Memorandum

Subject	Date
The Guardians Association v. Civil Service Commission of the City of New York, No. 81-431	May 17, 1982

To The Solicitor General From Edwin S. Kneedler

TIME LIMITATION

The City's brief is due on May 26, 1982, after one 30-day extension.

QUESTIONS PRESENTED

1. Whether there is an implied private right of action under Title VI of the Civil Rights Act of 1964: (a) to challenge the employment practices of a recipient of federal funds, (b) to obtain "compensatory" or retrospective relief, or (c) to obtain any relief.

2. Whether regulations issued by federal agencies pursuant to Section 602 of Title VI -- regulations that prohibit recipients of federal funds from adopting criteria or methods of administration that have the effect of subjecting persons to discrimination or have the effect of defeating or substantially impairing the objectives of the program as respects individuals of a particular race, color, or national origin -- are valid.

RECOMMENDATIONS

The Civil Rights Division recommends amicus participation taking the position that intentional discrimination must be shown under Title VI and that agency regulations incorporating an effects test are invalid. 1 /

We have solicited the views of the Cabinet Departments and other federal agencies that have issued regulations under Title VI that bar actions by recipients that have the effect of subjecting persons to discrimination. Their recommendations thus far are as follows: 2 /

Defense, HHS, HUD and the Nuclear Regulatory Commission recommend that we argue for a position of maximum flexibility under which agencies have the discretion to retain their "effects" regulations if they so choose. 3 / State has informally recommended the same position.

Energy told us informally that it is content to apply the effects test, as it has to date, and that it would require increased resources for its civil rights enforcement program if it were necessary to determine if there had been intentional discrimination.

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1 / The Justice Department's Office of Justice Assistance, Research, and Statistics -- the successor to LEAA, whose funds comprised part of the federal financial assistance at issue here -- expresses the view that after Bakke, a Title VI plaintiff must show intentional discrimination.

2 / None of the departments or agencies whose views were solicited have expressed a view on the private right of action issue, no doubt because we did not request them to do so. The Civil Rights Division did not take a position on this issue in its memorandum; but informally it has disagreed with the argument I recommend.

3 / HUD would argue, however, that Section 601 standing alone states an intent test.

The National Science Foundation and the Civil Rights Commission recommend that we support an effects test.

Treasury makes no recommendation as to the appropriate standard under Title VI (because it apparently has no programs covered by Title VI), but requests that our brief preserve its ability to continue to apply an effects test when implementing the parallel antidiscrimination provision of the Revenue Sharing Act.

Education and ACTION recommend that we argue that discriminatory intent must be shown under Title VI and that regulations adopting an effects test are invalid. AID urges an intent test but does not mention implementing regulations. Interior recommends that we argue for affirmance of the Second Circuit's intent holding, but, somewhat inconsistently, suggests that an effects test is one means of implementing the policies underlying Title VI.

Labor, Transportation, Agriculture, EPA, and SBA do not take a position on whether effects regulations are valid. 4/ Agriculture and SBA do stress, however, that adoption of an intent test would adversely affect their Title VI enforcement work. In a similar vein, Commerce defers to the Department of Justice because its regulations were approved by this Department and because it is not a major granting agency.

The CAB, TVA, NASA, and Federal Home Loan Bank Board do not express an opinion because they do not have substantial funding programs and therefore will not be significantly affected. The Veterans Administration informally advised that it defers to the Justice Department, but that it regularly applies an effects test in its compliance reviews of the admissions policies of educational institutions attended by veterans.

OPM and GSA have not yet responded.

4/ Labor, like HUD (see note 3, supra), does recommend that we urge an intent standard under the statute standing alone.

STATEMENT

A procedural history of the case is set forth at pages 1-3 of the options paper I prepared and at pages 3-6 of the Civil Rights Division's memorandum.

SUMMARY

1. I recommend that we argue that there is no implied private right of action in the circumstances of this case because Title VII provides the exclusive private remedy under the 1964 Act for employment discrimination. This position would further the congressional policies that facilitated the passage of Title VII by preventing a circumvention of the strict time limitations and deferral to state fair employment practice agencies. I also recommend that we express some sympathy for Judge Meskill's conclusion that compensatory relief is not available in private suits under Title VI.

2. I recommend that we argue that the agencies' regulations applying an "effects" test are authorized but not required by Section 602. This is not to say that a violation of Title VI is conclusively established if it is shown that a practice followed by a recipient of federal funds has a disparate impact on persons of a particular race, color, or national origin. The agencies have not applied their regulations in this fashion. Rather, a showing that a practice has a disparate impact simply establishes a prima facie case, which can be rebutted by the recipient by showing that the challenged practice is reasonably related to the purposes of the federal assistance program or to the legitimate needs of the recipient's operations. See Jefferson v. Hackney, 406 U.S. 535, 549-550 n.19 (1972); cf. Griggs v. Duke Power Co., 401 U.S. 424, 431-436 (1971). The burden on the recipient might, of course, vary in different contexts.

A number of factors, especially when viewed in combination, offer compelling reasons for defending the authority of agencies to implement Title VI in the manner they have:

(a) Section 602 grants the agencies the authority to promulgate legislative-type rules to effectuate the non-discrimination policy in Section 601. Those regulations have the

force and effect of law and must be sustained unless it can be shown that the judgment of the agencies that they constitute a reasonable means to effectuate Section 601 was arbitrary and capricious. That obviously is a heavy burden, especially at this late date.

(b) Regulations incorporating the effects standard were promulgated by seven agencies on December 4, 1964, just five months after passage of the 1964 Act. These regulations were developed by an interagency task force that included the Department of Justice and were approved by the President as required by Section 602. These regulations and those of other agencies patterned after them have remained in effect and have been applied throughout the government ever since in the day-to-day administration of numerous federal programs and in civil rights compliance reviews of recipients of federal funds. Such a contemporaneous, longstanding, pervasive, and consistent interpretation of the agencies' powers under Section 602 -- and an administrative practice so deeply embedded -- cannot be ignored.

(c) The interpretation reflected in the regulations and practice takes on added weight because the Department of Justice drafted Title VI, the Department was intimately involved in securing passage of the bill, and its views regarding the manner in which Title VI would be implemented were frequently cited during the legislative debates.

(d) The Supreme Court unanimously upheld application of an "effects" test under Title VI in Lau v. Nichols, 414 U.S. 563 (1974), relying on an HEW regulation identical to those of the Departments of Justice, Labor, and HUD at issue in this case, and Congress effectively ratified the specific result in Lau in the Education Amendments of 1974.

(e) The Department of Justice was given a coordinating role under Title VI in 1965, and this Department consistently has taken the position (including in memoranda signed in 1969 and 1970 by then-Assistant Attorney General Rehnquist approving certain proposed Title VI regulations) that agency non-discrimination requirements incorporating an "effects" test may be adopted under Title VI. We so argued in Lau ~~and~~ in an amicus

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brief in support of the petition for rehearing en banc in the court of appeals in this case in 1980, (Most recently, in a brief filed in the Ninth Circuit last July, the Department argued that Lau v. Nichols had not been overruled and that the "effects" test incorporated in governing regulations should be followed by the court.

and in numerous other cases.

(f) Aside from these general considerations supporting the validity of an effects approach, it is especially reasonable, in enforcing Title VI of the Civil Rights Act of 1964 in the context of employment discrimination, to refer to standards followed under Title VII of the very same Act. It is in Title VII that Congress has specifically addressed the problem of employment discrimination. Indeed, the legislative history of the 1964 Act indicates that one of the methods available to agencies to ensure compliance with Title VI as applied to employment would be to invoke the Title VII enforcement scheme. Moreover, the Supreme Court's decision in Griggs regarding Title VII was approved by Congress in the 1972 amendments to Title VII -- the same amendments that extended Title VII to State and local governments against the background of Congressional findings that unvalidated employee selection techniques were being used by State and local governments and that employment discrimination was widespread and especially deleterious in the area of law enforcement. It hardly is arbitrary and capricious or unreasonable for an agency to incorporate these clear expressions of the national policy against employment discrimination into its Title VI enforcement program where federal funds are used for the purpose of aiding employment, as in this case.

(g) Congress has enacted a number of federal funding statutes containing antidiscrimination provisions patterned after Title VI, generally expressing approval of and incorporating the Title VI enforcement approach, without ever questioning the effects test under Title VI regulations. This legislative practice has been so consistent and uniform that it must be seen as a firm ratification of the agencies' position that they have discretion to effectuate Title VI through such regulations as well. These other provisions have, in turn, been implemented through regulations stating an effects test and properly may continue to be so implemented even if the Title VI regulations are invalid. Congressional approval of the use of an effects

Just yesterday, in North Haven Board of Education v. Bell, No. 80-986 (May 17, 1982), the Supreme Court sustained employment regulations under Title IX of the Education Amendments of 1972 -- a funding statute patterned after Title VI -- that incorporate Title VII standards (although the question of standards was not involved).

test and Title VII standards in employment cases is unambiguous with respect to the LEAA statute, under which some of the funds involved in this suit were extended.

(h) The decided weight of the recommendations of the Cabinet Departments and other agencies surveyed is that we should support the authority of agencies to adopt an effects test under Title VI and similar provisions. This approach would ensure administrative flexibility, so that individual agencies could retain or revise their current regulations as applied to particular programs. This approach permitting each agency to follow the approach that appears to be most consistent with its own program is precisely what Congress intended when it enacted Title VI. The Civil Rights Division's position, in contrast, would limit the flexibility of the agencies that would prefer to defend their current regulations.

(i) We should not reverse a consistent and longstanding position of the federal government and this Department on a question of such importance without compelling reasons. Such reasons are wholly lacking here. The Powell and Brennan opinions in Regents of the University of California v. Bakke, 438 U.S. 265 (1968), do not warrant such action. These opinions concerned the circumstances under which a prima facie violation of Title VI may be rebutted by legitimate reasons for the use of race as a selection technique; this case, in constrast, concerns the showing that is necessary to establish a prima facie case in the first instance. Moreover, the Bakke opinions need not be read to cast doubt on the validity of implementing regulations. Finally, although the legislative history cited in the Bakke opinions shows that Congress was motivated by constitutional principles, these statements fall far short of manifesting a congressional intent affirmatively to preclude agencies from effectuating Title VI in the manner they have, especially given the longstanding practice to the contrary. Indeed, the Civil Rights Division apparently now concedes that the discussion in the Powell and Brennan opinions in Bakke equating the reach of Title VI and the Constitution was erroneous.

(j) The position I recommend -- that it is the regulations, not the text of Section 601 that controls and that agencies are authorized but not required to adopt an effects test in their

regulations -- presents the most effective litigating strategy to preserve the ability of the agencies to rescind effects regulations as a matter of policy. It furnishes a solid middle ground (and the correct one, in my view) between the absolute positions that the statute itself either states an effects test (as six Justices apparently held in Lau) or an intent test. This position would preserve the result in Lau, as resting on the regulations, and therefore would not put the Court in the all-or-nothing position of either repudiating Lau after it has been approved by Congress or announcing a potentially far-reaching test under which the statute itself requires courts to examine recipients' practices for disparate impacts, rather than leaving discretion in the agencies to implement an effects test in the manner they find appropriate.

(k) From a broader perspective, it would be contrary to the long-term interest of the Executive as a litigating party and the credibility of this Office before the Supreme Court to urge a rule that an administrative interpretation so contemporaneous, longstanding, and widespread is invalid, particularly one that has been ratified by Congress as often as this one has been. Indeed, it is difficult to conceive of a more compelling case in which to make the argument of deference to administrative interpretation on these grounds. We constantly invoke these principles of deference, and should not give them so little weight in a case where they are so overwhelming.

(l) In sum, in order to take the position Civil Rights recommends, we would have to argue that the action of 25 departments and agencies in adopting the regulatory provision at issue here was arbitrary and capricious and not reasonably related to the purposes of Title VI and that these departments and agencies are pervasively violating the law in administering Title VI. This, despite the fact that the interpretation reflected in these regulations was (i) approved immediately after passage of the Act by the agency that drafted the Act and was responsible for its implementation, (ii) uniformly followed by all agencies of government for 18 years, (iii) unanimously upheld by the Supreme Court in Lau v. Nichols, (iv) ratified by Congress in its specific approval of the Lau decision, (v) incorporated without alteration into similar antidiscrimination provisions on every occasion in which Congress has revisited the question of

discrimination in federally funded programs, and (vi) understood by Congress to apply in the specific context of the LEAA program at issue in this very suit. The mere recitation of these obstacles should be a sufficient answer to the suggestion that we reverse the Department's and the government's longstanding position.

(m) I believe it would be very unwise to fail to take a position on the validity of the current regulations that state an effects test. There are regulations of some 25 departments and agencies implicated here. These regulations are implemented on a day-to-day basis under an effects standard and would continue to be so implemented if we do not take a position. If we are to continue this enforcement policy, as a number of departments and agencies have requested, we should be prepared to defend it in the Supreme Court.

DISCUSSION

I

PRIVATE RIGHT OF ACTION

The Supreme Court's decision in Cannon v. University of Chicago, 441 U.S. 667 (1979), finding an implied right of action under Title IX of the Education Amendments of 1972 and the opinion of the Stevens group in Bakke expressing the same view as to Title VI would make it very difficult to argue against a private right of action under Title VI generally. In addition, to do so would be a switch from the government's arguments in favor of a private right of action under Title VI in Bakke. However, a persuasive case can be made for the narrower argument that there is no implied right of action under Title VI in the circumstances of this case because the express private right of action for employment discrimination in Title VII of the same Act

must be viewed as the exclusive private remedy under that Act for such discrimination. 5 /

To be sure, the Court has held that Title VII was not intended to oust pre-existing remedies, such as those under collective bargaining agreements or 42 U.S.C. 1981. Electrical Workers v. Robbins & Myers, 429 U.S. 229, 236-240 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). On this same theory, we may assume that Congress did not intend to oust the pre-existing right to sue a State or city under 42 U.S.C. 1983 for a constitutional violation in its employment practices. But it does not follow that Congress intended by implication to create a private right of action under Title VI of the Civil Rights Act of 1964 at the very time it explicitly furnished a private right of action under Title VII for the same conduct. 6 / Recognition of a private right of action in such circumstances would allow the plaintiff to circumvent the carefully crafted time limitations and procedural mechanisms that were an essential feature of the compromise that led to the enactment of Title VII. See Mohasco Corp. v. Silver, 447 U.S. 807, 818-822 (1980).

Moreover, although the legislative history is somewhat sketchy on the point, it does demonstrate that Congress was aware of the possible overlap of Titles VI and VII in the area of

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5 / This particular argument against a private right of action was not made below, insofar as I am aware, and the Court could decline to reach it for this reason.

6 / In suits against a State or local government, the issue is not whether there is an implied right of action in areas covered by Title VI, because the plaintiff has a cause of action under 42 U.S.C. 1983 for a deprivation of rights secured by Title VI, absent some evidence of congressional intent to the contrary. As explained in the text, there are substantial reasons why Congress would not have intended the procedural limitations in Title VII to be avoided by bringing a suit to enforce Title VI. See Great American Federal Savings & Loan Assn. v. Novotny, 442 U.S. 366 (1979).

employment. See, e.g., 110 Cong. Rec. 2484 (1964) (remarks of Rep. Poff). There are statements indicating that agencies could provide in their Title VI regulations for the referral to the EEOC of complaints alleging employment discrimination in federally funded programs or could secure compliance with Title VI through suits brought pursuant to Title VII. See, e.g., Civil Rights: Hearings before the House Comm. on Rules 342 (1964); 110 Cong. Rec. 6545 (1964) (remarks of Sen. Humphrey); but see Hearings, supra, at 341, 523 (suggesting that Titles VI and VII provide a "double barrel" approach; however, the reference to Title VI may be read here to mean only agency enforcement).

One awkwardness in this argument is that the employment actions challenged in this case under Title VI occurred prior to 1972, when Title VII was made applicable to the States and their political subdivisions. The result of the argument recommended here, then, would be to recognize no private right of action under the 1964 Act for employment discrimination by a State or local government. This result is not so anomalous, however: it simply gives effect to Congress' explicit exception of States and their political subdivisions from the coverage of Title VII as originally enacted. See 42 U.S.C. (1970 ed.) 2000e(b)(1). Moreover, the pre-existing cause of action under 42 U.S.C. 1983 for constitutional violations would remain.

I also am sympathetic to Judge Meskill's argument that a private right of action should not be available to obtain compensatory relief, especially in cases seeking such relief as damages for the failure to admit an applicant to college in violation of Title VI. The fund termination remedy in Title VII is prospective. It may be that relief in a private suit should be prospective as well in order not to visit unanticipated financial consequences upon the recipient of federal funds, especially if the recipient had no reason to believe that its policies were discriminatory and they had not yet been scrutinized by the funding agency. This is a tricky argument,

however, and the Court may well not be willing to so refine the private right of action. 7 / Moreover, we made the opposite argument in our supplemental brief in Bakke -- that retrospective relief was appropriate in a private right of action precisely because the agency's fund termination is prospective only. Of course, in Bakke, the relief ordered was simply to order the admission of the applicant to the program; there was no added financial burden for the institution. Retrospective relief could be limited in this fashion to situations where there would be no adverse financial consequences.

If the Court rejects our argument that there is no private right of action under Title VI in employment cases, the liability for back pay in such an action would essentially be the same as that already available under Title VII. But in other areas, the Court may be reluctant to sustain the effects test embodied in the agency regulations if it believed that recipients might thereby be exposed to substantial financial liability for a violation. As a tactical matter, then, it may be wise to highlight some of these concerns, although I would not take a firm position on Judge Meskill's approach at this point in view of our alternative argument against the availability of a private right of action.

II

WHETHER A VIOLATION OF TITLE VI REQUIRES A SHOWING OF DISCRIMINATORY INTENT

The issue of broader importance in this case is whether a showing of discriminatory intent is required in order to establish a violation of Title VI, either in the context of fund termination and other enforcement measures adopted by the agency or, as here, in a private suit against the recipient of federal funds. The Civil Rights Division argues that the language and legislative history of Section 601 indicate that it prohibits

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7 / For example, the Court might be reluctant to conclude that damages are unavailable even in the case of intentional discrimination in a federally funded program.

only intentional discrimination on the basis of race, color, or national origin -- the standard required to prove a constitutional violation. Accordingly, Civil Rights argues that a showing that actions by recipients of federal funds have the effect of discriminating on the basis of race, color, or national origin (and are not justified by the recipient under something akin to the business necessity approach) is not sufficient, even where there are regulations promulgated by the funding agency that prohibit conduct by the recipient that has such a discriminatory effect.

As explained below (see pages 23-1 , infra), I believe the Civil Rights Division memorandum, like the Powell and Brennan opinions in Bakke, reads far too much into the language of Section 601 8 / and the relatively few references to the Constitution in the legislative history. There are repeated statements, for example, that Section 601 itself declares a "principle" or "national policy" of non-discrimination, without any mention of the Constitution or reference to acts of intentional discrimination. And even if it is assumed that the constitutional principle of non-discrimination motivated Congress to action, as I think it plainly did, it would be ironic indeed to read references to the constitutional obligation to end discrimination in federal programs as an implied limitation on the ability of agencies effectively to do so. In any event, the Civil Rights Division no longer relies on the argument made in its initial memorandum that Congress intended Title VI to proscribe only conduct barred by the Constitution. Because Civil Rights now believes that the Powell and Brennan opinions in Bakke erred in concluding that Title VI and the Constitution are co-extensive, the Bakke opinions do not support a reversal of

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8 / Section 601 provides:

> 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.

position here. Civil Rights apparently will instead rely in its forthcoming supplemental memorandum on other aspects of the legislative history. As explained below, however, both the text and legislative history of Title VI fully support the current regulations.

But before reaching the issue whether intentional discrimination must be shown under Title VI, it must be stressed at the outset that whether Section 601, on its face, states an "intent" test is largely beside the point. Section 601 does not stand alone here, as it does not in most Title VI actions. Here there are implementing regulations, and it is these regulations that control this case. The proper question, then, is whether the controlling regulations are valid.

A. Agency Regulations

Section 602 directs each agency empowered to extend federal financial assistance to any program or activity "to effectuate the provisions of Section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." The "effects" regulations involved in this case were issued pursuant to this statutory directive and were approved by the President as the statute requires.

Section 602 in turn provides for termination of financial assistance by the agency, not for failure to comply with Section 601, but for failure to comply with a "requirement" adopted in a

rule or regulation issued pursuant to Section 602. 9 / Section 603 in turn provides for judicial review of agency action terminating assistance "upon a finding of a failure to comply with any requirement imposed pursuant to Section 602" -- i.e., a "requirement" adopted in a regulation issued to "effectuate" the provisions of Section 601. The statute makes clear, then, that it is a failure to comply with a regulatory requirement that exposes the recipient to fund termination or other compliance efforts initiated by the agency. It necessarily follows that it likewise is the failure to comply with such a regulatory requirement that gives rise to liability in a private suit under Title VI. 10 / In this case, petitioners have properly invoked the applicable "effects" regulations of the three funding agencies: the Departments of Justice, Labor, and Housing and

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9 / Compliance with the regulatory requirement may also be secured "by any other means authorized by law," which could include referral of the matter to the Attorney General to bring judicial proceedings. Section 602 further provides that the agency must first notify the appropriate person of the "failure to comply with the requirement." In addition, where funding is terminated "because of a failure to comply with a requirement imposed pursuant to this section," notice must be given to the appropriate congressional committees.

10 / We may put to one side those situations in which a recipient of federal funds engages in discriminatory conduct under a program funded by an agency that had not promulgated regulations to enforce Title VI. Perhaps the plaintiff in such a case could sue the recipient for a violation of Section 601, or perhaps he would be relegated to an APA or mandamus action to compel the agency head to perform his nondiscretionary duty under Section 602 to promulgate regulations containing the Title VI "requirements" with which the recipient must comply.

Urban Development. See 466 F. Supp. 1283-1285. 11 / "Thus, the actual issue we must decide is not how the statutory term should be interpreted, but whether the * * * regulation[s] [are] proper." Batterton v. Francis, 432 U.S. 416, 424 (1977).

In considering this issue, it is especially significant that these regulations are not merely "interpretative." Compare Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980). The regulations plainly were intended by Congress to be legislative or sustantive in nature. Such regulations are entitled to more than mere deference, for in such cases Congress has assigned to the agencies rather than the courts the responsibility for giving content to the statutory terms. Such regulations accordingly have "legislative effect" and are not to be set aside unless their adoption exceeded the authority of the respective agency heads or was arbitrary or capricious. See Schweiker v. Gray Panthers, 453 U.S. 34, 43-44 (1981); Batterton v. Francis, supra, 432 U.S. at 424-426.

The conclusion that regulations issued under Section 602 were to have legislative effect is apparent from the language and

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11 / I will assume for present purposes that if the "effects" regulations are valid, they were violated by the police department's hiring practices here. It does not appear that any of the regulations in effect between 1968 and 1972 went beyond the general "effects" standard in a way that would specifically indicate that a Griggs-type analysis should be followed with respect to employment tests. Any problems regarding the adequacy of the notice to recipients of federal funds as to what is expected of them in the employment area should now be largely cured by the fact that Title VII extends to State and local governments, so that State and local recipients cannot claim unfair surprise in being held to Title VII standards. See also 42 C.F.R. 50.14 (Uniform Guidelines on Employee Selection Procedures). I would think we would want to avoid an extended discussion of whether the regulations were violated here (assuming respondents even raise the issue), on the ground that it has not been considered by the court of appeals and may be considered on remand.

structure of Sections 602 and 603, which make non-compliance with the "requirements" "imposed" or "adopted" by regulation, not the statute itself, the basis of liability. In any event, the legislative history is unequivocal on the issue.

During the Senate Hearings, for example, Senator Ervin observed that the agencies would be writing definitions of the term "discrimination" and "prescribing the acts and omissions which shall constitute illegal discrimination." Civil Rights -- the President's Program, 1963: Hearings before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 398 (1963). Attorney General Kennedy -- whose Department drafted the substance of what is now Title VI and presented it to the congressional committees -- stated that the rules and regulations necessarily would vary from one program to another and, for that reason, the rules were not written into the Act itself but were left to each agency to adopt (id. at 399). He also agreed with Senator Ervin that it would be up to each administrator to write rules setting out "not only what constitutes discrimination in their programs but also what acts or omissions are to be forbidden" (id. at 399-400). Senator Ervin then inquired whether the regulations would have "the force and effect of law," and the Attorney General responded: "That is correct, Senator" (id. at 400). See also id. at 349 (Attorney General Kennedy observing that under this approach, recipients "will know what the rules and regulations are that they have to follow"). Attorney General Kennedy similarly observed in the House Hearings that Section 601 states a "general criterion" of non-discrimination and that the agencies "will establish the rules that will be followed in the administration of the program -- so that the recipients of the program will understand what they can or cannot do." Civil Rights: Hearings before the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2740 (1963); see also id. at 2703, 2766; Civil Rights: Hearings before the House Comm. on Rules, 88th Cong., 2d Sess. 321-322 (1964) (remarks of Rep. Celler, the sponsor in the House); id. at 330, 336, 434, 437-438, 447.

The floor debates also reflect the view that the agencies would "establish nondiscrimination standards" (110 Cong. Rec. 1519 (Rep. Celler)) and define the term "discrimination" in their rules (id. at 1632 (Rep. Dowdy), 6049 (Sen. Talmadge), 6050 (Sen. Javits), 9083-9084), and that it is a violation of the

regulations that gives rise to liability (id. at 2468 (Rep. Rodino), 12714-12715 (Sen. Humphrey)). Similarly, in successfully opposing a substitute for the rulemaking approach that would have required that particular standards be included in each grant agreement, Representative Celler stressed that the agencies should not be denied their "lawmaking" powers. Id. at 2494. Representative Corman pointed out that federal programs generally are administered under rules and regulations and that Title VI merely adds another set of such regulations. Id. at 2487-2488. See also id. at 7059 (Sen. Pastore: referring to rules "governing conduct of recipients"); id. at 6546 (Sen. Humphrey); id. at 6050 (Sen. Javits). Against this background, the Brennan group plainly was correct in Bakke when it noted the "strong emphasis throughout Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination." 438 U.S. at 338-339; see also id. at 381-382 (White, J.) ("Congress intended the departments and agencies to define and refine, by rule or regulation, the general proscription of §601").

Because the regulations at issue here are legislative in nature, they must be sustained unless the judgment of the agency heads (and the President) that the standards of conduct they adopt are an appropriate means to effectuate the non-discrimination policy in Section 601 was arbitrary and capricious. Schweiker v. Gray Panthers, supra; Batterton v. Francis, supra. 12 / Indeed, the provision in Section 603 for judicial review to be pursuant to the APA appears to have been

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12 / This standard appears to be even more deferential to the agency's judgment than is the test announced in Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973), which concerned a more general rulemaking authority. Under that standard, the regulation must be found by the court to be "reasonably related to the purposes of the enabling legislation" (id. at 369, quoting Thorpe v. Housing Authority, 393 U.S. 268, 280-281 (1969)). In any event, that standard is plainly satisfied here as well, as the concurring Justices in Lau and Nichols observed. 414 U.S. at 571.

specifically intended to ensure application of the substantial evidence test in the APA for review of factual questions but application of the APA's "arbitrary and capricious" standard for review of the agency's selection of a particular approach to effectuate Section 601. See, e.g., H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (provision in Section 603 that action terminating funds is not committed to agency discretion under the APA was not intended to alter the standard of review under 5 U.S.C. 706); Senate Judiciary Hearings, supra, at 400 (recipient can go to court if he believes he is being treated in an "arbitrary fashion"). (26)

The burden of showing that the approach embodied in the regulations was arbitrary and capricious is especially heavy here because of a number of other factors requiring that even greater deference be shown to the uniform regulations of the departments and agencies. Title VI was drafted by the Justice Department, in consultation with certain other agencies; the Justice Department was intimately involved in securing the passage of Title VI; and its views regarding the way in which Title VI would be interpreted and implemented were repeatedly cited during the legislative debates. This Department was, in turn, intimately involved in drafting the first sets of regulations, issued just five months after Title VI was passed, all of which contained the very same "effects" provision that is involved in this case. The views of an agency that participated in the drafting of the legislation, especially to this extent, are entitled to great weight. See, e.g., Miller v. Youakim, 440 U.S. 125, 144 (1979).

Similarly, an administrative practice, such as that reflected in the uniform regulations, "has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978), quoting Norwegian Nitrogen Products Corp. v. United States, 288 U.S. 294, 315 (1933). That plainly is the case here. It is significant as well that the approach embodied in these regulations is now "an interpretation followed by all agencies of the Government." United States v. Bergh, 352 U.S. 40, 46 (1956). Under these

circumstances, it is rather unrealistic to believe that we may now read the cold legislative record and reliably detect in it implicit (yet supposedly clear) restrictions on the authority of agencies to implement Title VI that were not apparent to Executive Branch personnel at the time -- personnel who surely attended the same hearings and debates we are now reviewing, but beyond that, no doubt negotiated about and discussed the bill exhaustively with the Members.

It also is significant that the regulations incorporating an "effects" test received the formal approval of the President of the United States. This occurrence is entitled to more than the usual dignity accorded Executive actions (cf. Dames & Moore v. Regan, No. 80-2078 (July 2, 1981), slip op. 10), especially because Congress viewed Presidential approval as a critical check against improvident implementation of Title VI by the agencies. See, e.g., 110 Cong. 2499-2500.

In addition, the departments and agencies uniformly have adopted an "effects" test in their regulations, and the responses to our inquiries indicate that these departments and agencies have consistently pursued their Title VI enforcement activities on the premise that an effects standard is appropriate. The Department of Justice, which since 1965 has had a coordinating role under Title VI, likewise has consistently construed the Act to authorize the adoption of regulations incorporating an effects standard ever since the first regulations were adopted in 1964-1966, and it has consistently defended the agencies' "effects" regulations in court.

For example, in a November 3, 1969 memorandum, then-Assistant Attorney General Rehnquist informed the Civil Rights Division that he had no legal objection to proposed Title VI regulations for the Department of Transportation providing, inter alia, that recipients may not make selections of sites for federally funded facilities "with the purpose or effect" of discriminating against persons on the basis of race, color, or national origin or "with the purpose or effect" of defeating or substantially impairing the accomplishment of the objectives of the Act. The same memorandum approved a DOT regulation barring employment discrimination if it "tends" to exclude beneficiaries

on the basis of race, color, or national origin. 13 / On March 25, 1970, Assistant Attorney General Rehnquist forwarded a memorandum to the Attorney General recommending that these proposed regulations be transmitted to the President. Attorney General Mitchell did so by memorandum dated April 14, 1970, finding them to be "an appropriate implementation of the requirement of Title VI." The President approved the regulations, they were issued by DOT (35 Fed. Reg. 10080 (1970)), and they remain in effect. 49 C.F.R. 21.5(b)(3) and (c)(3). Similar amendments subsequently were adopted by all agencies in 1973, again with the approval of the Department of Justice and the President. 38 Fed. Reg. 17920 et seq. (1973).

The Department of Justice has uniformly taken the same position in litigation as well. The Department argued in favor of an effects test in Lau v. Nichols, supra, in 1974, and the Court unanimously upheld application of an effects test in that case, relying in large part on an HEW regulation identical to those of the Justice Department, HUD, and Labor in this case. In 1980, the Department filed an amicus brief in the court of appeals in this very case in support of petitioners' petition for rehearing en banc, arguing that Lau v. Nichols has not been overruled and that an "effects" test is appropriate under both Section 601 and implementing regulations. 14 / ~~[illegible]~~ Most recently, the Civil Rights Division filed an amicus brief in the Ninth Circuit in July of 1981 again arguing that Lau v. Nichols had not been overruled and that Title VI regulations incorporating an effects test should be followed. In that case, we supported a challenge to the use of certain standardized I.Q. tests to place children in Educable Mentally Retarded classes on the ground that they disproportionately selected black children and had not been properly validated. See Brief for the United

The same position has been taken in numerous other cases.

13/ These regulations were based on the report of an inter-agency task force in 1967 recommending uniform changes in Title VI regulations.

14/ The position I recommend here would draw back from that argument by abandoning the position that Section 601 requires the application of an effects test in agency regulations.

States in Larry P. v. Riles, No. 80-4027, at 43-48. The position urged by the Civil Rights Division therefore would be an abrupt departure from the position this Department consistently has taken since immediately after Title VI was passed in 1964, and it would constitute a confession of error with respect to the position the Department previously asserted in this case.

Civil Rights' position also would constitute an abrupt departure from the manner in which Title VI has been interpreted and applied throughout the government. As noted above, all federal departments and agencies have regulations patterned after those at issue in this case. 15 / In addition, the responses to our request for agency views make clear that the day-to-day enforcement of Title VI and the conduct of civil rights compliance reviews of recipients of federal funds by the departments and agencies with substantial funding and civil rights programs is uniformly premised on application of an "effects" test. Moreover, a number of the Cabinet Departments and other agencies strongly urge that we continue to defend their authority to implement their Title VI regulations on the ground that it is necessary to an effective and efficient enforcement program -- i.e., that it remains the most appropriate means to "effectuate" Title VI in the context of their particular programs. This judgment, based on 18 years of accumulated experience, cannot be ignored. 16 /

Only the most compelling legal arguments would support a conclusion that an enforcement approach so firmly entrenched and

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15 / The one exception is the SBA, but that agency's letter makes clear that it follows an "effects" approach in enforcing Title VI.

16 / Even the Department of Education, which alone among the Cabinet Departments explicitly recommends that we repudiate the existing regulations, acknowledges that it now applies an effects test in administering Title VI. Indeed, Education, which has continued to implement the Lau decision (even after Bakke was decided), presumably has been one of the most prominent enforcers of the "effects" test under Title VI.

of such consistent, broad and longstanding application is unauthorized by the statute. This is especially so in view of the fact that on every occasion since 1964 on which Congress has revisited the problem of discrimination in federally funded programs, it has uniformly ratified the Title VI enforcement approach and incorporated it in a number of subsequent anti-discrimination provisions patterned after Title VI. See pages infra. The arguments against this view not only lack the requisite compelling force; in my view, they are clearly wrong. The text and legislative history of Title VI fully support the agencies' uniform enforcement approach.

B. The Language and Legislative History of Title VI

1. The Statutory Text

Nothing on the face of Title VI suggests that agencies are prohibited from issuing regulations that bar recipients from using criteria of selection or methods of administration that have the effect of excluding persons from participation or subjecting them to discrimination on the basis of their race, color, or national origin. Section 601 (quoted in footnote 8 supra) is "majestic in its sweep" (Bakke, 438 U.S. at 284 (Powell, J.). Standing alone, it does not appear to state either an intent or an effects test, but rather a general principle or policy of non-discrimination. In Bakke, for example, Justice Powell acknowledged that the word "discrimination" is "susceptible of varying interpretations" (ibid.) and does not necessarily connote any particular standard. The opinion of the Brennan group likewise was not premised on a reading of the text of Title VI, but on other materials (see 438 U.S. at 328). And although the Stevens group did rely on the text of the statute, it concluded that the statute was not necessarily coextensive with the Equal Protection Clause and that, "[a]s with other provisions of the Civil Rights Act, Congress' expression [in Title VI] of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not."

Putting Section 601 to one side, however, it is even more difficult to find in the text of Section 602 -- the provision relevant here -- any evidence of an intent to restrict the agencies by prohibiting all regulations that might bar actions by

recipients of federal funds that have the effect of subjecting persons to discrimination. Section 602 is written in broad and emphatic terms. It directs agencies to promulgate regulations to "effectuate" the provisions of Section 601 in a manner that is consistent with the achievement of the objectives of the funding program involved. This is expansive, not restrictive language.

The situation involved in Lau is a useful backdrop for considering the ~~impact~~ meaning of the statutory terms. The language of Sections 601 and 602 plainly can be read to contemplate that in the context of federal funding of public education available to all on a universal and mandatory basis, "effectuation" of the policy in Section 601 against denying the benefits of the federally funded program on the ground of national origin, together with the "achievement of the objectives" of the federal funding of such a program, require a school district using English as a medium of instruction to take affirmative steps to rectify the language deficiency of non-English speaking children of Chinese descent. Otherwise they may be "effectively foreclosed from any meaningful education" (Lau v. Nichols, 414 U.S. at 566) -- i.e., foreclosed from achieving the goal of the federal funding statute -- under circumstances that are directly traceable to their national origin. It requires no straining of the English language to characterize such an educational program as one that "subjects [children of Chinese descent] to discrimination under" or "denie[s] [such children] the benefits of" the program on the ground of their national origin. See Bakke, supra, 438 U.S. at 304 (Powell, J.).

The Supreme Court expressed precisely this view of the concept of "discrimination" in Griggs v. Duke Power Co., supra, with regard to the validity of employment tests (the same subject matter involved in this case) under Title VII (another Title of the same Act at issue here):

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has

> -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

401 U.S. at 431; emphasis added.

There is no reason on the face of Sections 601 and 602 why the term "discrimination" in Title VI cannot be given the same construction by an agency where children, because of language dificiency based on their national origin, are effectively foreclosed from participation in an education program. Indeed, 20 U.S.C. 1703(f), enacted after Lau was decided, is premised on the principle that this is unlawful discrimination; Section 1703(f) provides that "[n]o State shall deny equal education opportunity to an individual on account of his or her race, color, sex, or national origin, by * * * the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." Moreover, the legislative

and the Education Amendments of 1974, in which it was enacted, constitute a

history of this provision demonstrates that it ~~fairly may be viewed as~~ congressional ratification of the holding in Lau. 17 /

The application of "effects" regulations therefore is fully consistent with the statutory text. The Civil Rights Division argues in its memorandum (at 13-14), however, that the

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17 / The legislative history of this provision reveals that Congress fully recognized the direct parallel between 20 U.S.C. 1703(f) and the obligation of school districts under Title VI, as interpreted by HEW, to take action to correct a language deficiency and that Congress approved of HEW's Title VI enforcement program in this regard. 20 U.S.C. 1703(f) was added as a floor amendment in the House and was explained as incorporating the substance of a bill previously passed by the House on August 17, 1972. See 120 Cong. Rec. 8264 (1974). The House Report on the 1972 bill (H.R. 13915) in turn states with respect to the type of denial of equal educational opportunities referred to in what is now 20 U.S.C. 1703(f):

> [T]he committee commends HEW for having initiated recently compliance reviews of school districts throughout the country to ascertain whether they have fulfilled their affirmative obligation under Title VI of the Civil Rights Act to remove language and cultural barriers facing children.

H.R. Rep. No. 92-1335, 92d Cong., 2d Sess. 6 (1972).

The Education Amendments of 1974, in which 20 U.S.C. 1703(f) ultimately was enacted, were passed after the Supreme Court's decision in Lau, and this legislative history therefore must be read as an approval of that decision as well. Indeed, the bilingual education program enacted in Title VII of those amendments was explained in part as necessary to enable school districts to carry out what the House Committee referred to as the Supreme Court's "landmark" decision in Lau. See H.R. Rep. No. 93-805, 93d Cong., 2d Sess. (1974). Congress therefore has rather clearly approved the specific result in Lau.

; see also S. Rep. No. 93-763, 93d Cong., 2d Sess. 44-45, 48 (1974).

prohibition in Section 601 against discrimination "on the ground of" race, color, or national origin indicates a congressional purpose to bar only intentional discrimination. Civil Rights finds the quoted phrase to be classic language of intent. I disagree. There is no reason to believe that the phrase was meant to do any more than to introduce the bases on which persons may not be denied benefits or subjected to discrimination, not ~~to~~ address the scienter issue.

; it does

Civil Rights finds support for its position (memo at 14 n.20) in one definition of the word "ground" in Webster's Third New International Dictionary, which states:

> 2a: The foundation or basis on which knowledge, belief, or conviction rests; a premise, reason, or collection of data upon which something (as a legal action or an argument) is made to rely for cogency or validity * * * [opposing divorce on religious grounds].

This, Civil Rights argues, manifests an intent test. But Civil Rights fails to quote the very next definition:

> b: a sufficient and determining condition: a logical condition, physical cause, or metaphysical basis * * *.

This definition would suggest an "effects" test, wherever a person's race, color, or national origin is the "determining condition" of his exclusion from participation by the operation of a facially neutral criterion.

The Civil Rights memorandum (at 13 n.18) draws a parallel between the "on the ground of" language in Section 601 and the phrase "on account of" in Section 2 of the Voting Rights Act, which has been held to require a showing of intentional discrimination. See City of Mobile v. Bolden, 446 U.S. 55 (1980). Civil Rights offers no support for drawing a parallel between these separate phrases. In any event, Congress used the phrase "on account of" in 20 U.S.C. 1703(f), discussed above, to proscribe conduct that has the purpose or effect of

discriminating on the basis of race, color, national origin. Castaneda v. Pickard, 648 F.2d 989, 1007-1008 (5th Cir. 1981).

Finally, Civil Rights equates (memo at 13 n.19) the phrase "on the ground of" in Section 601 to the phrase "because of" in Section 703(a)(1) of Title VII of the Civil Rights Act, which, the Division states, was held by the Court in Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), to require proof of discriminatory intent. Contrary to Civil Rights' position, however, the Court did not so hold in the Teamsters footnote, despite the statement to this effect in Justice Stewart's dissenting opinion in Board of Education v. Harris, 444 U.S. 130, 162 (1979). Cf. General Electric Co. v. Gilbert, 429 U.S. 125, 137 (1976). In the Teamsters footnote, the Court simply distinguished as an analytical matter between Title VII cases premised on intentional discrimination and those premised on a disparate impact theory, without specific reference to either Section 703(a)(1) or (2). See Pullman-Standard v. Swint, No. 80-1190 (April 27, 1982), slip op. 2-3. In any event, the phrase "because of" is used in Section 703(a)(2) of Title VII as well, and the Court held in Griggs that proof of disparate impact is sufficient under that Section.

If there were any lingering doubt about whether the phrase "on the ground of" might be used in a statute barring conduct having a discriminatory effect, it is dispelled by the fact that all the later-enacted statutory provisions patterned after Title VI use the identical phrase, yet all clearly permit promulgation of "effects" regulations. See pages 45-54, infra.

The foregoing discussion is not meant to imply that Section 601 itself embodies an effects test in all circumstances and that agency regulations embodying such a test are mandated by Section 602. The discussion only underscores the view that Section 601 on its face refers to neither intent nor effects 18 / but rather states only a general policy or principle of non-discrimination, to which the agencies are directed by Section 602 to give content

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18 / This is not surprising, because the distinction between the two was not developed in 1964.

in their regulations. Under the approach I suggest, agency regulations presumably would always bar intentional discrimination. But an agency also might conclude in the context of a particular program that certain practices by recipients which result in excluding persons of a particular race, color, or national origin from participation for no legitimate reason should be barred as well, whether or not the practice was adopted for the purpose of excluding such persons. In short, the text of Section 601 does not advance Civil Rights' position at all, much less in such a clear and unambiguous way as to compel the reversal of the longstanding administrative interpretation to the contrary.

But even if the text of Section 601 were thought to refer explicitly to intentional discrimination, the mandate in Section 602 is more than ample to permit the adoption of regulations stating an effects test as a reasonable prophylactic measure to "effectuate" the prohibition against intentional discrimination. Such regulations would be reasonably related to Section 601 in the same manner as legislation incorporating an effects test that is passed pursuant to Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment is an "appropriate" prophylactic measure to "enforce" the prohibition in Section 1 of those Amendments against intentional deprivations of equal protection or the right to vote. See generally City of Rome v. United States, 446 U.S. 156, 173-178 (1980); see also Fullilove v. Klutznick, 448 U.S. 448, 476-478 (1980) (Burger, C. J.); id. at 479-480 (comparing the minority business enterprise program sustained in that case with the effects regulation sustained in Lau v. Nichols).

2. The Legislative History

The "effects" regulations also are fully consistent with the legislative history of Title VI. The House Report on the bill, 19 / for example, states generally that Title VI "declares it to be the policy of the United States" that discrimination on the ground of race, color, or national origin "shall not occur in

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19 / There was no Senate report.

connection with" federally assisted programs and directs the agencies to take action "to carry out this policy." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963). Section 601 is described as stating this "general principle," and Section 602 is described in turn as directing each funding agency to "effectuate the principle of Section 601 in a manner consistent with the achievement of the objectives of the statute authorizing the [financial] assistance." Id. at . This is the complete description of the purpose and operation of Title VI in the only report on the bill. The hearings and floor debates are replete with similar references to the "policy" or "principle" of non-discrimination set forth in Section 601, to be implemented or effectuated by the agencies under Section 602. 20 / Such broad and general references to a national "policy" or "principle" of non-discrimination do not suggest a purpose to limit federal agencies to ferreting out, on a case-by-case, individual instances of intentional discrimination.

The directive in Section 602 for agencies to effectuate Section 601 by issuing rules and regulations of general applicability itself also strongly supports the conclusion that agencies were authorized to adopt standards of conduct for recipients of federal funds, such as that at issue in Lau requiring a school district receiving federal funds to take affirmative steps to rectify a language deficiency of non-English speaking children in order to open its instructional program to

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20 / See, e.g., House Judiciary Hearings, supra, at 2774; House Rules Hearings, supra, at 94-95, 450; Senate Hearings, supra, at 333-334, 352, 400-401; 110 Cong. Rec. 1520-1521 (Rep. Celler), 1594 (Rep. Farbstein), 1613 (Rep. Meader), 1643 (Rep. Edwards), 2468 (Reps. Celler and Rodino), 2492-2493 (Rep. Meader), 6038 (Sen. Allott), 6544 (Sen. Humphrey), 6562 (Sen. Kuchel).

but having no role in defining

the students. See 414 U.S. at 568. 21 / The Civil Rights Division apparently contends, however, that Congress did not anticipate that the regulations would establish substantive rules of conduct for recipients to follow, but would instead do nothing more than identify what aspects of a recipient's program were to be covered by the non-discrimination prohibition in Section 601. In Civil Rights' view, then, the regulations would be essentially procedural ~~or interpretative~~ in nature, accomplishing nothing more than precisely tailoring the coverage of Title VI its substantive prohibition. This would be a modest function indeed for regulations that the statute identifies as the principal vehicle for the agencies' effectuation of the congressional policy to end discrimination in federally funded programs.

Moreover, because in Civil Rights' view Section 601 requires a showing of intentional discrimination, the function of the regulations Civil Rights describes in practice would be merely to notify recipients regarding those aspects of a federally funded program in which they could continue to get away with intentional discrimination. Surely Congress had something else in mind.

In any event, Civil Rights' limited view of the agencies' role is flatly contradicted by the legislative history previously discussed (see pages , supra), which makes clear that agencies were to have "substantive" or "legislative" rulemaking power. As those passages in the legislative history indicate,

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21 / Indeed, as explained above (see page , supra), the House rejected an amendment to require that agencies enforce Section 601 by including non-discrimination undertakings in individual grant agreements rather than by means of regulations, after Representative Celler argued that agencies should not be denied their "lawmaking" power. It is instructive, moreover, that even the rejected proposal would have provided for the non-discrimination undertaking in the grant agreement to contain such "appropriate terms and conditions" as the agency head may prescribe. 110 Cong. Rec. 2494. These presumably would have included particularized substantive requirements going beyond a mere restatement of a general prohibition against discrimination already set forth in Section 601.

regulation

Congress anticipated that the agencies would define the principle of non-discrimination in the context of their particular programs, setting out "what acts or omissions are to be forbidden," "so that recipients of the program will understand what they can or cannot do." These passages plainly reflect a congressional intent to permit federal ~~regulate~~ of the activities of recipients to accomplish the overriding federal policy against non-discrimination, in the same manner that they may issue regulations governing other aspects of the recipient's program in order to assure achievement of the policies sought to be accomplished by the federal grant. In other words, by virtue of Title VI, the federal policy against non-discrimination is made a part of the purpose or objective of every extension of financial assistance.

In addition, the Justice Department, which drafted Title VI, and all other federal departments and agencies have since 1964 understood Title VI to grant them substantive rulemaking authority to establish what acts and omissions should be barred. The agencies' longstanding view of their substantive rulemaking power -- unanimously upheld by the Court in Lau -- is entitled to great deference, in the same manner of the agencies' construction of the Act in other respects.

It is true that Title VI was enacted against a background of widespread segregation and other purposeful discrimination, especially in the South, and there are, to be sure, repeated references in the legislative history to such occurrences and statements that they would violate Title VI. But this does not mean that such references to the most egregious conduct of recipients of federal funds constitutes an implicit limitation on the scope of the agencies' power to effectuate the non-discrimination policy in Section 601 by restricting them to identifying acts of purposeful discrimination. Time and again in the legislative history there are references to ~~a broader purpose~~ prophylactic for Title VI -- to "prevent," "preclude," "end," or "get away from" discrimination; to "insure" or "make sure" that discrimination does not occur; to avoid the use of funds to "perpetuate" or "cause" discrimination; to prevent the use of funds in a way that discriminates; and to make sure that grants

ital.

It is far too late, after 15 years of contrary administrative practice and congressional and judicial approval of that practice to argue that Congress had something markedly different in mind for the agencies' role in implementing Title VI.

are available to all regardless of color. 22 / Of the same import is President Kennedy's statement in endorsing Title VI -- a statement echoed throughout the debates:

> Simple justice requires that public funds, to which all taxpayers contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.

110 Cong. Rec. 6543 (1969), quoted in Lau v. Nichols, supra, 414 U.S. at 569. 23 /

These statements in the legislative history suggest at least five purposes to be served by authorizing federal agencies to adopt regulations, where appropriate, that bar action by recipients of federal funds that have the effect of excluding persons from participation or subjecting them to discrimination on the basis of their race, color, or national origin (in the absence of a legitimate justification), even without a showing of purposeful discrimination: (1) to insure that the United States is not identified with instances of intentional discrimination that might occur under a more relaxed set of rules; 24 / (2) to avoid the diversion of resources and efforts that would be

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22 / See, e.g., House Judiciary Hearings, supra, at 2683-2684, 2774; House Rules Hearings, supra, at 94, 321, 330, 336, 343, 346-348, 422; Senate Hearings, supra, at 328, 330, 397-403, 413; 110 Cong. Rec. 1519-1520, 1527-1528 (Rep. Celler), 1542 (Rep. Lindsay), 1599 (Rep. Minish), 1613 (Rep. Celler), 1629 (Rep. Halpern), 1677 (Rep. Celler), 2595 (Rep. Donahue), 6562 (Sen. Kuchel), 7065 (Sen.).

23 / See also House Judiciary Hearings, supra, at 2683-2684; House Rules Hearings, supra, at 337; Senate Hearings, supra, at 328-329, 402-403, 377-388; 110 Cong. Rec. 1518-1519, 2468 (Rep. Celler), 6049-6050 (Sen. Pastore), 7054-7055 (Sen. Pastore).

24 / As Senator Humphrey said: "This is an area in which the United States, like Caeser's wife, must be above suspicion." 110 Cong. Rec. 6544.

necessary to establish a violation where facially neutral critera may be used as a subterfuge for intentional discrimination (see City of Rome v. United States, supra, 446 U.S. at 174); (3) to ensure, that where federal funds which Congress intended to be available to all persons are distributed or spent through the intermediary of a state or local government or private grantee, the intermediary does not erect "artificial, arbitrary, and unnecessary barriers" (Griggs, supra, 401 U.S. at 437) to the enjoyment of the benefits of the program by persons of a particular race, color, or national origin; (4) to permit federal agencies themselves to recognize the lingering effects of past intentional discrimination and to develop their own standards to insure that federal programs are not administered in a way that perpetuates those effects (see Griggs v. Duke Power Co., supra, 401 U.S. at 430-431; City of Rome v. United States, supra, 446 U.S. at 176); and (5) to "provide a spur or catalyst which causes [recipients of federal funds] to self-examine and to self-evaluate their * * * practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975).

The last factor is especially important, for example, in the context of the location or relocation of permanent educational, medical, or recreational facilities. In such instances, sound administration and common sense in implementing a national policy of non-discrimination as well as the funding program itself strongly support a requirement that the recipient and the funding agency consider the likely effects of the site selection in advance, before the facility is located. If the focus were necessarily on a discriminatory purpose, proof of such a purpose would often arise only after the facility was built -- at a time when it would be too late to undo the consequences. See, e.g., NAACP v. Medical Center, Inc., 657 F.2d 1322, 1325 (3d Cir. 1981) (en banc); id. at 1340 (Gibbons, J.).

The emphasis in the debates was on agency flexibility to accomplish the goal of non-discrimination, while guarding against a "shot gun" approach or a heavy-handed resort to cutting off funds where voluntary methods of resolution or other approaches would suffice. Thus, Senator Humphrey explained that "[a]ny nondiscrimination requirement an agency adopts must be

In this regard, the Supreme Court, in Hills v. Gautreaux, 425 U.S. 284, 301-302 (1976), noted with approval HUD's Title VI site selection rules for low rent housing designed to avoid segregation and to open up housing opportunities for minorities, without regard to the presence or absence of purposeful discrimination.

-- an example cited by a number of agencies as of considerable importance to Title VI in the location of federally funded hospitals

supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies." 110 Cong. Rec. 6544 (emphasis added). Surely the application of an impact regulation to an employment test under the standards of the Supreme Court's decision in Griggs is supportable as "tending to end racial discrimination," as the Court recognized in Griggs itself. Senator Humphrey similarly explained that Title VI "encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education, public health, social welfare, disaster relief, and other urgent programs." Id. at 6546 (emphais added). This passage, too, connotes a deference to the agencies' judgment. If federal agencies themselves properly may be expected to take into account the possible disparate impact of their implementation of federal programs on persons because of their race, color, or national origin, no reason appears why Congress would have intended to bar these same agencies from requiring State and local governments or private grantees to do the same in appropriate circumstances where these intermediaries are relied upon to distribute or expend funds on behalf of the federal government. Cf. Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947), cited frequently in the

legislative history of Title VI ~~upholding~~, which upheld application of the Hatch Act to State employees who administer federal funds. 25 /

Civil Rights also argues (memo at 16-18) that its position is supported by the inclusion of a definition of the term "desegregation" in Title IV of the Act, which states that the term "shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. 2000c(b). Also in Title IV, Congress provided that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils and students from one school to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 42 U.S.C. 2000c-6(a). As Civil Rights points out, Senator Humphrey explained

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25 / For example, several agencies have expressed the view in their letters regarding this case that if they were restricted to use of an intent standard, it would be very difficult to resolve discrimination disputes with grant recipients because recipients would be reluctant to admit to purposeful discrimination. Emphasis on the disparate impacts of federally funded programs, in contrast, permits a consideration of broader policies and criteria of the federal agency and the recipient that may have the effect of excluding persons from participation on the basis of their race, color, or national origin, without the need for a stigmatizing accusation of racial animus that may be disruptive to harmonious federal/state relations in the administration of federal grant programs. Moreover, if the same practice is entirely lawful in one State but unlawful in another simply because the funding agency was able to detect evidence of a subjective purpose to discriminate on the basis of race in one but not the other, the result would be an uneven application of non-discrimination requirements as well as the recipients' general approaches to carrying out the policies of the federal funding statute. It seems most unlikely that Congress would have intended to require such a result, in view of its directive that agencies adopt uniform non-discrimination requirements in the form of rules and regulations of general application.

during the floor debates that the term "herein" applied to the entire Civil Rights Act of 1964, including Title VI. 110 Cong. Rec. 12715. From this, Civil Rights infers that Congress meant to bar agencies from promulgating regulations that do anything more than simply prohibit acts of intentional discrimination by recipients of federal funds.

This argument rests on a misreading of the statutory provisions. As the Supreme Court observed in Swann v. Board of Education, 402 U.S. 1, 17-18 (1971), the legislative history of the provision indicates that Congress was concerned that the Act might be construed to be addressed to so-called de facto segregation, "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." In this case, in contrast, the argument of petitioners under Title VI is not that the New York City Police Force should have a particular "racial balance" for its own sake, as in the case of de facto school desegregation resulting from private conduct. Their contention is that the City's failure to hire more black and Hispanic police officers "was brought about by discriminatory action of [City] authorities" (402 U.S. at 17-18)--i.e., the use of an employment test that had a disparate impact on blacks and Hispanics without having been validated as job-related. Griggs v. Duke Power Co., supra, 401 U.S. at 430-431; Jefferson v. Hackney, 406 U.S. 535, 549-550 n.19 (1972). The conclusion that a prohibition against requiring "racial balance" is not to be equated with a prohibition against actions by recipients of federal funds that have the effect of discriminating was made clear in Congress' consideration of the comparable "racial imbalance" provision of the LEAA statute, under which the funds in this case were advanced. See pages , infra. Thus, the Civil Rights Division errs in attempting to equate a prohibition against requirements

to ~~achieve~~ racial imbalance and a prohibition against practices by the recipient that have a disparate impact. 26 /

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26 / Of course, in the specific area of school segregation, Title IV and VI read together do indicate that Congress intended to restrict the power of agencies to terminate funding. See also 42 U.S.C. 2000d-5. Indeed, in our amicus brief in the court of appeals in this case, we distinguished prior Second Circuit precedent arising in the school context on precisely this basis.

In the entire legislative record, I am aware of only two references ~~that have any bearing on~~ whether an intentional violation must be shown. On one occasion, Senator Robertson (an opponent) observed that it would not be necessary to show "any willful purpose or intentional violation" under either Title VI or Title VII. 110 Cong. Rec. 8428. The other occasion was during the Senate hearings when Senator Ervin (also an opponent)--by way of a clever introduction to a request for the Attorney General's reasons or "motive" in submitting a revised version of Title VI -- observed that "after all whether discrimination is practiced must be determined by the intent or motive with which a person does an otherwise neutral act." Senate Hearings, supra, at 341. The latter comment, ~~especially given~~ its context, is entitled to little weight, ~~especially since~~ Senator Ervin elsewhere observed that the agencies would define discrimination and identify in their regulations the acts or omissions that would be forbidden and was aware that the Attorney General so construed the proposal. See pages , supra. Senator Ervin could have been referring to the issue of intent in violating a requirement of a regulation proscribing a facially neutural act. Indeed, on a number of occasions Senator Ervin expressed a preference for enforcing a prohibition against discrimination in federally assisted programs by relying on 18 U.S.C. 242, which prohibits "willful" deprivations of constitutional or statutory rights (See Screws v. United States, 325 U.S. 91 (1945)). See, e.g., Senate Hearings, supra, at 329, 401-402. Thus, Senator Ervin's passing observation does not significantly support the intent standard, especially when viewed against Senator Robertson's contrary statement.

3. Special Considerations Applicable to Employment Tests under Title VI

There is an additional -- and weighty -- reason why it would be especially appropriate for a federal agency to adopt an "effects" test in the context of the present case, which involves discrimination in employment under federally funded programs. The national policy articulated in Section 601 against discrimination in federally funded programs is part of a broader Civil Rights Act that implements the national policy of non-discrimination in other respects as well. In particular, in Title VII of the 1964 Act, Congress specifically focused on the question of employment discrimination, adopted a policy of non-discrimination in that area, and enacted standards and procedures to carry out that policy. It is manifestly reasonable, then, for an agency to implement Title VI of the 1964 Act in the area of employment discrimination by reference to standards under Title VII of the very same Act.

As explained above (see page , supra), there were a number of references in the legislative history of the 1964 Act to the overlap of Titles VI and VII in the area of employment discrimination in federally funded programs, and there is not the slightest suggestion that the substantive standards of discrimination were to be different under the two Titles. To the contrary, these references appeared to proceed on the assumption that the substantive standard was the same. 110 Cong. Rec. 2484 (Rep. Poff); 110 Cong. Rec. 6545 (Sen. Humphrey); House Rules Hearings, supra, at 341-342, 523; see also id. at 140-141, 143-144, 229. Indeed, Senator Humphrey emphasized that the agency administering the federal funds "would consider the availability of a suit under Title VII in determining what means of obtaining compliance with its nondiscrimination requirement would be most effective and consistent with the objectives of the Federal assistance statute." 110 Cong. Rec. 6545; see also House Rules Hearings, supra, at 342. Given these express references in the legislative history to the availability of Title VII to enforce Title VI, Congress surely would not have regarded it as unreasonable for an agency to incorporate Title VII's substantive requirements in its regulations issued under Title VI.

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See 40 Fed. Reg. 24135 (explaining the similarity of the regulations involved in North Haven and Title VII).

The 1972 amendments to Title VII -- when Congress first revisited the issue of employment discrimination -- likewise furnishes compelling support in this case for an agency's authority to implement Title VI in the employment context by reference to Title VII standards. In amending and reenacting Title VII in 1972, Congress both ratified the result in Griggs 27 / and extended Title VII to state and local govenrments. Indeed, the committee reports on the 1972 amendments demonstrate that Congress extended Title VII to state and local governments on the basis of explicit legislative findings that these governments were utilizing "invalid selection techniques" and that a disparate impact on minorities and that employment discrimination was widespread and especially deleterious in law enforcement agencies. S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971); see also H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971); 118 Cong. Rec. 1816 (1972) (Sen. Williams). 28 / The instant case, of course, directly implicates the very issues about which Congress was concerned: the use of unvalidated employment tests by a law enforcement agency. The employment tests involved here in fact were held invalid under Title VII and Griggs for police officers hired after March 1972, when Title VII became

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27 / See, e.g., H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 21 (1971).

28 / The Senate Report observed with respect to discrimination in law enforcement and other agencies that directly effect the lives of the population, "[t]he exclusion of minorites from effective participation in the bureaucracy not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." S. Rep. No. 92-415, supra, at 10.

applicable to New York City. 29 / If Congress was prepared to extend the Griggs test to state and local government employment practices even where there was no federal involvement, then surely Congress would not have meant to require a showing of purposeful discrimination under Title IV where the federal and state or local governments were involved and where a primary objective of the federal was to provide the very employment in question. See 42 U.S.C. 2000d-3.

There also would not appear to be any substantial countervailing policy considerations weighing against recognizing the authority of agencies to apply Title VII standards in the employment context that might be raised in other contexts. When an agency patterns its implementation of Title VI on explicitly articulated congressional standards, as judicially construed, there is no basis for a fear that Congress has unwisely given too much power to administrative agencies or delegated legislative authority to the agencies in violation of the Constitution because of the absence of guiding standards. By the same token, the application of Title VII standards (including Griggs) under Title VI in the area of employment would not impose restrictions or potential liability on recipients of federal funds beyond those to which they already are subject under Title VII standing alone. Accordingly, there would appear to be no basis for an objection to such an approach in the employment context on the ground that it is too intrusive upon the prerogatives of the State and local governments and other recipients of federal funds.

Stressing the link between Titles VI and VII in this case would enable us to demonstrate that it is not at all surprising that Congress would have permitted agencies, in appropriate

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1/ Similar concerns regarding widespred discrimination in employment by law enforcement agencies were voiced when Congress amended the Omnibus Crime Control Act in 1973 and 1976 to strengthen the prohibitions against discrimination in LEAA funded programs. (119 Cong. Rec. 20070 (1973) (Rep. Jordan); 122 Cong. Rec. 34118 (1976) (Rep. Conyers)), under which funds were furnished to the New York City Police Department in the case.

cases, to prohibit actions having an unjustified discriminatory impact. Once again, this would permit the Court to move cautiously in recognizing agency flexibility in implementing Title VI, without forcing the Court to the conclusion that its only alternatives are to reject the effects test or to endorse it in a manner that would place the courts in a position to apply their own views regarding the balance that should be struck between an effective implementation of the non-discrimination provisions of Title VI and the purposes and policies of the federal funding programs. 30 / We must be careful, however, not to limit our discussion to the employment context, beause the concerns of HUD, HHS, Defense and other departments and agencies extend to other areas as well.

C. Subsequent Congressional Action

The conclusion that agencies are authorized to adopt regulations under Title VI applying an "effects" or disparate impact standard in appropriate cases also finds compelling support in subsequent congressional action bearing on the subject. Indeed, the expressions of congressional approval of the agencies' approach in implementing Title VI and similar antidiscrimination provisions are so overwhelming that it is difficult to conceive of a stronger case of congressional ratification.

1. Matters Pertaining to Title VI

I already have referred to 20 U.S.C. 1703(f) and the bilingual education program enacted in the Education Amendments of 1974, approximately six months after Lau was decided, which effectively codified the legal duty imposed by the Lau decision and furnished the authorization for funding that was expected to be necessary for school districts to comply with Lau. See pages 25-26, supra. Because the result in Lau depended upon

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29/ The focus on the link between Titles VI and VII also would dovetail neatly with the argument I recommend that there is no private right of action under Title VI in this case because Title VII furnishes the exclusive private remedy for employment discrimination.

application of an effects standard under governing regulations, this congressional action must be viewed as an approval of that approach under Title VI.

In any event, well before Lau, the House had rejected an amendment offered by Representative Whitener (an opponent of the 1964 Act) to a pending civil rights bill in 1966 under circumstances that reflected a uniform acknowledgment that more than intentional discrimination could be reached by Title VI. The Whitiner amendment would have amended Title VI to provide that federal funding could be terminated only upon a finding of a violation of the Constitution or an affirmative provision of a statute of the United states. The proposed amendment further provided that a determination under Title VI that "discrimination exists" would require a showing that in the administration or operation of the federally assisted program, "conditions or requirements, are, have been, or may be imposed with affirmative intent to exclude, or with the necessary effect of excluding, individuals from participation in the benefits of such program or activity solely upon the ground of race, color, or national origin" (emphasis added). Finally, the amendment provided that nothing in Title VI should be construed to authorize any federal agency to issue a rule "controlling or regulating the administration or operation of any school, hospital or other institution for any purpose other than to provide equal opportunity for access thereto by individuals without regard to race, color, or national origin." 112 Cong. Rec. 18701.

The proposed amendment was largely in response to HEW's recently issued desegregation guidelines, which imposed certain requirements for acceptable desegregation plans. These requirements included restrictions on freedom-of-choice plans by requiring them to show some measure of success, imposed duties with respect to student and faculty assignments, etc., without regard to whether the particular element of the school's program referred to was directly traceable to intentional discrimination. See 112 Cong. Rec. 18714. Representative Whitener also referred to situations in which Title VI enforcement efforts were "threatened" because, in his view, non-whites did not comprise a sufficient percentage of patients in a hospital and comprised too great a percentage of the students in an education program. 112 Cong. Rec. 18702. Thus,

would be to exclude

Representative Widener explained his proposal that a finding of "discrimination" under Title VI requires a showing of "affirmative intent" to exclude or ~~with~~ the "necessary effect" ~~of excluding~~ on the basis of race, color, or national origin as designed "to negate the application of purely mechanistic and statistical criteria in the determination of discrimination." Ibid.

Obviously, federal agencies were at that time imposing affirmative, detailed requirements that went beyond merely the stating of a prohibition against intentional discrimination with respect to any discrete action or policy of a recipient of federal funds. Indeed, Representative Whitener characterized Title VI as transferring "lawmaking" power to federal agencies and thereby "leav[ing] the definition of discrimination and the application of sanctions to the uncontrolled discretion to agency officials." Id. at 18702.

Representative Rodino urged defeat of the amendment, stating his understanding that "the rules are consistent with the objective of the title," that "[t]he spirit of the law is being complied with," and that the agencies concerned had not suggested "any difficulty in administering the law." 112 Cong. Rec. 18703. Representative Kastenmeier, a member of a special ad hoc subcommittee studying the implementation of the 1964 Act, urged rejection of the amendment on the ground that it would undo all that had been done in making the civil rights laws effective. Id. at 18705. The amendment was defeated. Id. at 18714. This action by the House indicates approval of an enforcement of Title VI that, at the very least, focused on whether actions by a recipient had the effect of perpetuating past discrimination and clearly took into account statistical disparity.

It is significant, moreover, that the amendment, which its sponsor said was consistent with the original intent underlying Title VI, would have permitted a finding of discrimination to be made not only where a practice had been adopted with the affirmative intent of excluding persons on the basis of their race, or national origin -- the position Civil Rights urges here -- but also where such exclusion was the "necessary effect" of the practice. In addition, Representative Whitener acknowledged that Title VI granted agencies the legislative power to define

discrimination, and indeed his amendment would have construed Title VI to permit "regulation" of schools and hospitals for the purpose of assuring equal opportunity of access. In short, even the proposal and arguments of those who wanted to cut back on the implementation of Title VI support the authority of agencies to adopt "effects" regulations.

2. Other Federal Statutes

It also is significant that on numerous other occasions following the promulgation of "effects" regulations under Title VI, whenever Congress has revisited the question of discrimination in federally funded programs, it uniformly has patterned non-discrimination provisions after Title VI. As the Supreme Court has only recently reiterated:

> "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951); National Lead Co. v. United States, 252 U.S. 140, 147 (1920); 2A C. Sands. Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 580-581 (1978)

Merrill Lynch, Pierce, Fenner & Smith, Inc. v Curran, No. 80-203 (May 3, 1982), slip op. 28 n. 66.

Some of these later-enacted statutory provisions bar discrimination in federally assisted programs on the basis of sex, handicap, or age (forms of discrimination not covered by Title VI); others to some extent duplicate Title VI by barring discrinimation on the basis of race, color, of rational origin as well, or extend that prohibition to other areas (such as general revenue sharing) that might not have been covered be Title VI. Because Congress has incorporated into these other statutes the Title VI enforcement approach (including the authority for "effects" regulations) that was ~~at the~~ time they were enacted, it seems clear that these subsequent statutory provisions would be construed to authorize agencies to promulgate "effects" regulations even if Title VI were construed to bar such regulations. See, e.g., Merrill Lynch, Piere, Fenner & Smith, Inc. v Curran, supra, slip op. 24-25 & n.61. This would create an anomalous result, under which the general statutory prohibition against discrimination on the basis of race, color, or national origin -- the form of discrimination at the very core of that to which the Thirteenth, Fourteenth and Fifteenth Amendments were directed -- would be subject to less rigorous and effective enforcement than would the statutory prohibitions against discrimination on the basis of sex, handicap, or age. Neither the Civil Rights Division nor anyone else has explained why Congress would have intended such an anomalous result.

The reason, of course, is that Congress did not intend any such difference: As the enactment of the anti-discrimination provisions discussed below makes clear, Congress has approved an "effects" approach under Title VI and its progeny.

(a) The Omnibus Crime Control Act.

It is perhaps most significant that Congress enacted the LEAA program against the background of Title VI after the Justice Department's effects regulation was promulgated and that Congress has now explicitly directed the application of Title VII standards in cases of alleged employment discrimination in programs funded by LEAA. Funds granted by LEAA led to the application of Title VI in this case, and LEAA took action to terminate LEAA funding of the New York City Police Department on the basis of the finding by the courts below of unintentional discrimination, unless the City complies with the courts orders.

Prior to 1973, when a specific antidiscrimination provision was enacted for LEAA programs, these programs were subject only to Title VI. During the hearings preceeding the enactment of the Omnibus Crime Control Act of 1968 (which authorized the LEAA program), Attorney General Ramsey Clark explained to the Senate Judiciary Committee that Title VI would apply to expenditures made under the LEAA program. Controlling Crime Through More Effective Law Enforcement: Hearings before the Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 487 (1967). At that time, the Justice Department's Title VI "effects" regulation at issue in this case already had been promulgated.

Several Senators inquired whether Title VI would permit the Administrator of LEAA to require, as a condition to the receipt of federal funds by a State or local government, that the percentage of police officers reflect the racial composition of the community as a whole. Hearings, supra, at 486, 487, 491, 492. Attorney General Clark explained that Title VI would apply where discrimination has been practiced by the jurisdiction, but that Title VI would not confer a general power to require racial balance in police departments.[32] Senator Thurmond repeatedly stressed the difference between racial imbalance and discrimination (id. at 492-494), but inquired as to who would determine whether there had been discrimination (id. at 492). Attorney General Clark replied that the head of LEAA would make that determination, "in accordance with general compliance techniques that have been utilized by the agencies under Title VI" (id. at 492-493). The "compliance techniques" utilized by agencies under Title VI generally of course were pursued on the

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32/ The Attorney General did indicate that in the extreme case when there was a large black population in the community and few or no black police officers, the "gross racial imbalance" (Hearings, at 493) might be relevant. In such situations, where the law enforcement agency had not made adequate efforts to recruit black police officers and the effectiveness of law enforcement was impaired, funds could be withheld. Id. at 494-495.

authority of the then-existing regulations, including the "effects" provision at issue here.[33]

In response to the concerns expressed at the hearings regarding the imposition of a requirement that funds could be withheld where the racial composition of the police force did not mirror that of the community, Congress included in Section 518(b) a provision that the Administrator of LEAA could not require the adoption "by an applicant or grantee * * * of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency." 42 U.S.C. 3766(b)(1). As the remarks of Senator Thurmond at the hearings make clear, however, "racial imbalance" is not the same thing as "discrimination," and, indeed, Title VI does not purport to authorize federal agencies to achieve racial balance for its own sake. The prohibition in 42 U.S.C. 3766 (b)(1) against the Administrator's requiring a recipient to achieve "racial balance" as a condition of receiving funds therefore does not constitute a prohibition against the Administrator's taking action where, as here, the law enforcement agency itself has engaged in discriminatory practices. See also Swann v. Board of Education, supra, 402 U.S at 17-18.

Because Congress specifically considered the application of Title VI to the LEAA program at the time of its enactment and responded only by enacting a provision to forclose any possibility that Title VI would be applied to require "racial balance," Congress must be taken to have accepted the application of the then-existing Title VI enforcement scheme to the LEAA program in other respects. Then-existing regulations and the congressional debates surrounding HEW's desegregation guidelines,

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33/ The "effects" regulations did not in terms apply specifically to employment, but read in para materia, the effects standard in the existing regulations appears to have applied to employment as well. See, e.g., 28 C.F.R. 42. 104(b)(1)(vi), (b)(2), and (c) (1967)(Department of Justice).

discussed above (see pages (43-45), supra),[34] made clear at that time that Title VI could be implemented by agencies to reach more than those particular actions by recipients that were undertaken for the purpose of discriminating on the basis of race, color, or national origin. Accordingly the application of Title VII to reach non-purposeful discriminatin by the New York City Police Department between 1968 and 1972 is affirmatively supported by the legislative history of the Omnibus Crime Control Act of 1968.[35]

In any event, the subsequent evolution of the Omnibus Crime Control Act dispositively establishes that Congress has ratified the application of "effects" standards, including Title VII standards, to LEAA programs. In 1973, Congress amended Section 518 of the Omnibus Crime Control Act to add a new subsection (c) containing an explicit prohibition against discrimination that was directly patterned after Title VI. See H.R. Rep. No. 93-249 93d Cong., 1st Sess. 7 (1973). During the debates, Representative Jordan noted with approval LEAA's creation of a civil rights office and its issuance of "implementing regulations." 119 Cong. Rec. 20070 (1973). Those implementing regulations included ones promulgated in 1972 governing employment by state and local law enforcement agencies. 28 C.F.R., Part 42, Subpart D; 37 Fed. Reg. 16671 (1972). On March 9, 1973, LEAA issued proposed guidelines to explain these equal

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34/ The discussion at the Senate hearings in April 1967 was undertaken against the background of HEW's desegregation guidelines (Hearings, supra, at 485-486), and the House had rejected the Whitener amendment to limit the application of Title VI in the school desegregation area the previous August.

35/ Similarly, in 1970 hearings on proposed LEAA amendments, Attorney General Mitchell informed the House Judiciary Committee that LEAA activities were subject to the Justice Department's Title VI regulations in 28 C.F.R., Part 42, which included the "effects" regulation at issue here. See Law Enforcement Assistance Amendments: Hearings on H.R. 14341, H.R. 15947 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary 91st Cong., 2d sess. 616-617 (1970).

employment opportunity regulations, including application of the EEOC's employee selection guidelines under Title VII. 38 Fed. Reg. 6389.[36]

Moreover, during the debates, Representative Jordan cited in support of the need for the antidiscrimination provision, three decisions finding discrimination in police departments by application of a disparate impact analysis to employment tests and other matters. See 119 Cong. Rec. 20070, citing Castro v. Beecher, 459 F.2d 725 (1972); Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 5 CCH Empl. Proc. Dec. ¶8502 (D. Conn. 1973); Morrow v. Crisler, 4 CCH Empl. Proc. Dec. ¶7541 (S.D. Miss.). Although these cases arose under 42 U.S.C. 1981 and 1983, not Title VI, it is clear that the citation of them with approval indicates the interpretation to be given Section 518(c)(1) of the Omnibus Crime Control Act, which is in turn patterned after Title VI. Congress' enactment of Section 518(c) in 1973 therefore must be seen as a ratification of the use of Title VII standards in implementing an antidiscrimination provision such as Title VI.

Moreover, during the floor consideration of the 1973 amendments, the House reinstated the prohibition in Section 518(b) of the original Act against any requirement of racial balance or quotas, which had been deleted in committee. The debate made clear, however, that the presence or absence of this prohibition had no effect on the substance of the antidiscrimination provision and was not inconsistent with the application of Title VI. 119 Cong Rec. 20096-20098.[37] Because the debate took place against a background of the application of Title VII standards in employment cases and the existence of "effects" regulations under Title VI since 1964, this debate

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36/ These regulations were issued in final form on August 31, 1973, after the 1973 amendments to the Omnibus Crime Control Act were enacted. 38 Fed. Reg. 23516; see 28 C.F.R. 42.304(g)(1).

37/ The debates indicate only that the House wanted to avoid the possibility that a repeal of the prohibition might have been viewed as an affirmative authorization to require racial balance.

confirms that the prohibition under the LEAA program against imposing racial balance is not inconsistent with application of an "effects" test.

Congress again amended Section 518 of the Omnibus Crime Control Act in 1976 to strengthen LEAA's Civil Rights enforcement program by, inter alia, limiting LEAA's discretion to decline to terminate funds when there has been a violation.[38] While the bill was in conference, the Supreme Court decided Washington v. Davis, 426 U.S. 229 (1976), an employment discrimination case arising under the Constitution and challenging a test used to select police officers. The Court held that only purposeful discrimination in the use of an employment test would violate the Constitution. In response to this holding, the Conference Report on the 1976 amendments makes clear that Title VII standards were to govern the interpretation of Section 518(c)(1), which is virtually identical to and was deliberately patterned after Section 601 of Title VI of the Civil Rights Act of 1964. See H.R. Conf. Rep. No 94-1723, 94th Cong., 2d Sess. 32 (1976). Thus, Congress has unequivocally stated that Title VII standards are to govern the evaluation of employment tests used by federally assisted law enforcement agencies -- the very issue involved in the instant case -- and it did so as a continuation of the prior practice under the LEAA statute.[39]

Congress' reaction to Washington v. Davis is especially significant, because it was the decision in that case that has led to the suggestion that an "effects" test under Title VI and Lau should be reconsidered. See, e.g., Bakke, supra, 438 U.S. at 352 (Brennan, et al., J.J.). Congress, however, reacted to Washington v. Davis by reiterating its intent not to follow the constitutional standard under antidiscrimination provisions in federal funding statutes, and it did so in the context of the

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38/ See our Brief in Velde v. National Black Police Association, Inc., No. 80-1074, at 23-24.

39/ As explained above (see pages 40-41, supra), Congress expressed the same intent when it extended Title VII to cover employment by State and local governments.

LEAA statute involved in this case. There is, accordingly, no basis for the Executive and Congress to depart from that judgment.

(b) Statutory Provisions Applicable to Labor and HUD

The other two departments whose effects regulations are involved in this case are Labor and HUD. It is not clear under what programs the funds in question were granted to the Police Department by those two departments, although the Departments believe that they probably were granted under the predecessor to the CETA program and Model Cities program, respectively.

It is significant in this regard that when the CETA statute was enacted in late 1973, it contained a special antidiscrimination provision patterned directly after that in the 1973 amendments to the Omnibus Crime Control Act passed several months earlier. See Pub. L. No. 93-203, 83 Stat. 882, 29 U.S.C. 991. For this reason, the authorization of effects regulations in LEAA programs applies to CETA programs as well. The CETA provision was reenacted in 1978 (Pub. L. No. 95-524, §2, 92 Stat. 19, 29 U.S.C (Supp. II) 834(a), after Washington v. Davis was decided, with no indication that Congress intended it to be interpreted differently. See also 49 U.S.C. 1615, as added by Pub. L. No. 95-599, §314, 92 Stat. (UMTA).

A virtually identical antidiscrimination provision was enacted in 1974 -- after Lau v. Nichols upheld an "effects" regulation under Title VI -- for HUD's Community Development programs. Pub. L. No. 93-383, §109, 88 Stat. 649, 42 U.S.C. 5309. Thus, Congress enacted virtually identical nondiscrimination provisions applicable to all three departments involved in this case in 1973 and 1979 under circumstances constituting a ratification of an "effects" approach.

(c) The Revenue Sharing Act

The Revenue Sharing Act contains a provision, 31 U.S.C. 1242, that is identical to Section 601 of the Civil Rights Act. That provision, passed in 1972, was implemented by regulations incorporating an effects test, even though the Act did not expressly so provide. See. e.g., 31 C.F.R. 51.32(b), as added 38

Fed. Reg. 9138 (April 10, 1973), regarding discrimination in the provision of municipal service. See Civil Rights Aspects of Revenue Sharing: Hearing Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 14 (1973). Presumably, the basis for such an approach was simply that Title VI had been implemented in the same fashion.

Congress subsequently amended 31 U.S.C. 1242 to strengthen the procedures for enforcing its civil reghts requirements (while retaining the substance of the language patterned after Title VI). The reenactment of the provision after it had been implemented by effects regulations is itself a ratification of that approach. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, supra, slip op. 28 n.66. But beyond this, apparently to prevent any suggestion that the decision in Washington v. Davis would alter the standard, the Conference Report on the 1976 amendments to the Revenue Sharing Act states that the prohibition against discrimination on the basis of race, color, religion, sex, or national origin should be interpreted in accordance with Titles II, III, IV, VI and VII of the Civil Rights Act of 1964. See H. R. Conf. Rep. No. 94-1720, 94th Cong., 2d Sess. 32 (1976). As a result, in cases of employment discrimination by a recipient of revenue sharing funds, Title VII standards are applied. See United States v. City of Chicago, 549 F.2d 415, 440 (7thCir. 1977), cert. denied, 434 U.S. 875 (1977). Thus, the 1976 reenactment of the pertinent provision of the Revenue Sharing Act, like the 1976 reenactment of Section 518(c)(1) of the Omnibus Crime Control Act, refutes the suggestion that the Supreme Court's decision in Washington v. Davis provides an occasion for finding the effects test under Title VI unlawful.

(d) Title IX of the Education Amendments of 1972

Similarly, the employment regulations implementing Title IX of the Education Amendments of 1972 that were sustained in North Haven Board of Education v. Bell, No. 80-986 (May 17, 1982), provide that a recipient of federal funds shall not administer any test that has a disproportionately adverse effect on persons of one sex unless the test has been validated and other tests that do not have such an effect are unavailable. 34 C.F.R. 106.52. Other provisions of DOE's Title IX regulations outside of the employment area similarly embody an effects test. See, e.g., 34 C.F.R. 106.21(b)(2) (prohibiting admissions tests that have a disproportionately adverse effect on persons on the basis of sex, unless validated and no other test available); 34 C.F.R. 106.22. These regulations were reported to Congress pursuant to the legislative veto provisions of Title IX, and Congress' failure to disapprove them is of some importance in determining whether they were authorized. North Haven, supra, slip op. at 19-22.

It is not surprising that the Title IX regulations would incorporate the same type of effects test as was established in regulations under Title VI of the Civil Rights Act, after which it is directly patterned, rather than require a showing of intentional discrimination: as the Supreme Court noted in Cannon (441 U.S. at 696 n.19), Senator Bayh, the sponsor of Title IX, explained: "The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]." 117 Cong. Rec. 30408 (1971) (Sen. Bayh). See also 118 Cong. Rec. 18437 (Sen. Bayh) (enforcement under Title IX "will draw heavily" on "precedents" under the Civil Rights Act). The enactment of Title IX in these circumstances must be viewed as a legislative approval of the implementation of Title VI as well.

(e) Section 504 of the Rehabilitation Act of 1973

Similarly, regulations under Section 504 of the Rehabilitation Act of 1973, which is similar to Section 601 of the Civil Rights Act, provide that actions that "have the effect"

of discriminating on the basis of handicap are barred. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the Court construed Section 504 and implementing regulations not to require "extensive modifications " in a college program to accommodate handicapped persons (id. at 410), but made clear that HEW nevertheless has an "important responsibility" to identify those instances "where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped" (442 U.S. at 413). Plainly, the Court did not construe Section 504 to bar only intentional discrimination against the handicapped. Indeed, the legislative history of the 1974 amendments to Section 504, discussed in our brief in Davis (at 32-38), makes clear that Congress intended to impose certain affirmative obligations to accommodate the needs of handicapped persons, just as the Title VI regulations sustained in Lau required certain actions to be taken with respect to non-English speaking students.

(f) Other Statutory Provisions

In addition, in 42 U.S.C. 6709, Congress prohibited discrimination on the ground of sex under public works employment programs and explicitly provided that this prohibition "will be enforced through agency provisions and rules similar to those already established * * * under Title VI," thereby incorporating existing "effects" regulations. An even more specific endorsement of an effects test is contained in 42 U.S.C. 6102 and 6103, dealing with age discrimination in federally funded programs. Section 6102 states a prohibition patterned after Section 601 of Title VI and provides for implementing regulations, and Section 6103(b)(2) provides that an action otherwise prohibited by Section 6102 shall not be a violation if "the differentation made by such action is based upon reasonable factors other than age." It would not be necessary to have the latter exception for factors other than age if Section 6102 barred only intentional discrimination on the basis of age; moreover, the defense applies only to "reasonable" factors other than age, thereby indicating that some factors that have the effect of discriminating on the basis of age will not be lawful.

Thus, without exception, at least nine antidiscrimination provisions patterned directly after Title VI authorize the application of an "effects" test, and their enactment must be read as a ratification of the agencies' enforcement approach under Title VI.

CONCLUSION

In sum, the legal foundation for the "effects" regulations at issue in this case, at least on their face, is compelling. Those regulations are supported by the language and legislative history of Title VI granting agencies legislative rulemaking authority to define the acts and omissions in federally funded programs that are forbidden and manifesting a broad and prophylactic purpose to root out and eradicate discrimination in federally funded programs and to prevent it from recurring. Moreover, in the specific context of the present case, the application of the Griggs standard developed under Title VII to evaluate employment tests given by a law enforcement agency is firmly supported by (1) the legislative history of the 1964 Act making clear that Title VII could be relied upon under Title VI to enforce the prohibition against employment discrimination in federally funded programs, (2) the legislative history of the 1972 amendments to Title VII extending that Title to state and local governments, its standards for judging the validity of employment tests, (3) the legislative history surrounding the enactment of the LEAA program in 1968 and the subsequent amendment of the LEAA statute in 1973 and 1976 making clear that an impact standard and Title VII are to be applied in employment test cases notwithstanding Washington v. Davis, and (4) the Supreme Court's decision in North Haven, sustaining the validity of Title IX regulations patterned after Title VII (although the applicable standard was not directly involved).

The Supreme Court indicated in Jefferson v. Hackney that Title VI reached more than purposeful discrimination, unanimously so held in Lau v. Nichols, noted with approval HUD's Title VI regulations that were not premised on a finding of purposeful discrimination in Hills v. Gautreaux, and most recently did not question the effects standard in the Title IX regulations in North Haven. Congress ratified the holding in Lau immediately after it was decided, which must be viewed as an approval of the

principle of applying an "effects" test under Title VI, and it has uniformly enacted other antidiscrimination provisions patterned after Title VI on the basis of a general approval of the manner in which Title VI has been implemented. That administrative practice, in turn, has been followed by all agencies of government since the Civil Rights Act was enacted in 1964, and its represents the contemporaneous and consistent construction of the statute by the Justice Department, which drafted Title VI, secured its passage, and set its enforcement in motion.

The support of the validity of the effects regulations is, in short, overwhelming. It would, conversely, be flatly contrary to the Executive's long-term litigating posture and would undermine our credibility before the Supreme Court to argue that an administrative practice so widespread, consistent, and longstanding and approved by both the Legislative and Judicial Branches is nevertheless unlawful. These arguments for deference to the agencies almost always support the Executive, ~~here~~, and they should not be belittled to the extent that would be necessary to urge the invalidity of the regulations.

Nor would there appear to be any policy reasons to compel such an approach. Title VI was premised on the need for agency flexibility in implementing the non-discrimination principle. The approach I suggest would retain this flexibility and allow agencies to reexamine their effects regulations and draw back from them where this was thought appropriate to avoid intrusiveness on ~~agency~~ programs. Moreover, a number of departments and agencies have informed us that their Title VI enforcement programs would be adversely affected if they were required to determine whether there was purposeful discrimination in the programs -- an undertaking that would require increased investigative resources and might undercut federal-state harmony. The result of taking the position Civil Rights urges therefore would be, and would be perceived to be, a substantial dismantling of the civil rights enforcement program that has been established throughout the government -- a program that has been approved by Congress and the courts and, for all that appears, accepted and accommodated by grant recipients generally.

a reversal of

The Powell and Brennan opinions in Bakke do not furnish a basis for ~~taking such a~~ position. As I have pointed out, the references to the Constitution in the legislative history of Title VI relied upon in these opinions do not suggest that Congress intended Title VI to be coextensive with the Constitution. They indicate at most that Congress was motivated by action by the constitutional principle of non-discrimination. The very fact that Title VI is to be implemented by substantive regulations is inconsistent with the notion that Title VI is coextensive with the Constitution, for Congress does not ordinarily assign to administrative agencies the responsibility to interpret the Constitution. On this issue, then, the four Justices in the Stevens group in Bakke were correct in concluding that Title VI is independent of and broader than the Constitution. I understand that Civil Rights now agrees with this view.

The issue involved in Bakke was different as well: there, a prima facie violation of Title VI was established by the University's explicit use of race; the issue was whether this showing could be rebutted by legitimate reasons for the use of race. Here, in contrast, the issue is what is necessary to establsh a prima facie violation in the first place -- i.e., whether a disparate impact will suffice. In any event, it does not appear that the Justices in Bakke had the benefit of the legislative history, widespread administrative practice, and congressional ratification supporting effects regulations. In any event, the Executive, since Bakke, has continued to administer Title VI in the manner it already has, and we are asked to defend that postion here.