar qualifications? Questions of this type can be answered only in the field, and only after the project has begun, at a time too late to correct a misplaced route.

Planning an effective Title VI compliance program must, therefore, seek a balanced allocation of resources among the three elements of educating the recipient, pre-grant reviews, and post-grant reviews. The balance need not be the same over any period of time. Priorities may be shifted as you gain experience in the program and as circumstances change. For example, you may decide that the first priority is to conduct a few selected post-grant compliance reviews in depth to aid you in developing criteria for compliance, developing check-lists for future

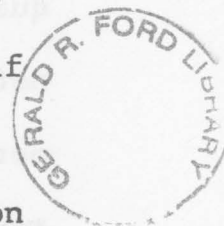
reviews, and perfecting investigative techniques. If these reviews result in administrative or judicial enforcement proceedings, they can also be used to establish legal precedent for future cases as to standards of compliance and proper relief, and to alert other recipients that you mean business. Once the results of the reviews are in, priority can be given to putting them in the form of instructions to your staff, guidelines for recipients, and data collection and reporting requirements. You can then carry out intensive educational programs both for your own staff, Department of Transportation program staffs, and recipient agencies, to be sure that they know what they should be doing. After that, you may want to emphasize pre-grant reviews for a while, to see whether the lessons have been learned, and what areas may need clarification. Finally, another series of post-grant reviews would indicate what discrimination remains, what additional remedial steps may be needed, whether the analyses of discrimination done on the first round needs refinement.



Such a program can be presented in the form of milestones: initial reviews to be performed in three months, any enforcement proceedings to be initiated in four months, guidelines and manuals to be prepared in six months, and so forth.

Passing milestones, of course, is not the same as achieving compliance. No single measurement of success exists. The measures are necessarily as complex and as varied as the forms of discrimination which may occur. In dealing with relocation, for example, it is not enough to know that "x" many non-white families were relocated and received relocation payments. You must also find out whether they received the same payments as similarly situated white families, and had the same choices as to the location of replacement housing. This in turn requires establishing relevant criteria for who is a similarly situated family, and determining whether minority families were in fact offered a choice of housing outside areas of minority concentration or transitional

areas, assuming housing in their price ranges was available for them. If no housing in their price range is available to minority families outside areas of minority concentration, is that circumstance itself due to discriminatory practices?



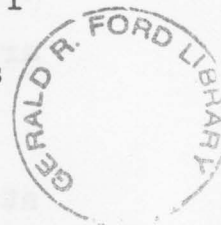
Similar difficulties arise in measuring provision of benefits on a nondiscriminatory basis. In routing of mass transit, for example, who among the white public is served, and how do you measure whether similarly situated blacks are not being served? How do you measure the potential beneficiary population, the "relevant market," much less the black portion of it? These questions can be answered only by careful scrutiny of the operation of the grant programs themselves. Even then substantial legal issues remain, such as the effect of Title VI and the Fair Housing Act on grants for service to communities or parts of communities from which minorities have been unlawfully excluded, whether by public or private action. Does the Department of Transportation have an obligation to require corrective action as a condition of making grants?

These complexities arise because the measurement of success cannot be purely quantitative; it must be qualitative as well. What you must seek to measure is not just how many compliance reviews were done. That is merely input. You need to know how many compliance reviews were done well, and what results they have achieved. Needless to say, it is no comfort to the victim of discrimination that the project by which he was victimized was reviewed, if the review failed to detect and correct existing discrimination.

Annual counts of man years expended, compliance reviews, and complaints processed are only a beginning. Even counts of instances of noncompliance found tell less than half the story. Those figures do not tell you how many persons were excluded from participation in, denied the benefits of, or subjected to discrimination under federally assisted programs or activities on the basis of race, color, or national origin. Only when you know that will you know whether you have been a success or a failure.

Obviously the program I have outlined is an ambitious one, and manpower is always short. To some extent this can be compensated by a system of priority allocations as I have described above. Instead of trying to do so many reviews, you may find it fruitful to focus on fewer, more carefully selected targets and spend enough time on each to do an in-depth job. In addition, it will be helpful to assign staff in each office to work full time on Title VI. Unfortunately, Title VI cases tend to be big, complex, and tedious. All of us naturally like to work on easier, more routine cases, such as contract compliance matters, particularly if our performance is rated on the basis of cases completed. Giving the same investigators responsibility for both Title VI and contract compliance may therefore often result in a failure to follow up adequately on Title VI matters.

You may note that I have not mentioned two aspects of enforcement work. The first is complaint investigations. This is an essential element of any enforcement program, but only within reasonable limits. While



complaints are frequently a signal of discrimination in a project and should be thoroughly investigated, they are too haphazard to form the basis of a systematic and efficient enforcement program.

The second aspect is enforcement of agreements to end discriminatory practices previously found. We have found frequent violations even of judicial decrees, more often from misunderstanding or neglect than from willfulness. Detailed reporting and careful policing are essential to maintaining compliance.

In closing, I would like to say that my staff stands ready to help you at any time in the enforcement of Title VI. We see our role primarily as a support staff for you, to help in working out legal and policy problems of Title VI enforcement, drafting necessary guidelines and manuals, and, in select cases, perhaps providing manpower for significant investigations. I hope that you will feel free to call upon us when you want help, and look forward to establishing a sound working relationship on those principles.

I would be happy to take any questions you may have.